BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

TO: Mr. John Therriault
Assistant Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA ELECTRONIC MAIL)

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board a copy of **MOTION FOR LEAVE TO FILE *INSTANTER*, and WRB REFINING, LLC'S RESPONSE TO MOTION FOR RECONSIDERATION**, copies of which are hereby served upon you.

Respectfully submitted,

WRB REFINING, LLC,
Petitioner,

Dated: December 23, 2011

By:/s/ Katherine D. Hodge
One of Its Attorneys

Katherine D. Hodge
Monica T. Rios
HODGE DWYER & DRIVER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

CERTIFICATE OF SERVICE

I, Katherine D. Hodge, the undersigned, certify that I have served the attached MOTION FOR LEAVE TO FILE *INSTANTER,* and WRB REFINING, LLC'S RESPONSE TO MOTION FOR RECONSIDERATION upon:

Mr. John Therriault
Assistant Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

via electronic mail on December 23, 2011; and upon:

Steve Santarelli
Illinois Department of Revenue
101 West Jefferson
P.O. Box 19033
Springfield, Illinois 62794

Robb H. Layman, Esq.
Assistant Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

Joshua S. Whitt, Esq.
Whitt Law, LLC
70 S. Constitution drive
Aurora, Illinois 60506

by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois, on December 23, 2011.

/s/ Katherine D. Hodge
Katherine D. Hodge

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

MOTION FOR LEAVE TO FILE *INSTANTER*

NOW COMES WRB REFINING, LLC ("WRB"), by and through its attorneys, HODGE DWYER & DRIVER, pursuant to the 35 Ill. Admin. Code Part 101, and for this Motion for Leave to File *Instanter* ("Motion") states as follows:

1. On November 23, 2011, Roxana Community Unit School District No. 1 ("Roxana") filed a Motion for Reconsideration ("MFR") requesting, among other things, that the Illinois Pollution Control Board ("Board") reconsider its October 20, 2011 Order denying Roxana's Petition to Intervene in the above-captioned matter. Motion for Reconsideration, *WRB Refining, LLC, Ultralow Sulfur Diesel Hydrotreater (Property Identification Number 19-1-08-35-00-000-001) v. Illinois EPA,* PCB No. 12-40 (Ill.Pol.Control.Bd. Nov. 23, 2011) (matter hereafter cited as "PCB No. 12-40"). WRB received the Motion on or after November 28, 2011.

2. On December 9, 2011, WRB filed a Motion for Extension of Time ("MET") requesting fourteen days from the date that Board grants the MET to file a response to Roxana's MFR. The Board did not rule on the MET at its meeting on December 15, 2011.

3. A hearing is scheduled on January 23, 2012 before the Madison County Board of Review to assess the value of the Refinery. Accordingly, WRB is filing this Motion and Response to Roxana's MFR in order to avoid any delay in the Board's ruling in this matter.

4. The filing of WRB's Response to MFR *instanter* will prejudice neither the Board nor Illinois EPA since the Board has yet to issue a decision in this matter. In this case, new counsel has been retained, and it was imperative that counsel have time to review the record in this matter and file a response addressing the statements and allegations made by Roxana in its MFR.

5. Accordingly, WRB requests that the Board exercise its discretion and allow the filing of WRB's Response *instanter.*

WHEREFORE, WRB REFINING, LLC respectfully requests that the Illinois Pollution Control Board grant this Motion for Leave to File *Instanter* and allow accept the Response to Motion for Reconsideration for consideration.

Respectfully submitted,

WRB REFINING, LLC,
Petitioner,

Dated: December 23, 2011

By: /s/ Katherine D. Hodge
One of Its Attorneys

Katherine D. Hodge
Monica T. Rios
HODGE DWYER & DRIVER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705
(217) 523-4900

WRBR:001/Fil/Motion for Leave to File Instanter – 12-40

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

WRB REFINING, LLC'S RESPONSE TO MOTION FOR RECONSIDERATION

NOW COMES WRB REFINING, LLC ("WRB"), by and through its attorneys, HODGE DWYER & DRIVER, pursuant to 35 Ill. Admin. Code Part 101, and for its Response to Motion for Reconsideration ("Response") states as follows:

I. BACKGROUND

On September 8, 2011, the Illinois Pollution Control Board ("Board") issued an order certifying that WRB's Ultralow Sulfur Diesel Hydrotreater systems are pollution control facilities. Order, *WRB Refining, LLC, Ultralow Sulfur Diesel Hydrotreater (Property Identification Number 19-1-08-35-00-000-001) v. Illinois EPA,* PCB No. 12-40 (Ill.Pol.Control.Bd. Sept. 8, 2011) (matter hereafter cited as "PCB No. 12-40"). Subsequently, Roxana Community Unit School District No. 1 ("Roxana") filed a Petition for Leave to Intervene ("Petition") in this matter. Petition for Leave to Intervene, PCB No. 12-40 (Ill.Pol.Control.Bd. Sept. 13, 2011). The Board denied the Petition on October 20, 2011. Order, PCB No. 12-40 (Ill.Pol.Control.Bd. Oct. 20, 2011) ("October Order").

On November 23, 2011, Roxana filed a Motion for Reconsideration ("Motion") requesting, among other things, that the Board reconsider its October Order denying Roxana's Petition. Motion for Reconsideration, PCB No. 12-40 (Ill.Pol.Control.Bd. Nov. 23, 2011). On December 9, 2011, WRB filed a Motion for Extension of Time ("MET"), requesting that the Board allow time for its recently retained legal counsel to file a response to Roxana's Motion. Although the Board has not yet ruled on WRB's MET, WRB is filing this Response so as to not cause any additional delay in this matter. In addition, as described in the Motion for Leave to File this Response *instanter,* WRB has a hearing scheduled on January 23, 2012, before the Madison County Board of Review ("Board of Review") to assess the value of the Refinery. Although as stated below, the certification granted by the Board is effective, WRB requests that the Board expedite its decision in this matter so the Board of Review can take notice of the Board's decision in this matter. Accordingly, WRB respectfully requests that the Board consider this Response, and affirm its October Order, as expeditiously as possible.

As will be discussed in further detail below, Roxana has failed to demonstrate that reconsideration is warranted in this case. Further, Roxana does not have a right to intervention in this matter, and thus, the October Order[1] should be affirmed.

[1]The Board has previously held, as it did in this matter, that where there is no case or controversy, a motion to intervene is moot. *Kibler Development Corporation and Marion Ridge Landfill, Inc. v. Illinois EPA,* PCB No. 05-35 at 2 (Ill.Pol.Control.Bd. Aug. 7, 2008) ("*Kibler*"). The Board's analysis in *Kibler* can be applied in this tax certification proceeding. The Petition was filed after the certification was granted by the Board and already effective, and thus, there was no case or controversy in which to intervene (even if intervention was allowed in tax certification proceedings) at the time the Petition was filed. The Petition here was therefore both untimely and moot, just as the motion to intervene was deemed untimely by the Board in the *Kibler* case.

II. ROXANA HAS FAILED TO MEET ITS BURDEN TO JUSTIFY THE RECONSIDERATION OF THE BOARD'S OCTOBER 20, 2011 ORDER.

The Board's rules provide: "In ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error." 35 Ill. Admin. Code § 101.902. Further, the Board has observed that "the intended purpose of a motion for reconsideration is to bring to the court's attention newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the court's previous application of the existing law." *Citizens Against Regional Landfill v. County Board of Whiteside,* PCB No. 92-156 (Ill.Pol.Control.Bd. Mar. 11, 1993) (quoting *Korogluyan v. Chicago Title & Trust Co.,* 213 Ill. App. 3d 622, 627 (1st Dist. 1992)); *see also* Board Order, *In the Matter of: Petition of Maximum Investments, LLC for an Adjusted Standard from 35 Ill. Adm. Code 740.210(a)(3) for Stoney Creek Landfill in Palos Hills, Illinois,* AS No. 09-2 (Ill.Pol.Control.Bd. Feb. 5, 2009); 35 Ill. Admin. Code § 101.902. "In addition, a motion to reconsider may specify 'facts in the record which were overlooked.'" *Illinois EPA v. Dennis Weiler*, AC No. 11-23 (Ill.Pol.Control.Bd. Sept. 8, 2011) (quoting *Wei Enterprises v. Illinois EPA*, PCB No. 04-23 at 5 (Ill.Pol.Control.Bd. Feb. 19, 2004); *see also* Board Order, *People v. Community Landfill Company, Inc.*, PCB No. 03-191 at 3 (Ill.Pol.Control.Bd. June 21, 2007). Roxana's Motion is deficient for several reasons, but on its face, the Motion fails to even address the Board's standard for evaluating reconsideration of its opinions and orders.

Section 101.902 states that the Board will consider new evidence in its evaluation of whether it has made a decision in error. 35 Ill. Admin. Code § 101.902. In this case, Roxana's Motion presents no new evidence that the Board's decision not to consider the

Petition was in error. The Board stated that the tax certification had already been granted, and the Board was correct, as the Board granted the tax certification on September 8, 2011. Board Order, PCB No. 12-40 (Ill.Pol.Control.Bd. Sept. 8, 2011). Further, in its September 8, 2011 Order, the Board quoted the Property Tax Code ("Tax Code"), stating that the "effective date of this certificate is 'the date of application for the certificate or the date of the construction of the facility, whichever is later.'" *Id.* at 2 (citing 35 ILCS 200/11-25). It would appear that upon the Board granting the tax certification, the certification became effective as of the application date, October 14, 2010. Thus, when the Board issued its October Order, the certification had not only already been granted, but it was also effective. Roxana has provided no new evidence to the contrary.

In addition, the Board also considers whether there is a change of law or an error in the application of law that warrants reconsideration of its previously issued order. Again, in this case, Roxana has neither demonstrated that there has been a change in the law since the issuance of the October Order nor that the Board erred in the application of law when it stated that the tax certification had been granted. As explained above, the tax certification was granted on September 8, 2011, several days before Roxana filed its Petition. There has been no change in law that would impact the Board's October Order, and the Board correctly stated that the tax certification had already been granted at the time of filing of the Petitions. Because Roxana has not met its burden to show that reconsideration is warranted, the Board should deny Roxana's Motion.

WRB further incorporates and adopts the Illinois Environmental Protection Agency's ("Illinois EPA") Response to Motion for Reconsideration ("Agency

Response") filed with the Board on December 16, 2011 into this Response. Agency Response, PCB No. 12-40 (Ill.Pol.Control.Bd. Dec. 16, 2011). The Agency's Response superbly articulates why the Board should deny Roxana's Motion and clearly explains the Board's sound basis for granting the certification, consistent with the information provided by WRB in its application to Illinois EPA, the Agency's recommendation to the Board, and the Board's precedent in granting certification to qualifying desulfurization projects.

The failure of Roxana to meet the reconsideration standard in conjunction with the Agency's Response, as well as the information provided below, overwhelmingly justify the denial of Roxana's Motion.

III. ROXANA MISCONSTRUES THE BOARD'S HOLDING IN *REED-CUSTER.*

Roxana's Motion states: "The Board has previously held that third-party intervention is allowed in tax certifications and should be encouraged due to the Board's limited ability to uncover possible fraud and misrepresentation." Motion at ¶28 (citing *Reed-Custer Community Unit School District No. 255 v. Pollution Control Board,* 232 Ill. App. 3d 571, 576 (1st Dist. 1992)) (Court case hereafter cited as "*School District*"). Roxana inaccurately represents the Board's holding in the *Reed-Custer* case.

In *Reed-Custer,* the Reed-Custer Community Unit School District No. 255 ("Petitioner") filed a petition to revoke the Board's certification of Commonwealth Edison's ("ComEd") cooling pond as a pollution control facility. *Reed-Custer Community Unit School District No. 255 v. Commonwealth Edison Company and Illinois EPA,* PCB No. 87-209 (Ill.Pol.Control.Bd. Aug. 30, 1990) (Board case cited as "*Reed-Custer*"). As the Board explained, its authority to issue tax certifications for pollution

control facilities stemmed from, at that time, the Illinois Revenue Act of 1939 ("Revenue Act"). *Id.* at 1. The Board summarized that "Reed-Custer seeks a revocation of the April 1986 certification under section 502a-6(A) of the Revenue Act[2] which allows revocation whenever a certificate was obtained by fraud or misrepresentation." *Id.*

The Board stated in regards to the scope of its consideration of the petition for revocation:

> We emphasize that, pursuant to Section 502a-6(A) of the Revenue Act, the sole basis for considering revocation in this case is whether or not ComEd's certificate of pollution control facility was obtained by fraud or misrepresentation. Therefore, the focus of the Board's review is restricted to the accuracy of ComEd's application, not the correctness of the Agency's determination.[3] In other words, the Revenue Act does not authorize a third party to seek to have the Board reverse the Agency's determination to issue the certificate on a claim that the Agency's action was in error based on the record; rather, it authorizes the third party to seek to have the Board revoke the certificate on a claim that ComEd's actions were unacceptable based on fraud or misrepresentation.

Id. at 5. (Emphasis in original.) The Board held that ComEd's statements to the Agency were not inaccurate and found that "ComEd did not obtain the certificate by fraud or misrepresentation." *Id.*

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[2] Section 502a-6(A) of the Revenue Act is currently Section 11-30 of the Tax Code, 35 ILCS 200/11-30.

[3] The authority for the Pollution Control Facilities Valuation Program is found in the Tax Code and became effective on January 1, 1994. 35 ILCS 200/11-5. The current authority was derived from the Revenue Act of 1939 which has since been repealed. Formerly 35 ILCS 205/21; Ill. Rev. Stat, Ch. 120, para 502(a). The Tax Code gives the Board authority to issue, modify or revoke pollution control facilities' tax certificates. On June 10, 1983, the Chairman of the Board delegated his authority under the Revenue Act to Illinois EPA. *Reed-Custer,* PCB 87-209 (Ill.Pol.Control.Bd. Feb. 25, 1988). However, the Board did retain its authority to revoke certifications under Section 21a-6(A) of the Revenue Act of 1939. *Id.* Section 200/11-30(a) of the Tax Code mirrors Section 21a-6(A), giving the Board authority to modify or revoke a pollution control certificate if it was obtained by fraud or misrepresentation. 35 ILCS 200/11-30(a).

In 2000, the Board adopted procedures for tax certification cases. *In the Matter of: Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130,* R00-20 (Ill.Pol.Control.Bd. Dec. 21, 2000). The newly adopted rules require Illinois EPA to submit a recommendation to the Board, and the Board would then grant or deny the certification. The Board retained the authority to modify or revoke the certificates, as well.

Petitioner appealed the Board's denial of its petition to the Appellate Court, where the Court affirmed the Board's Order. *School District,* 232 Ill. App. 3d 571. The Court concluded:

> In summary, plaintiff's entire case is nothing more than an attempt to have the Board and this court decertify the Braidwood cooling pond as a pollution control facility. As noted, the Board's review in this case was limited to determining whether the CWE's certification was obtained by fraud or misrepresentation. This court's role is even more limited as it sits only to review the Board's *factual* findings on the fraud or misrepresentation issue. Under our limited role of review, we determine that the manifest weight of the evidence supports the Board's conclusion that CWE did not obtain its certificate by fraud or misrepresentation.

Id. at 582. (Emphasis in original.)

Roxana grossly misconstrues the Board's holding in *Reed-Custer.* Roxana states that the Board held that "third-party intervention is allowed in tax certifications and should be encouraged due to the Board's inability to uncover possible fraud and misrepresentation." This characterization of the *Reed-Custer* holding is wholly inaccurate. First, the *Reed-Custer* case in no way addresses intervention. It is a case based on a petition to revoke certification brought pursuant to a statutory provision of the Revenue Act that specifically allows such petitions under limited circumstances. The Reed-Custer School District was not an Intervenor in the Board case; it was the Petitioner. It is not "third-party intervention" that should be encouraged, as Roxana represents, but rather "third-party revocation petitions," as the Court referenced in its recitation of the procedural history of the *Reed-Custer* case.

As noted, the Court in *School District* does reference third-party revocation petitions in a discussion on Respondent ComEd's motion to dismiss Petitioner's petition.

For the Board's consideration, WRB provides the full paragraph of the Court's opinion below so as to not truncate or misrepresent the Court's statement:

> CWE moved to dismiss the petition on the ground that the Board had no jurisdiction under the Act to consider third-party revocation petitions. On February 25, 1988, the Board rejected CWE's motion, reasoning that section 21a-6 does not expressly prohibit third-party revocation petitions and, further, that such petitions should be encouraged due to the Board's limited ability to uncover possible fraud and misrepresentation. CWE has not sought review in this court of the Board's order denying its motion to dismiss, and we assume its validity for purposes of this appeal.

Id. at 578. (Emphasis added). As the Board can note, the Court was referencing the Board's decision to deny ComEd's motion to dismiss because the provisions of the Revenue Act did "not expressly prohibit third-party revocation petitions." In addition, the Court reiterated the Board's reasoning that revocation petitions should be encouraged because of the limited ability of the Board to "uncover fraud and misrepresentation." In this respect, however, the Board has the benefit of not only expert, but also an unbiased recommendation from Illinois EPA, and accordingly, it does not need third parties to intervene and purport to inform the Board of the facts of a case.[4] Thus, as provided by the Revenue Act and interpreted by the Board in *Reed-Custer,* third-party revocation petitions may be allowed pursuant to the statute, but the scope of review is limited to several narrow circumstances, including revocation based on fraud or misrepresentation.

Roxana's statement in its Motion that the Board held that third-party intervention is allowed and should be encouraged is clearly incorrect. A simple reading of the *Reed-*

[4] Roxana states in its Motion: "This Board should allow the School District leave to intervene in both proceedings in order to facilitate a proper evidentiary hearing on these matters." Motion at ¶ 45. Roxana clearly envisions fully participating in this tax certification proceeding by introducing "evidence," presumably in support of the claims it makes in its Motions. As discussed throughout this Response, there is no right to intervention in tax certification proceedings, and it is clear from the statutory provisions of the Tax Code that the General Assembly did not intend for third parties to participate by intervention in these types of proceedings. Thus, even if the Board did decide to reconsider its October Order, intervention should be denied.

Custer and *School District* decisions shows that the cases are about revocation of a certification for fraud or misrepresentation, pursuant to the statutory provisions of the Revenue Act. These cases do not address intervention, as Roxana would have the Board believe. In fact, WRB is unable to locate a Board case, available on the Board's online database, and Roxana has failed to cite a case, where the Board has granted intervention in a tax certification proceeding. Instead, third-party participation in tax certification proceedings seems to be allowed only via the revocation provisions of the Revenue Act, now Property Tax Code, that allow a petition to revoke to be filed for certain limited circumstances.

IV. THERE IS NEITHER AUTHORITY NOR PRECEDENT FOR INTERVENTION IN TAX CERTIFICATION PROCEEDINGS BEFORE THE BOARD.

The Tax Code, 35 ILCS 200/11 *et seq.*, grants the Board authority to certify pollution control facilities. 35 ILCS 200/11-20. Further, the Tax Code states that should the Board find that a facility is a pollution control facility, the Board "shall enter a finding and issue certificate to that effect." In addition, "[t]he effective date for the certificate shall be the date of application for the certificate or the date of the construction of the facility, which ever is later." 35 ILCS 200/11-25.

In regards to the review of an issued certification, the Tax Code states:

> Before denying any certificate, the Pollution Control Board shall give reasonable notice in writing to the applicant and provide the applicant a reasonable opportunity for a fair hearing. On like notice to the holder and opportunity for hearing, the Board may on its own initiative revoke or modify a pollution control certificate or a low sulfur dioxide emission coal fueled device certificate whenever any of the following appears:
>
> (a) the certificate was obtained by fraud or misrepresentation;
>
> (b) the holder of the certificate has failed substantially to proceed with the

> construction, reconstruction, installation, or acquisition of pollution control facilities or a low sulfur dioxide emission coal fueled device; or
>
> (c) the pollution control facility to which the certificate relates has ceased to be used for the primary purpose of pollution control and is being used for a different purpose.
>
> Prompt written notice of the Board's action upon any application shall be given to the applicant together with a written copy of the Board's findings and certificate, if any.

35 ILCS 200/11-30.

The Board has adopted rules to govern tax certification proceedings. 35 Ill. Admin. Code Part 125. The rules apply "to any person seeking, for property tax purposes, a Board certification that a facility or portion thereof is a pollution control facility as defined in Section 125.200(a)(1) of this Part. . ." 35 Ill. Admin. Code § 125.100(a). The rules provide that a person may apply for certification by submitting an application to Illinois EPA. *Id.* at § 125.202. Illinois EPA then reviews the application and submits a recommendation to grant or deny the certification to the Board. *Id.* at § 125.204. Should Illinois EPA recommend denial of certification, the applicant may contest the recommendation, and a hearing may be held. *Id.* at §§125.206 and 125.210. The Board rules nearly mirror the Tax Code provisions in terms of the Board's authority to issue a certification for a pollution control facility, and take action to revoke or modify a certification in cases where any of the three circumstances referenced above in Section 11-30 of the Tax Code appear. *Id.* at § 125.216.

It is clear from the Tax Code provisions that the General Assembly envisioned certification of qualifying pollution control facilities by the Board and allowed for only the Board to revoke or modify a certification in narrow circumstances. The Board itself adopted this reasoning in *Reed-Custer*, where the Board entertained a petition to revoke a

certification, but limited its review to the statutory grounds allowed for revocation or modification of a certification, i.e. fraud or misrepresentation. *Reed-Custer* at 5; *see also Waltonville Community Unit School District No. 1 and the Jefferson County Board of Review v. Consolidation Coal Company and Illinois EPA,* PCB No. 89-149 (Ill.Pol.Control.Bd. Dec. 6, 1989) (where the Board stated that "Waltonville's brief does not allege any fraud or misrepresentation, any delay in proceeding with construction, installation or acquisition, or any change in primary use of the facility. The Board finds that it cannot exercise its power to revoke or modify if misconduct of the type specified in Section 502a-6 is not present.").

The statutory scheme that the General Assembly established for certification of pollution control facilities does not account for intervention of third parties. Instead, it mandates that the Board may, on its own accord, revoke or modify the certification if one of the three statutory circumstances appears. Further, the Tax Code allows any applicant or holder "aggrieved by the issuance, refusal to issue, denial, revocation, modification or restriction of a pollution control certificate ... may appeal the finding and order of the Pollution Control Board, under the Administrative Review Law." 35 ILCS 200/11-60. Again, the Tax Code allows for review of the Board's certification or action, but only by an applicant or holder – of which, Roxana is neither. Accordingly, there is no statutory authority for allowing intervenors in tax certification proceedings. Instead, as the Board allowed in *Reed-Custer,* a third party could petition the Board under the narrow Section 11-30 circumstances, and then, the Board may, on its own, consider revocation or modification of a certification. *See generally* Board Order, *In the Matter of: Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130,* R00-20 (Ill.Pol.Control.Bd.

Dec. 21, 2000) (where the Board stated that it may revoke or modify a certificate in several circumstances, including when a certificate was obtained by fraud or misrepresentation, and stated that it "may learn of the circumstances through any credible filing," citing *School District.*). Furthermore, allowing third parties to intervene in tax certification proceedings could result in the filing of numerous third-party actions before the Board. Not only schools, but anyone who benefits from property tax revenue could have a case to intervene, flooding the Board with actions that the General Assembly never authorized or intended.

Neither the Tax Code nor the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/1 *et seq.,* provide for intervention of third parties in tax certification proceedings, and the Board has specifically held that it cannot hear petitions from third parties if such petitions are not authorized by statute. *People of Williamson County Ex Rel. State's Attorney Charles Garnati and the Williamson County Board v. Kibler Development Corporation, Marion Ridge Landfill, Inc. and Illinois EPA*, PCB No. 08-93 (Ill.Pol.Control.Bd. July 10, 2008) (hereinafter "*Williamson County*"). In *Williamson County*, the Petitioners filed an appeal of a permit modification issued by Illinois EPA for a non-hazardous waste landfill. *Id.* at 1. The Board, reviewing Section 40 of the Act, noted that the appeal provision for this type of proceeding authorizes the *applicant* to petition for review, and thus, the Board concluded that State's Attorney has no statutory right to appeal, stating "to allow this action to proceed as a permit appeal would amount to an unlawful expansion of appeal rights by the Board." *Id.* at 13 (referencing *Landfill Inc. v. PCB*, 74 Ill. 2d 541 (1978), where the Supreme Court held that the Board was not

authorized to extend appeal rights to persons not authorized those rights through the Act. Also note that in a previous Board decision, involving the same parties, the Board stated:

> The Supreme Court in Landfill, Inc. made clear in 1978 that the Board has no authority to, by rule, extend appeal rights beyond those granted in the Act under Section 40. Landfill, Inc., 387 N.E.2d 258 . . . . Intervenors receive the same rights as the original parties to an action, including rights to appeal. Since the decisions in Pioneer Processing [1984] and Land and Lakes [1993], the legislature has granted some additional third party permit appeal rights. See 415 ILCS 5/40(e), as added by P.A. 92-574, eff. June 26, 2002 (granting third parties the right to appeal NPDES permits). Were the Board to grant Marion, Herrin, and the Airport Authority intervenor status in this appeal of a permit to develop a new municipal solid waste landfill brought under Section 40(a)(1) of the Act, the Board would be unlawfully extending appeal rights.

Kibler Development Corporation and Marion Ridge Landfill, Inc. v. Illinois EPA, PCB 05-35 at 5 (Ill.Pol.Control.Bd. May 4, 2006).

Although *Williamson County* involved a permit appeal, under Section 40 of the Act, the Board's analysis of statutory authority can be applied to the circumstances in this tax certification proceeding. There is no statutory authority either in the Tax Code or the Act that grants third parties the right to intervention. Further, the Tax Code only allows applicants or holders to appeal Board certifications pursuant to the Administrative Review Law. To allow third parties to intervene in tax certification proceedings would amount to circumvention of the General Assembly's intentions to allow only applicants and holders to appeal certification proceedings and would extend appeal rights beyond what is allowed by statute. Thus, the Board should, consistent with its precedent in *Williamson County,* disallow intervention since such petitions are not allowed by statute.

In addition to the lack of statutory authority for intervention in tax certification proceedings, WRB is unable to locate any cases as precedent for the Board allowing intervention in this type of proceeding, which in and of itself supports the discussion

above on the lack of authority for intervention in these cases. The Board has issued hundreds of certifications for pollution control facilities, and WRB is unable to find a case, available on the Board's online database, and Roxana has failed to cite to a case, where the Board has allowed intervention. It is not surprising that there is no precedent for intervention in these cases, however, because there is no statutory basis for the Board to allow such intervention. The General Assembly has vested the authority to issue and review tax certifications to the Board, and the Board alone. Any challenge to the certification must be raised pursuant to Section 11-30 of the Tax Code or by the applicant or holder via the Administrative Review Law.

Note that the Board's general provisions do allow for intervention in adjudicatory proceedings, if certain criteria are met. 35 Ill. Admin. Code § 101.402. However, the Board should note that there is no statutory right, either unconditional or conditional, for intervention in tax certifications, and although Roxana may be adversely affected, it has sought relief via an inappropriate mechanism. Regardless of the interests of Roxana, the Board does not have the authority to grant party status "through intervention to persons the General Assembly does not allow to become parties." *Sutter Sanitation, Inc. and Lavonne Haker v. Illinois EPA*, PCB No. 04-187 (Ill.Pol.Control.Bd. Sept. 16, 2004) (hereinafter "*Sutter*"). To challenge the certification, Roxana may petition the Board on Section 11-30 grounds. It has no right to intervention in this case.

V. PUBLIC POLICY DOES NOT SUPPORT GRANTING ROXANA'S PETITION.

Not only is there no statutory right to intervention in tax certification proceedings, but there is also no public policy basis to support intervention in these types of proceedings. The Board has reasoned that, although a person may have an interest in a

Board order, which may adversely affect that person, such an interest is not necessarily sufficient to allow that person to become a party to the proceeding through intervention. *Sutter*. Furthermore, in essence, Roxana is claiming that it should be granted intervention because certification means that a portion of the value of the pollution control facility will be removed from the tax rolls, and since tax revenues are reduced, Roxana is adversely impacted. However, the Board should note that certification itself will not lower assessments or taxes. In fact, certification only means that the duty to assess the pollution control facility shifts from the local assessor to the Department of Revenue ("DOR"), which does not necessarily result in the assessment being reduced.

Allowing intervention in pollution control facility tax certification proceedings could result in overwhelming the Board and courts with unanticipated reviews of Board certification determinations. The General Assembly did not intend such actions in tax certification proceedings. The Tax Code only allows for an applicant or holder of a pollution control facility certification to appeal under the Administrative Review Law. 35 ILCS 200/11-60. Allowing Roxana to intervene would make it a "party," and thus, it could allow Roxana to appeal the Board's final order, which appears to be directly contrary to the General Assembly's intentions. *Id.*; 735 ILCS 5/3-113. This could open the Board's certification proceedings to appeals that were never contemplated by the General Assembly or the courts. It is possible that the Board's entire docket could be monopolized by an influx of intervention petitions filed by taxing districts and taxpayers, who have any animus against an applicant seeking a certification.

Allowing any person who has an interest in property tax revenue and could be adversely affected by the loss of such revenue to intervene in tax certification

proceedings could have a chilling effect on promoting the use of equipment and processes for which the primary purpose is to "eliminate, prevent, or reduce air or water pollution," or treat, pretreat, modify or dispose of any potential pollutant. 35 ILCS 200/11-10. This basis for the pollution control facility valuation policy is sound and was adopted by the General Assembly to encourage the use of pollution control facilities. In many cases, the pollution control equipment is costly and would not otherwise be used without the tax certification incentive. However, allowing intervention of every entity or person, who could be adversely impacted by the tax certification, could spur years of costly litigation due to constant third-party intervention, and applicants may reconsider whether the cost of obtaining a tax certification is too burdensome to warrant resource intensive litigation.

VI. CONCLUSION

Based on Roxana's failure to demonstrate that there is new evidence, a change in the law, or an error in the application of the law that warrants reconsideration of the Board's October Order, Roxana's Motion must be denied. In addition, Roxana's misrepresentation of the holding in *Reed-Custer* and its lack of right to intervene in tax certification proceedings further support a denial of Roxana's Motion, as Roxana has pursued an unavailable avenue of relief by seeking intervention because Roxana has provided an insufficient basis for the Board to reconsider its October Order, Roxana's Motion should be denied.

WHEREFORE, WRB REFINING, LLC respectfully requests that the Illinois Pollution Control Board consider this Response and deny Roxana's Motion for Reconsideration.

Respectfully submitted,

WRB REFINING, LLC,
Petitioner,

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