Illinois Pollution Control Board

Annual Report 2009

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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Letter From the Chairman

Honorable Pat Quinn, 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 2009. Between July 1, 2008 and June 30, 2009, the Board continued to handle a large volume of rulemaking procedures and contested cases while operating within the constraints posed by the State's budget difficulties.

Under the Environmental Protection Act (Act), the Board has two major responsibilities: determining, defining, and implementing environmental control standards for the State of Illinois, and adjudicating complaints that allege non-criminal violations of the Act. The Board also reviews appeals arising from permitting and other determinations made by the Illinois Environmental Protection Agency (IEPA), as well as pollution control facility siting determinations made by units of local government.

Board rulemaking during FY 2009 covered most areas of the Illinois environmental regulations. Rulemakings governing water quality standards generated the most public interest. Significant rulemakings concluded during the FY 2009 are outlined in the following paragraphs.

On August 21, 2008, the Board adopted final amendments to a site-specific rule entitled: In the Matter of: Abbott Laboratories' Proposed Site Specific Amendment to Applicability Section of Organic Material Emission Standards and Limitations for the Chicago Area; Subpart T: Pharmaceutical Manufacturing (35 Ill. Adm. Code 218.480(b)), R08-8. Abbott Laboratories filed a proposal to allow "additional operational flexibility" with regard to emissions from certain tunnel dryers and fluid bed dryers at its pharmaceutical manufacturing facility located in Lake County.

On September 4, 2008, the Board adopted for final notice the rulemaking docketed as Triennial Review of Sulfate and Total Dissolved Solids Water Quality Standards: Proposed Amendments to 35 Ill. Adm. Code 302.102(b)(6), 302.102(b)(8), 302.102(b)(10), 302.208(g), 309.103(c)(3), 405.109(b)(2)(A), 409.109(b)(2)(B), 406.100(d); Repealer of 35 Ill. Adm. Code 406.203 and Part 407; and Proposed New 35 Ill. Adm. Code 302.208(h), R07-9. This rulemaking updated the Board's water quality regulations, including a change to the sulfate water quality standard and repeal of the total dissolved solid water quality standard.

On May 7, 2009, the Board adopted final amendments in Standards and Limitations for Organic Material Emissions for Area Sources Proposed New 35 Ill. Adm. Code Part 223, R08-17. This rulemaking regulates VOM emissions from consumer products and architectural/industrial maintenance products. On June 18, 2009, the Board adopted regulations entitled In the Matter of: Amendments to 35 Ill. Adm. Code 225: Control of Emissions from Large Combustion Source (Mercury Monitoring), R09-10. The amendments recreate monitoring provisions of the federal Clean Air Mercury Rule that were recently vacated by a federal court.

During FY 2009 the Board has also accepted several rulemakings that will continue into FY 2010 and that will require substantial resources from the Board. One significant rulemaking proposal accepted by the Board is: In the Matter of: Proposed Amendments to Tiered Approach to Corrective Action Objectives (35 Ill. Adm. Code 742), R09-9. In addition the Board has ongoing rulemakings that will require great resources such as Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and Lower Des Plaines River Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303, and 304, R08-9.

The Board's contested case docket in FY 2009 included numerous enforcement cases, permit appeals, adjusted standard petitions, administrative citations, and landfill siting appeals. Board decisions were overwhelmingly upheld on appeal at both the Appellate and Supreme Court levels. For example, in a case of first impression, the Board was affirmed in a National Pollutant Discharge Elimination System permit appeal establishing case law on the antidegradation rule for Illinois waters (IEPA and New Lenox v. Pollution Control Board and Sierra Club, 386 Ill. App. 3d 375; 896 N.E.2d 479).

Sincerely,

G. Tanner Girard

G. Tanner Girard
Acting Chairman

Meet the Board Members

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, 1998, 2000, 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 another term. Johnson 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 as a 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 serving on the Podiatric Medical Licensing Board.

Board Member Andrea S. Moore was first appointed to the Board 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 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.

Board Member Shundar Lin was appointed to the Board in 2008. Dr. Lin has a PhD in sanitary engineering from Syracuse University in Syracuse, New York. He holds an MS in sanitary engineering from the University of Cincinnati, Cincinnati, Ohio, and a BS in civil engineering from National Taiwan University, Taipei City, Taiwan.

He worked for the Illinois State Water Survey (ISWS) for 35 years performing basic and applied researches on topics including public water supply, wastewater treatment, microbiology, lake and stream studies, environmental protection, watershed management, and stream sanitation. From 1988 through 1995 annually, he led a two-week program entitled "Advanced Short Course of Environmental Protection" for Taiwanese environmentalists, which was sponsored by both the University of Illinois and the ISWS. He has published nearly 100 articles and two books - "Water and Wastewater Calculations Manual," and "Handbook of Environmental Engineering Calculations (co-authored with C. C. Lee)." He won the 1986 Water Resource Division best paper award for "Giardia lamblia and Water Supply" from the American Water Works Association (AWWA). He developed a media for stressed fecal coliform that has been incorporated in Standard Methods for Examination of Water and Wastewater. He has served on technical committees for Standard Methods, AWWA, Water Environment Federation, and American Society of Civil Engineers. Dr. Lin is also a member (2009-2012) of the Executive Board of the North America Taiwanese Professors' Association.

Board Member Gary Blankenship was appointed to the Board in 2008. Prior to serving on the Board, Mr. Blankenship was Business Manager and Financial Secretary for Plumbers & Pipefitters Local #422 in Joliet, Illinois. He served as Vice President of the Illinois Pipe Trades Association, Financial Secretary for the Will and Grundy Counties Building Trades Council and was a member of the Strategic Planning Committee for the United Association of Plumbers and Pipefitters International Union. Mr. Blankenship, with 38 years experience, has participated in the construction and maintenance of a wide variety of air, water, solid and hazardous pollution control systems for industrial facilities such as coal fired power plants, waste water treatment plants, refineries, chemical plants, incinerators, and landfills. He also managed a five-year training program for Pipefitter Apprentices that included constructing and maintaining air and water pollution control systems.

Former Board Member Nicholas J. Melas

In November 2008, the Board said good-bye to long-time Board Member Nicholas J. Melas who was first appointed to the Board in 1998 and reappointed several times. Prior to coming to the Board Mr. Melas served as Commissioner of the Metropolitan Water Reclamation District of Greater Chicago (MWRD) for 30 years and President of its Board for the last 18 of those years. Melas' experience with the MWRD was an asset to the Board as he worked on various water, wastewater, and other environmental rulemakings before the Board during his tenure.

The Illinois Pollution Control Baord

L-R Dr. Shundar Lin, Gary Blankenship, Chairman G. Tanner Girard, Andrea S. Moore, and Thomas E. Johnson

Rulemaking Review

Rulemaking is one of the Board's most visible functions. During the public notice, comment, and hearing process in any given rule docket, 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 common goal is to refine regulatory language and to ensure that adopted rules are economically reasonable and technically feasible as well as protective of human health and the environment.

Section 5(b) of the Environmental Protection Act (Act) (415 ILCS 5/5(b) (2008)) 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) 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 (2008)). 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 it has received.

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

The following is a summary of the most significant rulemakings completed in fiscal year 2009, arranged by docket number. During FY 2009, under Section 27 of the Act, the Board adopted rules in three significant rulemakings of statewide applicability and two site specific rulemakings.

RULES ADOPTED IN FISCAL YEAR 2009

Triennial Review of Sulfate and Total Dissolved Solids Water Quality Standards: Proposed Amendments to 35 Ill. Adm. Code 302.102(b)(6), 302.102(b)(8), 302.102(b)(10), 302.208(g), 309.103(c)(3), 405.109(b)(2)(A), 409.109(b)(2)(B), 406.100(d); Repealer of 35 Ill. Adm. Code 406.203 and Part 407; and Proposed New 35 Ill. Adm. Code 302.208(h), R07-9 (final rules adopted Sept. 4, 2008)

On September 4, 2008, the Board adopted final rules in the rulemaking docketed as Triennial Review of Sulfate and Total dissolved Solids Water Quality Standards: Proposed Amendments to 35 Ill. Adm. Code 302.102(b)(6), 302.102(b)(8), 302.102(b)(10), 302.208(g), 309.103(c)(3), 405.109(b)(2)(A), 409.109(b)(2)(B), 406.100(d); Repealer of 35 Ill. Adm. Code 406.203 and Part 407; and Proposed New 35 Ill. Adm. Code 302.208(h), R07-9 (Sept. 4, 2008). The rules are based on an October 23, 2006 proposal filed by the Illinois Environmental Protection Agency (IEPA).

The IEPA proposal set forth a sulfate standard for general use waters that varied from 500 milligrams per liter (mg/L) to 2,500 mg/L, depending on the associated chloride and hardness levels measured in the water. The sulfate standard in waters used for livestock watering had a maximum level of 2,000 mg/L. The proposal eliminated the total dissolved solids (TDS) water quality standard

for general use waters. The proposal also amended the mixing zone regulations to allow for mixing in 7Q1.1 zero flow streams, and in streams with less than a 3:1 dilution ratio. Finally, the provisions addressing separate sulfate and chloride water quality standards for discharges from mining operations were deleted. Discharges from mining operations would be subject to the general use water quality standards under the proposed regulations.

In response to the comments, the Board made changes to Section 302.208(h)(3)(C) and Section 309.102(b)(8). Specifically, the Board amended Section 302.208(h)(3)(C) to establish a standard for sulfate where chlorides exceed 500 mg/L and hardness is at or below 500 mg/L, according to Section 303(c) of the Clean Water Act and federal regulations at 40 C.F.R. 131.10(j)(2). Section 309.102(b)(8) was amended to require an NPDES permit applicant seeking a mixing zone more than 50% of the volume flow in streams where the dilution ratio is less than 3:1 to demonstrate the provision of an adequate zone of passage.

Abbott Laboratories Proposed Site-Specific Amendment to Applicability Selection of Organic Material Emission Standards and Limitations for the Chicago Area: Subpart T: Pharmaceutical Manufacturing (35 Ill. Adm. Code 218.480(b)), R08-8 (final rules adopted Aug. 21, 2008)

On August 21, 2008, the Board, adopted a final opinion and order in Abbott Laboratories Proposed Site-Specific Amendment to Applicability Selection of Organic Material Emission Standards and Limitations for the Chicago Area: Subpart T: Pharmaceutical Manufacturing (35 Ill. Adm. Code 218.480(b)), (R08-8) (Aug. 21, 2008). The Board held one hearing on Abbott Laboratories' request for rule change. Abbott sought "additional operational flexibility" with regard to emissions of volatile organic materials (VOM) from certain tunnel dryers and fluid bed dryers at its pharmaceutical manufacturing facility located in Libertyville Township, Lake County.

The Board determined that adopting the rule would result in "definite, if unquantifiable, economic savings to Abbott by allowing it to use its business judgment in determining the most efficient use of its process equipment," while also resulting in net reductions of VOM emissions from Abbott's facility.

Abbott's operations are subject to the VOM emissions standards at 35 Ill. Adm. Code, Subpart T – Pharmaceutical Manufacturing, which contains certain exemptions that are only applicable to Abbott's air suspension coater/dryer, fluid bed dryers, tunnel dryers, and Accelacotas. Adopted amendments to these site-specific exemptions now allow "capping" to lower the overall emissions of volatile organic material from tunnel dryers (Nos. 1-4), and fluid bed dryers (Nos. 1-3). Under the "cap" in the new 35 Ill. Adm. Code 218.480(b)(4), the combined total annual emissions from the seven covered dryers could not exceed 18,688 kg/year (20.6 tons/year).

Proposed New 35 Ill. Adm. Code Part 223 Standards and Limitations for Organic Material Emissions for Area Sources, R08-17 (final rules adopted May 7, 2009)

On May 7, 2009, the Board adopted a final opinion and order in Proposed New 35 Ill. Adm. Code Part 223 Standards and Limitations for Organic Material Emissions for Area Sources, R08-17 (May 7, 2009). The final rules have a July 1, 2009 implementation date. The rules are intended to reduce emissions of volatile organic material (VOM) from consumer and commercial products and architectural and industrial maintenance products. The rules include VOM content standards, exemptions and compliance alternatives, and various labeling, recordkeeping and reporting requirements.

Effective July 17, 1997, the USEPA revised the national ambient air quality standard (NAAQS) for ozone from 0.120 parts per million (ppm) to 0.080 ppm. In addition, USEPA increased from one hour to eight hours the time period used as the basis for compliance with the NAAQS for ozone. *Id.* at 1-2. The Board found that the rules are economically reasonable and technically feasible. and that these rules are needed to attain the ozone NAAQS by 2010 and to protect the health of the State's citizens. Combined VOM emissions from the sources regulated in these rules account for approximately 9.86% of all anthropogenic VOM emissions in the State of Illinois. These rules are expected to reduce VOM emissions by approximately 28.5 tons per day and slightly more than 10,000 tons on an annual basis.

Proposed Site Specific Rule for City of Springfield, Illinois, Office of Public Utilities, City, Water Light and Power and Springfield Metro Sanitary District from 35 Ill. Adm. Code Section 302.208(g), R09-8 (final rules adopted Apr. 2, 2009).

On May 21, 2009, the Board adopted a final rule in Proposed Site Specific rule for City of Springfield, Illinois, Office of Public Utilities, City, Water Light and Power and Springfield Metro Sanitary District from 35 Ill. Adm. Code Section 302.208(g), R09-8 (Apr. 2, 2009). On August 29, 2008, the City of Springfield, Office of Public Utilities, City Water, Light, and Power (CWLP), and Springfield Metro Sanitary District (District) proposed this site-specific rulemaking for alternative water quality standards for boron.

The Board found that the rule as proposed is technically feasible, economically reasonable, and protective of human health and the environment. The rule will enable the District to accept pretreated industrial effluent from CWLP's power plant. CWLP's power plant effluent causes increased boron levels in the effluent stream and is necessary to meet the power needs for the City of Springfield and surrounding communities. This site specific rule allows CWLP to operate the power plants in compliance with the National Pollutant Discharge Elimination System (NPDES) permits and State and Federal air regulations.

The adopted rule establishes an alternative water quality standard for boron from the point of discharge at Outfall

007 from the District's Spring Creek Sanitary Treatment Plant to the Sangamon River, to the confluence with the Illinois River, and in the Illinois River 100 yards downstream from confluence of the Sangamon River. Section 302.208(g) (35 Ill. Adm. Code 302.208(g)) of the Board's water quality rules sets a general use boron water quality standard of 1.0 milligrams per liter (mg/L) and Section 304.105 (35 Ill. Adm. Code 304.105)) of the Board's rules provides that the District's discharge cannot violate that standard. The Board has not adopted an effluent standard for boron; nor has the Illinois Environmental Protection Agency imposed an effluent limit on the District's discharge from Outfall 7 in the District's NPDES permit.

Amendments to 35 Ill. Adm. Code 225: Control of Emissions from Large Combustion Sources (Mercury Monitoring), R09-10 (final rules adopted June 18, 2009)

On June 18, 2009, the Board adopted final rules in Amendments to 35 Ill. Adm. Code 225: Control of Emissions from Large Combustion Sources (Mercury Monitoring), R09-10 (June 18, 2009). The proposal is based on the October 3, 2008 proposal of the IEPA to recreate certain monitoring provisions of the federal Clean Air Mercury Rule (CAMR) by adopting those provisions in Illinois' mercury rule. The federal CAMR provided that states must require electric generating units "to comply with the monitoring, recordkeeping, and reporting provisions of Part 75 of the *Code of Federal Regulations* with regard to monitoring emissions of mercury to the atmosphere." The Illinois mercury rule, as adopted in R06-25, specifically required compliance with 40 C.F.R. Part 75. In the Matter of: Proposed New 35 Ill. Adm. Code 225 Control of Emissions From Large Combustion Sources (Mercury), R06-25 (Dec. 21, 2006). However, the United States Court of Appeals for the District of Columbia vacated CAMR, removing the monitoring provisions of that rule, and creating the need to amend Part 225 to recreate certain monitoring provisions of the federal rule. *See* New Jersey v. Envtl. Prot. Agency, 517 F.3d 574, 578-81 (D.C. Cir. 2008).

As a result of the Board's adoption of these amendments, the substance of Part 225 is largely unchanged as those regulations continue to address the control of mercury emissions from coal-fired electric generating units beginning in July 2009. In addition, the Board's adopted rules also include provisions to amend the Multi-Pollutant Standard at Section 225.233 of Part 225.

Semi-Annual Identical-In-Substance Update Dockets

Section 7.2 and various other sections of the Environmental Protection Act require the Board to adopt regulations identical-in-substance to federal regulations or amendments thereto promulgated by the USEPA Administrator in various federal program areas. *See* 415 ILCS 5/7.2 (2008). 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 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 among 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 FY09. Summaries of these dockets are included in the Board's newsletter the *Environmental Register*. They are available on the Board's Web site at www.ipcb.state.il.us.

RULES PENDING AT END OF FISCAL YEAR 2009

At the close of FY09, there were 14 open dockets, exclusive of one reserved IIS docket. (A proposal for public comment is being prepared for expected Summer 2009 adoption in reserved docket R09-16 RCRA Subtitle C (Hazardous Waste) Update, USEPA Amendments (July 1, 2008 through December 31, 2008)).

The Board typically holds hearings on proposals filed with it, prior to adoption of the "first notice" orders required under the IAPA. 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 pending dockets below (not including identical-in-substance rule dockets) includes brief notations in parentheses of significant Board actions. For reasons of space, the substance of these dockets carried over from FY09 into FY10 is not summarized below. Additional information is available from the Board's Web site at www.ipcb.state.il.us.

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

R06-20 Proposed Amendments to the Board's Special Waste Regulations Concerning Used Oil, 35 Ill. Adm. Code 808,809 (in first notice, three hearings held on NORA proposal, second notice expected Fall 2009)

R06-22 NOx Trading Program: Amendments to 35 Ill. Adm. Code Part 217 (pre-first notice, hearing, amended IEPA proposal expected)

R07-19 Section 27 Proposed Rules for Nitrogen Oxide (NOx) Emissions From Stationary Reciprocating Internal Combustion Engines and Turbines: Amendments to 35 Ill. Adm. Code Parts 211 and 217 (in second notice, two sets of hearings held, final rule adoption expected Summer 2009)

R07-21 Site Specific Rule for City of Joliet Wastewater Treatment Plant Fluoride and Copper Discharges, 35 Ill. Adm. Code 303.432 (pre-first notice, hearings to be scheduled after receipt of proponent's readiness motion)

R08-9 Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and the Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303 and 304 217 (pre-first notice, 28 hearings held on IEPA proposal, with more scheduled in Fall 2009)

R08-18 Proposed Amendments to Groundwater Quality Standards, 35 Ill. Adm. Code 620 (pre-first notice, three sets of hearings held, first notice expected Fall 2009)

R08-19 Nitrogen Oxides Emissions from Various Source Categories, Amendments to 35 Ill. Adm. Code Parts 211 and 217 (in first notice, two sets of hearings completed, second notice expected July 2009, final rule adoption expected Fall 2009)

R09-9 In the Matter of: Proposed Amendments to Tiered Approach to Corrective Action Objectives (35 Ill. Adm. Code 742) (pre-first notice, two hearings held, first notice expected Fall 2009)

R09-11 Galva Site Specific Water Quality Standard for Boron Discharges to Edwards River and Mud Creek: 35 Ill. Adm. Code 303.447 and 303.448 (in second notice, one hearing held, final rule adoption expected Summer 2009)

R09-19 Air Quality Standards Clean-up: Amendments to 35 Ill. Adm. Code Part 243 (pre-first notice, two hearings held on IEPA proposal, first notice expected Summer 2009)

R09-20 Nitrogen Oxide (NOx) Trading Program Sunset Provisions for Electric Generating Units (EGU's): New 35 Ill. Adm. Code 217.751 (in first notice, second notice expected Summer 2009)

R09-21 Ameren Ash Pond Closure Rules (Hutsonville Power Station): Proposed 35 Ill. Adm. Code Part 840.101 through 840.144 (pre-first notice, hearing scheduled on Ameren proposal on September 29, 2009)

R09-22 Petition of Maximum Investments, LLC for a Rule of General Applicability Under 415 ILCS 5/22.2b(a)3 (pre-first notice, IEPA motion to dismiss Maximum Investments' June 25, 2009 proposal pending)

The Board presently expects that it will adopt rules in many of these dockets during FY10.

Judicial Review

Introduction

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

Pursuant to Section 41 of the Environmental Protection Act (Act) (415 ILCS 5/41 (2008)), any party to a Board hearing, anyone who filed a complaint on which a hearing was denied, anyone denied a permit or variance, anyone who is adversely affected by a final Board order, or anyone who participated in the public comment process under subsection (8) of Section 39.5 of the Act, may file a petition for review of the Board's order with the appellate court. The petition for review must be filed within 35 days of service of the Board order from which an appeal is sought.

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

At the conclusion of Fiscal Year 2009, the appellate courts were in the process of hearing appeals of five Board decisions. Of these, three involved review of a local government siting decisions regarding a pollution control facility, one involved an adjusted standard decision, and the last was the Board's final adoption of mercury control rules.

The following summaries of the written appellate decisions are organized first by case type and then by date of final determination

Enforcement

Sections 30 and 31.1 of the Act (415 ILCS 5/30 and 31.1 (2008)), respectively, provide for "standard" enforcement actions and for the more limited administrative citations. The standard enforcement action is initiated by the filing of a formal complaint by a citizen or by the Attorney General's Office. A public hearing is held. At the hearing, the complainant must prove that the "respondent has caused or threatened to cause air or water pollution or that the respondent has violated or threatens to violate any provision of this Act or any rule or regulation of the Board or permit or term or condition thereof." 415 ILCS 5/31(e) (2008). The Board is authorized under Sections 33 and 42 of the Act to direct a party to cease and desist from violation, to revoke a permit, to impose civil penalties, and to require posting of bonds or other securities to assure correction of violations. 415 ILCS 5/33 and 42 (2008). 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 (2008).

In Fiscal Year 2009, the appellate court for the Fifth District affirmed a Board decision granting summary judgment and finding violations, but declining to issue a civil penalty.

People of the State of Illinois v. Illinois Pollution Control Board and CSX Transportation, Inc., No. 5-07-0504 (Feb. 26, 2009) (unpublished Rule 23 order affirming Board's orders in PCB 07-16 (Jul. 12 & Aug. 9, 2007)

The Fifth District Appellate Court upheld the Board's decision in People of the State of Illinois v. Illinois Pollution Control Board and CSX Transportation, Inc., No. 5-07-0504 (Feb. 26, 2009) (CSX (5th Dist.)). In an enforcement action involving cross-motions for summary judgment, the Board resolved penalty issues without a hearing requested by complainant, the successful movant for summary judgment. People of the State of Illinois v. CSX Transportation, Inc., PCB 07-16 (Jul. 12, 2007; reconsid. den. Aug. 9, 2007)) (CSX, PCB 06-76). The court's ruling was a non-precedential order, issued under Illinois Supreme Court Rule 23 (166 Ill.2d R.23

The Board's Orders (CSX, PCB 06-76)

The People of the State of Illinois (People), in a September 12, 2006 complaint, alleged that CSX Transportation, Inc. (CSX) violated water pollution and open dumping provisions of the Act and failed to thoroughly and timely remediate the site of a 2004 spill of 440 to 500 gallons of diesel fuel onto the ground at the Rose Lake Railroad yard in St. Clair County.

In the spring of 2007, CSX filed a motion for summary judgment and the People filed a cross-motion for summary judgment. The People's motion sought summary judgment on the alleged violations. However, the People's motion asserted that genuine issues of material fact existed on questions of civil penalty, and therefore requested a penalty hearing. CSX's response to the People's motion urged the Board to deny the People's request for a penalty hearing because CSX did not violate the Act and, even if the Board

found that CSX did violate the Act, a civil penalty was not appropriate based on the record.

The Board granted summary judgment in favor of the People, finding that CSX violated the water pollution, water pollution hazard, and open dumping prohibitions of Sections 12(a), (d) and 21(a) of the Act (415 ILCS 5/12(a), (d), and 21(a) (2006)). Declining to grant the People's request for a hearing on penalty issues, the Board considered the uncontested facts in light of the factors spelled out in Sections 33(c) and 42 (h) of the Act. The Board concluded that no civil penalty was necessary to deter future violations of the Act based on CSX's prompt action to clean up the site. The Board found that no economic benefit occurred to CSX because of the failure to remediate the exceedances found at the sampling site especially as the release had been remediated. The Board did however order CSX to cease and desist from further violations

On August 9, 2007, the Board denied the People's motion for reconsideration. The People argued that the issue of the amount of a penalty was not part of either motion for summary judgment and was accordingly not properly before the Board; CSX filed a response in opposition. CSX, PCB 06-76 (Aug. 9, 2007).

The Fifth District's Order (CSX (5th Dist.))

The Fifth District summarized the Board's proceedings and then commented on the People's difficulties in stating the issue on appeal, agreeing with CSX that the People's statement of the issue sought to "'shoehorn several distinct issues with various legal standards'" (CSX (5th Dist.) Order at 4, quoting CSX brief):

> whether the Board abused its discretion in failing to hold a hearing on the penalty issue and whether the Board's failure to impose a penalty was arbitrary and capricious" (*Id.* at Order at 4).

The court observed that the People stated to the court that they did not wish the court itself to impose a civil penalty, but rather to remand for a penalty hearing, leading the court to conclude that the People must be asserting on appeal that there exist genuine issues of material fact regarding civil penalty, making it inappropriate for the Board to have disposed of the matter by summary judgment. CSX (5th Dist.), Order at 4. Having so framed the issue, the court applied the *de novo* standard of review to the Board's ruling. *Id.* at Order at 5, citing Forsythe v. Clark USA, Inc., 224 Ill. 2d 274, 280 (2007).

The court then recited the standard of decision for summary judgment: that it is proper to award summary judgment only where the pleadings, affidavits, depositions, admissions, and exhibits on file, viewed in the light most favorable to the non-movant, reveal that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. CSX (5th Dist.), Order at 5. The People argued that there were disputed issues of material fact concerning CSX's diligence and cooperation in cleaning up the site. According to the People, CSX denied the People's allegations that CSX failed to respond to several IEPA letters and notices, and CSX and the People also disagreed about whether CSX provided cleanup information to the IEPA in a timely manner. *Id.* The court noted, however, that the People identified no other disputed facts or any additional facts that the People would introduce at a penalty hearing. *Id.*

Finding that "the penalty issue was presented to the Board in CSX's motion for a summary judgment despite the State's request for a hearing on the issue," the court held that the Board properly considered whether summary judgment was appropriate on whether to impose a civil penalty. CSX (5th Dist.), Order at 5-6. The court then determined that the Board correctly found no genuine issue of material fact concerning penalty. According to the court, the Board had before it "a complete record" of all the facts, including the parties' correspondence and the timeliness of CSX's responses to the IEPA. *Id.* at 6.

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. 415 ILCS 5/39 (2008). 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(a) of the Act. 415 ILCS 5/40(a) (2008). Third parties may appeal permits as specified in Section 40(b), (c), (d), and (e) of the Act. 415 ILCS 5/40 (b), (c), (d), and (e) (2008). These include IEPA-issued permits for hazardous waste disposal sites implementing the federal Resource Conservation and Recovery Act of 1976, permits for hazardous waste facilities issued under Section 39.3, permits implementing the federal Clean Air Act issued under Section 9.1(c), and permits implementing National Pollutant Discharge Elimination System (NPDES) issued under Section 39(b). 415 ILCS 5/39.3, 9.1(c) and 39(b) (2008)

In Fiscal Year 2009, the appellate court for the Third District affirmed the Board's order in an appeal under Section 40(a) filed by the permit applicant after the Board affirmed the IEPA's permit denial. The appellate court reviewed two Board decisions involving third party appeals of NPDES permits filed under Section 40 (e). The appellate court for the Third District affirmed the Board's order reversing IEPA issuance of a permit. But, the appellate court for the Fifth District vacated and remanded for further Board proceedings a Board order overruling, on procedural grounds, IEPA's denial of a permit.

Peoria Disposal Company v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, No. 3-08-0030 (Jan. 20, 2009) (unpublished Rule 23 order affirming Board's order affirming permit denial in PCB 08-25 (Jan. 10, 2008)

In a January 20, 2009 order, the Third District Appellate Court upheld the Board's decision to affirm the IEPA's denial of a permit modification sought by Peoria Disposal Company (PDC) to expand the PDC No. 1 Landfill in Peoria County. Peoria Disposal Company v. Illinois Pollution Control Board and County of Peoria, No. 3-08-0030 (3rd Dist. Jan 10, 2009) (Peoria Disposal (3rd Dist.)). The court's ruling was an unpublished order, issued under Illinois Supreme Court Rule 23 (166 Ill.2d R.23), with the presiding justice filing a special concurrence.

PDC sought modification of the hazardous waste permit issued by IEPA in 1987 to implement Part B of the federal Resource Conservation and Recovery Act of 1976 (RCRA Subtitle C) (42 U.S.C. §§ 6901 et seq. (2005)); the permit is sometimes called a "RCRA Part B" permit. The IEPA denied the permit modification under Section 39(c) of the Environmental Protection Act (Act), 415 ILCS 5/39 (c) (2006). IEPA's stated grounds were that PDC had failed to submit proof of local government site location suitability approval by Peoria County of the expansion required under Section 39.2 of the Act. 415 ILCS 5/39.2 (2006).

Resolution of the issues presented involved interpretation of several of the Act's provisions, including definitions of "generator" in Section 3.205 and "pollution control facility" and the various exemptions from that definition as stated in Section 3.330 of the Act. 415 ILCS 5/3.330 (2006). The Third District Appellate Court order concluded that "IEPA and the Board correctly determined that PDC must demonstrate proof of local siting approval before PDC could receive a permit modifying its existing permit to expand the horizontal and vertical boundaries of the existing landfill." Peoria Disposal (3rd Dist.), Order at 21.

Stipulated Facts Concerning the PDC Facility and Permit History

The parties stipulated to all salient facts of the permit chronology involved in PDC's appeal. Peoria Disposal Company v. Illinois Environmental Protection Agency, PCB 08-25 (Jan. 10, 2008) (Peoria Disposal, PCB 8-25), slip op. at 2-7. Those facts include that in 1987, IEPA granted PDC a RCRA hazardous waste permit to operate a waste stabilization facility and landfill in Peoria County. In 2006, PDC filed an application with the Peoria County Board for siting approval of an expansion of the hazardous waste landfill. PDC proposed to expand the landfill vertically by 44 feet and horizontally by 8.2 acres. The landfill expansion would be used to dispose of hazardous waste residue resulting from PDC's treatment of its customers' hazardous wastes at the stabilization facility. Peoria Disposal (3rd Dist.), Order at 2.

On May 3, 2006, the Peoria County Board denied PDC's application for siting approval of a landfill expansion, a decision which PDC appealed to the Board. *Id.* The Board upheld the Peoria County Board's denial and PDC appealed to the Third District Appellate Court. While that appeal "was still unresolved at the time the parties filed their briefs in this pending appeal," the court noted that it had "confirmed" the decision of the Board, citing Peoria Disposal Company v. Illinois Pollution Control Bd., 385 Ill. App. 3d 781, 896 N. Ed. Ed 460 (3rd Dist. 2008). Peoria Disposal (3rd Dist.), Order at 3 and n.1.

PDC submitted an application to IEPA, seeking to modify PDC's RCRA Part B permit during the pendency of the appeal of the siting denial. Through the application for permit modification, PDC asked IEPA to grant it the right to operate a proposed, expanded residual waste landfill in the exact same location utilizing the precise vertical and horizontal expanded dimensions as those dimensions which were denied siting approval by the County, and affirmed by the Board. Peoria Disposal (3rd Dist.), Order at 3.

On August 30, 2007, IEPA denied PDC's permit application because PDC's application did not include proof of local siting approval under Section 39.2 of the Environmental Protection Act (Act) (415 ILCS 5/39.2 (2006)). *Id.* at Order at 1, 4.

Board Order in PCB 08-25

PDC initiated its appeal to the Board on September 17, 2007, and the Board, on January 10, 2008, affirmed IEPA's denial of PDC's permit application. The Board found that PDC's proposed residual waste landfill is not excluded from the definition of "pollution control facility" and PDC must demonstrate proof of local siting approval. Peoria Disposal, PCB 08-25, slip op. at 1.

The Appellate Court's Decision in Peoria Disposal (3rd Dist.)

The court noted that the parties had disputed the issue of standard of review, with IEPA arguing in favor of a "clearly erroneous" standard and PDC arguing in favor of a *de novo* standard. Quoting the Illinois Supreme Court's decision in Cinkus v. Village of Stickney, 228 Ill. 2d 200, 210 (2008), the Third District Appellate Court states that "[t]he applicable standard of review depends upon whether the question presented is one of fact, one of law, or a mixed question of fact and law." Peoria Disposal (3rd Dist.), Order at 12. The Third District notes that as the parties stipulated to the facts, this case requires the reviewing court to apply the statutory language to the undisputed facts, "creating an issue of statutory interpretation for our review" which must be considered *de novo*. *Id.*, citing City of Belvidere v. Illinois State Labor Relations Bd., 181 Ill. 2d 191, 205 (1998).

The Third District Appellate Court began its analysis by observing that "the Board's carefully written order" recognized the parties' competing interpretations of the exemption from the Section 3.330(a) definition of "pollution control facility" for the disposal of "wastes generated by such person's own activities." Peoria Disposal (3rd Dist.), Order at 12. Citing the line of decisions relied upon by the Board, the court notes the Board's conclusion that the legislative intent behind the similar exemption of Section 21(d)(1) of the Act (415 ILCS 5/21(d)(1) (2006)) was to

"exempt minor amounts of refuse which could be disposed of without environmental harm on the site where it was generated." *Id.* at Order at 12-13, quoting the Board in IEPA v. City of Pontiac, PCB 74-396, slip op. at 4 (Aug. 7, 1975).

The court relates that, to avoid the Section 39(c) bar on IEPA issuing a "new pollution control facility" permit without proof of local siting approval, PDC argued that its proposed expansion qualified for the Section 3.330(a)(3) exemption from the definition of "pollution control facility." Peoria Disposal (3rd Dist.), Order at 13. According to PDC, the company sought the landfill expansion only to dispose of its "own waste," asserting that the waste it receives from its customers becomes "PDC's very own self-generated waste as a result of [PDC's] waste treatment process." *Id.* at 14. The court explains that PDC relies on the fact that "IEPA tacitly approved PDC's past course of record keeping that identified PDC as the generator" and cites past "Hazardous Waste Location Logs" completed by the company. *Id.* at 14-15. But, the court was not persuaded by PDC's argument, finding that PDC's "circular logic" ignores the company's description of its operation as the "Peoria Disposal Landfill Facility" on those same logs, and that "PDC's terminology asserted landfill status which is defined under the Act as a pollution control facility." *Id.*

The Third District also finds "misplaced" PDC's reliance on Envirite Corp. v. IEPA, 158 Ill. 2d 210 (1994), finding that the supreme court had expressly limited the definition of "generator" in that case to the context of the recently amended section 39(h) of the Act." Peoria Disposal (3rd Dist.), Order at 15-16.

The Third District declined PDC's invitation to "ignore the definition of generator as one who 'produces' waste under section 3.205 of the Act [] and substitute the definition of generator as limited to section 39(h)." Peoria Disposal (3rd Dist.), Order at 18. Accordingly, the court reasoned that the Section 3.205 "generator" definition must be read in conjunction with the Section 3.330(a)(3) exemption from the "pollution control facility" definition.

The court then turns to the definition of "new pollution control facility" in Section 3.330(b)(2) of the Act, and finds that PDC's proposed expansion qualifies as a "new pollution control facility" because PDC sought a permit modification that would allow for an additional 2.4 million tons of disposal space beyond the boundaries of the currently permitted landfill. Peoria Disposal (3rd Dist.), Order at 20.

The court concluded that the Board and IEPA were correct in concluding that PDC could not be granted a permit modification under Section 39(c) of the Act without submission of proof of Peoria County's siting approval under Section 39.2 of the Act. 415 ILCS 5/39(c) and 5/39.2 (2006).

Special Concurrence

Presiding Justice O'Brien wrote to express his view that he agrees with

> the majority result to the extent it is based on the reasoning that, if granted, PDC's request for modification would have created a "new" pollution control facility as defined under section 3.330(b)(2) of the Act. It is undisputed PDC's request involves an increase in the vertical and horizontal dimensions of the boundaries of the current permitted landfill. As the majority points out, any expansion of PDC's landfill beyond its current boundaries requires local siting approval, and "[f]or this reason alone the Board and the IEPA were correct in rejecting PDC's request and I would rest our decision solely on this analysis. Peoria Disposal (3rd Dist.), Special Concurrence at 1.

Illinois Environmental Protection Agency and Village of New Lenox v. Illinois Pollution Control Board, Des Plaines River Watershed Alliance, Livable Communities Alliance, Prairie Rivers Network, Sierra Club, 386 Ill. App. 3d 375, 896 N.E.2d (3rd Dist. 2008)

In an October 7, 2008 opinion, the Third District Appellate Court affirmed the Board's order in a third party permit appeal. Illinois Environmental Protection Agency and Village of New Lenox v. Illinois Pollution Control Board, Des Plaines River Watershed Alliance, Livable Communities Alliance, Prairie Rivers Network, Sierra Club, 386 Ill. App. 3d 375, 896 N.E.2d (3rd Dist. 2008) (New Lenox, 896 N.E.2d at).

The Board ruled on the appeal brought by the Des Plaines River Watershed Alliance, Livable Communities Alliance, Prairie Rivers Network, and Sierra Club (collectively, petitioners or Environmental Groups). The Board found that the IEPA failed to adequately address issues raised by the Environmental Groups during the permitting process concerning implementation of the Illinois antidegradation rule at 35 Ill. Adm. Code 302.105. The Board concluded that, as a result of this failure, the issuance of the permit violated 35 Ill. Adm. Code 302.105(c) and Section 39 of the Act (415 ILCS 5/39 (2006)). The Board accordingly found that the IEPA improperly granted the permit under the National Pollutant Discharge Elimination System (NPDES) to the Village of New Lenox (New Lenox) for the expansion of one of three sewage treatment plants. The Board reversed the permit, and remanded it to the IEPA for additional proceedings consistent with the Board opinion. Des Plaines River Watershed Alliance, Livable Communities Alliance, Prairie Rivers Network, and Sierra Club v. IEPA and Village of New Lenox, PCB 4-88 (Apr. 19 and July 12, 2007) (New Lenox, PCB 04-88).

The Board's Decision in New Lenox, PCB 04-88

The permit appeal to the Board was initiated December 2, 2003, by the Environmental Groups. On October 31, 2003, the IEPA issued an NPDES permit to New Lenox, in Lake County, for the expansion of one of New Lenox's three

sewage treatment plants. The NPDES permit issued by the IEPA contains effluent limits and operational conditions that the New Lenox wastewater treatment facility must meet to discharge effluent to Hickory Creek, which ultimately joins with the Des Plaines River. New Lenox, PCB 04-88, slip op. at 1.

In 2002, New Lenox had applied to IEPA, seeking an increase in permitted discharge of effluent flows into Hickory Creek from 1.54 million gallons per day (MGD) to 2.516 MGD. New Lenox, PCB 04-88, slip op. at 2. To support its permit application, New Lenox submitted a study by Earth Tech (which collected five water samples in August 2002, and performed a macroinvertebrate (insect) analysis) and a 2002 report from Suburban Laboratories, Inc., which analyzed two water samples collected from Hickory Creek in January and June 2001, for contaminants. *Id.* at 2-3.

IEPA issued a proposed draft permit and held a public hearing, at which the Environmental Groups commented about green algal blooms observed on Hickory Creek and requested that IEPA "properly analyze whether the increased discharge would further deteriorate the stream's water quality and negatively impact the existing uses of the stream; examine potential alternatives and the costs of eliminating harmful chemicals from the effluent, specifically phosphorus and nitrogen; and require a new and valid survey of the current stream conditions be conducted in accordance with the published IEPA methodology." New Lenox, PCB 04-88, slip op. at 3-4.

After a public comment period, IEPA issues a "responsiveness summary" addressing various issues raised. New Lenox, PCB 04-88, slip op. at 6-8. The October 31, 2003 NPDES permit issued by the IEPA reflected a modified dissolved oxygen limit but did not otherwise address the Environmental Groups' concerns. *Id.*

The Environmental Groups filed a third-party NPDES permit appeal with the Board in December 2003. New Lenox, PCB 04-88, slip op. at 1. The Board denied respondent's requests for discovery, as well as cross-motions for summary judgment on November 17, 2005. *Id.* at 3, 15-20. On April 19, 2007, the Board found that the Environmental Groups demonstrated that IEPA failed to properly consider, under the antidegradation rule, the effect of the increased discharge from New Lenox on Hickory Creek, and therefore the permit's issuance violates that regulation (35 Ill. Adm. Code 302.105(c)) and Section 39 of the Environmental Protection Act (Act) (415 ILCS 5/39).

The Appellate Court's Decision in New Lenox

IEPA and New Lenox each filed separate appeals, which were consolidated by the court for disposition. New Lenox, 896 N.E.2d at 482. The appellate court decision first laid out the factual background, a summary of the Board's proceeding and decision and an overview of the NPDES permit process and the roles of the Board and Agency. *Id.* at 896 N.E.2d at 482-486. The court then began its detailed analysis of the various issues presented:

Burden of Proof and Standard of Review. The court observed that the NPDES permit application must contain sufficient information for IEPA to determine that the proposed discharge will comply with all state and federal requirements. New Lenox, 896 N.E.2d at 486, citing ESG Watts, Inc. v. IPCB, 224 Ill. App. 3d 592, 595 (3rd Dist. 1992).

According to the court, IEPA's decision to issue the permit must be supported by "substantial evidence," (New Lenox, 896 N.E.2d at 486, quoting Prairie Rivers Network v. IEPA and Black Beauty Coal, PCB 01-112, slip op. at 7 (Aug. 9, 2001)), but this does not "shift the burden away" from the petitioner Environmental Groups. The Environmental Groups "alone bear the burden in their appeal before the Board to prove that the permit, as issued, violated either the Act and/or the Board's regulations." New Lenox, 896 N.E.2d at 486, citing, among other authorities, Prairie Rivers Network v. IPCB, 335 Ill. App. 3d 391, 401 (4th Dist. 2002).

The court disagreed with the claim of IEPA and New Lenox that the Board "misapplied the burden of proof by making IEPA justify the terms and conditions incorporated into the permit." New Lenox, 896 N.E.2d at 486. The Board "must review the entire record relied upon by IEPA to determine whether the third party has shown that IEPA failed to

comply with criteria set forth in the applicable statutes and regulations before issuing or denying the NPDES permit." *Id.* at 896 N.E.2d at 487. The court concluded that the Environmental Groups met their burden of proof before the Board by demonstrating that IEPA "failed to require sufficient evidence to *assure* the water quality of Hickory Creek would not deteriorate further by exceeding the regulatory narrative and numeric standards as a result of the plant expansion." *Id.* (emphasis in original).

The court stated that it would review the Board's decision in order to determine whether the Board's findings were "contrary to the manifest weight of the evidence." New Lenox, 896 N.E.2d at 487, citing IEPA v. IPCB, 115 Ill. 2d 65, 69-70 (1986), 415 ILCS 5/41(b). The court therefore would not reweigh the evidence but instead would uphold the Board if any evidence in the record fairly supports the Board's decision. 896 N.E.2d at 48

Review of Board's Findings on Permit Issues. The court related that the Board found that IEPA did not receive sufficient data concerning the increased pollutants and consequently did not properly assess the impact of the increased pollutant loading from the expanded plant as required by the Act. New Lenox, 896 N.E.2d at 487. Applying the manifest weight of the evidence review standard, the court separately addressed the Board's findings in each of the four areas covered by the Board's remand instruction to IEPA

> to conduct an antidegradation assessment that (1) addressed whether the NPDES permit was necessary; (2) assures that the water quality would not be diminished below regulatory standards; (3) protected existing uses of the stream; and (4) considered all technically and economically reasonable alternative measures to avoid or minimize the extent of the pollutant loading on the stream. New Lenox, 896 N.E.2d at 488.

Necessity of Lowering Water Quality to Accommodate Important Economic or Social Development. The Board found that the record contained no data showing that the increased discharge to Hickory Creek was unavoidable or necessary, no facts or analyses discussing other feasible alternatives that might negate the need to increase the discharge, and no information revealing that IEPA evaluated the possibility of other methods to eliminate or reduce phosphorus or nitrogen from the effluent before discharging to the stream. According to the court, the Board's finding that IEPA did not follow Section 302.105(c)(1) was not contrary to the manifest weight of the evidence. New Lenox, 896 N.E.2d at 488.

Effects of Increased Discharge on Water Quality Standard Exceedences. Because IEPA did not "assure" that the water quality standards for certain contaminants would not be exceeded as a result of granting the NPDES permit, the Board determined that IEPA's issuance of the permit violated Section 302.105(c)(2)(B)(i). New Lenox, 896 N.E.2d at 488. For example, the Board found that Hickory Creek's phosphorus and nitrogen levels must be assessed by IEPA, rejecting IEPA's conclusion that phosphorus and nitrogen limits could not be delineated accurately within the permit. IEPA's antidegradation assessment had indicated that IEPA declined to develop specific restricted limits for the nutrient loading in the discharge because "development for water quality standards for nutrients is progressing as fast as resources allow and research is being conducted" and "standards for phosphorus sources could be another four or five years away." *Id.* at New Lenox, 896 N.E.2d at 489.

To determine average concentrations for copper in Hickory Creek, the Suburban Laboratories, Inc. report relied on data from two water samples collected in 2001. New Lenox, 896 N.E.2d at 490. Because the average copper level of these two samples was substantially less than the maximum or chronic water quality standard for copper, IEPA determined that permit limits for copper were not necessary. The court observed that IEPA's reliance on "limited copper sampling data, especially when one sample contained copper levels approximately equaling the maximum copper water quality standard," was troubling to the Board. *Id.* Further, the Board found that IEPA did not use the United States Environmental Protection Agency method for "evaluating the reasonable potential to exceed water quality standards for copper because that method called for using more than two samples." *Id.*

The Board found, in fact, that the record showed evidence that the increased loading would cause or contribute to violations of the water quality standards for offensive conditions related to phosphorous, nitrogen, dissolved oxygen, pH, and algal bloom levels in the stream. New Lenox, 896 N.E.2d at 490. The Board held that IEPA did not have sufficient information to determine that the numeric and narrative water quality standards would not be violated with the expansion of New Lenox's wastewater treatment plant. *Id.* The court ruled that the Board's findings were not against the manifest weight of the evidence. *Id.*

Protection of Existing Uses. The court quoted the Board's statement that "one of the most important tenets of the antidegradation regulations is the protection of the existing uses of all waters of the State." New Lenox, 896 N.E.2d at 490-491. Under Sections 302.105(a) and 302.105(c)(2)(B)(ii) of the Board's antidegradation rules, IEPA must assure that all existing uses of the stream are both maintained and protected before IEPA issues a permit allowing increased discharge. *Id.* at 896 N.E.2d at 491. According to the Board, the record lacked evidence assessing how the increased discharge would maintain and protect the existing uses of the stream, including aquatic life. *Id.*

IEPA conceded that its antidegradation assessment relied on the 2002 Earth Tech macroinvertebrate (insect) study, even though copies of IEPA interoffice memoranda showed that the study was "highly criticized" by IEPA employees. New Lenox, 896 N.E.2d at 491. One IEPA memo stated that Earth Tech's collection methods did not comply with IEPA's 1994 "Quality Assurance and Field Methods Manual," making it "difficult to judge the validity of the Earth Tech study." *Id.* The memo further observed that the Earth

Tech study did not contain enough specific information on habitat, water chemistry, and flow, and used different criteria for interpreting "MBI" (macroinvertebrate biotic index) scores than those typically used by IEPA. *Id.* at 18. Another IEPA memo called the Earth Tech study "one of the poorest studies I have seen in a while." *Id.* Some of these memoranda also recommended that IEPA require Earth Tech to conduct a new, compliant study. *Id.*

The court noted that other than the "questionably invalid and unreliable Earth Tech study," the Board found that the record contained no evidence of any current study of the existing aquatic communities or how the increased discharge will affect those communities. New Lenox, 896 N.E.2d at 491. The Board stated that the record contained evidence that Hickory Creek supported a "diverse assemblage of fish species," yet nothing in the record showed that Hickory Creek's aquatic wildlife would not be harmed by the increase in nutrient loading. *Id.* The court held that the Board's finding that IEPA did not comply with the antidegradation provisions was not contrary to the manifest weight of the evidence. *Id.*

Consideration of Reasonable Alternatives. The court reported that the Board found that Section 302.105(c)(2)(B)(iii) requires IEPA's antidegradation assessment to assure that "all technically and economically reasonable alternatives are incorporated into the proposed expansion to avoid or minimize the proposed increase of pollutant loading into a stream." New Lenox, 896 N.E.2d at 492. IEPA considered only one general cost estimate to demonstrate the feasibility of using a land management program as an alternative to the wastewater treatment plant expansion, and that cost estimate was from the "discredited Earth Tech study." *Id.* Further, the Board found that the record did not address any other alternatives or technologies to minimize the increased pollutant loading into Hickory Creek, and that nothing in the record showed that IEPA considered the costs or technology available to remove phosphorus and nitrogen from the effluent before it was discharged into Hickory Creek. The court ruled that the Board's finding, that permit issuance under these circumstances violated the antidegradation rule, was not against the manifest weight of the evidence. *Id.*

Review of Board's Findings on Procedural Issues. The court then turned to various procedural issues raised by appellants, again affirming the Board's determinations.

Denial of Discovery Request. Applying an "abuse of discretion" standard of review to the Board's ruling denying appellants' discovery request, the court noted the Board's reliance on Section 40(e)(3) of the Act (415 ILCS 5/40(e)(3)) and Section 105.214(a) of the Board's procedural rules (35 Ill. Adm. Code 105.214(a)). New Lenox, 896 N.E.2d at 492. Those provisions require the Board to "conduct the permit appeal hearing 'exclusively on the record before the Agency [IEPA] at the time the permit or decision was issued.'" *Id.*, quoting 35 Ill. Adm. Code 105.214(a). The court ruled therefore that the Board did not abuse its discretion, finding that the Board "could not properly consider additional evidence or testimony that might be disclosed through additional discovery." New Lenox, 896 N.E.2d at 492.

Board Denial of Motion for Summary Judgment. According to IEPA and New Lenox, the Board's denial of the Environmental Groups' motion for summary judgment is "inconsistent with the ultimate conclusions" in the Board's final opinion and order. New Lenox, 896 N.E.2d at 492-493. The appellants argued that because the Board did not grant summary judgment for the Environmental Groups or receive additional evidence during the permit appeal hearing, the Environmental Groups "could not have met their burden of proof." *Id.* at 896 N.E.2d at 493. The court disagreed, stating: "We conclude that appellants' position that a ruling on summary judgment should predict the outcome of the hearing on the merits of a case is erroneous." *Id.*

The court recounted the familiar standards applied when considering a motion for summary judgment: (1) summary judgment may be entered if the record shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law; (2) when ruling on a motion for summary judgment, pleadings, depositions, and affidavits must be considered strictly against the moving party and in favor of the opposing party; (3) the purpose of summary judgment is not to try a question of fact, but instead to determine whether a genuine question of material fact exists; and (4) summary judgment is a drastic means of disposing of litigation and accordingly should be allowed only where the moving party's right is clear and free of doubt. New Lenox, 896 N.E.2d at 493, citing, among other authorities, Bagent v. Blessing Care Corp., 224 Ill. 2d 154, 162 (2007). The court observed that the Board applied these standards and properly denied the Environmental Groups' motion for summary judgment: "considering the record and pleadings strictly against the Environmental Groups and in favor of IEPA and New Lenox, there existed genuine issues of material fact regarding the issues of nutrient loading, the narrative offensive conditions water quality standard, and the copper water quality standard." New Lenox, 896 N.E.2d at 493.

The court stated that when summary judgment is denied, the case proceeds to hearing and a final judgment on the merits, and "questions of fact must be resolved by the Board." New Lenox, 896 N.E.2d at 493, citing Town & Country Utilities, Inc. v. IPCB, 225 Ill. 2d 103, 118 (2007). Distinguishing the Board's task in ruling on a summary judgment motion, the court explained that "[a]t the final hearing on the merits, the Board is not called upon to review the evidence in a light most favorable to either party, but must balance and weigh the evidence in a neutral context to make its final determination or judgment." New Lenox, 896 N.E.2d at 493. The Board therefore had "very different legal standards to apply" when ruling on the summary judgment motion and deciding the merits of the case: "In making its final determinations in its opinion and order, the Board resolved the questions of material fact based upon the evidence in the record." *Id.* The court concluded that "the Board's decision to deny summary judgment in favor of the Environmental Groups was not

irreconcilable with its final decision to negate IEPA's issuance of the New Lenox permit and remand it for further evaluation." *Id.* at 896 N.E.2d at 49.

U.S. Steel Corp. v. Illinois Environmental Protection Agency and Illinois Pollution Control Board, 384 Ill. App. 3d 457, 896 N.E.2d 606 (Fifth Dist. 2008)

The Fifth District Appellate Court vacated and remanded the Board's order in a permit appeal. U.S. Steel Corp. v. Illinois Environmental Protection Agency and Illinois Pollution Control Board, 384 Ill. App. 3d 457, 896 N.E.2d 606 (Fifth Dist. 2008). (U.S. Steel, 896 N.E.2d at ___). In its order, the Board found that the IEPA inappropriately denied, under 35 Ill. Adm. Code 309.115(a), a public hearing request by the American Bottom Conservancy (ABC). The Board accordingly found that the IEPA improperly granted a permit under the National Pollutant Discharge Elimination System (NPDES) to the United States Steel Corporation (U.S. Steel) for its Granite City Works, and the Board invalidated the permit. American Bottom Conservancy v. Illinois Environmental Protection Agency and United States Steel Corporation - Granite City Works, PCB 06-171 (July 22, 2006) (U.S. Steel, PCB 06-171).

The sole issue on appeal was whether the Board had applied the correct standard of review to the IEPA's hearing denial. Reviewing the issue *de novo*, the Fifth District Appellate Court determined that the Board should have applied an "abuse of discretion standard." U.S. Steel, 896 N.E.2d at 973, 976. Since the Board did not, the court vacated the Board's order and remanded the action to the Board for further proceedings. *Id.* at 896 N.E.2d at 976.

The Board received the appellate court's remand order on September 5, 2008. At the close of FY 09, the parties had fully briefed the issues on remand, which are awaiting decision by the Board.

The Board's 2006 Decision in U.S. Steel, PCB 06-171

On May 8, 2006, ABC filed a petition contesting issuance of an NPDES permit issued pursuant to Section 40(e) of the Act (415 ILCS 5/40(e)(2006)). U.S. Steel, PCB 06-171, slip op. at 1. The permit was issued by the IEPA on March 31, 2006, to U.S. Steel for its steelmaking facility at 20th and State Streets, in Granite City, Madison County. The NPDES permit governs U.S. Steel's discharges of some 25 million gallons per day of wastewater from its Granite City Works' facility into Horseshoe Lake.

In a December 19, 2004 notice of the proposed NPDES permit, the IEPA stated that the public notice period started on December 19, 2004 and ended on January 18, 2005. On January 17, 2005, Kathleen Logan Smith submitted a comment to the IEPA on behalf of the Health & Environmental Justice (HEJ) that requested a public hearing.

On January 18, 2005, American Bottom filed a comment (jointly submitted by four other organizations; the Sierra Club, Webster Groves Nature Study Society, HEJ, and the Neighborhood Law Office) that Horseshoe Lake is impaired and has a negative impact on the community that utilizes the lake for recreation and as a food source. The comment stated that the named organizations request that the IEPA hold a public hearing for the above-entitled permit; that the receiving waters for this permit is Horseshoe Lake at Horseshoe Lake State Park in Madison County; and that the lake is used recreationally by outdoor enthusiasts, bird watchers, nature lovers, fishers, hunters and families, as well as low-income and minority folks for subsistence fishing. Finally, the letter asked the IEPA to hold a public hearing in order to allow citizens to ask questions and present information and testimony." U.S. Steel, PCB 06-171, slip op. at 3.

The ABC comment also raised the following issues: (1) that allowing U.S. Steel to put additional lead and ammonia into the lake would be contrary to the federal Clean Water Act and the IEPA's Bureau of Water's mission; (2) that U.S. Steel should be added to a list of potential contributors to the impairment of the lake; (3) that U.S. Steel had violated ammonia and "other" limits in the past; (4) that the IEPA should hold a public hearing; and (5) that the public comment period should be extended 30 days if the IEPA denied the request for a public hearing. U.S. Steel, PCB 06-171, slip op. at 3-4.

The IEPA did not hold a public hearing. On March 8, 2006, the IEPA issued an NPDES permit to U.S. Steel. The IEPA reissued the NPDES permit on March 31, 2006, after responding to the American Bottom comments filed after the comment period. U.S. Steel, PCB 06-171, slip op. at 4.

In its appeal to the Board, ABC argued that the IEPA's failure to hold a public hearing violated the Board's rule for NPDES permit issuance at 35 Ill. Adm. Code 309.115(a). The rule provides, in pertinent part, that:

> The Agency shall hold a public hearing on the issuance or denial of an NPDES permit or group of permits whenever the Agency determines that there exists a significant degree of public interest in the proposed permit or group of permits (instances of doubt shall be resolved in favor of holding the hearing), to warrant the holding of such a hearing.
>
> Any person, including the applicant, may submit to the Agency a request for a public hearing or a request to be a party at such a hearing to consider the proposed permit or group of permits. Any such request for public hearing shall be filed within the 30-day public comment period and shall indicate the interest of the party filing such a request and the reasons why a hearing is warranted. 35 Ill. Adm. Code 309.115(a)(1), (2) (2006).

In reaching its decision on the merits of ABC's appeal, the Board declined to apply the "abuse of discretion" standard to the IEPA's decision on the hearing issue:

> In reviewing the Agency's decision not to hold a public hearing, the Board applies the standard applicable to all reviews of an Agency's permit decision - whether or not the issuance of the permit violates the Act or Board regulations. Thus, the Board does not apply an "abuse of discretion" standard as advocated by U.S.

> Steel. The regulation at issue is Section 309.115(a), which requires the Agency to hold a public hearing if the Agency determines that there is significant public interest. U.S. Steel, PCB 06-171, slip op. at 13.

The Board concluded that the two public comments filed in this case evidence a significant degree of public interest in the proposed permit. The Board remarked that ABC has a membership of approximately 100 people; Sierra Club has approximately 26,000 members in Illinois and 650 members in the area around Horseshoe Lake; Webster Groves Nature Study Society has over 400 members; and HEJ has approximately 500 members. U.S. Steel, PCB 06-171, slip op. at 13.

Finally, the Board noted that Section 309.115(a) expressly provides that "instances of doubt shall be resolved in favor of holding the hearing." *See* 35 Ill. Adm. Code 309.115(a). The Board found that

> This caveat coupled with the strong showing of public interest in the draft permit, renders the Agency's decision in violation of Section 309.115(a). Thus, the permit as issued violates Section 309.115(a) of the Board's regulations. U.S. Steel, PCB 06-171, slip op. at 14.

The Appellate Court's Ruling in U.S. Steel

After reviewing the facts in the case, U.S. Steel, 896 N.E.2d at 608-609, the Fifth District then set out the standards by which appellate courts review rulings of lower tribunals such as the Board. *Id.* at 896 N.E.2d at 609-610. Finding that the correct interpretation of 35 Ill. Adm. Code 309.115(a) is a question of law, the court concluded that its review of the Board's decision would be *de novo*, citing Elementary School District 159 v. Schiller, 221 Ill. 2d 130, 144 (2006). *Id.* at 896 N.E.2d at 610.

In so ruling, the court found:

> The unambiguous and plain language of section 309.115(a) vests discretion in the Agency to hold a public hearing *whenever it determines* that there exists a significant degree of public interest in the proposed permit. The regulation does not state that the Agency must hold a hearing *whenever there is a significant degree of public interest*. It states that the Agency must hold a public hearing whenever it determines that there is a significant degree of public interest in a proposed permit. *Id.* (emphasis in original).

The court went on to remark that the appellate court had previously recognized that the IEPA's decision to hold a hearing under section 309.115 is a discretionary one under Borg-Warner Corp. v. Mauzy, 100 Ill. App. 3d 862, 867 (1981), and that the Board itself had referred to the discretionary nature of the IEPA decision in Marathon Oil Co. v. IEPA, PCB 92-166 (Mar. 31, 1994). U.S. Steel, 896 N.E.2d at 611-612. Under these circumstances, the court found that the Board improperly reviewed the IEPA's hearing decision using a *de novo* standard, since "the Agency's [hearing] determination is discretionary and relates to a procedural issue." *Id.* at 896 N.E.2d at 612.

In its concluding summary, the Fifth District found that the Board "erred as a matter of law in applying the incorrect standard of review to the Agency's decision not to hold a public hearing" under the Board's rule at 35 Ill. Adm. Code 309.115. U.S. Steel, 896 N.E.2d at 612. The court vacated the order and directed that, on remand for further proceedings not inconsistent with the opinion.

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 (2008). 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 (2008).

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.

During FY09, the appellate court for the Third District reviewed two siting decisions by the Board. One case involved affirmance of Board and county approval for a landfill expansion in Peoria County in PCB 08-64. The other case involved continuing proceedings in a case known as "Town & Country II" involving a siting application in Kankakee County (PCB 04-33, 04-34, and 04-35(cons.)) "Town & Country II" has generated Board, appellate court, and Supreme Court rulings in FY08, and FY09, and promises to occupy the Board's time again in FY10.

Peoria Disposal Company v. Illinois Pollution Control Board and County of Peoria, 385 Ill. App. 3d 781, 896 N. E.2d 460 (3rd Dist. 2008) (petition for leave to appeal denied January 28, 2009) (affirming Board's order affirming local grant of siting approval in PCB 08-64 (June 21, 2007)

In an October 7, 2008 published opinion, the Third District Appellate Court upheld the Board's decision to affirm the Peoria County Board's denial of siting for a landfill expansion under Section 39.2 of the Environmental Protection Act (Act), 415 ILCS 5/39.2. Peoria Disposal Company v. Illinois Pollution Control Board and County of Peoria, 385 Ill. App.3d 781, 896 N. E.2d 460 (3rd Dist. 2008). Peoria Disposal Company (PDC) had sought local

siting approval for the proposed expansion of its hazardous waste landfill in unincorporated Peoria County (County). The Board found that the County timely rendered a decision, that the County's proceedings were fundamentally fair, and that the County's decision to deny siting based on the nine statutory criteria was not against the manifest weight of the evidence. Peoria Disposal Company v. Peoria County Board, PCB 06-184 (June 21, 2007).

Below is a summary of the Third District's decision. As the court recited the facts in detail, and quoted salient portions of the Board's decision, there is no separate discussion of the Board decision below. In its precedential opinion, the Third District reached several legal conclusions that should prove significant for future landfill siting cases, including the court's interpretation of the "final action" and the "written decision" requirements of Section 39.2(e) of the Act, 415 ILCS 5/39.2(e)(2006). Additionally, the court explicitly overruled its ruling in Land & Lakes Co. v. PCB, 319 Ill. App. 3d 41, 48-49, 743 N.E.2d 188, 194 (3rd Dist. 2000) that a "*de novo*" standard of review applies to the Board's findings on fundamental fairness in siting cases, now agreeing with the Board that the more deferential "clearly erroneous" standard of review must be applied.

The court's opinion relates that PDC owns and operates a 32-acre landfill located in unincorporated Peoria County. The landfill receives industrial waste, including hazardous waste. PDC sought County siting approval to expand the landfill 45 feet vertically and eight acres horizontally, which would allow the landfill to continue operating for an additional 15 years and receive over 2 million tons of additional waste. Peoria Disposal, 896 N.E.2d at 464.

The County's Proceedings

PDC's siting application was received by the County Clerk's Office on November 9, 2005. Peoria Disposal (3rd Dist.), slip op. at 3. Under the Peoria County Code, the County Clerk's Office must confirm that such an application satisfies the County's filing requirements before accepting the application for filing. The County Clerk's Office determined on November 14, 2005, that the application was complete, and pursuant to the County Code, file-stamped the application with that date, November 14, 2005. Peoria Disposal, 896 N.E.2d 464.

After the County held six days of public hearing in February 2006, the County's Site Hearing Committee, which consists of all members of the County Board, held meetings in April 2006, to discuss PDC's application. Peoria Disposal, 896 N.E.2d at 468. At the Committee's April 3, 2006 meeting, the Special Assistant State's Attorney informed the Committee that it had to base its decision exclusively on the information contained in the public record. *Id.* On April 6, 2006, the Committee voted on proposed findings of fact, recommending that siting criteria (i), (ii), and (iii) had not been satisfied. *Id.* On criterion (v), the Committee recommended that it had been satisfied only if certain special conditions were added, including one requiring the creation of a perpetual care fund to be funded by PDC (requiring PDC to deposit $5 per ton of waste into the fund and no less than $750,000 annually). The Committee's proposed written findings of fact in support of its conclusion were filed with the County Clerk on April 27, 2006. *Id.* at 896 N.E.2d at 468-469.

On May 3, 2006, the County Board met to vote on the application. Peoria Disposal, 896 N.E.2d at 469. Before that meeting, the County Board members were advised by letter from the State's Attorney that they would be taking two votes. First, they would vote on a motion to approve the application, and if that motion did not pass, an additional vote denying the application would not be necessary. Second, the County Board members would take a vote to approve a set of fact findings in support of the decision on the application. *Id.*

At the May 3 meeting, the State's Attorney, on the record, again advised the County Board as to the appropriate procedure. A motion was made and seconded to approve PDC's siting application, after which a vote was taken on the motion. Twelve members voted against the motion and six members voted for it. Peoria Disposal, 896 N.E.2d at 469. A second vote was taken on the findings of fact, and by a vote of 12 to 6, the County Board approved the previously filed findings of fact, with the understanding that there would be some minor changes. On May 12, 2006, the meeting's unofficial transcript was posted on the County's web site. At the County Board's June meeting, the May 3 transcript was approved and adopted by the County Board. *Id.*

The Board's Proceedings

In its petition to the Board, PDC alleged that its application's effective filing date was November 9, 2005, when the County Clerk received the application. Peoria Disposal, 896 N.E.2d at 469-470. PDC argued that the County failed to take final action on the application within 180 days as the Act requires. In addition, PDC asserted that the County proceedings were fundamentally unfair and that the County's siting decision was against the manifest weight of the evidence. *Id.* at 896 N.E.2d at 470.

After considering the County record, as well as additional evidence received by the Board concerning fundamental fairness, the Board affirmed the County. In its June 21, 2007 opinion and order, the Board found that November 14, 2005, was the effective starting date of the 180-day statutory period, noting that November 14 was used as the starting date throughout the County proceedings and PDC never objected to using that date. Peoria Disposal, 896 N.E.2d at 470. Nevertheless, the Board concluded that regardless of whether November 9 or November 14 was the starting date, the County took "final action" within the 180-day period when it voted against the motion to approve the application on May 3, 2006. *Id.* The Board also found that the Section 39.2(e) "written-decision" requirement was met by the verbatim transcript of the May 3 meeting and the County's approved findings of fact.

The Board next held that PDC was not prejudiced by any ex parte communications and that PDC had forfeited any claims of bias by failing to raise them in the County

proceedings. Peoria Disposal, 896 N.E.2d at 469-470. The Board therefore found that the local proceedings were fundamentally fair. Finally, the Board ruled that the County's determination that PDC failed to satisfy siting criteria (i), (ii), (iii), and (v) of Section 39.2(a) was not against the manifest weight of the evidence. *Id.*

The Court's Analysis

Section 39.2(e) 180-Day Final Action/Written Decision. Because the Third District's consideration of this issue "centers around an interpretation of section 39.2(e) of the Act," a question of law, the court applied the *de novo* standard of review to the Board's decision. Peoria Disposal, 896 N.E.2d at 471-472. Under Section 39.2(e), "[d]ecisions of the county board or governing body of the municipality are to be in writing, specifying the reasons for the decision, such reasons to be in conformance with subsection (a) of this Section." *Id.* at 896 N.E.2d at 471 (quoting the Act). The court referred to this requirement of Section 39.2(e) as "the written decision requirement." *Id.* Section 39.2(e) also provides that "[i]f there is no final action by the county board or governing body of the municipality within 180 days after the date on which it received the request for site approval, the applicant may deem the request approved." *Id.* (quoting the Act). The court referred to this requirement of Section 39.2(e) as "the final action requirement." *Id.*

The court framed the issue as "whether the 180-day time limitation applies to only the final action requirement or to both the final action requirement and the written decision requirement." Peoria Disposal, 896 N.E.2d at 471. Taking into account the "organization and plain language" of Section 39.2(e), the court agreed with the Board and found that Section 39.2(e) "requires only that the local siting authority take final action on the application within 180 days; it does not require that the local siting authority's written decision memorializing that final action be issued within 180 days." *Id.* The court noted that in addition to using the distinct terms "action" and "decisions," the legislature placed the 180-day limit in the same sentence as the final action requirement, while the sentence containing the written decision requirement occurs three sentences earlier in the paragraph. *Id.* The court concluded by noting that the Board's procedural rule (35 Ill. Adm. Code 107.204) does not define "action" as used in Section 39.2(e), as "Section 107.204 defines 'action' only as referenced in section 107.204 and only for the purpose of filing for review with the PCB." *Id.* at 896 N.E.2d at 471-472.

Final Action within 180 Days. The court held that the requirement for final action within 180 days was met here, as "it is clear from the record that the county board denied the company's application at the May 3 county board meeting." Peoria Disposal, 896 N.E.2d at 473. The procedure that the County Board was following at the meeting is "clearly set forth in the record." Moreover, PDC's attorneys were in attendance "when the manner of proceeding was stated for the record and did not object to the form of the vote." *Id.* The court therefore held that "[r]egardless of whether a November 9, 2005, or a November 14, 2005, starting date is used," the County took final action within the 180-day period. *Id.* The court declined to address "whether it was proper for the county to delay the filing of the application for a short period so that the county clerk could verify that the application was administratively complete." *Id.* at 896 N.E.2d at 473-474.

Written Decision. The court agreed with the Board that the County also met the written decision requirement of Section 39.2(e). The court first noted that the Act does not "define the form that the local siting authority's written decision must take" and then refused to "read such a condition into the statute." Peoria Disposal, 896 N.E.2d at 474. The court observed that: (1) the County adopted a written set of facts supporting its decision; (2) the County agreed to allow the meeting transcript to serve as a written record of what occurred; and (3) the "unofficial version of that transcript was posted on the county's web site a short time later." .

Section 40.1(a) Fundamental Fairness. The court first determined that, as the Board argued, the "clearly erroneous" standard of review should apply to the fundamental fairness question, rather than the "*de novo*" standard applied by the Third District in Land & Lakes Co. v. PCB, 319 Ill. App. 3d 41, 48-49, 743 N.E.2d 188, 194 (3rd Dist. 2000)

The court then applied the standard, finding the Board's decision that the County proceedings were fundamentally fair is not clearly erroneous. Peoria Disposal, 896 N.E.2d at 475. First, the court found that PDC's claim that specified County Board members were biased against the application was "forfeited," as PDC was aware of the grounds for making the bias claim before the County's

May 3, 2006 vote and yet did not object. The court further ruled that even if it reached the merits of the bias claim, the court would find that the Board's ruling is not clearly erroneous, as PDC failed to overcome the presumption that the County Board members at issue acted in a fair and impartial manner. *Id.*

Nor was the court persuaded by PDC's argument that it was deprived of a fair proceeding because of ex parte contacts. Discovery conducted as part of the appeal to the Board revealed that during the local siting proceeding, several County Board members received ex parte e-mails, letters, and telephone calls. Peoria Disposal, 896 N.E.2d at 476. Some of those communications were made a part of the record, but several were not as the County Board members had disposed of them. The court found that the contacts, though improper, were "little more than an expression of public sentiment and were duplicative of the public comment that was properly made part of the record." *Id.* at 896 N.E.2d at 477. Moreover, the County Board members were informed many times that they had to make their decision based on the evidence and "the record indicates that they did that to the best of their abilities." *Id.* PDC was given a "full and complete opportunity to present evidence and to support its application." *Id.* The court ruled that it could not find the Board's decision on this issue clearly erroneous, and that it would have reached the same decision even under the *de novo* standard of review PDC had requested. *Id.*

Section 39.2(a) Siting Criteria. The court first rejected PDC's argument that the Board erred by reviewing the County's decision under the manifest weight of the evidence standard. Peoria Disposal, 896 N.E.2d at 477. PDC argued that the Illinois Supreme Court's ruling in Town & Country Utilities, Inc. v. PCB, 225 Ill. 2d 103, 866 N.E.2d 227 (2007) "changed the standard of review that the PCB is to apply and requires the PCB to conduct a *de novo* review of the county board's decision while applying its own technical expertise to the evidence gathered in the local proceedings." Peoria Disposal (3rd Dist.), slip op. at 25. In rejecting PDC's argument, the Third District noted that "[t]he established standard is for the PCB to review the local siting authority's decision on the statutory criteria to determine if that decision is against the manifest weight of the evidence." *Id.*, citing, *e.g.*, Waste Management of Illinois, Inc. v. PCB, 123 Ill. App. 3d 1075, 1083, 463 N.E.2d 969, 976 (2nd Dist. 1984). The court ruled that Town & Country not only "does not change that standard," it "does not even address that issue." *Id.*

The court then found that the Board's ruling on criteria (i), (ii), (iii), and (v) of Section 39.2 was not against the manifest weight of the evidence. 415 ILCS 5/39.2 (i), (ii), (iii), and (v) (2006). The court pointed out the "potential flaws" of PDC's criterion (i) "needs" analysis, which failed to consider declining rates of hazardous waste generation, as revealed through cross-examination at the County's public hearing. Peoria Disposal, 896 N.E.2d at 477-478. Conflicting expert testimony was presented on criterion (ii), particularly as the proposed expansion "related to the geology and hydrogeology of the site and the possible effects of the proposed expansion on water quality." *Id.* at 896 N.E.2d at 478. Concerning criterion (iii), the court observed that PDC's "compatibility" expert "acknowledged that the vertical expansion would be visible to nearby residences and that it would consist of a dirt project for the 15-year lifespan of the operation." *Id.*

As to criterion (v), the court reasoned that as "the company itself proposed that a perpetual care fund condition be added to criterion v," PDC "cannot now object to the implementation of that condition." *Id.*, citing McMath v. Katholi, 191 Ill. 2d 251, 255, 730 N.E.2d 1, 3 (2000) (a party cannot complain about an error that it induced the court to make). The Third District distinguished County of Lake v. PCB, 120 Ill. App. 3d 89, 101, 457 N.E.2d 1309, 1317 (2nd Dist. 1983), relied upon by PDC:

> Although the court in County of Lake found that section 39.2 of the Act does not grant the local siting authority the power to assess fees against the applicant (County of Lake, 120 Ill. App. 3d at 101, 457 N.E.2d at 1317), that rule does not prevent the local siting authority from doing so in a case such as this, where the applicant proposes that a fee be assessed against it as a condition of approval. Peoria Disposal, 896 N.E.2d at 478.

The court added that the dollar amount imposed here by the County Board is supported by "ample evidence" in the record. *Id.* For all reasons stated, the court concluded by "confirming" the Board's decision. *Id.*

PDC filed a petition for leave to appeal, which the Illinois Supreme Court denied January 28, 2009.

The Town & Country II Rulings

Background

Town & Country Utilities, Inc. (T & C) seeks to develop a new municipal solid waste landfill of approximately 400 acres with a waste disposal footprint of 236 acres and an estimated service life of 30 years. T & C has twice filed applications for site location suitability approval with the City of Kankakee (City). The City denied T & C's first application filed in 2002.

In a series of appeals known as Town & Country I, the Illinois Supreme Court ultimately upheld the Board's decision in Town & Country I, reversing the City of Kankakee's grant of siting approval for the 2002 application as against the manifest weight of the evidence. In so doing, the Supreme Court reversed the decision of the Third District reversing the Board. Town & Country Utilities, Inc. v. Illinois Pollution Control Board, 225 Ill. 2d 103, 866 N.E.2d 227 (2007)

T & C filed a second application in 2003. The City approved this application, and the Board affirmed the approval. T & C's appeal of the grant of the 2003 application resulted in a series of cases known as "Town & Country II." Town & Country II concerns review by the Third District Appellate Court of the three consolidated cases

the court has docketed as County of Kankakee, Illinois, Edward D. Smith, Kankakee County State's Attorney, Byron Sandburg and Waste Management of Illinois, Inc v. Illinois Pollution Control Board, City of Kankakee, Illinois, Kankakee Regional Landfill, LLC and Town & Country Utilities, Inc., Nos. 3-04-02713-04-02853-04-0289 (cons.) (Town & Country II (3rd Dist.). In these cases, appellants seek review of the Board's decision in Byron Sandberg v. City of Kankakee, Illinois, The City of Kankakee, Illinois City Council, Town & Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C.; Waste Management of Illinois v. City of Kankakee, Illinois, City Council, Town & Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C.; 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 & Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C., PCB 04-33, PCB 04-34, PCB 04-35 (cons.) (March 18, 2004) (hereinafter "Town & Country II (PCB)".

In Fiscal Year 2008 Town & Country II was the subject of three orders by the Third District and a supervisory order by the Illinois Supreme Court. The Third District had issued an April 24, 2008 Rule 23 order affirming the Board's decision. Town & Country II (3rd Dist. Apr. 24, 2008). (The court issued the order on rehearing requested by the parties following issuance of the court's original November 17, 2006 order reversing the Board. Town & Country II (3rd Dist. Nov. 17, 2006).)

The Third District's April 24, 2008 Rule 23 order affirmed the Board's decision on a single ground, finding that the 2003 application was properly considered under Section 39.2(m) of the Act, which provides:

> An applicant may not file a request for local siting approval which is substantially the same as a request which was disapproved pursuant to a finding against the Applicant under any criteria (i) through (ix) of subsection (a) of this Section within the preceding two years. 415 ILCS 5/39.2(m)

The April 24, 2008 order did not address other appeal grounds that were raised by the appellants (*e.g.*, compliance with siting criteria and fundamental fairness). Town & Country II, Order at 12-13 (Apr. 24, 2008).

On June 5, 2008 The Illinois Supreme Court's issuance of a "supervisory order" stating

> The appellate court is directed to reconsider the case, and if it finds that the second siting application was disapproved within the meaning of 415 ILCS 5/39.2(m), to determine whether the second application was substantially the same as the first application under the statute, acknowledging that the Pollution Control Board expressly did not reach this issue. If the appellate court then finds that the second siting application was properly filed, the appellate court is directed to address the remaining issues raised by the parties to the appeal.
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> County of Kankakee, Illinois. *et al*. v. Hon. William E. Holdridge *et al*., No. 106525 (June 5, 2008), slip op. at 1-2.

Town & Country II was under advisement in the Third District at the close of FY08.

Events in FY09

County of Kankakee, Illinois, Edward D. Smith, Kankakee County State's Attorney, Byron Sandburg and Waste Management of Illinois, Inc v. Illinois Pollution Control Board, City of Kankakee, Illinois, Kankakee Regional Landfill, LLC and Town & Country Utilities, Inc., Nos. 3-04-02713-04-02853-04-0289 (cons.) (3rd Dist. Oct. 10, 2008) (affirming Board's order affirming grant of siting approval in PCB 04-33, 34, 35 (Mar. 18, 2004))

On October 10, 2008, the Third District Appellate Court issued a "summary order" (a form of non-precedential order under Supreme Court Rule 23 (166 Ill. 2d R. 23(c)) affirming the Board in County of Kankakee, Illinois, Edward D. Smith, Kankakee County State's Attorney, Byron Sandburg and Waste Management of Illinois, Inc v. Illinois Pollution Control Board, City of Kankakee, Illinois, Kankakee Regional Landfill, LLC and Town & Country Utilities, Inc., No. 3-04-0271 consol. w/ 3-04-0285 & 3-04-0289 (3rd Dist. Oct. 10, 2008) (Town & Country II) (Oct. 10, 2008)).

The summary order first quotes most of Supreme Court Rule 23(c) to explain why the court issues a "summary order." Town & Country II (Oct. 10, 2008), Order at 1-2. In accordance with Rule 23(c), the court explains that it limited "discussion to specifically answering the questions raised in the supervisory order." Town & Country II (Oct. 10, 2008), Order at 6. Apparently taking literally what appears to have been a typographical error in the Supreme Court's supervisory order, the Third District states:

> First, we are asked to determine whether the 2003 application [*i.e.*, the second 2003 application] was disapproved within the meaning of section 5/39.2(m) of the Act. (415 ILCS 5/39.2(m)). It was not disapproved within the meaning of section 5/39.2(m) . . . . *Id.*

The Third District states that despite some similarities between the two siting applications, the 2003 application was "profoundly, significantly and fundamentally different in that it included significant additional hyd[r]ogeologic investigations and also included several engineering design changes." Town & Country II (Oct. 10, 2008), Order at 4. The court holds that "by *de novo* or any other standard of review," the 2003 application was not substantially the same as the 2002 application and therefore as a matter of law, "it was impossible for the 2003 application to have been 'disapproved' in the previous siting request, as it was not the same application." *Id.* at 7.

The court then turns to the remaining issues on appeal, "which were apparently not sufficiently addressed in our prior order." Town & Country II (Oct. 10, 2008), Order at 7. On the issues of Section 39.2(b) notices, Section 39.2(a) siting criteria, and Section 40.1 fundamental fairness, the

court repeatedly states that it must review the Board's decision to determine whether the decision is supported by the manifest weight of the evidence. In each instance, the court summarily states: "We have. It was." *Id.* at 7-8.

In doing so, the court explicitly refers to only two of the three siting criteria at issue: siting criterion (ii) (protect public health, safety, and welfare) and criterion (viii) (consistency with the County's solid waste management plan), but not criterion (iv)(B) (located outside of the 100-year floodplain). Town & Country II (Oct. 10, 2008), Order at 7-8. Nevertheless, the court states

> Finally, we have reviewed the Board's decision, to determine if any part of the Board's decision upholding the decision of the city council was in any way against the manifest weight of the evidence. We have found no such error and have concluded that the decision of the Board is not contrary to the manifest weight of the evidence. *Id.* at 8.

The Third District therefore upheld the Board's decision affirming the City's determination to grant approval of Town & Country's 2003 siting application. Town & Country II (Oct. 10, 2008), Order at 8-9. Thereafter, a petition for rehearing was filed and pending in the Third District, while a petition for review was filed and pending in the Illinois Supreme Court.

County of Kankakee, Illinois, *et al*. v. Hon. William E. Holdridge *et al*., 231 Ill. 2d. 661, 903 N.E.2d 420 (2009), Directing Third District Appellate Court to Vacate October 10, 2008 Summary Order in "Town & Country II": County of Kankakee, Illinois, Edward D. Smith, Kankakee County State's Attorney, Byron Sandburg and Waste Management of Illinois, Inc. v. Illinois Pollution Control Board, City of Kankakee, Illinois, Kankakee Regional Landfill, LLC and Town & Country Utilities, Inc., Nos. 3-04-02713-04-02853-04-0289 (cons.) (3rd Dist. Oct. 10, 2008) (affirming Board's order affirming grant of siting approval in PCB 04-33, 34, 35 (Mar. 18, 2004))

The Illinois Supreme Court issued a second supervisory order March 26, 2009 in County of Kankakee, Illinois. *et al*. v. Hon. William E. Holdridge *et al*., No. 107422 (Mar. 25, 2009), reported at 213 Ill. 2d 661, 903 N.E.2d 420 (2009). The Supreme Court's March 2009 supervisory order, the second in the same underlying case, was issued in the course of the denial of a petition for leave to appeal filed by Waste Management of Illinois, Inc. in response to the Third District Appellate Court's October 10, 2008 summary order affirming the Board's decision in the case known as "Town & Country II" *i.e.* County of Kankakee, Illinois, Edward D. Smith, Kankakee County State's Attorney, Byron Sandburg and Waste Management of Illinois, Inc. v. Illinois Pollution Control Board, City of Kankakee, Illinois, Kankakee Regional Landfill, LLC and Town & Country Utilities, Inc., Nos. 3-04-02713-04-02853-04-0289 (cons.) (3rd Dist. Oct.10, 2008) (affirming Board's order affirming grant of siting approval in PCB 04-33, 34, 35 (Mar. 18, 2004). *See* above)

In its March 26, 2009 supervisory order, the Illinois Supreme Court first denied the petition for leave to appeal. The Supreme Court then issued its second supervisory instructions, directing the Third District to vacate the October 10, 2008 "summary order." Specifically, the Supreme Court's concluding paragraph instructed as follows:

> The appellate court is directed to reconsider its decision. The appellate court should first determine whether the first siting application was disapproved within the meaning of 415 ILCS 5/ 39.2(m). If it determines that it was, the appellate court should next consider the effect of the Board's failure to consider the [Section 39.2 (m)] substantial similarity issue. In other words, the appellate court will determine if a remand to the Board is required or if that issue may be decided in the first instance on appeal. If it determines that the issue may be decided in the first instance on appeal, the appellate court will properly consider the parties' remaining issues on appeal. The appellate court's decision will not be by summary order pursuant to Supreme Court Rule 23(c) (166 Ill. 2d. R. 23 (c)), but shall be either by opinion pursuant to Supreme Court Rule 23(a) (166 Ill. 2d. R. 23 (a)) or by written order pursuant to Supreme Court Rule 23(b) (166 Ill. 2d. R. 23 (b)). The appellate court will not be flippant in its decision, but will act with the utmost decorum and give the issues the attention and consideration they deserve. The appellate court will address the issues thoroughly and completely. As part of its consideration of each issue, the appellate court will set out the parties' arguments, the governing law, and the standard of review. If the current panel of justices is incapable of complying, or unwilling to comply, with this supervisory order, the cause should be assigned to another panel. Failure to comply with this supervisory order in all respects will result in the appellate court's decision being summarily vacated and the cause remanded to a different panel of judges. County of Kankakee, Illinois, *et al*. v. Hon. William E. Holdridge *et al*., 903 N.E.2d at 421-422 (emphasis in original).

Town & Country II was under advisement in the Third District at the close of FY09. The Board and parties await additional proceedings.

Legislative Review

Summarized below are seven bills, each of which amends the Environmental Protection Act (Act) and relates to the Board's work.

Public Act 96-0235 (House Bill 266)
Effective August 11, 2009

The bill amends the Act regarding the duties of an owner or operator of a facility accepting exclusively construction or demolition debris. The bill adds provisions that (i) specify that recovered wood that is processed for use as fuel must be sorted within 48 hours, (ii) specify that all non-recyclable general construction or demolition debris that is neither recyclable general construction or demolition debris nor recovered wood that is processed for use as fuel must be transported off site for disposal, (iii) require the transport of certain materials within 45 days after their receipt by the facility. The bill also defines the terms "recovered wood that is processed for use as fuel" and "non-recyclable general construction or demolition debris."

Public Act 96-0308 (House Bill 3859)
Effective August 11, 2009

The bill amends the Act by re-enacting a Section concerning fast-track rulemaking for the Clean Air Act. First, the bill defines the terms "fast-track rulemaking" and "requires to be adopted." The bill then provides that, if the Clean Air Act Amendments of 1990 require the adoption of rules other than identical in substance rules, then the Pollution Control Board must adopt rules under fast-track rulemaking if requested to do so by the Illinois Environmental Protection Agency. The bill also sets out the form for a fast-track rulemaking proposal and the procedure for considering one.

Public Act 96-603 (House Bill 4021)
Effective August 24, 2009

First, the bill requires the Illinois Environmental Protection Agency (IEPA) to evaluate the release of contaminants if it determines that the extent of soil, soil gas, or groundwater contamination may extend beyond the boundary of the site where the release occurred. The bill also requires the IEPA to notify the owner of the contaminated property if soil contamination beyond the boundary of the site where the release occurred, soil gas contamination beyond the boundary of the site where the release occurred, or both pose a threat of exposure to the public above the appropriate Tier 1 remediation objectives. The bill also defines the term "soil gas."

In addition, the bill amends the Act by requiring owners and operators of community water systems to maintain and make available to the IEPA certain documents. It further provides that the IEPA shall provide public notice within two days after it refers a matter for enforcement under Section 43 of the Act or issues a seal order under subsection (a) of Section 34 of the Act. The bill also provides that the IEPA must provide notice to the owners and operators of the community water system within five days after taking one of these actions. It also requires that, within five days after receiving that notice, the owner or operator of the community water system must notify all residents and owners of premises connected to the community water system. The bill sets forth similar notice requirements that must be complied with when groundwater contamination

poses a threat of exposure to the public above the Class I groundwater quality standards. Finally, it creates a civil penalty for violations of these notice requirements and makes it a felony to make certain false, fictitious, or fraudulent statements.

Public Act 96-0418 (Senate Bill 99)
Effective January 1, 2010

The bill amends the Act by defining the terms "food scrap" and "organic waste." The bill provides that the term "pollution control facility" does not include the portion of a site or facility (i) that is used for the composting of food scrap, livestock waste, crop residue, uncontaminated wood waste, or paper waste, including, but not limited to, corrugated paper or cardboard, and (ii) that meets a list of specified requirements. The bill also specifies the type of notice that an applicant must give before the Illinois Environmental Protection Agency (IEPA) may issue the applicant a permit to construct or develop a composting facility and authorizes the IEPA to develop standards. Finally, the bill provides that, except as otherwise provided in Board rules, solid waste permits for organic waste compost facilities shall be issued under the Board's Solid Waste Rules and requires permits to include, but not to be limited to, measures designed to reduce pathogens in the compost.

Public Act 96-0611 (Senate Bill 125)
Effective August 24, 2009

First, the bill amends the Act by excluding the portion of a site or facility accepting exclusively general construction debris, located in a county with a population over 500,000 from regulation as a pollution control facility.

Second, the bill also amends the Act by providing that a facility located in a county with a population over 700,000 as of January 1, 2000, operated and located in accordance with Section 22.38 of the Act, and used exclusively for the transfer, storage, or treatment of general construction or demolition debris does not need a permit if "the facility was receiving construction or demolition debris on the effective date of this amendatory Act of the 96th General Assembly." The bill also inserts a provision requiring an owner or operator of a facility accepting exclusively general construction or demolition debris for transfer, storage, or treatment to obtain, on or after the effective date of this amendatory Act of the 96th General Assembly, a permit issued by the Illinois Environmental Protection Agency prior to the initial acceptance of general construction or demolition debris at the facility.

Public Act 96-0489 (Senate Bill 2034)
Effective August 14, 2009

The bill amends the Act by authorizing the Illinois Environmental Protection Agency to make written determinations that certain materials that would otherwise be required to be managed as waste may be managed as non-waste if those materials are used beneficially and in a manner that is protective of human health and the environment. Specifically, the bill requires applicants for beneficial use determinations to demonstrate that (i) the chemical and physical properties of the material are comparable to similar commercially available materials, (ii) the market demand for the material meets certain requirements, (iii) the material is legitimately beneficially used, (iv) the management and use of the material will not cause, threaten, or allow the release of any contaminant into the environment, except as authorized by law, and (v) the management and use of the material otherwise protects human health and safety and the environment. The bill also prohibits recipients of a determination from managing or using the material that is the subject of the determination in violation of the determination or any conditions imposed by it, unless the material is managed as waste. In addition, the bill defines the terms "commercially available material" and "commercially available product."

Public Ac 96-0737 (Senate Bill 2013)
Effective August 25, 2009

The bill amends the Act by authorizing the Illinois Environmental Protection Agency to issue an administrative citation and impose a civil penalty if any person (i) causes or allows water to accumulate in used tires, (ii) fails to collect the new or used tire fee as required by Section 55.8, (iii) fails to file a State tax return listing, among other things, the number of tires sold at retail during the past calendar year as required by Section 55.10, or (iv) transports used or waste tires in violation of the registration and vehicle placarding requirements adopted by the Board. The bill also provides that the prohibition against causing or allowing water to accumulate in used or waste tires does not apply to used or waste tires located at a residential household, as long as not more than 12 used or waste tires are located at the site.

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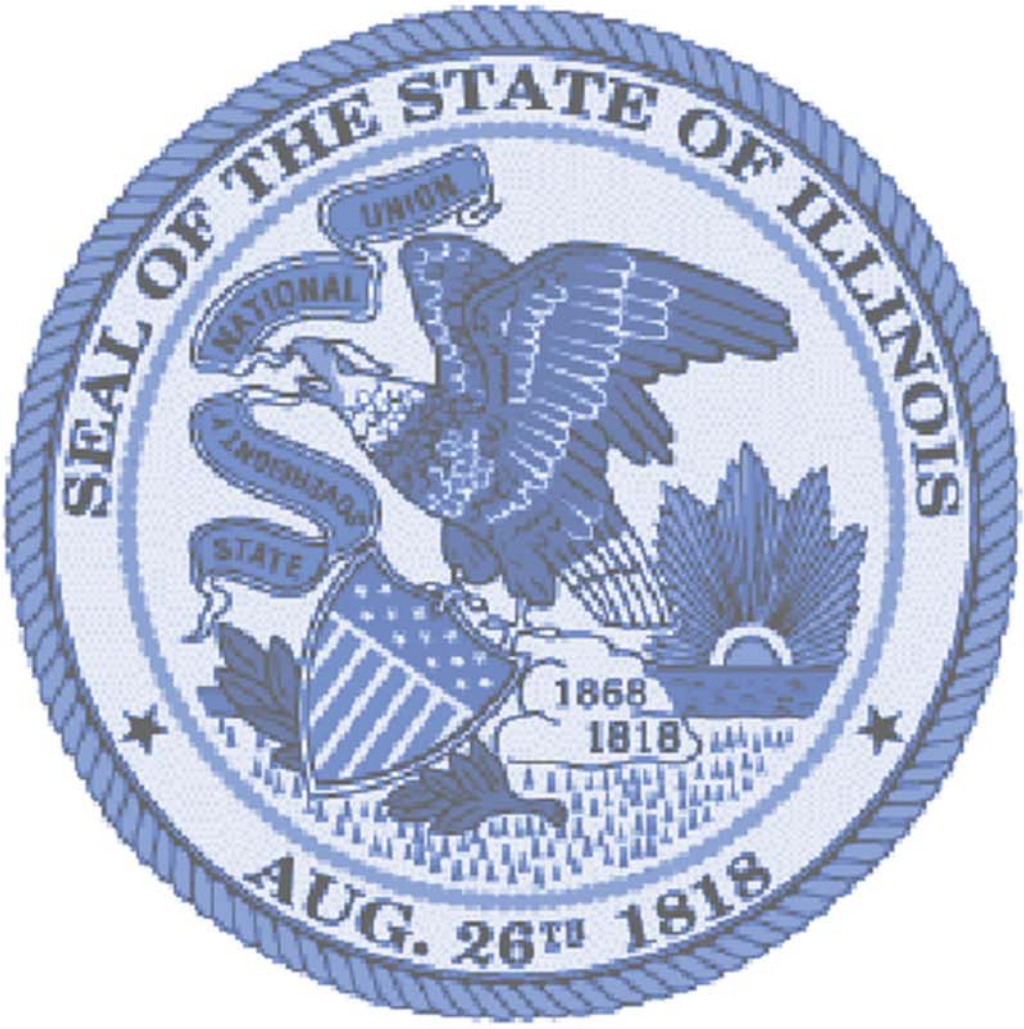

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