

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS**

WRB REFINING, LLC	)	PCB 12-065	12-078
	)	12-066	12-079
	)	12-067	12-080
	)	12-068	12-081
PROPERTY IDENTIFICATION NUMBERS	)	12-069	12-082
19-1-08-35-00-000-001,	)	12-070	12-083
19-1-08-34-00-000-008.004, and	)	12-071	12-084
19-1-08-34-00-000-006, or portions thereof	)	12-072	12-086
	)	12-073	12-087
	)	12-074	12-088
	)	12-075	12-089
	)	12-076	12-090
	)	12-077	12-091
	)		

**NOTICE**

TO: [Electronic filing]  
John Therriault, Assistant Clerk  
Illinois Pollution Control Board  
State of Illinois Center  
100 W. Randolph Street, Suite 11-500  
Chicago, Illinois 60601

[Service by mail]  
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[Service by mail]  
Steve Santarelli  
Illinois Department of Revenue  
101 West Jefferson  
P.O. Box 19033  
Springfield, Illinois 62794

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Pollution Control Board the **RESPONSE TO PETITION FOR INTERVENTION** of the Illinois Environmental Protection Agency, and a paper copy of which is herewith served upon the applicant and its attorney, the attorney for the Roxana Community Unit School District No. 1, and a representative of the Illinois Department of Revenue.

Respectfully submitted by,

/s/ *Robb H. Layman*

Robb H. Layman  
Assistant Counsel

Date: December 27, 2011

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 North Grand Avenue East

P.O. Box 19276

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	)	12-075	12-089
	)	12-076	12-090
	)	12-077	12-091
	)		

**RESPONSE TO PETITION  
FOR INTERVENTION**

NOW COMES the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Illinois EPA”), through its attorneys, and pursuant to 35 Ill. Adm. Code 101.500(d) of the ILLINOIS POLLUTION CONTROL BOARD’S (“Board”) procedural regulations, files a Response to the Petition for Intervention (“Petition”) submitted by attorneys for the Roxana Community Unit School District No. 1 (hereinafter “Petitioner”) in the above-referenced matters for tax certification of pollution control facilities requested by WRB Refining, LLC (“WRB”).

**RELEVANT BACKGROUND**

1. On November 29, 2011, the Illinois EPA filed formal Recommendations with the Board in each of the above-captioned matters recommending issuance of tax certifications for WRB projects at its Wood River refinery in Madison County, Illinois. The applications, previously submitted by WRB to the Illinois EPA in October 2010, sought certification of numerous projects as “pollution control facilities” in accordance

with the requirements of the Illinois Property Tax Code, 35 ILCS 200/11-5 through 11-30 (2008), and the Board's implementing regulations at 35 Ill. Adm. Code Part 125.

2. On December 9, 2011, Petitioner filed its Petition for Leave to Intervene (hereinafter "Petition") with the Board.

3. The Illinois EPA received service of the Petition on December 12, 2011.

4. The filing of this Response is made in compliance with 35 Ill. Adm. Code 101.500(a) and 101.300(a), as it is being filed electronically with the Board within fourteen days (not including the next business day following a recognized legal holiday) after service of the Petition.

#### **ARGUMENT**

5. Petitioner seeks intervention in this matter to allow it to participate in a comprehensive and seemingly endless investigation of WRB's pending requests for tax certifications. To read the Petition, up through and including the prayer for relief in the final paragraph, it is clear that the Petitioner seeks a full-blown discovery process and a Board hearing for each of the matters identified therein.<sup>1</sup>

6. In tax certification proceedings, the Illinois EPA's recommendation to the Board is not determinative.<sup>2</sup> The Board is the final decision-maker, who acts in an adjudicative capacity in fulfilling its statutory duties under the Illinois Property Tax

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<sup>1</sup> The caption of the Petition, as well as its text, identifies twenty-five matters that are the subject of its filing. A total of twenty-six recommendations concerning tax certification were filed by the Illinois EPA with the Board on November 28, 2011. The Petition's caption skips a reference to PCB No. 12-079, which involves the Delayed Coker Naphtha Hydrotreater. Given the document's caption and correct referencing of the number of petitions, it is not clear whether the omission was deliberate or, rather, a typographical error. As the Board has identified the filing on the docket for PCB No. 12-079, the Illinois EPA will presume that the Board has determined that the skip was unintentional and that it was meant to be included in the Petitioner's filing. In addition, the Illinois EPA has followed the same approach as the Petitioner and counsel for WRB in filing a single document covering all of the proceedings, rather than filing separate documents under each docket.

<sup>2</sup> In the context of a tax certification proceeding under the Board's Part 125 regulations, the Illinois EPA presents a recommendation to the Board, who, in turn, may or may not choose to rely upon it in its own deliberations.

Code, 35 ILCS 200/11-5 through 11-30 (2008), and implementing regulations at 35 Ill. Adm. Code Part 125. Further, to the extent that intervention is not a jurisdictional matter, the Board may be called upon to exercise discretion that is inherent to its quasi-judicial duties. The Illinois EPA will not presume to instruct the Board how it should discharge its duties or exercise its attendant discretion. However, the Illinois EPA has grave concerns regarding the Petitioner's desired scope of involvement, especially for extensive discovery and hearings. Several factors should inform the Board's judgment on these issues.

A. *The Petitioner's intervention in these tax certification proceedings may be beyond the scope of Board's jurisdiction to allow.*

7. Neither the statutory nor regulatory framework for tax certifications under the Property Tax Code appears to support Petitioner's status as a party to this proceeding. The statute addresses only the role and involvement of an applicant for tax certification. Notably, the sole section authorizing direct judicial review mentions only the rights of the applicant [or holder] and contains the clear legislative expression that such limited review is subject to the Illinois Administrative Review Act.<sup>3</sup> *See*, 35 ILCS 200/11-60. The statute's expressed inclusion of appeal rights for applicants, for purposes of statutory construction, is indicative of an implied legislative intent to exclude a similar role or involvement for others.

8. The Board's regulations implementing the Property Tax Code also contemplate only the role of applicants, and not third parties, in the certification process. The Part 125 regulations convey no express or implied rights, including the rights of appeal, formal discovery or hearing, to non-applicants. Quite simply, the Board's

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<sup>3</sup> Where a statute expressly adopts the provisions of the Administrative Review Law, all other forms of review (i.e., "any other statutory, equitable or common law mode") are effectively extinguished. *See*, 735 ILCS 5/3-102 (2008).

certification process does not afford any kind of recognition to third parties like Petitioner.

9. The threshold question posed by the Motion is whether the Board possesses the jurisdictional authority to grant Petitioner's request for intervention given the absence of third-party appeal rights in this type of proceeding. The Board has repeatedly held that it lacks the authority to award "party status through intervention to persons the General Assembly does not allow to become parties." *See, Chicago Coke Company v. Illinois EPA*, PCB 10-75 (April 21, 2011), citing *Landfill, Inc., v. Pollution Control Board*, 74 Ill.2d 541, 557-60, 387 N.E.2d 258, 264-65 (Ill. 1978); *see also, Kibler Development Corporation and Marion Ridge Landfill v. Illinois EPA*, PCB No. 05-35 (May 4, 2006)(municipal petitioners possessed "no explicit statutory right to intervene" and grant of intervention would amount to Board "unlawfully extending appeal rights"); *Sutter Sanitation, Inc., v. Illinois EPA*, PCB No. 04-187 (September 16, 2004)(denying third-party intervention in transfer station permit denial on basis that Board "cannot, through rulemaking or otherwise, expand intervention rights beyond that which the Act can bear"); *Riverdale Recycling, Inc., and Tri-State Disposal, Inc., v. Illinois EPA*, PCB No. 00-228 (August 10, 2000)(intervention by municipality in landfill siting proceeding denied on basis that "[Environmental Protection] Act does not grant express authority to the Board to accept third-party appeals or interventions").

10. The legal principle relied upon in the aforementioned rulings rests on the notion that the Board, whose jurisdiction is derived from its enabling authority, does not possess the ability to endow third parties with appeal rights. *See infra, Riverdale Recycling* ("the underlying holding [of *Landfill, Inc.*] that the Board does not have general authority to allow third-party challenges without explicit statutory authority,

*directly applies to this case*”). Given the continued viability of this doctrine, which was re-affirmed by the Board as recently as this year in *Chicago Coke*, it is dubious that the Petitioner’s intervention can be permitted in this proceeding without the Board doing violence to its own philosophy [and thereby violating the very jurisdictional constraint successfully avoided in the earlier rulings]. Moreover, it is not intuitively obvious that a tax certification proceeding for pollution control facilities is so “procedurally unique” as to warrant an exception to this doctrine, as suggested by the Board in the *Chicago Coke* matter.

B. *The Petition does not appear to satisfy the criteria for mandatory or permissive intervention under the Board’s procedural requirements.*

11. Even if the Board declines to follow established precedent and considers the Petitioner’s Motion under a traditional analysis for intervention, the Illinois EPA is not persuaded that the Petitioner should prevail to its desired extent or effect. The Illinois EPA has previously observed in two related proceedings that Petitioner and other similarly-situated tax bodies possess a general interest in the outcome of these types of proceedings.<sup>4</sup> However, any such interest does not necessarily equate to legal standing, particularly where, as here, the legislature has spoken directly to the rights and remedies underlying a particular statutory scheme. The question presented for the Board’s consideration is whether the Petitioner’s interest warrants intervention, on either a grand scale or a more limited one, in this type of proceeding.

12. The Board’s review of a request for intervention is guided by the criteria established in its procedural rules. Section 101.402 of Title 35 provides for both

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<sup>4</sup> The Illinois EPA made this observation in recent filings involving separate tax certification proceedings pending before the Board in PCB Nos. 12-039 and 12-040. If the Board grants the Illinois EPA’s accompanying motion in those cases, then the Board may take official notice in this proceeding of those filings in accordance with 35 Ill. Adm. Code 101.630.

mandatory and permissive intervention in Board proceedings. *See*, 35 Ill. Adm. Code 101.402(c) and (d). This case does not present a compelling basis for the Board to exercise either source of authority, as the Petitioner does not possess a right, conditional or otherwise, to intervene in this cause. As previously discussed, the Property Tax Code and the Board's implementing regulations at Part 125 do not contemplate any role or right of participation for third parties.

13. It is also not self-evident that Petitioner will be "materially prejudiced" or "adversely affected" by a final Board order, as set forth in the Board's criteria for permissive intervention. *See*, 35 Ill. Adm. Code 101.402(d)(2) or (3). As represented by Petitioner, it is currently involved in litigation with the refinery concerning its local tax assessment. The litigated or negotiated outcome of the lawsuit could conceivably overlap with the certification and/or valuation processes undertaken by both the Board and the Department of Revenue through the Property Tax Code. In this regard, Petitioner is not without some legal recourse. In addition, the Petitioner cannot be said to be "adversely affected" by a Board order in this matter, as that standard derives from the judicial review provisions of the Illinois Environmental Protection Act and not from the Property Tax Code. The Board's application of the standard for purposes of intervention may be useful in general, but it is problematic in the context of tax certification proceedings.<sup>5</sup>

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<sup>5</sup> It should be noted that any assertion of a right of intervention as an extension of appeal rights under Section 41 of the Act, 415 ILCS 5/41(a), is fundamentally misplaced, whether it's framed as an argument for recognizing a right of intervention or for showing adverse affect. The judicial review provision only extends to matters in which the Board derives its authority under the Environmental Protection Act. As previously mentioned, the Board acts pursuant to the Property Tax Code in adjudicating tax certifications, and the latter statute does not recognize appeal rights for third parties. It stands to reason that the General Assembly would not allow indirectly that which it forbade directly.



14. Separately, Petitioner's intent to pursue discovery and a hearing in all of the above-captioned proceedings does not tend to support the notion that intervention will promote administrative economy or efficiency. *See*, 35 Ill. Adm. Code 101.402(b). A fishing expedition and drawn-out hearings, as apparently pictured by the Petitioner, will almost certainly cause further delays and tax the administrative resources of the Board and the Illinois EPA. The Board should be wary of allowing these proceedings to become a spectacle, particularly where the nature and subject matter of many of the proceedings do not pose legitimate reasons for controversy.

15. Petitioner identifies only a handful of these proceedings with which to take issue. Of all the twenty-six proceedings for which intervention is sought, Petitioner calls the Board's attention to only nine projects, and most of those are mentioned only in passing. [*Petition* at pages 6-7]. Referring to the Ultralow Sulfur Diesel Expansion and Gasoline Hydrotreater projects, Petitioner essentially restates the same basic objections to certification that were raised in PCB Nos. 2012-039 and 040 for two similar projects. As argued by the Illinois EPA in those separate proceedings, the projects here can be shown to result in actual pollution reduction or prevention and satisfy the "primary purpose" test of the "pollution control facilities" definition. For these reasons, and consistent with a long line of prior Board rulings involving similar project types,<sup>6</sup> little reason exists to deny certification to the two referenced projects.

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<sup>6</sup> *See, Aux Sable Liquid Products v. Illinois EPA*, PCB 02-123 (March 21, 2002)(Mercox Treating Process Unit, whose primary purpose was to remove sulfur compounds from natural gas liquids); *ConocoPhillips Company v. Illinois EPA*, PCB No. 04-214 (June 17, 2004)(Low Sulfur Gasoline Project, whose primary purpose was to remove sulfur from certain gasoline streams); *Exxon Mobil Corporation v. Illinois EPA*, PCB 05-122 (January 6, 2005)(Ultra-low Sulfur Diesel Project, whose primary purpose was to facilitate reduction of sulfur content from diesel streams); *Marathon Ashland Petroleum, LLC, v. Illinois EPA*, PCB 06-94 (January 5, 2006)(DHT-Coker Naptha Project, whose primary purpose was to enable a hydrotreater unit to remove sulfur from gasoline); *Marathon Ashland Petroleum, LLC, v. Illinois EPA*, PCB 07-56 (January 26, 2007)(Gasoline Desulfurization Unit, whose primary purpose was to reduce sulfur content of gasoline); *Marathon Petroleum Company, LLC, v. Illinois EPA*, PCB 11-84 (June 2, 2011)(Routing of Light Straight Run, whose primary

16. In citing to some of the other proceedings, Petitioner seems especially concerned with the refinery's revenue-generating potential and specific cost figures reported in the application forms. [*Petition* at pages 8-10]. These concerns are misdirected. The Board's review in the certification process addresses whether a project satisfies the definitional requirements of the Property Tax Code. Profitability or cost information is not central, or even particularly revealing, to this analysis.<sup>7</sup>

17. Petitioner also takes issue with a few projects because the underlying applications do not contain, in its estimation, the appropriate level of descriptiveness for the associated project or project component. [*Petition* at pages 7-8, citing the projects identified in PCB Nos. 2012-078 and 088]. While the technical information contained in some applications may be more abbreviated than in others, the information conveyed in the forms and attached discussion to both applications was commensurate with the nature and subject matter of each project and is arguably sufficient to allow for the Board's considered judgment as to certification.<sup>8</sup>

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purpose was to ensure the movement of a feed-stream to the main desulfurization unit); *Marathon Petroleum Company, LLC, v. Illinois EPA*, PCB 12-5 (July 21, 2011)(Ultra-Low Sulfur Diesel Project, whose primary purpose was to construct reactors and modify an amine treatment unit to facilitate desulfurization of diesel fuel feed-stream).

<sup>7</sup> The consideration of a pollution control facility's profitability and related cost estimates more aptly relate to the assessment value of a project, which is undertaken by the Illinois Department of Revenue and is not part of the Board's purview in the certification process. *See*, 35 ILCS 200/11-15; *see also*, *Reed-Custer Community Unit School Dist. No. 255-U v. Pollution Control Board*, 222 Ill. App.3d 571, 597 N.E.2d 802, 809 (1<sup>st</sup> Dist. App. Ct. 1992).

<sup>8</sup> It can perhaps also be noted that tax certifications before the Board typically involve a straight-forward application of facts to the legal criteria set forth in the definitional requirements of the Property Tax Code. *See*, 35 ILCS 200/11-10. The analysis, whether reflected in the Illinois EPA's formal recommendation or in the Board's own order, is not particularly complicated and concerns itself with fairly objective, not subjective, considerations. In addition, the information conveyed by an applicant in certification requests, which are usually submitted on forms developed by the Illinois EPA, is usually self-explanatory. Given this framework, the kind of scrutiny and scope of review sought by the Petitioner is not warranted.

18. On the whole, the considerations reflected above do not tend to support Petitioner's intervention in these proceedings under the Board's procedural rules.<sup>9</sup> However, if the Board is inclined to grant intervention, the Illinois EPA urges the Board to reject the Petitioner's demand for extensive discovery and hearings in all of the proceedings. Such a whole-sale approach, in the Illinois EPA's estimation, is neither necessary nor desirable. Moreover, as the weight of Petitioner's concerns seem largely academic or extraneous to the certification process, such efforts would not likely generate useful information beyond that already addressed by the Illinois EPA's recommendations and underlying applications. If the Board is concerned about certain aspect(s) of a particular project, it can and should proceed in a manner that does not subject the entire gamut of certification proceedings to pointless litigation and delay.

WHEREFORE, the Illinois EPA respectfully requests that the Board consider the matters expressed herein as part of its deliberations of the Petitioner's filing or, in the alternative, order such relief as may be deemed just and appropriate.

Respectfully submitted by,

/s/ Robb H. Layman

Robb H. Layman  
Assistant Counsel

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<sup>9</sup> If the Board denies intervention, the Board could still address any potential concerns relating to the merits of a project in a couple of ways. For example, the Board could remand one or more of the proceedings to the Illinois EPA for the purpose of securing additional information deemed necessary by the Board to further justify certification. Alternatively, the Board could direct the applicant to submit additional information relating to one or more proceedings to the Board itself, then proceed to issue a ruling on the merits of the pending application. As a last resort, the Board could schedule a limited hearing on one or more of the proceedings addressing only those matters warranting inquiry, as determined by the Board. Petitioner could present comments at the hearing, as is consistent with the Board's usual procedures for public comment.

DATED: December 27, 2011

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 27<sup>th</sup> day of December, 2011, I electronically filed the following instruments entitled **NOTICE** and **RESPONSE TO PETITION FOR INTERVENTION** with:

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

and, further, that I did send on the next business day a true and correct paper copy of the same foregoing instruments, by First Class Mail with postage thereon fully paid and deposited into the possession of the United States Postal Service, to:

Michael Kemp  
WRB Refining, LLC  
404 Phillips Building  
Bartlesville, Oklahoma 74004

Steve Santarelli  
Illinois Department of Revenue  
101 West Jefferson  
P.O. Box 19033  
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/s/ Robb H. Layman  
Robb H. Layman  
Assistant Counsel