ILLINOIS POLLUTION CONTROL BOARD
February 2, 2012

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| WRB REFINING, LLC (Distilling West Flare Gas Recovery Project) (Property ID No. 19-1-08-35-00-000-001), | ) | |
| Petitioner, | ) | |
| v. | ) | PCB 12-68 |
| | ) | (Tax Certification - Air) |
| ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, | ) | |
| Respondent. | ) | |

ORDER OF THE BOARD (by C.K. Zalewski):

This matter comes before the Board as one of many pending tax certification cases involving facilities of WRB Refining, LLC. (WRB).[1] In each case, the Illinois Environmental Protection Agency (Agency) filed a recommendation that the Board certify certain WRB facilities at its Wood River petroleum refinery as "pollution control facilities" for preferential tax treatment under the Property Tax Code. *See* 35 ILCS 200/11-5 *et seq.* (2010); 35 Ill. Adm. Code 125.

The WRB facilities at issue here are the Distilling West Flare Gas Recovery Project facilities. WRB's Wood River refinery is located at 900 South Central Avenue in Roxana, Madison County. The Roxana Community Unit School District (Roxana CUSD or School District) seeks leave to intervene in this and all of these WRB cases, as WRB's refinery is on the Roxana CUSD property tax rolls.

In summary, after granting all motions for leave to file and considering all filings made, the Board denies Roxana CUSD's motion for leave to intervene in this case. The Board then goes on to grant tax certification of the described certain pollution control facilities under the Property Tax Code. *See* 35 ILCS 200/11-5 *et seq.* (2010); 35 Ill. Adm. Code 125.

In this order, the Board first describes the procedural history in this case, and the legal framework for tax certifications, and sets out the substance of the Agency Recommendation. The Board then discusses and rules on the motion for leave to intervene. Finally, the Board discusses the facilities at issue in light of the filings of WRB, the Agency, and the School

[1] PCB 12-039 and PCB 12-40 are closed cases, in which the Board denied motions for reconsideration on January 19, 2012. The bulk of the cases are awaiting issuance of the initial Board order. *See* WRB Refining, LLC. v. IEPA, PCB 12-65 through and including PCB 12-84, and PCB 12-86 through and including PCB 12-91.

District. In conclusion, the Board finds and certifies that the WRB's air emission control facilities at issue here are pollution control facilities.

## PROCEDURAL HISTORY

On November 28, 2011, the Agency filed a Recommendation (Rec.) that the Board certify certain WRB facilities as "pollution control facilities" for preferential tax treatment under the Property Tax Code. *See* 35 ILCS 200/11-5 *et seq.* (2010); 35 Ill. Adm. Code 125. The application materials WRB submitted to the Agency are appended to the Recommendation.

On December 9, 2011, Roxana CUSD filed a petition for leave to intervene (Pet. Int.), as the WRB facility is on the School District's property tax rolls. A single petition was filed in this and all other WRB cases in which no initial Board order had been issued. WRB filed a single response in opposition (WRB Resp.) in all cases on December 23, 2011, and the Agency filed a single response in opposition (Ag. Resp.) in all cases on December 28, 2011.

On January 4, 2012, Roxana CUSD filed what it termed a "joint reply" (Reply)to the two respondents' responses to Roxana CUSD's petition for leave to intervene, as well as their responses to the School District's motion for reconsideration in PCB 12-39 and PCB 12-40. The reply was accompanied by a motion for leave to file. No responses in opposition have been filed. *See* 35 Ill. Adm. Code 101.500(d). The Board would have preferred that the School District address the reconsideration issues in PCB 12-39 and PCB 12-40 in a separate filing, since the issues in those cases are not identical with the ones in cases where the Board has yet to rule. But, Roxana CUSD's motion for leave to file is nonetheless granted.

## LEGAL FRAMEWORK

### Property Tax Code

The application at issue here was made under the Pollution Control Facilities Valuation Program currently found in the Property Tax Code, effective on January 1, 1994. 35 ILCS 200/11-5. The Property Tax Code gives the Board authority to issue, modify, or revoke pollution control facilities' tax certificates.

The program was derived from the Revenue Act of 1939, which has since been repealed, and was formerly 35 ILCS 205/21*;* Ill. Rev. Stat, Ch. 120, para 502(a). On June 10, 1983, the Chairman of the Board delegated his authority under the Revenue Act of 1939 to issue certificates to the Agency. *See* Reed-Custer Community Unit School District No. 255-U v. Commonwealth Edison Company (Certification No 21RA-Ill-WPC-85-15, Braidwood Station) and IEPA. PCB 87-209 (Feb. 25, 1988). However, the Board retained the authority to revoke certifications under Section 21a-6(A) of the Revenue Act of 1939. *Id.* Section 200/11-30(a) of the Property Tax Code mirrors former 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) (2010).

Under the Property Tax Code, the General Assembly declared that "[i]t is the policy of this State that pollution control facilities should be valued, at 33 1/3% of the fair cash value of their economic productivity to their owners." 35 ILCS 200/11-5 (2010); 35 Ill. Adm. Code 125.200(a)(2). The Property Tax Code goes on to define "pollution control facilities" as meaning:

> any system, method, construction, device or appliance appurtenant thereto, or any portion of any building or equipment, that is designed, constructed, installed or operated for the primary purpose of:
>
> (a) Eliminating, preventing, or reducing air or water pollution, as the terms are defined in the Illinois Environmental Protection Act; or
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> (b) Treating, pretreating, modifying or disposing of any potential solid, liquid or gaseous pollutant which if released without treatment, pretreatment, modification or disposal might be harmful, detrimental or offensive to human, plant or animal life, or to property. 35 ILCS 200/11-10 (2010).

While there are four listed exclusions from the definition, none are applicable here. *Id.*

The Property Tax Code provides that"[f]or tax purposes, pollution control facilities shall be certified as such by the Pollution Control Board and shall be assessed by the Department [of Revenue]." 35 ILCS 200/11-20 (2010); *see* 35 Ill. Adm. Code 125.200(a).

The Property Tax Code describes the certification procedure, and powers of this Board under that procedure, as follows

> **Certification Procedure.**
> Application for a pollution control facility certificate shall be filed with the Pollution Control Board in a manner and form prescribed in regulations issued by that board. The application shall contain appropriate and descriptive information concerning anything claimed to be entitled in whole or in part to tax treatment as a pollution control facility. If it is found that the claimed facility or relevant portion thereof is a pollution control facility as defined in Section 11-10, the Pollution Control Board, acting through its Chairman or his or her specifically authorized delegate, shall enter a finding and issue a certificate to that effect. The certificate shall require tax treatment as a pollution control facility, but only for the portion certified if only a portion is certified. The effective date of a certificate shall be the date of application for the certificate or the date of the construction of the facility, whichever is later. 35 ILCS 200/11-25 (2010).
>
> **Powers and duties of the certifying Board.**
> 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 certification or a low sulfur dioxide emission control fueled device certificate [as provided for in 35 ILCS 200/11-35 – 200/11-65] whenever any of the following appears:
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> (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 control 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.
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> 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 finding and certificate, if any. 35 ILCS 200/11-25 (2010)

The Property Tax Code provides the path for judicial review of Board orders in tax certification as follows:

> Any applicant or holder aggrieved by the issuance, refusal to issue, denial, revocation, modification or restriction of a pollution control certificate or a low sulfur dioxide emission coal fuel device may appeal the finding and order of the Pollution Control Board, under the Administrative Review Law [735 ILCS 5/3-101 *et seq.*]

## Board Procedural Rules

**Part 101 General Rules.** The Board's rules are structured to begin with general provisions that apply to later Parts dealing with specific subject matters. The Part 101 general rules include information concerning, *inter alia*, the Board's procedures; definitions; instructions for filing service, and computation of time; parties, joinder, and consolidation; motion practice; hearings, evidence and discovery; oral argument; sanctions, and review of final opinions and orders. Section 101.100(a) "Applicability" makes clear that the rules in Part 101

> should be read in conjunction with procedural rules for the Board's specific processes, found at 35 Ill. Adm. Code 102 through 130. . . In the event of a conflict between the rules of this Part and those found in subsequent Parts, the more specific requirement applies. 35 Ill. Adm. Code 101.100(a).

Another rule at issue is the Board's rule for intervention of parties at 35 Ill. Adm. Code 101.402. The Board "may permit" intervention in an adjudicatory proceeding upon

motion, after considering timeliness of the motion, and whether intervention will unduly delay, materially prejudice, or otherwise interfere with the proceeding. 35 Ill. Adm. 101.402(a), (b). Absent an unconditional statutory right or need to impose a condition on the would-be intervenor, the Board examines whether the person 1) has a conditional statutory right to intervene, 2) may be materially prejudiced absent intervention, or 3) is so situated as to be adversely affected by a Board order. 35 Ill. Adm. Code 101.402(d). The Board reserves the right to limit the rights of intervenors as justice may require. 35 Ill. Adm. Code 101.402(e).

**Part 125 Tax Certification Rules**. The Board's procedural rules for tax certifications are codified at 35 Ill. Adm. Code Part 125. These rules establish a procedure similar to those for variances and adjusted standards under the Act. *See* In the Matter of Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R00-20 (Dec. 21, 2000). The application is made in the first instance to the Agency. 35 Ill. Adm. Code 125.202. The Agency investigates the application and files a recommendation to the Board. 35 Ill. Adm. Code 125.204. The rules specifically provide that the applicant may file a petition to contest any Agency recommendation to deny certification, at which the applicant has the burden of proof. 35 Ill. Adm. Code 125.206 and 125. 214. Duly-noticed public hearings must be held in tax certification proceedings if the applicant files a petition, although the Board may in its discretion hold hearings in other cases if deemed advisable. 35 Ill. Adm. Code 125.210 and 125.214.

In Section 125.216 "Board Action", the rules provide that the Board shall issue tax certifications upon receipt of proper proof under 35 ILCS 200/11-25. The Board, on its own motion, may revoke or modify a certification upon receipt of proper proof under 35 ILCS 200/11-30. The Board has conducted only one proceeding to revoke a tax certification, and this was based on a third-party petition under the Revenue Act of 1939 in Reed-Custer Community Unit School District No. 255-U v. Commonwealth Edison Company (Certification No 21RA-Ill-WPC-85-15, Braidwood Station) and IEPA, PCB 87-209 (Aug. 30, 1990) (dismissing petition and finding certificate not obtained by fraud or misrepresentation), *aff'd. sub nom.* Reed-Custer Community Unit School District No. 255 v. Pollution Control Board, 232 Ill. App. 3d 571 (1st Dist. 1992).[2]

## AGENCY RECOMMENDATION

The Agency states that it received a tax certification application from WRB on October 14, 2010. Rec. at 1. On November 28, 2011, the Agency filed a recommendation on the application with the Board, attaching the application. The Agency's recommendation identifies the facilities at issue:

> The subject matter of this request [the Distilling West Flare Gas Recovery Project] involves the installation of equipment to process units that generate low-volume and low-pressure streams containing hydrocarbons, hydrogen sulfides and ammonia, which are routed to a flare device at the Distilling West Area of the

[2] The Board's decision will be cited as Reed-Custer, PCB 87-409, and the court's as Reed-Custer (1st Dist. 1992).

> refinery. The Distilling West Flare Gas Recovery Project consists of liquid ring compressors and a pressure control system designed to recover streams from the process units that are continuously routed to the Distilling West Flare during routine refinery operations. The installation of new equipment, consistent with the requirements of a consent decree, will capture the hydrocarbon vapors and hydrogen streams, compress them and re-direct them to the fuel gas treating process, thus preventing the combustion of the contaminants from the flare device. In doing so, the equipment acts to reduce or prevent the release of volatile organic materials, sulfur oxides and nitrogen oxides that would otherwise be combusted to the atmosphere. Rec. at 2.

Based on "exercise of its engineering judgment," the Agency recommends that the Board certify that the identified facilities are pollution control facilities as defined in Section 11-10 of the Property Tax Code (35 ILCS 200/11-10 (2010)) with the primary purpose of eliminating, preventing, or reducing air pollution, or as otherwise provided in 35 Ill. Adm. Code 125.200(a)(1). Rec. at 2-3.

## ROXANA CUSD'S PETITION FOR LEAVE TO INTERVENE

In its December 9, 2011 13-page petition for leave to intervene in each of the tax certification actions, Roxana CUSD first states that

> Certification of these properties as pollution control facilities will materially prejudice and adversely affect the School District by the potential loss of as much as $8.9 million in annual property tax revenue. They consist of over $708 million worth of real property that would be locally assessed and taxed for the benefit of the School District and other taxing bodies. In light of the substantial value of these properties and the overwhelming number of applications to be considered at this time, intervention by the School District would provide this Board with an additional level of review and information to aid in its decisions. Pet. Int. at 1-2.

Roxana CUSD next argues how it will be adversely affected by the Board's order. Roxana CUSD states that WRB Refining owns and operates the Wood River petroleum refinery in Madison County, Illinois. The Wood River petroleum refinery is within the boundaries of the School District, and the School District receives property tax revenues from it. Pet. Int. at 2.

Roxana CUSD's motion then relates a chronology of recent actions. The Board, on September 8, 2011, granted tax certification in PCB 12-39 and PCB 12-40 for two WRB pollution control facilities; the Board reaffirmed the decision on October 20, 2011. The School District estimates the worth of the facilities involved in those cases at $300,000. Pet. Int. at 2. On November 28, 2011, IEPA filed Recommendations, triggered by applications filed by WRB with the Agency on October 14, 2010, in support of grant of tax certification for 25 additional WRB facilities. *Id.*; s*ee also supra*, p. 1 at n.1. Roxana CUSD reports that these facilities 'have a total value of at least $708,543,732." Pet. Int. at 2. The School District attached to its petition as Exhibit 1 a table showing that IEPA completed technical review of these WRB applications at various times between November 18 and November 28, 2011. Pet. Int. at 3, & Exh. 1.

Roxana CUSD explains that the Wood River refinery was the subject of a 2004 property tax settlement agreement between then-owner ConocoPhillips and a number of taxing bodies, which pre-determined the assessed value of the refinery through the 2010 tax year. Pet. Int. at 3. The School District stated that '[t]his effectively excluded all properties from taxation." *Id.* Roxanna CUSD reports that it and a number of other taxing bodies are currently litigating the fair market value of the refinery before the Madison County Board of Review. *Id., esp.* n. 3 (listing the 13 taxing bodies including Roxanna CUSD involved in this litigation). The School District opines that the value of the facilities at issue in all cases filed with the Board in 2011 totals just over $1 billion, and anticipates that applications for another $2 billion could be forthcoming. *Id.*

Roxana CUSD reminds the Board that its rules state that the Board "encourages public participation in all of its proceedings." 35 Ill. Adm. Code 101.110(a) (2011). Citing Reed-Custer (1st Dist. 1992), Roxana CUSD contends that "[t]he 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." Pet. Int. at 4.

Roxana CUSD relates how removal of an "assessed value of $236 million" to its property tax base of facilities that "do not meet the statutory definition of pollution control facility" would "materially prejudice and adversely affect" the School District. Pet. Int. at 4-5. Roxana CUSD claims that removal of these WRB facilities from the tax rolls would have a significant impact on the school district, an impact that would not be fully aired absent intervention:

> The School District's total tax rate for its operating funds for the 2010 tax year was 3.81%, and these properties would have resulted in over $8.9 million in property tax revenue last year if they had not been excluded from taxation under the settlement agreement. Multiplying this amount over the life of these assets gives WRB Refining a tremendous incentive to seek pollution control facility treatment for them and claim that they have no economic productivity value—even if they do not qualify for that status. Pet. Int. at 4-5.

Arguing that the "adverse impact would be most inequitable if preferential treatment is given to properties which do not meet the strict definition of 'pollution control facility' as set out by the Legislature in the Property Tax Code," the School District went on to challenge the Agency's Recommendations concerning various facilities. These include those in:

- PCB 12-75 Ultralow Sulfur Diesel Expansion Project (ULSD Expansion); worth $406 million; "directly reduces $SO_x$ pollution by removing sulfur from the diesel product" and "provides the diesel quality necessary for reduction emissions of oxides of nitrogen and particulate matter through the use of advanced emission control systems in diesel engines" [citing PCB 12-75 Ag.Rec., Ex. A, Sec. D]; objectionable to School District because it fulfills United States Environmental Protection Agency (USEPA) requirements for reduction of sulfur in diesel fuel and produces more profitable product that high sulfur diesel; likened to PCB 12-40 Ultralow Sulfur Diesel Hydrotreater (Pet. Int. at 6-7);

- PCB 12-70 Gasoline Hydrotreater; worth $31.8 million; "directly reduces SOx pollution by removing sulfur from the gasoline product" and "provides the gasoline quality necessary for reduction emissions of oxides of nitrogen and particulate matter through the use of advanced emission control systems in gasoline engines"[citing PCB 12-39 (sic) Ag.Rec., Ex. A, Sec. D]; objectionable to School District because it allows WRB to produce and sell gasoline in compliance with USEPA requirements (Pet. Int. at 7);

- Various projects involving flares which the School District says "may incidentally reduce air emissions but appear oriented around hydrocarbon recovery or modification of refinery operations," and lacking in detail to allow for evaluation of "true primary purpose of projects" Pet. Int. at 7. As the School District did not supply all of the information for a all of the following facilities as it did above, the information below is as complete as that in the petition:

  PCB 12-68 Distilling West Flare Gas Recovery Project
  PCB 12-74 New Units' Maintenance Drop-Out System
  PCB 12-78 New Units' Flare System; worth $32 million; "network of piping, two liquid knock out vessels, and flare gas recovery compressors, intended to recover flare gas and hydrocarbons for reprocessing" (Pet. Int. at 8 [citing PCB 12-78 Ag.Rec., Ex. A, Sec. D]); objectionable to School District because of lack of detail about operations, costs, amount recovered, etc. (Pet. Int. at 8);
  PCB 12-81 Subpart Ja Revisions to Flares; worth $16 million; "extensive piping, flare gas recovery compressors, and flow meters" (Pet. Int. at 8 [citing PCB 12-81 Ag.Rec., Ex. A, Sec. C, D]) involving unspecified plant revisions involving four flares; objectionable to School District because of unspecified plant revisions lack of detail about costs, revenue amounts (Pet. Int. at 9);
  PCB 12-82 Aromatics North Flare Gas Recovery Project; worth $45 million, "involves extensive equipment to recover hydrocarbons, hydrogen, and sulfur, which WRB Refining admits generates revenue. Again, no specific costs or revenue amounts are given." Pet Int. at 9.
  PCB 12-88 Aromatics South Flare Subpart Ja Tie-Ins Project; no worth given; "[t]his project installs piping tie ins and spools in the Aromatics South Flare headers which will allow for later installation of" a flow meter and emissions monitor (Pet. Int. at 7 [citing PCB 12-88 Ag.Rec., Ex. A, Sec. D]) that "will result in reduced $SO_x$, $NO_x$, and $CO^2$ emissions to air; objectionable to School District because no description of refinery revision, piping installation, or explanation of how monitoring facilities reduce emissions, as opposed to reporting on them (Pet. Int. at 8);
  PCB 12-90 Continuous Emissions Monitoring System and Consent Decree Improvements for Flares

Roxana CUSD next argues that the Agency's analysis of WRB's applications was rushed and "lacking in "significant technical review". Pet. Int. at 10. Next, the School District asserts that WRB failed to properly complete the applications, as they relate to certain accounting information and the "fair cash value of the facility if it were real property." Pet. Int. at 9-10. The School District relates that WRB improperly answered a question about "percentage of whole

facility value" as "to be determined", and by giving information about "total installed cost" in an area asking for "fair cash value if considered real property." Pet. Int. at 10.

Roxana CUSD argues that its petitions to intervene were timely filed. Pet. Int. at 11. The School District concludes its argument by saying

> Intervention by the School District will allow this Board the opportunity to receive additional review and further information on these projects that may be available now and which was not available at the time WRB Refining submitted its applications over one year ago. The School District's intervention will not delay, prejudice, or interfere with these proceedings. Instead, it will allow this Board to carefully review and consider whether or not these $708 million worth of properties do, in fact, qualify as pollution control facilities before it grants that preferential and essentially irrevocable status upon them. Pet. Int. at 11.

In its request for relief, among other things Roxana CUSD prays the Board to grant leave to intervene, give it all rights of an original party, to set a schedule for hearing and discovery, and to deny certification to all facilities which do not meet the statutory definition of pollution control facilities in the Property Tax Code.

## WRB'S RESPONSE IN OPPOSITION TO THE MOTION TO INTERVENE

WRB filed its response in opposition to the motion to intervene on December 23, 2011. The gist of WRB's argument is that there is neither authority nor precedent in support of intervention in tax certification proceedings before the Board. WRB Resp. at 2. WRB also contends that Roxana CUSD does not meet the criteria for intervention set out in the Board's procedural rules at 35 Ill. Adm. Code 101.402(c)-(d). WRB Resp. at 8.

WRB argues that Roxana CUSD has incorrectly cited the Reed-Custer case for the proposition 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." WRB Resp. at 11, citing Pet. Int. at 7. WRB reminds that Reed-Custer in no way addresses intervention. Instead, the case involved a school district's petition to revoke a certification under section 502a-6(A) of the Revenue Act of 1939, which allows revocation when a certificate was obtained "by fraud or misrepresentation." The Reed-Custer School District was not an intervenor in the Board case in PCB 87-409; it was the petitioner initiating the action to revoke the certification. The Reed-Custer court observed that

> CWE [Commonwealth Edison] moved to dismiss the petition on the ground that the Board had no jurisdiction under the [Revenue] Act to consider third-party revocation petitions. On February 25, 1988, the Board rejected CWE's motion, reasoning that section 2 a-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. WRB Resp. at 14, citing Reed-Custer, 232 Ill. App. 3d at 578.

WRB states that "it 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." WRB. Resp. at 15. Instead, WRB believes, 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. *Id.*

WRB cites to the Board's holdings in various cases finding that the Board cannot extend appeal rights beyond those granted by the General Assembly, consistent with the Supreme Court's holding in Landfill Inc. v. PCB, 74 Ill. 2d 541 (1978). WRB Resp. at 5-7. In Landfill, Inc., the Supreme Court held that the Board was not authorized to extend appeal rights to persons not granted those rights through the Act. Where no explicit statutory appeal rights exist, the Board has declined to allow intervention in cases including Kibler Development Corporation and Marion Ridge Landfill, Inc. v. IEPA, PCB 05-35 at 5 (May 4, 2006), and 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 IEPA, PCB No. 08-93 (July 10, 2008). WRB concludes that

> 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. WRB Resp. at 13.

WRB concedes that, although Roxana CUSD may be adversely affected by the Board's order, such interest does not provide policy reason enough to grant party status through intervention to persons the General Assembly does not allow to become parties.WRB Resp. at 15, citing Sutter Sanitation, Inc. and Lavonne Haker v. IEPA, PCB No. 04-187 (Sept. 16, 2004). WRB Resp. at 14-15. WRB disputes Roxana CUSD's claim that certification means that a portion of the value of the pollution control facility will be removed from the tax rolls, and tax revenues reduced. WRB suggests that certification itself will not, in and of itself, 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, which does not necessarily result in the assessment being reduced. WRB Resp. at 15-16.

WRB contends that granting Roxana CUSD's motion would, in essence "open the flood gates" of tax certification litigation:

> 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. Again, allowing intervention in tax certification proceedings would almost certainly result in undue delay and material prejudice in the proceeding, as well as otherwise interfere with the orderly and efficient proceeding established by the General Assembly in the Tax Code.
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> * * *
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> 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. WRB Resp. at 16-17.

In summary, WRB argues that 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 petition for leave to intervene. WRB Resp. at 17.

## AGENCY RESPONSE IN OPPOSITION

The Agency filed its 11-page response in opposition to the School District's petition for leave to intervene on December 28, 2011. The Agency asks the Board to take official notice of its filings in PCB 12-39 and 12-40 here. Ag. Resp. at 5, n. 5. In addition to any other arguments made there, the Agency suggests that the Board may not have jurisdiction to allow intervention in this case, as the Property Tax Code "addresses only the role and involvement of an applicant for tax certification." Ag. Resp. at 3-4, and Board cases cited therein, also cited by WRB. Likewise, the Agency notes, the Board's Part 125 procedural rules provide a role only for the applicant. *Id.*

Even assuming the Board could grant intervention, the Agency argues that the School District does not satisfy the criteria for mandatory or permissive intervention under 35 Ill. Adm. Code 101.402. Ag. Resp. at 5-6. While observing that Roxana CUSD and other similarly-situated tax bodies possess a general interest in the outcome of Board proceedings under Part 125, the Agency does not believe that such interests necessarily equates to legal standing. The Agency believes that the School District possesses no right to intervene, conditional or otherwise under the Property Tax Code or Board rules. Noting the School District's reference to pending litigation with WRB concerning its local tax assessment, the Agency comments that

> 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 provision 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. Ag. Resp. at 6 (n. 6 omitted).

Too, the Agency suggests that intervention here will not promote administrative economy or efficiency, given the "fishing expedition and drawn out hearings, as apparently pictured by the Petitioner [Roxana CUSD]. *Id.* at 7.

The Agency remarks that the petitioner has taken issue with only nine of what the Agency counts to be 26 pending proceedings. Ag. Resp. at 7, citing Pet. at 6-7. The Agency argues that all of the facilities satisfy the "primary purpose" test under the Property Tax Code's "pollution control facilities" definition. Ag. Resp. at 7-8, and cases cited therein. The Agency agrees that the PCB 12-75 Ultralow Sulfur Diesel Expansion Project and PCB 12-70 Gasoline Hydrotreater are in fact similar to the facilities the Board correctly certified in PCB 12-39 and PCB 12-40, and in a number of previous tax certification cases[3]. Ag. Resp. at 7.

As to Roxana CUSD's arguments about WRB's failure to provide information in applications regarding the refinery's revenue generating potential and specific cost figures, the Agency reminds that "[p]rofitability or cost analysis is not central, or even particularly revealing" to the Board's analysis under 35 ILCS 200/11-10 of the Property Tax Code. Ag. Resp. at 8. Concerning the lack of descriptiveness concerning some projects (PCB 12-78 and PCB 12-88), the Agency states that:

> While the technical information contained in some applications may be more abbreviated than in others, the information conveyed in the forms and attached

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[3] These include Aux Sable Liquid Products v. IEPA, PCB 02-123 (March 21, 2002) (Merox Treating Process Unit, whose primary purpose was to remove sulfur compounds from natural gas liquids); ConocoPhillips Company v. IEPA, PCB No. 04-214 (June 17, 2004) (Low Sulfur Gasoline Project, whose primary purpose was to remove sulfur from certain gasoline streams); Marathon Ashland Petroleum, LLC, v. IEPA, 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. IEPA, PCB 07-56 (January 26, 2007) (Gasoline Desulfurization Unit, whose primary purpose was to reduce sulfur content of gasoline); Marathon Petroleum Company, LLC, v. IEPA, PCB 11-84 (June 2, 2011) (Routing of Light Straight Run, whose primary purpose was to ensure the movement of a feed-stream to the main desulfurization unit); Marathon Petroleum Company, LLC, v. IEPA, 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).

> 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. *Id.*

In summary, the Agency requests that the Board deny intervention. Alternatively, if the Board does grant the petition, the Agency

> urges the Board to reject the Petitioner's demand for extensive discovery and hearings in all of the proceedings. Such a whole-sale approach. . . 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 recommendation and underlying applications. Ag. Resp. at 9.

## ROXANA CUSD'S JOINT REPLY TO THE RESPONSES

In its January 4, 2012, 18-page reply, in response to the Agency comment that it exhibited a "zeal for litigiousness," Roxana CUSD rejoins that

> The Wood River refinery is the single largest taxpayer in its boundaries and paid 33% of its total property tax revenues in 2010. If WRB Refining has taken advantage of the tax certification process and has sought to certify non-conforming property as pollution control facilities, as the School District believes, that will materially prejudice the School District and its constituents. The School District cannot be expected to sit idly by as its largest taxpayer potentially abuses the system and erodes its tax base to the detriment of the children and the other taxpayers it serves. Reply at 1-2.

Roxana CUSD states that it has found no other case in which a person sought intervention in a tax certification proceeding before the Board[4]. Reply at 4. Roxana CUSD argues that, because the Board's Part 125 tax certification rules are silent on the issue, the Board should follow the intervention provisions of Part 101. *Id.* Roxana is not persuaded that the Board precedent based on Landfill Inc. disallowing intervention absent explicit statutory intervention rights appropriately applies here. Reply at 6. Roxana CUSD reads the appeal provisions of the Property Tax Code at 35 ILCS 200/11-60 as broadly allowing appeal by persons "aggrieved by the issuance" of a tax certification, since the applicant or holder of such certification could not be "aggrieved by its issuance". Reply at 7.

[4] Later, Roxana CUSD opines that such may be due to

> the lack of any public disclosure of pending recommendations by the Illinois EPA, the extremely brief window of time between initial filings and the Board's orders granting tax certifications, and the lack of any notice to the affected taxing bodies. Reply at 8.

Roxana CUSD continues to maintain that Reed-Custer stands for the proposition that the Board encourages intervention in tax certification proceedings, particularly since the Board is now the "final arbiter" in tax certifications. Reply at 8. In the absence of a statutory prohibition against intervention, Roxana CUSD believes that the Board's Part 101 intervention rules should be applied. *Id.*

Roxana CUSD argues that there is no bar to the grant of this motion and the setting of tax certifications for full hearings. Roxana reminds that

> The Supreme Court has held that "an express grant of power or duty" to an administrative body like the Board "carries with it the grant of power to do all that is reasonably necessary to execute that power or duty." Lake County Bd. of Review v. Property Tax Appeal Bd., 119 Ill.2d 419, 427 (1988). The Board has the power and duty to determine what property meets the statutory definition of pollution control facilities, and it may do all that is reasonably necessary to fulfill that duty – including granting intervention, setting the matter for hearing, or rescinding an order that was not final and concerned property that may not have been properly reviewed or recommended for certification. Reply at 10.

Roxana CUSD argues that, contrary to WRB's assertions, it did specify "facts in the record that were overlooked", including federal Clean Air Act requirements for removal of sulfur from some fuel types making questionable what the "primary purpose" of some WRB equipment is. Reply at 10-11.

Roxana CUSD does not believe that the Board tax certification cases cited by the Agency offer much guidance, given the brevity of the recommendations and the "lack of any material scrutiny or meaningful comparison to the projects here." Reply at 15.

Roxana CUSD similarly discounts WRB's argument that the policy reasons advanced by the School District do not support grant of the motion to reconsider. Instead, Roxana CUSD contends that "[p]ublic policy does not support a closed certification process with no right for third-party intervention until after the essentially irrevocable certification has been granted." Reply at 15. Concerning WRB's projected flood of litigation before the Board and the courts, Roxana CUSD notes that 35 of the 54 tax certification applications on the Board's docket with PCB 2012 numbers were filed by one source: WRB. Consequently, Roxana CUSD believes that:

> allowing WRB Refining to submit applications without meaningful review is much more likely to fill the Board's docket. Furthermore, it seems unlikely that there are many other taxing districts facing the potential loss of several billion dollars worth of real property from their locally assessed rolls, as the School District faces here. Intervention in these tax certifications is at the discretion of the Board, and if a future potential intervenor is not facing the same magnitude of impact, there is no reason why the Board would have to exercise its discretion in that hypothetical case. Reply at 16.

Roxana CUSD points out that the only consequence of tax certification is not, as WRB suggested, a shift of assessment duties from the local assessor to the Department of Revenue. An additional consequence is assessment of the pollution control facilities at one-third "of the fair cash value of their economic productivity to their owners," under 35 ILCS 200/11-5 (2011), instead of at one-third of the "fair cash value" of the property itself, under 35 ILCS 200/9-145 (2011). Reply at 17.

Roxana CUSD contends that if "facilities generate significant amounts of revenue, as the School District has advocated here, that directly calls into question whether or not their primary purpose is the reduction of pollution." Reply at 17. Roxana CUSD concludes that it has "provided as much factual review and analysis as it can possibly be expected to provide with minimal notice and no discovery or factual record upon which to rely." *Id.* Consequently, Roxana CUSD requests that the grant its petition, set a discovery schedule, and proceed to hearing.

## BOARD RULING ON MOTION FOR LEAVE TO INTERVENE

The Board denies the School District's petition for leave to intervene. The arguments the School District has presented in support of its petition do not convince the Board to rule other than it did in PCB 12-39 and PCB 12-40. The Board restates its findings in those cases here.

The Board finds that Roxana CUSD has presented a compelling case that it is singularly affected by the tax certification process for "pollution control facilities" established under the Property Tax Code at 35 ILCS 200/11-5, as implemented by Board rules at 35 Ill. Adm. Code 125. The Board has not previously seen one source file 35 applications for 35 separate "pollution control facility" certifications in the space of six months, and agrees with Roxana CUSD that it is unlikely that any other school district is facing a similar "potential loss of several billion dollars worth of real property from their locally assessed rolls." But, arguments about this significant impact do not convince the Board that it may grant the relief sought.

The Board does not contest the general principle proffered by Roxana CUSD that the Supreme Court has held that express grant of a power or duty to an administrative agency such as the Board "carries with it the grant of power to do all that is reasonably necessary to execute that power or duty." Lake County Bd. of Review v. Property Tax Appeal Bd., 119 Ill.2d 419, 427 (1988). But, in the landmark case Landfill, Inc., the Supreme Court made equally clear to the Board that extension of appeal rights beyond those granted by the legislature does not fall within the class of things "reasonably necessary" to the conduct of its duties. In that case, the Board by rule had attempted to confer the right of appeal of Agency permits to third parties. The Supreme Court invalidated the procedural rule, noting that third parties could file citizen enforcement actions to remedy pollution caused even by a source with a permit.

Neither the Act nor the Property Tax Code provides for intervention in the Board's tax certification decision proceedings. The Act does not give an appeal route for decisions of the Board under the Property Tax Code. Appeals are restricted under the Property Tax Code at 35 ILCS 200/11-60 to applicants or holders "aggrieved by the issuance" or other action taken by the Board in a tax certification. The Board accordingly reads the Property Tax Code as creating a

circumscribed proceeding with limited appeal rights. The experience of the Agency and the Board with the types of pollution control equipment on the market enables a determination concerning the primary purpose of the equipment without requiring the type of expanded proceeding and discovery that might prove necessary to educate a member of the public without such familiarity. The Board accordingly provided for a simple proceeding in adopting the tax certification procedural rules at 35 Ill. Adm. Code Part 125, and notes that its adopting opinions in R00-20 describe no adverse comments as having been filed concerning the Part 125 process.

As WRB correctly argued, the Board has applied the lesson of Landfill, Inc. in several instances in which persons have sought to intervene in appeals of various decisions by the Agency.

> 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 Corp. and Marion Ridge Landfill, Inc. v. IEPA, PCB 05-35, slip op. at 5 (May 4, 2006) (denying intervention in a challenge to a prior, still-pending permit).

Roxana CUSD has no express statutory right to become a party to a Part 125 tax certification proceeding under the Board's enabling authority. As established in Part 125, the only proper parties to this tax certification case are the applicant WRB, and the Agency, which the Board has made a nominal party by rule as it is in variance and adjusted standard proceedings, to facilitate the recommendation process. Consequently, in contrast to Roxana CUSD's assertions, any Board-created intervention rights as outlined in Part 101 cannot "trump" the certification procedure as envisioned by the Property Tax Code.

If the Board were a legislative body creating a tax certification procedure *de novo*, Roxana CUSD's policy arguments for the relief it seeks might be appropriate. Similarly, if the Board had the powers of an equity court, such policy arguments might lead it to create the exception to the statutory scheme sought here. But, given the present state of the law, the Board cannot grant Roxana CUSD's petition for leave to intervene.

## DISCUSSION OF DISTILLING WEST FLARE GAS RECOVERY PROJECT

> As previously stated, the Agency's recommendation identifies the facilities at issue: The subject matter of this request [the Distilling West Flare Gas Recovery Project] involves the installation of equipment to process units that generate low-

> volume and low-pressure streams containing hydrocarbons, hydrogen sulfides and ammonia, which are routed to a flare device at the Distilling West Area of the refinery. The Distilling West Flare Gas Recovery Project consists of liquid ring compressors and a pressure control system designed to recover streams from the process units that are continuously routed to the Distilling West Flare during routine refinery operations. The installation of new equipment, consistent with the requirements of a consent decree, will capture the hydrocarbon vapors and hydrogen streams, compress them and re-direct them to the fuel gas treating process, thus preventing the combustion of the contaminants from the flare device. In doing so, the equipment acts to reduce or prevent the release of volatile organic materials, sulfur oxides and nitrogen oxides that would otherwise be combusted to the atmosphere. Rec. at 2.

Based on "exercise of its engineering judgment," the Agency recommends that the Board certify that the identified facilities are pollution control facilities as defined in Section 11-10 of the Property Tax Code (35 ILCS 200/11-10 (2010)) with the primary purpose of eliminating, preventing, or reducing air pollution, or as otherwise provided in 35 Ill. Adm. Code 125.200(a)(1). Rec. at 2-3.

The Board has thoroughly reviewed the Agency's Recommendation and WRB's supporting application. The Board notes that this is one of the facilities that the School District particularly challenged. *See, supra,* at p.8. But, the School District has presented no information that would convince the Board not to certify these facilities as pollution control facilities. The Board finds that pollution control is the "primary purpose" of the Distilling West Flare Gas Recovery Project.

As previously stated, the experience of the Agency personnel with the types of pollution control equipment on the market, coupled with the Board's technical expertise, enables a determination concerning the primary purpose of the equipment without requiring the type of expanded application, discovery, or contested case proceeding that might prove necessary to educate a member of the public. The Property Tax Code does not concern itself with whether pollution control is the "sole purpose" of a particular piece of equipment or facility, whether it improves profitability or plant operations, or whether it is necessary to meet USEPA or state requirements. The Property Tax Code concerns itself only with whether the "primary purpose" of the equipment or facility for which certification is sought pollution control. The record here supports the Board's finding that certification is warranted.

## TAX CERTIFICATE

Based on the Agency's recommendation and WRB's application, the Board finds and certifies that WRB's facilities identified in this order are pollution control facilities under the Property Tax Code (35 ILCS 200/11-10 (2010)). Under Section 11-25 of the Property Tax Code, 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." 35 ILCS 200/11-25 (2010); *see also* 35 Ill. Adm. Code 125.216(a). Section 125.216(d) of the Board's procedural rules states that the Clerk "will provide the applicant and the Agency with a copy of the Board's order setting forth *the Board's findings and certificate, if any*." 35 Ill. Adm. Code 125.216(d) (quoting in italics 35 ILCS

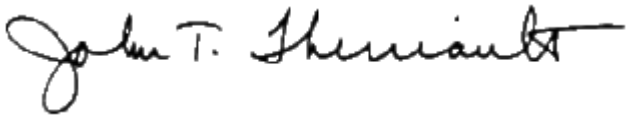
200/11-30 (201)). The Clerk therefore will provide WRB and the Agency with a copy of this order.

IT IS SO ORDERED.

Chairman Holbrook abstained.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2010); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 2, 2012, by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board