Honorable Jim Edgar, Governor of Illinois
Honorable Members of the General Assembly:

In Fiscal Year 1996, the Board faced the challenge of developing several new state-mandated rules to implement a number of new environmental initiatives. The Board's role in amending and adopting the State's environmental regulations will continue to play an important role in state government. In addition to developing rules to implement the new Brownfields redevelopment program, proportionate share liability for environmental cleanups, and the Clean Air Act market credit trading program, the Board was also directed to implement new rules to regulate very large livestock management facilities. Working with the Illinois Environmental Protection Agency, the regulated business community, the agricultural community, and the environmental community, the Board is now in the process of adopting rules for these programs that will assure the maximum flexibility for individuals required to comply while assuring the environment is adequately protected.

Amid developing these rules, the Board's continues to process a substantial caseload for contested cases. The Board has continued to show that it can function effectively by doing more with less. We have significantly reduced the average time it takes to settle cases, while our level of General Revenue Funding has decreased in every one of the last three fiscal years and remains below what it was in the early 1980s.

The Board made major strides in Fiscal Year 1996 to make its process more user friendly to the general public. As a pioneer among state agencies in developing a World Wide Web site, the Board has ensured that all of its rules, orders, and opinions may be downloaded. Additionally, the Board developed a general informational packet for citizens to use in learning how to participate in the Board process. Finally, the Board is currently streamlining and updating its procedural rules. Through its openness and commitment to developing consensus on these issues, the Board has shown that government can play a positive role in assuring that effective rules can be made sensible and reasonable. Rules work best for all when they are made easier to understand and when all parties have had a voice in their development.

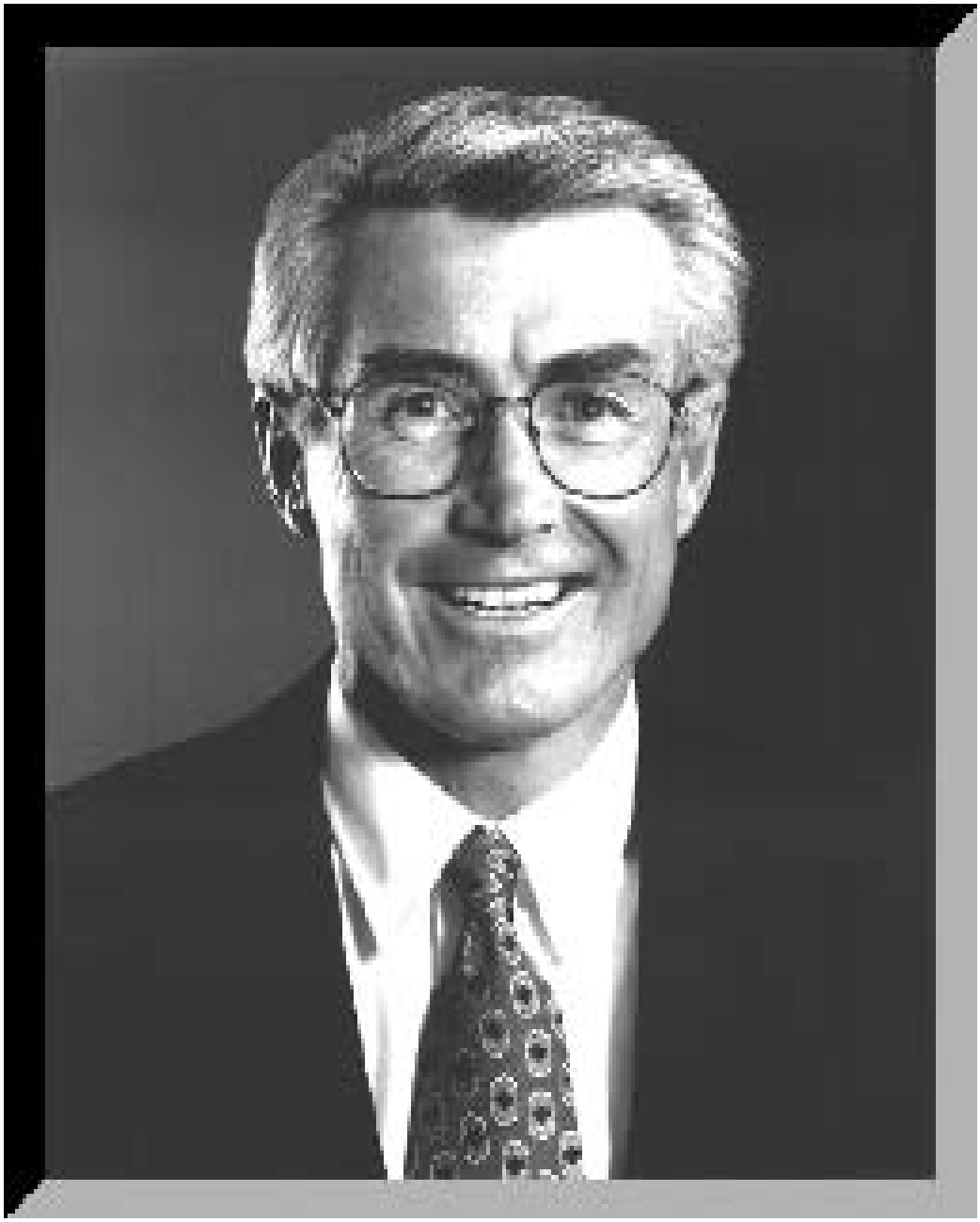
We are pleased to share with you the Annual Report of the Illinois Pollution Control Board for Fiscal Year 1996. This annual report provides information on all aspects of the Board's activities and responsibilities for protecting the environment under the Illinois Environmental Protection Act and, specifically, discusses the Board's accomplishments between July 1, 1995, and June 30, 1996.

Sincerely,

Claire A. Manning

Chairman

Contents:



HONORABLE GOVERNOR JIM EDGAR

State of Illinois

SUMMARY OF ENVIRONMENTAL AND BOARD-RELATED STATE LEGISLATION PASSED IN FISCAL YEAR 1996

(July 1, 1995 through June 30, 1996)

Overview

Fiscal Year 1996 started out with the completion of legislation initially passed the spring before, notably the final resolution in November of 1995 of the Brownfields initiative. The General Assembly voted to accept the Governor's amendatory veto replacing joint and several liability with proportionate share liability for environmental cleanups. The Governor's actions were based on his concern that the State would wind up assuming the liability for the numerous "orphan shares" of contaminated property, property for which the party that actually caused the contamination could not be located, identified, had since died or moved away, or was simply unable to pay for the cleanup. The resolution reached in November involved enacting proportionate share liability, and provided for the quarterly transfer of $500,000 ($2 million per year) of Solid Waste Management Funds (SWMF) into the State's Hazardous Waste Cleanup Fund to offset costs to the State for orphan shares. With this agreement, Brownfields was enacted into law giving the Pollution Control Board nine months (from August 1996 until approximately May 1997) to develop and adopt final Brownfields cleanup standards, and another 18 months (from July 1, 1996 until December 31, 1997) to develop proportionate share liability rules.

Another major legislative initiative that resurfaced this year after it stalled in 1995 involved the imposition of a new "environmental impact fee" to replenish the Leaking Underground Storage Tank (LUST) cleanup reimbursement fund. The new $60 per 7,500 gallons of gasoline fee is expected to generate approximately $45 million per year. The bill also contained a number of other changes to the State's LUST law required by the United States Environmental Protection Agency (USEPA), including a provision that authorizes the Illinois Environmental Protection Agency (IEPA) to require an owner who has already completed a cleanup and received a no further remediation letter (commonly known as a "clean letter") to reopen the site for further cleanup under certain conditions set forth by rules adopted by the Pollution Control Board. This legislation, originally contained in HB 901, was defeated in May, 1995 due to the inclusion of the $60 fee, but was later passed in SB 1390, and was signed into law as Public Act 89-457, effective May 22, 1996.

Perhaps the most far reaching environmental legislation passed in January of 1996 involved the repeal of the 9-year old Retail Rate Law, a law designed to provide subsidies for the development of waste-to-energy facilities, notably municipal waste incinerators. The Retail Rate Law, originally passed in 1987 over the veto of Governor Jim Thompson as an economic development incentive for poorer communities, had led to numerous incinerators being proposed around the State, a trend that would have made the State liable for over $2 billion over the next 20 years in State tax credits to the public utilities required to purchase the energy generated by these incinerators. By the same token, the dramatic increase in the number of incinerators being proposed led to a host of siting appeals before the Pollution Control Board, while developers of facilities already under development (such as Robbins and Ford Heights) are challenging the repeal in court.

The spring 1996 session also saw a continuation of the cooperative spirit between business and government in developing more flexible, cost-effective ways of improving the environment. Two proposals, one crafted by the IEPA and one crafted by the business community, will hopefully reduce costly litigation while moving industry toward further pollution reduction. For its part, the IEPA successfully sought passage of its "Beyond Compliance" initiative, a pilot program patterned after the USEPA's XL Program. This program urges companies that are already in compliance with the State's environmental standards to go further in reducing pollution in return for more flexibility in how they achieve compliance. At the same time, the business community successfully advanced a measure that will provide an opportunity for entities notified that they are in violation of the State's environmental standards to address and rectify the problem with the IEPA before they pursue an enforcement action against the entity.

Another major initiative enacted in 1996 involved legislation directing the Department of Agriculture to regulate large livestock management facilities (such as large hog and cattle feed lots). As the bill moved through the General Assembly, numerous concerns were raised regarding the environmental protections against potential spills into the State's rivers, lakes, and groundwater, as well as the potential odor problems arising from such facilities. In order to address these concerns, the bill was amended to require mandatory inspections of such facilities and financial assurance to ensure that the operator of the facility has sufficient resources to pay for the liability costs of any potential contamination or cleanup. The Department of Agriculture, in cooperation with an advisory group made up of members of the IEPA, the Illinois Department of Natural Resources (DNR) and the Illinois Department of Public Health (DPH), was given 6 months to develop rules for the implementation of the bill (by November 21, 1996), after which time the Pollution Control Board will have 6 months to adopt final rules (by May 21, 1997).

Finally, a handful of other bills involving the siting of waste transfer stations, the disposal of coal combustion waste, and the creation of an Ozone Oversight Committee to monitor coal-related air pollution measures taken by neighboring states found their way to the Governor's desk.

The following summary of laws passed during the fall legislative veto session (November 1995) and the regular spring legislative session (January through May 1996) in Fiscal Year 1996, details not only that legislation that directly impacts the Board, but also those changes made to the State's environmental laws that indirectly impact how the Board adjudicates cases. Not included in this summary is environmental legislation that has virtually no impact on the Board, such as those laws dealing exclusively with recycling, conservation, nuclear safety, etc. Additionally, any bills vetoed by the Governor for which final action will not take place until after the fall veto session (November 19-20-21 and December 3-4-5,

1996) are listed at the end of the summary.

Summary of Bills Signed by the Governor

Air Pollution/Clean Air Act Compliance

Public Act 89-410 (SB 276) Effective November 17, 1995

Creates the Alternative Fuels Act and amends the State Finance Act to add a new Section 5.403. Creates a rebate program to be administered by the IEPA for individuals who convert their vehicles in order to use alternative fuels (liquid petroleum gas, 80% ethanol fuel, biomass-based fuel, fuels derived from biomass, or electricity). The program would be funded by a $20 per vehicle decal fee required to be paid by all individuals and companies with fleets of 10 or more vehicles, the proceeds of which would be used for the rebate program as well as for an ethanol research program. Provides that the Secretary of State's Office oversee the vehicle registration portion of the program. Creates an Alternative Fuels Advisory Board to assist in the development and implementation of the program.

This bill, passed in May 1995, was amendatorily vetoed by the Governor. In November 1995, the General Assembly accepted the Governor's amendatory changes and the bill subsequently became law.

Public Act 89-448 (HB 1523) Effective March 14, 1996

Amends Section 8-403.1 of the Public Utilities Act. Repeals the Retail Rate Law for all waste incinerators, but leaves the law in place for landfills that generate and recover methane. Contains no grandfather clause, meaning the subsidy contained in the law is abolished for those incinerators currently in place or under development (such as Robbins, Ford Heights, and Fulton), as well as those built in the future. *The State's Retail Rate Law was first passed in 1987 to assist poorer communities (such as the Village of Robbins in south suburban Cook County) with economic development. Specifically, the law required public electric utilities to purchase electricity generated by waste-to-energy facilities (incinerators and landfills that recover methane) at the higher rate of what it cost the waste facilities to generate the electricity, as opposed to the lower "avoided" rate of what it cost the electric utility to generate the same amount of electricity on its own. (The Federal Public Utilities Regulatory Policies Act already requires electric utilities to purchase electricity from such facilities, but only at the lower avoided cost.) Under the Retail Rate Law, the utilities required to purchase this electricity were held harmless through a State income tax credit equal to the difference between the higher and lower rate. The law then provided the State be reimbursed by the waste-to-energy facility for the cost of the tax credit, but only after all the waste facility's capital costs had been retired.*

Public Act 89-465 (HB 3161) Effective June 13, 1996*

Amends Section 9.8 of the Environmental Protection Act (Act) and adds a new Section 5.432 to the State Finance Act. Creates the Alternative Compliance Market Account Fund as a new State fund within the State Treasury as a repository for any and all funds generated from the purchase or sale of Clean Air Act emissions credits under the Clean Air Act Emissions Credit Trading Market program enacted last year in SB 460/P.A. 89-173. Provides that monies in this new fund shall be used by the IEPA to purchase services, equipment, or commodities that help generate emissions reductions in or around the ozone nonattainment area in northeastern Illinois (the Chicago/collar county metropolitan area).

*This bill also contained a separate provision creating the IEPA's "Beyond Compliance" program. See also Public Act 89-465/HB 3161 under the *Environmental Liability, Enforcement, and Pollution Prevention* Section.

Public Act 89-566 (SB 1408) Effective July 26, 1996

Creates the Interstate Ozone Transport Oversight Act. Requires the Director of the IEPA to submit any proposed memorandum of understanding developed by the national Ozone Transport Assessment Group, along with information detailing any alternative strategies, to the Illinois House and Senate Environment and Energy Committees no later than 10 days after the development of any such memorandum agreement. Also requires both DNR and the Department of Commerce and Community Affairs (DCCA) to conduct a joint study on the potential impacts of such an agreement on Illinois' economy which might result from the implementation of the emission reduction strategies contained in any such agreement or alternative strategy. Requires the House and Senate Environment and Energy Committees to hold at least one public hearing on the proposed memorandum, and to report the two Committees' findings and recommendations to the President of the Illinois Senate, the Speaker of the Illinois House, and to the Governor. The intent of this bill is to call attention to a program currently being developed within the USEPA to achieve greater reductions in ozone-harmful emissions in the northeastern part of the country via entering into memoranda of agreement with other states.

Public Act 89-491 (SB 1633) Effective June 21, 1996

Amends Section 9 of the Act to relax certain air pollution requirements on certain small grain elevators. Specifically, exempts those grain elevators located outside of major population areas from having to install various pollution control equipment in their dump pits, cleaning and separating equipment, internal transfer equipment, and loading equipment. Retains the general prohibition contained in Section 9(a) of the Act that such elevators not cause air pollution. (Effectively exempts these grain elevators from such requirements provided they are not causing major air pollution problems.) Does *not* extend this exemption to any grain elevators that are under any IEPA certified investigation of any alleged violations. Also does *not* apply to those grain elevators subject to federal USEPA new source regulations or elevators that generate or contain PM-

10 particulate, as PM-10 particulate continue to be strictly regulated by the USEPA.

Public Act 89-493 (SB 1719) Effective January 1, 1997

Repeals the Employee Commute Options (a.k.a., mandatory car pooling) Act and replaces it with a new Voluntary Employee Commute Options Emission Reduction Act. This bill was enacted after Congressional repeal of the federally-mandated car pooling requirement in the fall of 1995. Requires the State to notify the USEPA that the Employee Commute Options requirement should be removed from Illinois' State Implementation Plan (SIP) for reducing ozone-harmful emissions, and that emissions reductions achieved by voluntary implementation of the program by affected employers are creditable toward the emissions reductions required under other post-1996 stationary source emission reduction banking and trading programs. Amends the Unemployment Insurance Act to delete the requirement under the Employee Commute Option Act that the Department of Employment Security (DES) supply IDOT with the names of all employers subject to the Employee Commute Options Act.

Landfill and Waste Transfer Station Siting and Regulation

Public Act 89-487 (SB 1266) Effective June 21, 1996

Amends Section 39 of the Act. Removes the January 1, 1997 sunset date for a provision in the "SB 172" siting law that allows certain municipalities (as opposed to the county) sole siting authority over pollution control facilities where the facility lies on an adjacent parcel of land in an unincorporated area. Does not apply any proposed landfill which was, on April 1, 1993, owned in whole or in part by another municipality. *This provision, added in 1993 in what was known as "the Minonk Landfill bill," was enacted after a waste disposal company attempted to expand a landfill located on a large tract of land in unincorporated Woodford County right next to the City of Minonk. Minonk was opposed to the landfill expansion, but the Woodford County Board (which had siting authority) voted to allow the expansion anyway. In order to limit the scope of this provision, the 1993 bill applied only to facilities in unincorporated areas of counties with less than 100,000 people that, on April 1, 1993, lie adjacent to municipalities of 5,000 or fewer people. (As a practical matter, the 1993 bill applied only to the Minonk landfill at the time it passed.) Moreover, this special provision was to sunset on January 1, 1997. While the enactment of the 1993 bill succeeded in blocking the Minonk landfill expansion at the time, Minonk is still afraid the developer will try to expand the landfill again in the future. To this end, this bill (SB 1266) simply removes the sunset date on this unique caveat to the siting law, thereby making it permanent. The exclusion for facilities owned in whole or in part by another municipality was added to clarify that the provisions of this bill not apply to the Rochelle/Ogle County Landfill.*

Public Act 89-556 (HB 2725) Effective July 26, 1996

Amends Section 39 of the Act. Exempts from the local siting law (allows the IEPA to issue a permit for) any waste transfer station that was in existence on or before January 1, 1979 (before the siting law was passed) and was in continuous operation from January 1, 1979 to January 1, 1993, provided: 1) the operator of the facility submitted a permit application to the IEPA to operate the waste transfer station during April of 1994; 2) the local government in which the facility is located does NOT object to the facility; and 3) the facility has local zoning approval. *Applies only to one waste transfer station in unincorporated DuPage County near the Village of Westmont.*

Public Act 89-619 (HB 2747) Effective January 1, 1997

Amends Sections 3.45 and 22.28 of the Act, as well as adding a new Section 22.23a to the Act. Beginning July 1, 1997, prohibits the disposal of fluorescent and high intensity lights in municipal waste incinerators. By December 31, 1997, requires the Pollution Control Board to seek authorization from the USEPA to include fluorescent lights as a category of universal waste subject to the streamlined hazardous waste regulations. If and only if the USEPA authorizes the addition of fluorescent lights to the definition of universal waste, requires the IEPA to propose and the Pollution Control Board to amend its rules to include fluorescent lights under its universal waste rules within 180 days of the USEPA authorizing the change. Until such time as the Board adopts such rules, declassifies fluorescent lights as hazardous waste and instead requires retailers to collect the lights and send them to a fluorescent light recycler.

Land Pollution

Public Act 89-431 (HB 544) Effective December 15, 1995

Creates a new Title XVII, subtitled "Site Remediation Program," in the Act, as well as amending Sections 22.2 and 22.7 of the Act. This legislation is the "Brownfields" initiative. Creates a new remediation process for cleaning up contaminated sites, both voluntary and required, other than those: 1) already on the federal Superfund National Priorities List (NPL), 2) currently permitted by the IEPA or subject to federal or state closure laws, 3) those for which remedial action has already been required by the State or federal government, or 4) those subject to State or federal underground storage tank laws.

Provides for risk-based cleanup actions for sites or portions of sites (similar to the process for underground storage tanks), and based upon background area characteristics and the future proposed land use of the site (i.e., residential v. industrial). Authorizes any remediation applicant (RA) to utilize either the IEPA directly or hire his own licensed professional engineer to oversee all cleanup work at the site. Subjects all work

conducted by the RA to IEPA review and approval, but allows for the RA to appeal any IEPA determination to the Board. Upon IEPA approval of the RA's final remedial action completion report, the IEPA would be required to issue the RA a No Further Remediation Letter and file a copy with the county recorder of deeds. This letter would contain limitations and proposed future land use which would carry from owner to future owner. Authorizes the IEPA to void the No Further Remediation Letter under certain limited circumstances, subject to appeal to the Board. Requires the IEPA to propose rules to the Board within 9 months of the effective date of this bill, after which the Board would be required to adopt final rules within 9 months of the IEPA proposing them. Prior to the Board's final adoption of rules, provides that the program operate under the Board's current underground storage tank program rules.

This bill, passed in May 1995, was amendatorily vetoed by the Governor. In November 1995, the General Assembly accepted the Governor's amendatory changes and the bill subsequently became law.

Public Act 89-443 (HB 901) Effective July 1, 1996

Contains the identical "Brownfields" provisions passed in HB 544/P.A. 89-431, but also adds the following provisions:

Adds a new Section 58.9 to the new Site Remediation (or "Brownfields," as it is commonly known) Title XVII of the Act passed in May 1995 in HB 544. Effectively replaces the current joint and several liability for any cleanup actions *under any part of the Act* with a limitation that a party only be held liable only for his proportionate share of liability for a site. Further exempts from all liability any party that did not cause or materially contribute to the release or threatened release of any regulated substance under the Act. Provides immunity for the State and local governments under certain circumstances where the governmental unit had nothing to do with the contamination. Requires the Pollution Control Board to adopt final rules for the determination of proportionate share liability within 18 months of the effective date of the bill (by December 31, 1997).

Also amends Section 22.7 of the Act. Beginning July 1, 1996, provides that $500,000 be transferred quarterly from the Solid Waste Management Fund into the Hazardous Waste Cleanup (State Superfund Cleanup) Fund, for a total transfer of $2 million per year. *This money, formerly earmarked for various activities including grants by the IEPA to units of local government to complete their solid waste management plans, would instead be set aside for additional state-funded cleanups of "orphan" sites (those contaminated sites for which the responsible party can either not be found or is incapable of paying for the cleanup).*

Amends Sections 5 and 7 of the Solid Waste Planning and Recycling Act. Eliminates the requirement that the IEPA assist (provide grants to) local governments to assist them in developing and implementing their local solid waste management plans. *This requirement was deleted because: 1) the approximately $2 million per year in Solid Waste Management Funds previously utilized for this purpose will begin being transferred into the Hazardous Waste Cleanup Fund, beginning July 1, 1996, and 2) all such plans are required to be completed by July 1, 1996 (the effective date of this bill).*

Amends Sections 58.8, 58.10, and 58.11 of the Act. Upon receiving a final "No Further Remediation Letter" (or "clean letter" as it is commonly known), requires the site owner to pay a new fee of the lesser of $2,500 or the IEPA's actual costs for reviewing and evaluating Brownfields site remediation plans and final corrective action reports, the proceeds of which would be deposited into the Hazardous Waste Fund. In the case where a site owner receives a No Further Remediation Letter by operation of law, requires the owner to file an affidavit stating that the letter was, in fact, issued by operation of law. Provides that the (Brownfields) Site Remediation Advisory Committee created in HB 544 is to assist the IEPA in proposing cleanup standards to the Board for adoption and in preparing annual reports on the State's use of Hazardous Waste Funds to cleanup orphan sites.

Public Act 89-499 (HB 3380) Effective June 28, 1996

This is the FY97 budget implementation bill. Amends numerous Acts, among them Section 55.6 of the Act. Changes the annual allocation of Used Tire Management Funds to provide that through June 30, 2000 the following state agencies shall receive the following percentages of the first $2 million in Used Tire Management Funds: 38% to the IEPA (a decrease from 44%) for enforcement, cleanup, etc.; 23% to DCCA (a decrease from 39%) for recycling grants, research grants, etc.; 25% to DPH (an increase from 13%); 10% to DNR's Illinois Natural History Survey for research (no set percentage was guaranteed in the old law); 2% to the Department of Agriculture for its pesticide-related activities (no change from previous allocation); and 2% to the Pollution Control Board (no change from previous allocation). Abolishes all these allocations beginning July 1, 2000. The allocation for all Used Tire Management Funds in excess of $2 million would remain 55% to the IEPA for cleanup activities and 45% to DCCA for recycling grants, etc. Beginning January 1, 1998 and biennially thereafter, requires all State agencies that receive Used Tire Management Funds to report their uses of the Funds to the Governor and the General Assembly.

Public Act 89-535 (SB 1360 from 1996) Effective July 19, 1996

Amends Section 21 of the Act. Prohibits any person from causing or allowing the storage or disposal of coal combustion waste except under certain specified conditions.

Underground Storage Tanks

Public Act 89-457 (SB 1390) Effective May 22, 1996

****Public Act 89-428 (SB 721) Effective January 1, 1996****

Public Act 89-457 contains the identical provisions of P.A. 89-428, enacted in December 1995, regarding the State's Leaking Underground Storage Tank (LUST) Program. P.A. 89-428 was ruled unconstitutional on May 7, 1996 (Johnson v. Edgar) by Cook County Circuit Court Judge Aaron Jaffe, not because of any of the LUST provisions contained in the bill, but because it violated the state constitutional requirement that bills be confined to a single subject matter. SB 721/P.A. 89-428 also contained numerous unrelated Criminal Code provisions, together with the child sex offender notification bill. P.A. 89-457 contains only the LUST provisions of P.A. 89-428.

Creates the Environmental Impact Fee Law. Also amends Sections 39b2, 39b47, and 39b48 of the Civil Administrative Code, and Section 2a of the Motor Fuel Tax Law. Creates a $60 Environmental Impact Fee per every 7,500 gallons of gasoline (roughly $60 per truckload) delivered to licensed distributors (primarily gas station owner) to be paid by the distributor to the Department of Revenue, all of which would be deposited into the Leaking Underground Storage Tank (LUST) Fund. *This fee is estimated to generate approximately $46 million per year for the LUST Fund.*

Amends Title XVI of the Act to make numerous changes to the 1993 rewrite of the State's LUST law (HB 300/PA 88-436), necessary to bring the State's law into compliance with USEPA guidelines.

Within 6 months of the effective date (by June 30, 1996), requires the IEPA to propose to the Board rules setting forth criteria under which the IEPA may require a tank owner/operator to further investigate and/or remediate a site after the owner has already received a no further remediation letter (commonly known as a "clean letter"). Requires the Board to adopt final rules for this "reopener provision" within 6 months of receiving proposed rules from the IEPA (by December 31, 1996).

Within 6 months of the effective date (by June 30, 1996), requires the IEPA to propose to the Board rules setting forth criteria under which the IEPA may require tank owners to conduct groundwater monitoring on "No Further Action" sites. Requires the Board to adopt final rules within 6 months of receiving proposed rules from the IEPA (by December 31, 1996).

Within 6 months of the effective date (by June 30, 1996), requires the IEPA to propose to the Board rules setting forth risk-based procedures and criteria under which a tank owner/operator could defer corrective action on a LUST site, based upon risk to human health or environment, only when the LUST Fund is running an inadequately low balance. This section replaces the provision in the current law specifying when an owner may or may not defer corrective action on a site in times when LUST reimbursement funds are inadequate. Requires the Board to adopt final rules within 6 months of receiving proposed rules from the IEPA (by December 31, 1996).

In the case where the LUST Fund is running an inadequately low balance, authorizes the IEPA to develop a priority list for deferring LUST reimbursements *only*; *not* for deferring corrective action. *This section replaces the current language that authorizes the IEPA to develop such a priority list for deferring corrective action on cleaning up UST sites.*

All cases in which the IEPA fails to act within its 30-day and 120-day deadlines would be deemed "rejected" (as opposed to "approved," as the law currently reads). Also removes 60-day limit on the time period in which the IEPA may reclassify a low priority site as a high priority site, based upon the results of an owner's groundwater testing; IEPA would have as long as it needs.

Provides that, where the Office of the State Fire Marshal (OSFM) fails to send a tank owner a certificate for removal within 30 days, the certification that the tank was properly removed shall be deemed "rejected" (as opposed to "approved," as the law currently reads).

Clarifies that tank owners whose tank releases were certified by the OSFM as "no release" or "minor release" between September 13, 1993 and August 1, 1994 and for which OSFM subsequently rescinded its determination and required the release be reported to the Illinois Emergency Management Agency (IEMA), remain eligible for reimbursement from the LUST Fund. Eligibility would be based upon the date of the initial inspection by the OSFM.

Clarifies that the primary burden for reporting a release remains with the owner/operator of the LUST; not the OSFM. Also clarifies that the owner must report the leak to the IEMA and perform a site assessment at the time of the removal. Clarifies that any inspector of the OSFM has authority to require the owner to report any suspected release the inspector believes may have occurred.

Clarifies that a tank owner has 35 days (previously 30 days) to decide to incorporate IEPA required changes into his corrective action plan (as opposed to appealing the IEPA's decision to the Board), based upon the 35 days current law gives the tank owner to appeal the IEPA's decision.

Clarifies that costs recovered for actions the State had to pay for shall be deposited back into the state fund from which they were expended. Added at the request of IDOT to insure that, in a case where the IDOT may have had to expend road funds to a LUST site, the costs recovered would go back into the Road Fund; not the LUST Fund. All punitive damages won by the State would continue to go into the LUST Fund.

Public Act 89-468 (SB 1258) Effective January 1, 1997

Amends Section 2a of the Motor Fuel Tax Law and Section 310 of the Environmental Impact Fee Law. Exempts from the $60 LUST/Environmental Impact Fee, created pursuant to P.A. 89-428 and P.A. 89-457, diesel fuel consumed or used in the operation of ships, barges, or vessels that are used primarily for the transportation of property in interstate commerce for hire on rivers bordering Illinois (the Mississippi, Ohio, and Wabash Rivers) if the diesel fuel is delivered by a licensed receiver to

the purchaser's barge, ship, or vessel while it is afloat upon the bordering river.

Environmental Liability, Enforcement, and Pollution Prevention

Public Act 89-443 (HB 901) Effective July 1, 1996*

Adds Section 58.9 to the new Site Remediation (or "Brownfields," as it is commonly known) Title XVII of the Act passed in May 1995 in HB 544. Effectively replaces the current joint and several liability for any cleanup actions *under any part of the Act* with a limitation that a party only be held liable for his proportionate share of liability for a site. Further exempts from all liability any party that did not cause or materially contribute to the release or threatened release of any regulated substance under the Act. Provides immunity for the State and local governments under certain circumstances where the governmental unit had nothing to do with the contamination. Requires the Pollution Control Board to adopt final rules for the determination of proportionate share liability within 18 months of the effective date of the bill (by December 31, 1997).

*This bill also contained a number of other provisions making changes to the new Site Remediation Program (commonly known as "Brownfields"). See also Public Act 89-443/HB 901 under the *Land Pollution* Section.

Public Act 89-645 (SB 1494) Effective January 1, 1997

Adds a new Section 40 to the State Finance Act. Requires the Attorney General to notify the Speaker of the House and the President of the Senate before a court order or consent decree may be entered into in any settlement of any class action lawsuit in which the State is a defendant if the settlement may involve the appropriation or expenditure of more than $10 million in State funds.

Public Act 89-465 (HB 3161) Effective June 13, 1996*

Amends the Act to add new Sections 52.3-1, 52.3-2, 52.3-3, and 52.3-4. Creates a 5-year pilot program that allows the IEPA to enter into "Environmental Management System Agreements" with various parties, businesses, etc. setting forth various pollution reductions to be achieved by the entity that goes beyond those reductions currently required under the State's laws and regulations, hence the name "Beyond Compliance." These agreements (which would serve as a kind of permit) would also contain any agreed-to penalty provisions for failure of the entity to achieve the goals set forth in the agreement. No appeals process is contained in the bill, save for a party's ability to appeal a termination of the agreement by the IEPA to the Board. The IEPA would have until December 31, 1996 to propose rules for how agreements could be terminated under the program, after which the Board would have 6 months to adopt final rules. The IEPA anticipates it will enter into 3-5 such agreements initially including 3M Corporation and Safety-Clean. *Modeled after the USEPA's "XL Program."*

*This bill also contained a separate provision creating the Alternative Compliance Market Account Fund for the IEPA's Clean Air Act Emissions Credit Trading Market Program. See also Public Act 89-465/HB 3161 under the *Air Pollution/Clean Air Act Compliance* Section.

Public Act 89-596 (HB 3625) Effective August 1, 1996

Amends Section 31 of the Act. Requires the IEPA to issue a 31(a) pre-enforcement letter within 180 days of learning of an alleged violation. Requires the alleged violator to respond to the IEPA in writing within 45 days, but allows the party to propose in its response a Compliance Commitment Agreement setting forth time frames by which the party agrees to resolve the violation. Does *not* require the IEPA to accept or enter into the agreement. Authorizes the IEPA to extend the amount of time the alleged violator has to respond to the 31(a) letter. Authorizes the party and the IEPA to set up a meeting to discuss an alleged violation without the Attorney General or the State's Attorney being present, but allows the IEPA to proceed with an enforcement action for any part of an alleged violation not covered by the agreement, as well as any provision in the agreement the party subsequently fails to meet. All enforcement actions other than those where an agreement is entered into between the IEPA and the alleged violator would proceed just as they do under current law.

Agricultural/Pesticide Regulation

Public Act 89-456 (HB 3151) Effective May 21, 1996

Creates the Livestock Management Facilities Act. Requires owners of large hog and livestock feed lots that build, expand, or modify their waste (manure) lagoons to first register their facilities with the Department of Agriculture (Department). Sets forth fees to be paid to the Department, plus penalties for failure to register. Directs the Department to investigate any complaints stemming from such facilities and, if necessary, turn such complaints over to the IEPA. Any enforcement action would be handled through the normal process before the Board. Expands the current residential set-back requirements contained in the Board's agricultural waste regulations to address larger feed lots, based upon the number of animals handled at the facility. Requires feed lots with 1,000 or more animals to submit management plans to the Department. Requires owners of livestock facilities to purchase insurance or a surety bond to cover the cleanup costs of any potential environmental spill or contamination. Requires the Department to conduct investigations of new or expanded facilities during the preconstruction, construction, or post-construction phases.

Requires the Department to propose rules to the Board within 6 months of the effective date of the bill (by November 21, 1996), and gives the Board another 6 months to adopt final rules for the implementation of this bill (by May 21, 1997). Requires such

facilities to practice odor control methods as set forth in the Act and related Board and/or IEPA rules, as well as comply with all other Board and/or IEPA rules covering agricultural-related waste. Clarifies that nothing in this bill prohibits the IEPA from investigating or pursuing any enforcement action against any livestock facility suspected to be or found in violation of any provision of the Act.

Public Act 89-463 (SB 1473) Effective January 1, 1997

Amends the Gasohol Fuels Tax Abatement Act, as well as the four State Sales Tax Acts. Effective January 1, 1997, extends by 1 year the current 15% state sales tax reduction on the sale of gasohol. Makes numerous other unrelated changes relating to programs administered by the Department of Agriculture.

Public Act 89-614 (HB 1798) Effective January 1, 1997

Amends Section 19.1 of the Illinois Pesticides Act. Changes the collection and disposal program requirements to allow the Department of Agriculture alone to implement a voluntary program and collect fees for the collection and disposal of unwanted pesticides from farmers and structural pest control businesses.

Miscellaneous

Public Act 89-511 (HB 2251) Effective January 1, 1997

Amends Section 25 of the State Finance Act to shorten the lapse spending period for State agencies from three months to two months, meaning agencies (including the Board) could only spend prior fiscal year appropriations through August 31, as opposed to September 30. (The State's fiscal years begin on July 1 and expire on June 30 of the following year.)

Bills Amendatorily Vetoed by the Governor

The following bills were amendatorily vetoed by the Governor and must, therefore, await final action by the General Assembly until the fall veto session (November 19-20-21 and December 3-4-5, 1996). In order for anyone of these bills to become law, both the House and the Senate must take the identical action on the bill during the fall veto session or the entire bill will die; both houses must either vote to accept the amendatory veto (simple majority needed - 30 in the Senate and 60 in the House) or both must vote to override the amendatory veto (3/5 majority required - 36 in the Senate and 71 in the House).

HB 3193

Amends Sections 3, 5, and 10 of the Toxic Substances Disclosure to Employees Act, and repeals Section 4 of the same act. Repeals the requirement that the Director of the Department of Labor to establish and maintain a list of toxic substances. Changes the definition of a "toxic substance" by defining it as a substance, mixture, or compound containing a substance that is determined to be hazardous under federal regulation (29 C.F.R. 1910.1200). Provides that a copy of the Material Safety Data Sheet shall be made available only upon the request of the Director of the Department of Labor, who must maintain such data sheets for 5 years. *Intended to eliminate a duplicative paperwork requirement, as federal law already requires essentially the same thing. The Governor amendatorily vetoed this bill to make a technical correction only.*

SB 1781

Amends numerous Acts (including Section 5 of the Act). Provides that all State board and commission members (including the Board) may only remain in office up to 30 days after their term is up unless reappointed by the Governor. *The Governor amendatorily vetoed this bill to change 30 "calendar" days to 30 "Senate session" days. In the case of the Board (whose members' terms expire on June 30 of a given year), this change would effectively leave the Governor approximately 7 1/2 months after a Board Member's term had expired to either reappoint that Board Member or appoint a new Board Member to replace him. This is due to the fact that the General Assembly typically adjourns its spring session by Memorial Day, and that both the House and the Senate are typically in for only 6 days during the fall veto session before returning in January; 30 Senate session days after June 30 would not come until some time in late January or early February of the following year depending upon the Senate's schedule.*

Illinois Pollution Contr

ILLINOIS POLLUTION CONTROL BOARD
CONTESTED CASES FILED BY FISCAL YEAR

Type Of Filing	FY71-90	FY91	FY92	FY93	FY94	FY95	FY96
Variances							
Water	1,544	20	31	13	19	30	19
Air	1,222	11	10	11	80	135	11
Land	198	60	43	29	26	21	12
Public Water Supply	257	23	9	6	8	11	15
Noise	26	0	0	0	0	0	0
Special Waste Hauling	21	0	0	0	0	0	0
TOTAL	3,268	114	93	59	133	197	57
Enforcement							
Water	501	5	1	4	5	8	17
Air	568	21	20	30	45	29	40
Land	401	0	14	15	10	16	14
Public Water Supply	114	1	1	0	0	0	0
Noise	77	11	11	7	5	4	9
Special Waste Hauling	8	0	0	0	0	2	0
Other*	0	0	0	4	18	13	17
TOTAL	1,669	38	47	60	83	72	97
Permit Appeals	743	59	44	43	52	55	42
Landfill Siting Reviews	74	10	5	16	10	12	8
Administrative Citations	629	80	80	61	83	115	61
UST	2	15	62	64	48	76	69
Adjusted Standards**	7	1	14	11	19	17	12
Other	203	0	0	3	2	0	2
GRAND TOTAL	6,595	317	345	317	430	544	348

*Includes Underground Storage Tank Enforcements and Emergency Planning & Community Right-to Know Act Enforcements, and mega-hog farm case

**By statute, Adjusted Standards modify rules and are considered adjudicatory proceedings.

ol Board Case Statistics

ILLINOIS POLLUTION CONTROL BOARD
RULEMAKINGS FILED BY FISCAL YEAR

Type of Filing	FY71-90	FY91	FY92	FY93	FY94	FY95	FY96*
Water	129	4	4	6	4	5	1
Air	242	7	16	7	12	13	7
Land	71	15	11	11	17	21	6
Public Water Supply	10	0	2	5	2	3	2
Noise	26	0	1	0	0	0	0
Other (Procedural Rules, etc.)*	52	2	1	0	0	1	2
TOTAL	530	28	35	29	35	43	18

*Beginning in FY96, many separate rulemaking activities were consolidated into fewer proceedings.

Board Mem

Chairman Claire Manning was first appointed to the Board and designated Chairman by Governor Jim Edgar in May 1993. She was reappointed in May 1995. Chairman Manning earned a JD from Loyola University School of Law in 1979, and a BA from Bradley University. She was an original Member of the Illinois State Labor Relations Board and was instrumental in designing that Board and the public sector labor relations system in Illinois. She is a frequent speaker on Board related matters before various associations and environmental groups. Prior to her appointment to the Board, Chairman Manning was a visiting Professor at the University of Illinois' Institute of Labor and Industrial Relations; President-Elect of the National Association of Labor Relations Agencies; and Chief Labor Relations Counsel for the State of Illinois.

Board Member Emmett Dunham formerly served as Environmental Manager for Enterprise Companies and Valspar Corporation. Prior to that, he was Regulatory Compliance Engineer with Acme/Borden and a Pollution Control Officer, biologist and microbiologist with the Metropolitan Water Reclamation District of Chicago. Mr. Dunham holds a JD from Kent Law School and an MS and BA in biology. He has taken post-graduate courses in environmental and chemical engineering from the Illinois Institute of Technology, and is a registered professional engineer in Illinois. The Board and staff would like to thank Mr. Dunham for his contributions to the Board as his term effectively expired in October of 1996.

Board Member Ronald C. Flemal earned a BS from Northwestern University, and a Ph.D. in Geology from Princeton University. From 1967 to 1985 he served as a Professor of Geology at Northern Illinois University, during which time he authored over eighty articles dealing principally with environmental and natural science issues. Dr. Flemal also serves as a member of the Illinois State Bar Association Environmental Law Council. Dr. Flemal was appointed by Governor James R. Thompson in May 1985 and was most recently reappointed by Governor Jim Edgar in 1996.

Board Member G. Tanner Girard was first appointed in February 1992 and reappointed in June 1994 by Governor Jim Edgar. Dr. Girard has a Ph.D. in science education from Florida State University. He holds an MS in biological science from the University of Central Florida and a BS in biology from Principia College. He was formerly Associate Professor of Biology and Environmental Sciences at Principia College and Visiting Professor at Universidad del Valle de Guatemala. Other gubernatorial appointments have included services as Chairperson and Commissioner of the Illinois Nature Preserves Commission and membership on the Governor's Science Advisory Committee. He also was President of the Illinois Audubon Society and Vice-President of the Illinois Environmental Council.

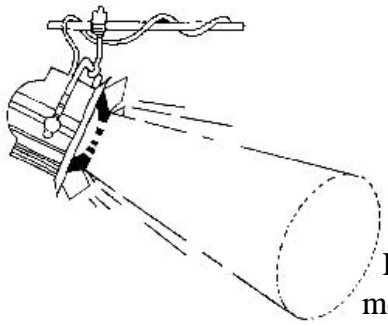
ber Profiles

Board Member Marili McFawn brings expertise as a former law partner at Schiff, Hardin and Waite. She also served as Attorney Assistant to former Illinois Pollution Control Board Chairman Jacob Dumelle, former Vice-Chairman Irvin Goodman, and current Board Member J. Theodore Meyer, and as an Enforcement Staff Attorney for the Air and Public Water Divisions at the Illinois Environmental Protection Agency. Ms. McFawn earned a JD from Loyola University in 1979 and a BA in English from Xavier University in 1975. She was first appointed to the Board in November 1993 and reappointed in May 1995 by Governor Jim Edgar.

Board Member J. Theodore Meyer's long history of distinguished service to the Board began with his first appointment by Governor James R. Thompson in June 1983. He was last reappointed in June 1994 by Governor Jim Edgar. Mr. Meyer was a State Representative, 28th District, in the Illinois General Assembly from 1966-1972 and 1974-1983. Among his many honors, he held the Chairmanship of the House Energy and Environment Committee. Mr. Meyer has a JD from DePaul University and a BS in biology and chemistry from John Carroll University. He is currently listed in the 1996 editions of Who's Who in the World, Who's Who in America, Who's Who in the Midwest, Who's Who in Finance and Industry, Who's Who in American Law and Who's Who in American Politics.

Board Member Joseph C. Yi is a registered Professional Engineer and a licensed Asbestos Abatement Management Planner. He has a B.S. in Civil Engineering from the Illinois Institute of Technology. Mr. Yi served as the Assistant to the Director of Finance and Administration and also as the Bureau Chief of the Small Business Enterprises (Federal DBE/WBE Program) of the Illinois Department of Transportation. Earlier, he was a partner of the engineering consultant firm Nakawatase, Rutowski, Wyns, & Yi, Inc; Director of Transportation of the midwestern offices of Metcalf & Eddy, Inc.; and the City Engineer of the City of Evanston. He is extensively involved in the social services activities of the Korean American and the Asian American communities. Governor Edgar appointed Mr. Yi to the Board in September 1994 and reappointed him in July 1995.

Board Member Kathleen M. Hennessey, the newest member of the Illinois Pollution Control Board, was appointed to the Board effective October 16, 1996. Ms. Hennessey has a JD from the University of Chicago Law School in 1985, and an AB in Economics with honors from the University of Michigan in 1981. Ms. Hennessey has broad experience in environmental law and litigation through her prior work as a Senior Supervising Attorney for the City of Chicago Law Department, a partner in the Environmental Practice Group of Mayer, Brown, & Platt and an attorney at Schiff, Hardin and Waite.



Public Service Spotlight

During fiscal year 1996, the Board took many steps to make it's process more accessible to the public and regulated community. New Administrative Rules were adopted and new Procedural Rules were proposed to clarify and simplify the Board's process. In conjunction with these efforts the Board has developed a citizen's information guide, has added to and improved the Board's World Wide Web Site, and improved the content and timeliness of the *Environmental Register*.

The Board's new citizen's information guides outline Board processes such as: permit appeals, regulatory relief mechanisms, pollution control facility siting appeals, rulemakings, and hearings. While the guides are not intended to replace any statute or rule, they do provide a method for the general public to quickly grasp the statutory authority and processes of the Board.

The Board's web site has undergone major development, and currently consists of the following categories: General Information, Rules and Regulations, Meeting Information, Publications, and Legislation.

General Information on the Board's web site includes the Board's mission statement, Board member profiles, a staff phone and email directory, a list of frequently asked questions, a list of attorneys who do pro bono work in environmental cases, and forms for filing environmental complaints with the Illinois Environmental Protection Agency (IEPA). The Board will soon have its citizen information guide on the web as well.

The Board is working with the IEPA to bring Title 35 of the Illinois Administrative Code to the web. Title 35 contains the core environmental rules and regulations of Illinois. Several sections of the Title are already available. Other regulations available online include: Board administrative rules, Board proposed procedural rules, and proposed rules currently pending before the Board.

The Board provides its meeting dates, meeting agenda, calendar of hearings, final decisions, new cases, opinions and orders, and other meeting information on the site. The final decisions are provided free of charge which is a substantial savings, compared to purchasing the documents in a hard copy format for 75 cents a page. The newsletter of the Board, the *Environmental Register*, is available in viewable and downloadable formats as well. Interested individuals may even fill out a form to receive the newsletter via email.

Besides getting information about the Board, you can also find out what is happening environmentally in the Illinois General Assembly. Session summaries and weekly updates are posted in the Legislation section of the site.

For more information visit the Board's web site at

http://www.state.il.us/pcb

The Board is always looking for way to add to and improve their site. If you have any suggestions please contact Kevin St. Angel at 217-524-8510, or email at kstangel@pcb084R1.state.il.us

Judicial Review of Board Decisions

Introduction

Pursuant to Title XI, Section 41 of the Act, both the quasi-legislative and the quasi-judicial functions of the Board are subject to review in the appellate courts of Illinois. Any person seeking review must be "qualified" and must file a petition for review within 35 days of the Board's final order or action. A qualified petitioner is any person denied a permit or variance, any person denied a hearing after filing a complaint, any party to a Board hearing, or any person who is adversely affected by a final Board order.

Administrative review of the Board's final order or action is limited in scope by the language and intent of Section 41(b). Judicial review is intended to ensure fairness for the parties before the Board but does not allow the courts to substitute their own judgment in place of that of the Board. The standard for review of the Board's decision is whether the decision is against the manifest weight of the evidence. The standard for review of the Board's quasi-legislative actions is whether the Board's decision is arbitrary or capricious. Board decisions in rulemaking proceedings and in imposing conditions in variances are quasi-legislative. All other Board decisions are quasi-adjudicatory in nature.

The appellate courts reviewed nine Board decisions in fiscal year 1996. The cases are organized by section of the Act and discussed below. In all but one case, the courts affirmed the Board.

Permit Appeals

The Board is authorized to require a permit for the construction, installation, and operation of pollution control facilities and equipment. Under Section 39 of the Act, it is the duty of the IEPA to issue those permits to applicants. Permits are issued to those applicants who prove that the permitted activity will not cause a violation of the Act or the Board regulations under the Act. The IEPA has the statutory authority to impose conditions on a permit to further ensure compliance with the Act. An applicant who has been denied a permit or who has been granted a permit subject to conditions may contest the IEPA decision at a Board hearing pursuant to Section 40 of the Act. The final decision of the Board is reviewable by the appellate court. No appellate court cases concerning permit appeals were issued in the 1996 fiscal year.

Site Location Suitability Appeals

The Act provides, in Sections 39(c) and 39.2, for local government participation in the siting of new regional pollution control facilities. Section 39(c) requires an applicant requesting a permit for the development or construction of a new regional pollution control facility to provide proof that the local government has approved the location of the proposed facility. Section 39.2 provides for proper notice, filing, public hearings, jurisdiction, time limits, specific criteria, and other information that the local governments must use to reach their decision. The decision of the local government may be contested before the Board under Section 40.1 of the Act. The Board reviews the decision to determine if the local government's procedures satisfy the principles of fundamental fairness and whether the decision was against the manifest weight of the evidence. The Board's final decision is then reviewable by the appellate court. The following three cases were appeals to the appellate courts of Board decisions on local siting.

Turlek v. Illinois Pollution Control Board, 274 Ill. App. 3d 244, 653 N.E.2d 1288, 210 Ill.Dec. 826 (First District 1995).

This case involved an appeal of a Board opinion and order affirming the Village of Summit's (Summit) grant of siting approval to West Suburban Recycling Center, Inc. (WSREC). The First District affirmed the Board's opinion and order issued in Turlek et. al. v. Village of Summit and WSREC, PCB 94-19, PCB 94-21 and PCB 94-22 consolidated (May 5, 1994).

On October 19, 1992, Summit, after public hearings, granted WSREC siting approval for a municipal waste-to-energy facility. On February 25, 1993, the Board reversed Summit's approval because of Summit's failure to make WSREC's siting application available to the public. In its February 25, 1993 opinion and order, the Board remanded the siting process to Summit allowing WSREC 35 days to reinstitute its application. On March 26, 1993, WSREC appealed the Board's order to the First District and filed a motion for stay with the Board. The Board denied the motion to stay on April 8, 1993. On June 14, 1993, the First District dismissed WSREC's appeal for lack of jurisdiction on the grounds that the Board order was not final.

On June 25, 1993, WSREC filed a new application for a substantially similar but larger facility with Summit. Public hearings were held and on December 6, 1993 Summit approved the application for siting approval. The opponents of the facility filed a petition for review with the Board in January of 1994 and on May 5, 1994 after public hearings, the Board affirmed Summit's decision

granting siting. After filing motions for reconsideration with the Board which were denied, the petitioners filed the instant appeal with the First District.

On appeal, the petitioners argued that the Board erred in finding that Summit had jurisdiction to hear WSREC's 1993 application for siting, that the incinerator was necessary to serve the intended area's waste disposal needs, that the proposed incinerator satisfied the IEPA's flood proofing criterion, and that the proper legal standard was applied in denying petitioners' motions for reconsideration.

In the appeal, the petitioners argued that Summit did not have jurisdiction to entertain WSREC's 1993 application for siting. The Act at 415 ILCS 5/39.2 prohibits an applicant from filing a request for siting approval which is substantially the same as a request which was disapproved pursuant to a finding against the applicant on one of the nine statutory criteria within the preceding two years. Based on this, the petitioners argued that, because WSREC filed its 1993 request while the substantially similar 1992 request was still pending, Summit did not have jurisdiction to hear the 1993 request for siting approval.

The court found that WSREC's 1992 application was approved and the section of the Act which was relied upon by the petitioners related only to applications which are disapproved based on a criterion. Additionally, the court stated that even if the provision did apply in this case, where a second request for siting approval was filed, the Board's remand of the original request reversed Summit's siting approval because of inadequate public notice, a ground which is not one of the nine substantive statutory criteria. The court also noted that there is doubt as to whether the applications were in fact substantially similar. Thus, the First District held that section 39.2 of the Act, which precludes consideration of a second application did not apply in this case.

Next the petitioners argued that, when read in conjunction with section 40.1 of the Act, section 39.2 does not provide a basis for a local government to have jurisdiction over two pending applications for siting from the same applicant. The court found that there was no statutory prohibition against pendancy of two concurrent applications.

The next argument by the petitioners was that the Board erred in finding that the facility was necessary to serve the intended area's waste disposal needs. The petitioners contended that 1) Summit failed to include two reports which were relied upon in the hearing record which prevented the Board from performing a meaningful review, 2) the reports and data relied upon by Summit were outdated and inaccurate, 3) Summit failed to consider the effect of alternative waste disposal means, and 4) Summit failed to consider the effect of the Retail Rate Law (220 ILCS 5/8-403.1).

The court found that the missing reports were largely duplicative of other reports before the Board and that they did not contain information suggesting the proposed incinerator was not necessary. The court stated, "it seems, then, that petitioners are protesting the fact the Board did not consider additional or cumulative evidence supporting a finding of necessity." The court held that the omission of the two reports did not suggest that the Board's decision was arbitrary and that the petitioner's argument was unpersuasive.

The court also rejected the argument that a 1991 Northeastern Illinois Planning Commission Report relied upon by Summit failed to give an accurate description of the area's present waste needs. The court found that the discrepancy of 30 days between the lifespan of the remaining Illinois landfills found between the 1991 and the 1993 versions of the report was not enough to "impugn" the Board's decision. Additionally, the court found that the record did not "allow for the conclusion that Summit or the Board relied upon improper, dated or inaccurate evidence."

The petitioners also argued that without the revenue guaranteed by the Retail Rate Law that the facility would not be profitable and there would be no need for it to exist. The court again rejected the petitioners' arguments, stating that the market analysis provided by the petitioners did not suggest that the Board's decision was contrary to the manifest weight of the evidence.

The petitioners then argued that a portion of the proposed facility was to be located within the 100-year flood plain and that WSREC failed to demonstrate that the site was flood-proofed. The Board found that Summit's determination that the facility was designed to be flood-proofed was not against the manifest weight of the evidence. The First District upheld the Board and stated that "section 39.2(a) (iv) is satisfied where the local authorities determine that a proposed facility is designed flood-proofed, and flood-proofing is a recognized precondition of ultimate site suitability."

Finally, the petitioners argued that the Board applied an incorrect standard when denying the petitioners' motion to reconsider. The court disagreed, finding that the Board's order made it clear that it had applied the correct standard.

Southwest Energy Corporation v. Illinois Pollution Control Board, Beardstown Area Citizens For A Better Environment, and the City of Havana, an Illinois Municipal Corporation, 275 Ill. App. 3d 84, 655 N.E.2d 304, 211 Ill.Dec. 401 (Fourth District 1995).

On July 9, 1993, Southwest Energy Corporation (Southwest) filed an application with the City of Havana (City) for local siting of a nonhazardous waste-to-energy incinerator. The City approved the siting and the Havana Area Citizens for a Better Environment appealed the approval to the Board. The Board reversed the City's decision, finding a lack of fundamental fairness in the hearing process. Southwest appealed the Board's decision and the Fourth District Appellate Court affirmed the Board's decision in Concerned Citizens for a Better Environment v. City of Havana and Southwest Energy Corporation, PCB 94-44 (May 19, 1994).

Under Section 40.1 of the Act, the Board is required to consider the fundamental fairness of the procedures used by the local governing body in reaching its decision on a siting application. In the instant case, after the siting application was filed, hearings were held on October 26 and 27 and November 2, 1993 before a hearing officer hired by Havana. After the hearing, the hearing officer submitted a report to the City recommending findings of fact and conclusions of law. The local siting ordinance passed by the City incorporated the hearing officer's recommendations.

In September 1993, the local chamber of commerce sponsored a luncheon meeting with the president of Energy Answers, the company which would build the incinerator. Approximately 75 people attended the meeting. One of the opponents testified at hearing that the police prevented her from attending the meeting. Five city councilmen and the mayor attended the meeting. The mayor did not request the police to be present and was not aware that anyone was denied entrance to the meeting.

After the application was filed and before hiring the hearing officer to run the hearings, the mayor and John Kirby, the president of Southwest, met with the hearing officer to determine her qualifications. Both the mayor and the developer asked the hearing officer questions at this meeting. Once the hearing officer was hired, she met with the developer on several occasions as evidenced by her billing records. One phone call to the developer involved the accuracy of a draft of the notice. The hearing officer had no contact with the developer during the siting hearings. The hearing officer's fee agreement was signed by the mayor and the developer and it required Southwest to forward payment of her bill directly to her. At one point, the hearing officer sent the developer a letter requesting him to pay her fees.

In October of 1993, the developer paid for a trip to tour SEMASS, an incinerator in Massachusetts that was operated by Energy Answers. Among those on the trip were five city council members, the mayor, the owners and publishers of the local newspaper, the president of the chamber of commerce and the developer. The developer paid for the airfare, motel accommodations and dinner on Friday and Saturday nights. The participants paid for their other meals.

The participants on the trip took a tour of the SEMASS facility on Saturday. While at the plant, the participants were allowed to ask questions and were shown operating permits and records of emission testing. No one was shown a complaint history of the plant. The trip participants spoke to local residents about the facility and no negative comments were made. In general, the city council members were favorably impressed by the SEMASS facility and felt it gave them an idea of what the Havana incinerator would look like. However, the members who testified at the Board hearing stated that their votes were not based upon what they saw during the tour but instead on what they heard at the siting hearing.

The Board found that the siting hearings were fundamentally unfair. The Board found that the extensive contact between the hearing officer and the developer, the fee agreement, the council's trip to SEMASS, and the luncheon meeting which the council attended but where the general public was not allowed all tainted the process.

Southwest argued in the appeal that the SEMASS trip was not fundamentally unfair. Southwest contended that the law allows such trips, the tour was only marginally relevant to the issue of site approval, and there was no showing that the trip influenced the siting procedure or biased the city council members.

The court held that the Board correctly found that the SEMASS trip was not fundamentally fair. The court found that the opponents were hindered in their ability to prepare their case because they were not exposed to the same information as were the trip participants. However, the court made clear that it would not consider all trips to tour an existing facility a fundamental fairness violation. The court held that fundamental fairness simply requires the local governing body to allow representatives from all parties to the proceeding to have an opportunity to join the trip. Additionally, the court stated that it would be proper for the applicant to pay for the tour since section 39.2(k) allows the local governing body to charge a reasonable fee to cover the reasonable and necessary costs incurred in the siting review process. The court noted that the appropriate way to do this would be for the local governing body to pay for the tour and be reimbursed by the applicant.

Southwest argued next that the hearing officer's fee agreement and the direct relationship and contact between the hearing officer and Southwest were not fundamentally unfair. The Fourth District Appellate Court disagreed, finding that the payment of the hearing officer's fees by Southwest was improper under the Act. Here again, the court suggested that the proper way to handle the cost would be the local government being reimbursed by the applicant for the cost of the hearing officer under section 39.2(k). The court also found that Kirby's involvement in selecting the hearing officer was fundamentally unfair. Additionally, the court found that it was likely that the hearing officer was confused as to who was her actual client and that this made her contacts with Kirby fundamentally unfair.

Finally, Southwest argued that it was not fundamentally unfair for Energy Answers to attend the luncheon meeting with the city council where the general public was not allowed. The court agreed, since at that time no opponents had filed an appearance. However, despite the fact that the court agreed with Southwest on this point, it found that the proceedings as a whole were fundamentally unfair.

Southwest Energy Corporation v. Illinois Pollution Control Board, Beardstown Area Citizens For A Better Environment, and the City of Beardstown, an Illinois Municipal Corporation, No. 4-95-0128 slip op. (Fourth District March 15, 1996) (unpublished rule 23 order).

On September 17, 1993, Southwest Energy Corporation (Southwest) filed an application with the City of Beardstown (City) for local siting of a nonhazardous waste-to-energy incinerator. The City approved the siting and the Beardstown Area Citizens for a Better Environment appealed the approval to the Board. The Board reversed the City's decision, finding a lack of fundamental fairness in the hearing process. Southwest appealed the Board's decision and the Fourth District Appellate Court affirmed the Board's decision issued in Beardstown Area Citizens for a Better Environment v. City of Beardstown and Southwest Energy Corporation, PCB 94-98 (January 11, 1995) (Southwest/Beardstown).

Under Section 40.1 of the Act, the Board is required to consider the fundamental fairness of the procedures used by the local governing body in reaching its decision on a siting application. In the instant case, after the siting application was filed, John Kirby, the president of Southwest, contacted the City's economic development administrator and offered to pay for ten people to visit an incinerator located in Massachusetts (SEMASS). The trip took place in October of 1993, after the siting application was filed. Six aldermen, the mayor and his wife, a newspaper reporter, and the economic development administrator attended. Southwest and/or its partners paid for all expenses including airline tickets, rental cars, meals, and lodging.

The participants of the trip took a tour of the SEMASS facility, met with local officials, and also with officials of Energy Answers (the corporation which owns the SEMASS facility). During their free time, some of the trip participants spoke to local residents about the facility and others went to Plymouth Rock. In general, the city council members were favorably impressed by the SEMASS facility. However, the members who testified at the Board hearing stated that their votes were not based upon what they saw during the tour.

The Board found that the hearing process was fundamentally unfair because the trip to SEMASS was improper. In its decision, the Board held that because the general public was excluded from the tour, the incinerator opponents were prejudiced, because they could not appropriately address all of the impressions formed by the council members who participated in the trip.

The appellate court affirmed the Board and reiterated the Board's finding that the case was controlled by Southwest Energy v. Pollution Control Board, 275 Ill. App. 3d 84 (1995) (Southwest/Havana). The facts in the Southwest/Havana case were similar to those in the instant case. However, in Southwest/Havana, councilmen favoring the incinerator went on the trip while those opposed to it did not participate, even though an effort was made to include them. As in the instant case, the trip was paid for by the applicant. The Board found in the Southwest/Havana case that the trip contributed to the fundamental unfairness of the hearing process. On appeal, the Fourth District affirmed the Board's findings in Southwest/Havana. In the instant case, the court found that the opponents were prejudiced by not being included in the trip and that there must be "a bona fide effort to include representatives of those opposed to the siting application" in such trips. Additionally, the court stated that, although an applicant may pay for the expenses of a trip like the one in this case, the applicant must not do so directly. Instead, the local governing body should pay for the tour and be reimbursed by the applicant pursuant to section 39.2(k) of the Act. Section 39.2(k) allows governing bodies to charge applicants a reasonable fee to cover the "reasonable and necessary costs incurred by such county or municipality in the siting review process." (415 ILCS 39.2(k) (1994).)

Underground Storage Tank Fund Reimbursement

On September 13, 1993, Governor Edgar signed into law P.A. 88-496, "Petroleum Leaking Underground Storage Tanks." P.A. 88-496, also known as H.B. 300, added new Sections 57 through 59 to the Act and repealed Sections 22.13, 22.18, 22.18b and 22.18c. The new law did not create new programs, but instead substantially amended the administration of the program and the method by which petroleum leaks are remediated in Illinois. One significant change was the division of program administration between the IEPA and the OSFM. Under the new law, the OSFM continues to be responsible (as it was in the past) for early action activities such as supervising tank pulls; it is also responsible for determining whether an owner or operator is eligible to seek reimbursement for corrective action from the Illinois Underground Storage Tank Fund (Fund) and for determining the applicable deductible. These decisions are then directly appealable to the Board. Additionally, the new law focuses on risk based cleanup and site assessment. The new law contains several new points at which an owner or operator can appeal various IEPA decisions to the Board while going through the remediation process. In this fiscal year, all of the appellate decisions involved eligibility and deductibility determinations by the OSFM.

Stroh Oil Company v. The Office of the State Fire Marshal and The Illinois Pollution Control Board, 216 Ill. Dec. 480, 665 N.E.2d 540 (Fourth District 1995)

On July 20, 1995, the Board affirmed the Office of the State Fire Marshal's (OSFM) final eligibility/deductibility determination on Stroh Oil Company's (Stroh) application. The determination found Stroh eligible to access the Underground Storage

Tank Fund (Fund) but imposed the $100,000 deductible against Stroh. In the appeal before the Fourth District Stroh argued that it had registered one of its underground storage tanks prior to July 28, 1989 and therefore, was subject only to the $15,000 deductible. Additionally, Stroh argued that the OSFM's failure to comply with the Forms Management Act (20 ILCS 435/1 et seq. (1994)) relieved Stroh from having to submit registration forms. Finally, Stroh argued that the Fund deductible scheme violates the special legislation clause of the Illinois Constitution and the equal protection clauses of the Illinois and United States Constitutions (Ill. Const. 1970, art. IV, sec. 13, art. I, sec. 2; U.S. Const. Amend. XIV. The Fourth District Appellate Court affirmed the Board.

The site in question in this case contained three LUSTs. Stroh operated as a petroleum retailer at the site from 1936 to 1990. In 1988, Stroh decided to replace one of the existing LUSTs at the site with a larger LUST; the OSFM approved the installation plan and issued a permit for the work. Additionally, an OSFM inspector supervised the installation. In 1989, during an inspection by the OSFM, the registration status of the LUSTs at the site was questioned. Stroh believed the tanks had previously been registered, however a check of the records indicated that the LUSTs were not registered. On or about October 28, 1989, Stroh submitted registration forms to the OSFM.

In May 1991, Stroh received permission to remove all LUSTs on the site and in September 1991, all the tanks were removed. At the time of the removal, Stroh realized that a petroleum release had occurred at some point in the past; Stroh notified the Emergency Services and Disaster Agency (ESDA) of the release. In April 1994, Stroh submitted an eligibility-deductibility application to the OSFM seeking reimbursement for its corrective action costs from the Fund.

The applicable law on April 19, 1994, provided that Fund eligibility and deductibility determinations were to be made by the OSFM. The Act (415 ILCS 5/1 et seq. (1994)) set a minimum deductible of $10,000 for all reimbursement cases, and if all LUSTs at the site were registered with the OSFM by July 28, 1989, the minimum amount was to be applied. If one but not all the LUSTs at the site were registered by July 28, 1989, the applicable deductible was to be $15,000. Finally, if no LUSTs at the site were registered, a deductible of $100,000 was applied. (See, 415 ILCS 5/57.9(b)(1), (b)(2), and (b)(3) (1994).)

Stroh, in its application for access to the Fund, asserted that the 1988 OSFM-supervised installation/replacement of the LUST constituted registration of the LUST and, therefore, the applicable deductible should be $15,000. The OSFM rejected Stroh's assertion and found that the $100,000 deductible was applicable since none of the tanks was registered by July 28, 1989. The Board affirmed the OSFM's ruling and the instant appeal followed.

Stroh's first argument before the Fourth District was that it had registered one of its LUSTs prior to July 28, 1989 and therefore, was subject only to the $15,000 deductible. However, the court rejected Stroh's argument that the OSFM's supervision of Stroh's 1988 tank installation constituted registration within the meaning of the Gasoline Storage Act (Gas Act). (430 ILCS 15/4 (1994).)

In ruling against Stroh, the court stated that the public act which first required registration of LUSTs required registration to be "on the form provided by the [Illinois Environmental Protection] Agency." (See P.A. 84-1072 Sec. 1, eff. July 1, 1986.) Additionally, Public Act 85-861, which transferred the responsibility of maintaining LUST records from the IEPA to the OSFM, required LUST owners to register "on forms provided by the OSFM." (See P.A. 85-861 eff. September 24, 1987.) The court also noted the testimony of Keith Immke, legal counsel for the OSFM, who testified that forms had always been required which asked for basic information about the LUST and which required certification that the information which was provided was true and accurate.

The court held that the inspection report filled out by the OSFM inspector during the 1988 installation of the LUST was "separate and distinct" from the registration form which was to be filled out and certified to be true and accurate by the LUST owner-operator. The Fourth District also agreed with the Board that, although much of the information on the inspection report was identical to the information required on a registration form, the OSFM should not be required to "cull" the information from the inspection report when the owner-operator is required by statute to provide it to the OSFM. The Fourth District also rejected Stroh's argument that the newest LUST (installed in 1988) was registered because Section 4(b)(6) of the Gas Act requires new tanks to be registered prior to installation. Instead, the court saw the failure to register the tank as "another example of Stroh's failure to comply with its statutory obligations."

Stroh's next argument centered on the contention that the OSFM failed to comply with the Forms Management Program Act (Forms Act) (20 ILCS 435/1 et seq. (1994)). Stroh contended that the OSFM's failure to comply with the Forms Act relieved Stroh of the obligation to register the LUSTs and thus made Stroh eligible for the $10,000 deductible. This issue was one of first impression before both the Board and the Fourth District. The Fourth District agreed with Stroh that the OSFM was in violation of the Forms Act in that the OSFM relied on a federal form for state registration which failed, among other things, to indicate the potential state penalties for failure to complete the form. However, the Fourth District went on to find that, although the Forms Act protects the public from penalties or fines associated with failure to respond to a form which does not comply with the Forms Act, the higher deductible imposed in the instant case did not constitute a penalty within the meaning of the Forms Act.

Stroh's final argument was an attack of the deductible scheme and the Fund. Stroh argued that the deductible scheme and the Fund violate the special legislation prohibi-

tion and the equal protection clause of the Illinois Constitution and the equal protection clause of the United States Constitution. The court held that the issues of violation of the special legislation prohibition and the equal protection clauses turned on one question: were the deductible levels rationally related to a legitimate state interest? In looking for an answer to that question, the court found that Stroh failed to meet its burden to show that the deductible scheme was irrational or arbitrary. In fact, the Fourth District Appellate Court stated, "the State has a legitimate interest in determining the population of LUSTs within its borders through the registration process, and establishment of a deductible scheme which encourages registration is certainly a rational approach to this end." In addition, the court rejected Stroh's argument that the July 28, 1989 date for imposition of higher deductibles was arbitrary since no "lead in" period was allowed. In doing this, the court stated that Stroh had been in statutory noncompliance for over two years prior to the introduction of the new scheme and that Stroh knew or should have known that it was subject to penalties for failing to register its LUSTs.

The City of Wheaton v. The Illinois Pollution Control Board and Office of the State Fire Marshal, No. 2-95-0038 slip op. (Second District December 8, 1995) (unpublished rule 23 order).

This case involves an appeal by the City of Wheaton (City) from a Board opinion and order affirming the OSFM determination of eligibility and deductibility pursuant to section 57.9 of the Act (415 ILCS 5/57.9). The Second District affirmed the Board's opinion and order issued in City of Wheaton (Old Police Station) v. Office of the State Fire Marshal, PCB 94-18 (December 1, 1994).

In 1960 the City had installed, owned, and operated two underground storage tanks at its police headquarters. Tank number 1 held gasoline and had a capacity of 2,000 gallons. Tank number 2 stored diesel fuel and had a capacity of 3,000 gallons. Tank number 1 was removed in the summer of 1982 by the City. In 1986 the City filed a form with the OSFM indicating that there was one LUST at the police headquarters and that it stored gasoline and had a capacity of 2,000 gallons. In March of 1991, the City filed an amended form with the OSFM. This form indicated that tank 1 had been removed and stated that tank 2 was on the site. The amended form indicated that tank 2 held 1,000 gallons and was used to store diesel fuel. In August of 1991 tank 2 was removed. During the removal process it was determined that there was a soil leak and the City hired a contractor to perform soil redemption. On November 12, 1993 the City submitted to the OSFM an application for eligibility and deductibility. The application sought reimbursement from the LUST Fund for corrective action taken at the site. At the same time, the City submitted a third form to the OSFM clearly showing that both tanks had been removed with the removal dates included. Additionally, the new form showed the capacity of tank 2 as 3,000 gallons.

On November 22, 1993 the OSFM issued an order stating that tank 1 was no longer registered or no longer registerable because it was removed prior to September 24, 1987. The order stated that an appeal had to be made within 10 days in writing to the OSFM or the right to appeal would be forfeited. On December 6, 1993 the OSFM issued a final decision as to the City's application of deductibility and eligibility. The OSFM determined that tank 1 was ineligible and that tank 2 was eligible but only for costs in excess of $100,000. This decision was appealed to the Board.

On December 1, 1994, the Board entered an order granting the OSFM's motion for summary judgment. The Board held that the administrative order issued by the OSFM on tank registration became final when the City did not appeal it. Thus, the Board found that it must accept the final unappealed decision of the OSFM that tank 1 was no longer registerable. Thus, the Board affirmed the OSFM's eligibility and deductibility determination which applied the $100,000 deductible. The Board's decision, after a timely filed motion for reconsideration which was denied, was appealed to the Second District.

In the appeal, the City argued that it should be subject to the $15,000 deductible for access to the UST Fund because tank 1 was registered prior to 1989. The City acknowledged that tank 2 was not registered. Under section 57.9(b) (3) of the Act, the $15,000 deductible for access to the LUST Fund applies when an owner or operator registered one or more, but not all, of the LUSTs at a site prior to July 28, 1989. Additionally, the City contended that the Board erred by not reviewing the OSFM's tank registration order. The City argued that the OSFM did not have the authority to revoke the 1986 registration of tank 1 nor the authority to have a ten-day deadline for any appeal of its tank registration orders. Finally, the City argued that since the OSFM acted without authority, that the tank registration order was void and, therefore, the Board could review the order at any time even though the City did not appeal it.

The court found that OK Trucking Co. v. Armstead, 274 Ill. App. 3d 376 (1995) was controlling in this case and held that tank 1 was not registarable as a LUST in 1986 because it was no longer in the ground. Explaining, the court stated that in order to qualify as a LUST, at least 10% of the tank must be beneath the surface of the ground. Based upon this, the court found that $100,000 deductible applied to the City.

The court did not reach the other issue of whether the OSFM had the authority to impose a ten-day deadline on the appeal of its administrative orders since it found that, under OK Trucking, the City could not have prevailed in an appeal. Additionally, the court did not reach the question of whether the Board had the authority to review the OSFM's tank registration determination.

Lindsay-Klein v. Illinois State Fire Marshall and Illinois Pollution Control Board, No. 3-994-0665 slip op. (Third District February 16, 1996) (unpublished rule 23 order).

This case consisted of an appeal by Lindsay-Klein of a Board opinion and order in Lindsay-Klein v. Office of the State Fire Marshal, PCB 93-255 (August 11, 1994), affirming the State Fire Marshal's (OSFM) determination that its underground storage tank was not properly registered and that therefore, Lindsay-Klein was ineligible for reimbursement from the LUST Fund. The Third District found the OSFM's interpretation of the Gasoline Storage Act (430 ILCS 15/4) to be erroneous and reversed and remanded this case.

Lindsay-Klein is a Chevrolet-Oldsmobile dealership which is owned by Mr. Charles Lindsay. Upon purchasing the dealership Mr. Lindsay discovered two LUSTs on the property. In 1986, the dealership submitted registration forms to the OSFM pursuant to section 4 of the Gasoline Storage Act in order to register the LUSTs on the property. In 1992, Lindsay-Klein applied for an OSFM permit to remove the tanks and on the application form stated that the tank at issue in this appeal was last used prior to 1973. The OSFM gave Lindsay-Klein a removal permit and the LUST was removed in April of 1992. During the removal, it was discovered that the LUST had leaked and contaminated the soil with a mixture of gasoline and water, some of which was still in the tank. Lindsay-Klein notified the Illinois Emergency Services Disaster Agency and filed an amended registration statement with the OSFM. The amended statement noted that the tank had been removed and that it contained gasoline.

In January 1993, the OSFM issued an administrative order finding that the LUST was not registerable since it had not been used since January 1, 1974. The order stated that it was appealable for ten days. Lindsay-Klein disregarded the order because the tank had been removed and discarded.

In September 1993, Lindsay-Klein applied for access to the LUST Fund. The OSFM denied access to the LUST Fund because the LUST in question was not properly registered. Lindsay-Klein appealed the OSFM decision to the Board. At the Board level, the parties stipulated that the tank was registered from 1986-1992. Lindsay-Klein argued that the LUST was properly registered at the time of removal and, therefore, it should have access to the LUST Fund. The Board found that the administrative order from the OSFM stating the tank could no longer be registered was a final determination that the LUST was not properly registered. The Board noted that the order was received by Lindsay-Klein before it applied for access to the LUST Fund.

On appeal, Lindsay-Klein argued that the OSFM and the Board erred in finding that the LUST was not properly registered. In reply, the OSFM argued that the Gasoline Storage Act prohibits the registration of any tank that was not in use between January 1, 1974 and September 24, 1987. Thus, since Lindsay-Klein's tank was not in use during those dates, the OSFM reasoned the tank could not be registered and Lindsay-Klein was not eligible for access to the LUST Fund. Additionally, the OSFM contended that it revoked the registration in its administrative order, which was final and conclusive on the issue of registration.

The court rejected the OSFM's arguments, holding that any LUST which contained petroleum between January 1, 1974 and September 24, 1987 is registerable regardless of whether or not it was in use after January 1, 1974. The court based this holding on its decision in First of America Trust Co. v. Armstead, 269 Ill. App. 3d 432 (1995). Additionally, the court rejected the OSFM's contention that its administrative order was conclusive on the issue of registration of the LUST. The court felt that because Lindsay-Klein did not litigate the OSFM's registration determination before a trier of fact, the court was not bound by the OSFM's determination that the LUST was not properly registered.

Lindsay-Klein v. Illinois State Fire Marshall and Illinois Pollution Control Board, No. 3-994-0665 (Third District July 3, 1996) (unpublished rule 23 order).

On June 5, 1996, the Illinois Supreme Court vacated the Third District's judgment in the original Lindsay-Klein appeal (see above) and directed the Third District to reconsider its judgment in light of in First of America Trust Co. v. Armstead, 171 Ill. 2d 282 664 N.E. 2d 282 (1996), reversing 269 Ill. App. 3d 432, 646 N.E. 2d 302 (Third Dist 1995). The Third District Appellate Court, in its review of the case, reaffirmed its prior judgment and again reversed and remanded the case. A petition for leave to appeal this second decision has been filed by the OSFM and the Board.

The court, in this new opinion, focused on whether the September 15, 1992 amendments to the Gasoline Storage Act (430 ILCS 15/4) applied to this case. Specifically, the court focused on the applicability of section 4(b)(1)(A) which provides that "(n)o underground storage tank taken out of operation before January 2, 1974, may be registered under this Act."

The Third District Appellate Court noted that in First America Trust, the Illinois Supreme Court held that appellate courts must apply the tank registration statute which was in effect at the time of the appeal unless doing so interfered with a vested right. The court went on to explain that the Illinois Supreme Court found that tank registration is an ongoing process and that owners and operators do not have a vested right to maintain registration under prior statutes. However, the Illinois Supreme Court also stated that owners and operators who have established a vested right to reimbursement from the Fund cannot be denied reimbursement by a statutory amendment. (See also Chemrex, Inc. v. Pollution Control Board, 257 Ill. App. 3d 274 (1994).)

In the case at hand, the court found that Lindsay-Klein had a vested right to reimbursement prior to September 15, 1994, the date of the amendment to the tank registration statute, because it

notified the Illinois Emergency Services Disaster Agency and commenced corrective action on April 23, 1992 prior to the amendment.

Again, in this opinion, the court rejected the OSFM's interpretation that the tank registration statute prior to September 15, 1992 prohibited Lindsay-Klein from registering its tank. Additionally, the court reiterated its finding that the OSFM's registration determination was not binding upon the appellate court because it was not litigated in a full and fair way before a trier of fact.

Enforcement

The Act provides for standard enforcement actions in Section 30 and for the more limited Administrative Citation (AC) in Section 31.1. The standard enforcement action is initiated by the filing of a formal complaint with the Board either by a citizen or by the Attorney General on behalf of the People of the State of Illinois. A public hearing is held where the burden is on the complainant to prove that "respondent has caused or threatened to cause air or water pollution or that the respondent has violated or threatens to violate an provision of the Act or any rule or regulation the Board or permit or term or condition thereof." The Board is authorized by Section 33 and 42 to direct a party to cease and desist from violation, to revoke a permit, to impose civil penalties, and to require posting of bonds or other security to assure correction of violations. During fiscal year 1996 two decisions were issued by appellate courts concerning enforcement actions. The first involved a complaint filed by citizens and the second involved a complaint filed by the Attorney General's Office.

Discovery South Group, Ltd., v. Illinois Pollution Control Board, 275 Ill.App. 3d 547, 656 N.E.2d 51, 211 Ill.Dec. 859 (First Dist. 1995).

This case involves an appeal by Discovery South Group, Ltd., Music Center Associated Limited Partnership, and Tinley Park JAM Corp. (collectively the Theater) of a ruling by the Board that the World Music Theater had violated section 24 of the Act (415 ILCS 5/24) and sections 900.101 and 90.102 of the Illinois Administrative Code (Code) (35 Ill. Adm. Code 900.101 and 900.102.). The First District affirmed the Board's opinion and order issued in Village of Matteson v. Discovery South Group, Ltd., Music Center Associates Limited Partnership, and Tinley Park Jam Corp., PCB 90-146, (February 25, 1993).

In June 1990, the World Music Theater opened for business in Tinley Park, Illinois. The World Music Theater is an outdoor amphitheater used for rock concerts and other events. On August 2, 1990 the Village of Matteson (Village) filed a complaint against the Theater with the Board alleging violations of the Act. The proceedings in the case encompassed three years and several hearings were held. In April of 1991 the Board issued an interim order in the case and on February 25, 1993 the Board issued its final opinion and order.

The Board found that the Theater had violated section 24 of the Act and sections 900.101 and 900.102 of the Code. The Board, in its order, required the Theater to conduct sound monitoring during all theater events for three years from the date of the order. The Board also mandated that there be a minimum of three monitoring stations and that monitoring equipment and procedures prescribed by the Code be used. The order also established specific sound level restrictions for the Theater. Finally, the Board ordered $13,000 in civil penalties for violations which occurred in 1991 and 1992.

The Theater appealed the Board's opinion and order. In the appeal the Theater argues that the Board's finding that the Theater violated section 24 of the Act and sections 900.101 and 900.102 of the Code was against the manifest weight of the evidence. It further contended that the remedy ordered by the Board provided for stricter standards than the applicable regulations, was arbitrary and unduly restrictive, and violated the Theater's State constitutional rights to freedom of speech and equal protection.

In reviewing the Board's determination that the Theater had violated section 24 of the Act and sections 900.101 and 900.102 of the Code, the court found that "sufficient competent evidence was presented and relied upon by the Board in reaching its determination." Additionally, the court found that the testimony presented by Matteson from residents who testified concerning the affect the Theater noise had on their lives "provided a sufficient basis for the Board's finding that the Theater was emitting noise pollution as that term is defined in the Code." The court also found that the Board had sufficient evidence before it to justify its ruling on the section 33(c) factors.

As for the remedy, the court upheld the Board's order. The court found that the Board was acting in its quasi-legislative capacity and that "Illinois decisions reflect the generally acknowledged authority of the Board to take whatever steps are necessary to rectify the problem of pollution and to correct instances of pollution on a case-by-case basis." Finally, the Court held that the Board's action was neither arbitrary or capricious since it was based upon expert evidence provided by both parties.

Freedom Oil v. The Illinois Pollution Control Board, 275 Ill. App. 3d 508, 655 N.E.2d 1184, 211 Ill. Dec 801(Fourth District 1995)

This case was an appeal of the Board's penalty assessment in an enforcement case involving a failure to investigate and report leaks from underground storage tanks at two separate sites. The Fourth District Appellate Court affirmed the Board's decision issued in People v. Freedom Oil Co., PCB 93-59 (May 5, 1994 and June 6, 1994).

On May 5, 1994, the Board, after hearing on the matter, issued an opinion and order finding against Freedom Oil (Freedom). On June 6, 1994, the Board issued a supplemental opinion which changed the penalty amount against Freedom from $15,000 to

$30,000 to correct a typographical error. Freedom appealed from the second decision. Freedom challenged the result in the supplemental opinion, arguing the validity of the June 6, 1994 meeting, the Board's characterization of the change in penalty as a clerical error, and the Board's authority to hold a meeting by telephone conference call. The Board challenged the court's jurisdiction over the petition for review. The court found it had proper jurisdiction to hear the case.

In the complaint, the People requested a $30,000 penalty for each release and $10,000 a day for each day the violation continued. In their post hearing brief, the People sought a $30,000 civil penalty for the two releases from the underground storage tanks. In its May 5, 1994 order, the Board found that Freedom had violated the regulations at both of its sites and assessed a $15,000 penalty. The Board concluded in its order that due to Freedom's failure to comply, the fact that the extent of contamination remains unknown because of Freedom's failure, and Freedom's recalcitrance over a three-year period, the Board must assess a penalty sufficient to deter future violations by Freedom. On May 23, 1994, Freedom issued a check in the amount of the $15,000 penalty. On June 3, 1994 counsel for the Board left a message for Freedom's attorney to advise him that the Board had scheduled a special meeting to correct the Freedom opinion and order. On June 6, 1994 counsel for the Board talked to Freedom's attorney and verified the message. Notice of the special meeting was posted on June 3, 1994.

At the June 6, 1994 meeting the Board corrected what it referred to as a clerical error in accordance with its procedural rules, stating that at the May 5, 1994 meeting it had voted to assess a $30,000 penalty against Freedom, not a $15,000 penalty. Freedom filed a timely motion for reconsideration of this order which was denied by the Board and then filed this appeal with the court.

Freedom recognized that the Board may correct clerical errors, but argued that in this case the doubling of the penalty amount did not constitute a clerical error. The court found, however, that the Board's opinion supported the argument that the Board had originally voted to assess a $30,000 penalty originally and not a $15,000 penalty. The Board's finding that Freedom showed a "blatant disregard" for the regulations and the statement that there were "no facts or circumstances which would mitigate the penalty requested" convinced the court that the Board originally intended to assess the full penalty amount requested by the People.

Freedom next contended that the Board did not have the statutory authority to hold a meeting by telephone conference. Freedom argued that neither the Act nor the Board's rules allow for telephonic meetings. The court found that the Board's telephonic meeting fell within the Board's statutory authority to conduct meetings. The court stated that a lack of specific statutory authority did not indicate an intent by the legislature to prohibit telephonic meetings. Additionally, the court held "in performing its specific duties, an administrative agency has wide latitude to accomplish its responsibilities."

Freedom also argued that the telephonic meeting violated the Open Meetings Act (5 ILCS 120/1 et. seq.). Freedom contends that in order for there to be a quorum, the correct people must be physically present in the same room. The court held however that "members of an administrative agency need not be in each other's physical presence to constitute a quorum." In support of this, the court cited an Illinois Attorney General Opinion and cases from other states. The court went on to hold that the Open Meetings Act does not prohibit telephone conferences as meetings.

Finally, Freedom argued that the Board waived its authority to hold telephonic meetings by not promulgating procedural rules to govern this process. The court disagreed holding that "statutory authority to promulgate rules does not mandate rules be adopted to cover every conceivable issue." The court suggested, however, that procedural rules might be advisable; advice which the Board has acted on.

ESG Watts, Inc., v. The Illinois Pollution Control Board, and the People of the State of Illinois, No. 4-95-0642 slip op. 282 Ill. App. 3d 43, 668 N.E.2d 1015, and 218 Ill. Dec.183 (Fourth District June 28, 1996) (unpublished rule 23 order) motion to publish granted August 12, 1996 (rule 23 order withdrawn and opinion refiled as an opinion *nunc pro tunc*).

This case was before the appellate court on an appeal by ESG Watts (Watts) of the $60,000 penalty imposed by the Board for Watts' failure to timely pay solid waste fees and failure to timely submit reports required to be filed by landfill operators by the Act (415 ILCS 5/1 *et. seq.*) and environmental regulations promulgated under the Act. In the appeal, Watts admitted to violating the Act but argued that the penalty was excessive because the violations caused no environmental harm. Additionally, Watts argued that the Board improperly considered past violations when assessing the penalty. The Fourth District disagreed with Watts and affirmed the Board opinion and order issued in People v. Watts, PCB 94-127 (May 4, 1995).

On April 20, 1994, the Attorney General's office filed a complaint before the Board alleging that Watts Trucking (which owns ESG Watts Inc.) and James Watts (the sole shareholder and president of Watts Trucking and ESG Watts Inc.) failed to timely file fees and reports required of landfill operators. On October 14, 1994, the Attorney General's office amended the complaint to include violations which occurred after the filing of the complaint.

The first count of the complaint alleged that quarterly reports from the Taylor Ridge Landfill (Taylor Ridge) for the fourth quarter of 1993 and the first and second quarters of 1994 were filed late and that the fees reported due had not been paid. Additionally, Count I alleged that the Sangamon Valley Landfill (Sangamon Valley) had filed its reports late and paid its fees late for each of these three quarters. Filing fees are required under Section 22.15(b) of the Act and Section 858.401(a) of the

Board's rules. (415 ILCS 5/22.15(b) and 35 Ill. Adm. Code 858.401(a).)

The second count alleged that both Taylor Ridge and Sangamon Valley filed their significant modification applications (SIGMODs) late. SIGMODs were required to be filed within four years of the Board's adoption of its 1990 landfill regulations or at an earlier time if so specified by the IEPA. If facilities did not wish to provide a SIGMOD, they were to close within two years of the effective date of the rule. (35 Ill. Adm. Code 814.104(a) and (c).)

The third count summarized past violations found in circuit court actions. Count IV alleged Sangamon Valley failed to file a biennial revision of its closure cost estimate in accordance with 35 Ill. Adm. Code 807.623.

The State, in its post-hearing brief, asked the Board to take official notice of its own records of 19 prior administrative citations against Watts. Additionally, the State requested that the Board revoke Watts' operating permits or impose civil penalties of $254,100. Watts admitted the allegations in the complaint but argued that permit revocations and the monetary penalties requested by the Attorney General were inappropriate.

After a hearing on the violations, the Board rendered its decision. The Board did not revoke the landfill's operating permits and did not "pierce the corporate veil" to hold Mr. Watts or Watts Trucking responsible for the violations. However, the Board did impose $60,000 in fines on ESG Watts, Inc.

In its May 4, 1995, opinion and order, the Board explained how it reached the $60,000 penalty amount. First, the Board imposed $30,000 for late payment of quarterly fees. The amount was reached by calculating the annual cost of borrowing the money to timely pay the fees at a rate of 10% per annum and with an additional charge of 10% per annum to remove the economic incentive for late payments and to deter future violations. The Board then imposed a flat rate of $2,500 for each late report. In reaching this amount, the Board took into account the economic benefit of not filing and the fact that Watts was currently in compliance. The total for failing to file reports was $15,000. The Board then fined Watts $5,000 for failure to file each SIGMOD. The Board characterized the failure to file the SIGMODs as a "substantial violation." The total for failure to file the SIGMODs was $10,000. The Board also fined Watts $5,000 for failure to timely file the biennial revision. The Board noted that the delay in filing benefited Watts economically, but also recognized that Watts was currently in compliance. Finally, because the violations were willful, knowing, and repeated, the Board assessed $4,980 in attorney's fees as allowed for by the Act at 415 ILCS 5/42(f).

The Fourth District Appellate Court upheld the Board's decision to impose penalties recognizing that "[t]he Board is vested with broad discretionary powers in the imposition of civil penalties, and its order will not be disturbed upon review unless it is clearly arbitrary, capricious, or unreasonable." Additionally, the court recognized that the Act does not allow the Board to impose penalties unless the record adequately demonstrates the rationale for the imposition of the penalty. However, the court did state that the "Act clearly authorizes the Board to assess civil penalties for violations regardless of whether those violations resulted in actual pollution." The court also recognized that in assessing penalties the Board must look at the factors listed in Section 33(c) of the Act. (415 ILCS 5/33(c).) Additionally, in discussing Section 42(h) of the Act, the court stated, ". . . it is now clear from the 42(h) factors that the deterrent effect of penalties on the violator and potential violators is a legitimate goal for the Board to consider when imposing penalties." (415 ILCS 5/42(h).)

With respect to the Section 42(h) factors, the Board found, and the court upheld, that Watts' lack of diligence, the economic benefits gained by untimely filings, the necessity of deterring future violations, and Watts' past history of violations were all factors which should aggravate the penalty imposed. The court acknowledged that the Board addressed each of the Section 42(h) factors and the court found the Board's discussion to be well reasoned and the court would therefore not overturn the Board's findings. (415 ILCS 5/42(h).) Additionally, the Fourth District held "the Board's decision that a stiff penalty was warranted to deter future violations was neither arbitrary nor capricious."

The court dismissed Watts' arguments relating to penalties. First, Watts argued that the penalty was excessive in light of other cases. The court found that the violations in this case occurred after the new penalties in Section 42(a) (415 ILCS 5/42(a)) were in effect as opposed to the case cited by Watts where the violations took place before the new penalty amounts were enacted. Additionally, the court states that the assessed penalty amount was a small fraction of the maximums allowed by the Act for the various violations, and noted that the Board did not impose an additional penalty for each day of noncompliance.

Next, Watts argued that it did not receive an economic benefit from noncompliance. Again, the court upheld the Board, stating "we deem it reasonable to assume petitioner received the time value of money by delaying the expenditures necessary to prepare such reports." Additionally, the court found that Watts received economic benefits from delaying payment of its quarterly fees.

Finally, Watts challenged the Board's consideration of prior violations in aggravation of the penalty. The court, in response to the challenge, stated "the Board is allowed wide discretion under section 42(h) of the Act to consider any factor in aggravation and mitigation of the penalty." (415 ILCS 5/42(h).)