Honorable Governor of Illinois
Honorable Members of the General Assembly:

On behalf of the Illinois Pollution Control Board (Board), I am pleased to share with you the Annual Report of the Board for fiscal year 1998. This report provides information on all aspects of the Board's activities and responsibilities from adopting rules and regulations to implement the provisions of the Environmental Protection Act (Act), to conducting hearings upon complaints charging violations of the Act. Specifically, this report summarizes the Board's many accomplishments during fiscal year 1998.

One of the major highlights of this period is the placement of Illinois' environmental rules and regulations on the Board's world wide web site (http://www.ipcb.state.il.us). The lawyers, engineers, corporate and municipal environmental managers, and citizens who are involved in the Illinois environmental regulatory process have greatly appreciated and have greatly benefited from this accomplishment, which the Board was able to achieve in cooperation with the Illinois Environmental Protection Agency. In addition to the publication of Illinois' environmental rules, the Board now regularly publishes on our web page the transcripts from all hearings held, the Board's meeting agendas, minutes, and Board decisions. The Board remains committed to developing a process that is open and accessible to all citizens of Illinois and believe that these achievements are great steps forward to reach this goal.

The improvements concerning accessibility to environmental information coincided well with the Board's major area of involvement this fiscal year: the continued promulgation of a myriad of important environmental rules. Those rules include: (1) regulations creating an Emissions Reduction Market System, (2) amendments designating mercury-containing lamps as a category of universal waste, and (3) amendments to the water quality standards for the Lake Michigan Basin to implement in Illinois the federal Great Lakes Initiative. In each of these matters, the Board's decision was based upon significant participation by State and federal agencies, the regulated community, and Illinois citizens.

Additionally during this timeframe, the Board has processed a number of contested cases involving permit appeals, enforcement actions, site location suitability appeals, administrative citations, adjusted standards, and variances. The Board continues to deliver timely, well-considered opinions which have generally withstood court challenge, thereby creating stability in environmental law in Illinois.

Again, we are pleased to share with you this Annual Report and look forward to the new challenges facing the Board in the upcoming fiscal year.

Sincerely,

Claire A. Manning
Chairman

Judicial Review of Board Decisions

Pursuant to Section 41 of the Environmental Protection Act (Act), both the quasi-legislative and quasi-judicial functions of the Board are subject to review in the Illinois appellate courts. Any person seeking review must be qualified and must file a petition for review within 35 days of the Board's final opinion or order. 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 a Board 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.

In fiscal year 1998, there were final orders entered by the appellate court in 14 cases involving appeals from Board opinions and orders. The Board's decision was affirmed, in total or in part, in eight of these cases. In two cases consolidated for decision, the Board's decision was reversed. In two other cases, the court found that it did not have jurisdiction to hear the cases and dismissed them. Short orders allowing petitioners to withdraw their appeals were entered in two cases. Finally, the Illinois Supreme Court denied petitions for leave to appeal in two other cases. The following, organized by section of the Act, includes summaries of written appellate decisions in Board cases for fiscal year 1998.

Variances

Under Section 36 of the Act, variances may be granted to petitioners who seek relief from the Act or regulations, provided petitioners can show that compliance with the regulation would impose an "arbitrary or unreasonable" hardship and that the request is consistent with federal law. Variances of not more than 90 days during a calendar year, called provisional variances, and longer-term variances for up to five years are available to a petitioner.

W.R. Meadows, Inc. v. Environmental Protection Agency, Joseph E. Svoboda, and Pollution Control Board, No. 4-96-0736 slip op. (4th Dist., January 6, 1998) (unpublished order under Illinois Supreme Court Rule 23).

The Illinois Appellate Court, Fourth District, affirmed a decision of the Illinois Environmental Protection Agency (IEPA) to deny W.R. Meadows' (Meadows) request for a provisional variance. Although the Board was joined as a party defendant in this action, there was no order of the Board under review by the court. Instead, the determination before the court for review was one made by the IEPA, denying a provisional variance under Sections 35, 36, and 37 of the Environmental Protection Act (Act). Because of the way the Act's provisional variance procedure is structured, the Board issues orders only to grant provisional variances upon IEPA recommendation that compliance would impose an arbitrary or unreasonable hardship. If the IEPA declines to recommend a grant of provisional variance, the matter does not come before the Board for review. This was a case of first impression concerning IEPA's denial of a provisional variance.

By way of background, Meadows produces asphalt saturated fiber expansion joints, which are used by the construction industry as expansion joints in poured concrete applications. During the manufacturing process, volatile organic materials (VOM's) are emitted. Consequently, in 1996, Meadows obtained a construction permit from the IEPA which prohibited it from emitting VOM emissions exceeding 20.5 tons per year in connection with its fiber expansion joint production. Meadows obtains the unsaturated fiber joints from a supplier and performs the asphalt saturation process at its facility.

. . .the appellate court found that Meadows failed to satisfy its burden. . .

After a fire at Celotex Corporation, Meadows' exclusive supplier of fiber expansion joints, Meadows applied for a provisional variance in March 1966. Meadows sought a 45-day provisional variance from the material usage restrictions and VOM emission limitations in its construction permit. Meadows alleged the variance was necessary in order to temporarily increase its own production of fiber expansion joints to meet customer needs. Meadows estimated that VOM emissions would significantly increase from 20.5 tons per year to 38.2 tons per month.

In affirming the IEPA's decision, the appellate court first addressed the IEPA's argument that the court lacked jurisdiction to consider the appeal. The IEPA argued that the Act did not authorize review of IEPA actions in the appellate court. Section 41(a) of the Act specifically provides for review of Board decisions by the appellate court, rather than the circuit court

as is normally the case for review of actions of State agencies under the Administrative Review Law. Neither Section 41(a) nor Sections 35 through 37 of the Act specifically set out a route for appeal of IEPA denials of provisional variances.

In order to avoid "an absurd or unjust result," the court found that it did have jurisdiction under Section 41(a) of the Act. The appellate court reasoned that to decide otherwise "would leave Meadows and others in a similar position with no avenue of appeal" and "would leave IEPA with unfettered and unreviewable discretion in these cases." Noting that it did not believe that the legislature had intended to deprive applicants who were denied variance an appeal route, the court "urged the legislature to correct this apparent oversight." The court concluded its discussion by observing that, while the case was moot since the 45-day period for which variance had been sought was well past, the case was being addressed was "one of the class of cases that would otherwise elude review" (which are decided by the courts in a well-recognized exception to the mootness doctrine).

Having found that it had jurisdiction, the court then proceeded to address the dispute over the appropriate standard of review. The court reasoned that the question of what standard of review to apply depended on what type of function the IEPA was performing. The appellate court drew a distinction between quasi-legislative and quasi-judicial functions, noting that the Board performs both. In this instance, the appellate court determined that the IEPA decision denying Meadows a provisional variance was most akin to the quasi-judicial functions performed by the Board. Accordingly, the court found that the appropriate standard of review for quasi-judicial functions performed by an administrative agency is whether the agency's decision was against the manifest weight of the evidence.

Applying the manifest weight of the evidence standard, the appellate court found that Meadows failed to satisfy its burden with regard to each of the following three points: 1) inclusion of a compliance plan; 2) consideration of alternatives for compliance; and 3) assessment of adverse environmental impacts.

First, the appellate court noted that the only evidence of a compliance plan in Meadows' application was the indication that Meadows would continue with its attempts to locate another supplier of the fiber expansion joints. Since this was something that Meadows was already doing prior to filing the variance application, the court rejected the compliance plan as very insufficient.

Second, the court determined that Meadows had failed to demonstrate that any alternate methods of compliance were even considered in applying for a provisional variance. Meadows argued that it did not have time to examine alternatives for compliance. Unconvinced, the court stated that Meadows failed to show any authority which would allow it to avoid compliance with this requirement due to lack of time to investigate other alternatives.

Third, the appellate court found Meadows' assessment of adverse environmental impacts to be lacking. Meadows proposed that during the variance period it would minimize air quality impacts by investigating the possibility of moving the facility to an ozone attainment area, and by consulting with the IEPA about a permit revision and about installing VOM controls to reduce emissions. The appellate court reasoned that merely investigating or consulting about options to reduce or minimize adverse environmental impacts is not the same as actually achieving a reduction or minimization of adverse impacts.

Based on these reasons, the court concluded that while the IEPA identified additional areas in which the Meadows' application was lacking, it was not necessary to explore each of those areas. A review of the three main areas identified was sufficient for the appellate court to conclude that the IEPA's decision denying Meadows' request for a provisional variance was not against the manifest weight of the evidence.

RULEMAKING

SECTION 5 OF THE ACT MANDATES the Board to "determine, define and implement the environmental control standards applicable in the State of Illinois." When the Board promulgates rules, it does so pursuant to the authority and procedures set forth in Sections 26 through 29 of Title VII of the Act. Additionally, Section 7.2 of the Act establishes special procedures for adoption of rules "identical-in-substance" to rules adopted by the United States Environmental Protection Agency in certain federal programs.

When the Board adopts a regulation, judicial review of that Board action is authorized under Sections 29 and 41 of the Act. Section 29 entitles any person who is adversely affected or threatened by a regulation to petition for review. The review is held in the appellate court pursuant to Section 41. Section 29 states that the purpose of judicial review is for the court to determine the validity or applicability of the regulation.

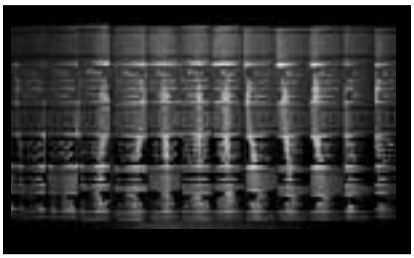
HORSEHEAD RESOURCE DEVELOPMENT COMPANY, INC. V. ILLINOIS POLLUTION CONTROL BOARD AND CONVERSION SYSTEMS, INC., No. 1-96-2571 slip op. (1st Dist., August 15, 1997) (unpublished order under Illinois Supreme Court Rule 23).

HORSEHEAD RESOURCE DEVELOPMENT COMPANY, INC. (Horsehead) appealed the Board's June 20, 1996 order adopting a federal hazardous waste delisting of electric arc furnace dust (EAFD) treated by Conversion Systems, Inc., (CSI)

through the identical-in-substance rulemaking procedure in Docket R95-20. This appeal was the first challenge made to the Board's use of the identical-in-substance rulemaking process as defined in Section 7.2 of the Environmental Protection Act (Act) and as mandated in other sections for Board use in maintaining regulatory parity with specified federal programs. See, *e.g.* (415 ILCS 5/22.4 (1996)), which requires the use of identical-in-substance rules adopted under the federal Resource Conservation and Recovery Act of 1976 (RCRA). The appellate court affirmed the Board's decision, finding that Horsehead failed to establish that the Board exceeded its statutory authority under the Act by promulgating the delisting through the identical-in-substance procedure under Section 7.2(a) of the Act.

Until 1991, EAFD was a listed hazardous waste and was subject to RCRA land disposal restrictions. These restrictions made disposal of the EAFD more costly than a non-hazardous waste. In 1991, the United States Environmental Protection Agency (USEPA) delisted EAFD treated by the high temperature metals recovery process being used by Horsehead. As a result of this delisting, Horsehead gained an economic advantage over others in the industry for whom the EAFD was still a listed hazardous waste.

In 1993, CSI obtained a USEPA delisting of its EAFD which was treated by a "Super Detox" process. CSI then requested that Illinois adopt the USEPA's delisting of the "Super Detox" treated EAFD. The Board issued a proposed opinion in February 1996, which adopted the federal delisting using the identical-in-substance process authorized by Sections 7.2(a) and 22.4 of the Act. Horsehead filed comments objecting to the adoption of the federal delisting. Nevertheless, on June 20, 1996, the Board entered a final opinion which adopted the federal delisting by use of the identical-in-substance process. The Board noted that the identical-in-substance process does not allow or require the Board to reconsider the merits of a USEPA delisting.



On appeal, Horsehead argued that the Board exceeded its statutory authority in utilizing the identical-in-substance procedure to adopt the federal delisting. Horsehead asserted that the Board should have instead followed the adjusted standard process, pursuant to Section 28.1 of the Act and Sections 720.120(a) and 720.122(m) and (n) of the Board's rules, in considering the delisting.

In affirming the Board's decision, the appellate court reasoned that the Board's interpretation of the Act, which the Board is charged with administering, is entitled to deference. Furthermore, when the Board exercises its rulemaking powers, it is acting in a quasi-legislative capacity and can only be overturned if it is found to act in an arbitrary and capricious manner.

Looking to the language of Sections 720.120(a) and 720.122(m) and (n) of the Act, the court found no support for Horsehead's contention that the adjusted standard procedures were the only procedures available to the Board for considering a hazardous waste delisting. In fact, in Section 720.120(a), the Board specifically reserved the option to use identical-in-substance rulemaking procedures to adopt recent federal delisting amendments and regulations.

Horsehead also argued that the Board erred in failing to consider comments submitted in objection to the proposed delisting. Since the court concluded that the Board correctly used the identical-in-substance rulemaking procedure, it did not address this argument. However, on the issue of the identical-in-substance rulemaking procedure, the court did restate the reasoning set forth in the Board's final opinion as follows, "[t]he theory behind the identical-in-substance procedure is that the USEPA has reviewed all the merits of the actions that it has undertaken, so substantive Board review of those actions is not necessary." For these reasons, the appellate court concluded that Horsehead failed to carry its burden of showing the Board's decision to be arbitrary and capricious. As a result, the Board's decision was affirmed.

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 Illinois Environmental Protection Agency (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.

County of Kane v. The Illinois Pollution Control Board et al. consolidated with Waste Management of Illinois Inc. v. The Illinois Pollution Control Board et al., Nos. 2-96-0652 and 2-96-0676 slip ops. (2nd Dist., September 4, 1997) (unpublished order under Illinois Supreme Court Rule 23).

This case was before the appellate court for the Second District on an appeal by Kane County (County) and Waste Management of Illinois Inc. (WMII) from the Board's decision in PCB 96-85 (February 1, 1996), which upheld the Agency's denial of WMII's permit application for the expan-

sion of the Settler's Hill landfill facility. In an earlier case, ***The City of Geneva v. Illinois Pollution Control Board, Illinois Environmental Protection Agency, County of Kane, and Waste Management of Illinois***, No. 2-96-0560, slip op. (Second District April 11, 1997) (unpublished Rule 23 order) the Second District affirmed the Board's denial of the City of Geneva's (Geneva) petition for intervention, upholding a prior Board hearing officer ruling.

This case involved the Settler's Hill Landfill which is located in part within unincorporated Kane County and in part within the corporate limits of Geneva. The Settler's Hill facility siting was approved in 1982 by both the County and Geneva. The landfill is owned by the County and WMII operates the facility. In 1986, WMII got siting approval from the County to expand the facility but did not seek or obtain approval from Geneva.

In 1993, WMII submitted a siting application to the County to expand the landfill. The area of expansion was outside of Geneva's corporate boundaries and WMII did not submit a siting application to Geneva. However, the road to the landfill, the entrance gate, and administrative buildings for the landfill were located in Geneva and even under the expansion plan would still be used by WMII.

After the County approved the siting application, WMII and the County submitted a permit application to the Illinois Environmental Protection Agency (IEPA). The IEPA denied the permit on the grounds that WMII and the County had failed to obtain siting approval from Geneva. WMII and the County then filed a petition for review with the Board. Geneva filed a motion to intervene in the case before the Board which was denied by the Board's hearing officer. On February 1, 1996, the Board upheld the IEPA's denial of the permit application. The Board's decision was the subject of the appeal.

In the appeal, the County and WMII argued that siting approval by Geneva was not required because the proposed expansion did not include any acreage located within Geneva. They contended that siting approval is required for a "new pollution control facility" and that since in this case the "new facility" was defined as the area of expansion beyond the existing facility, that only the body with siting jurisdiction over the expansion area must grant siting approval. The Board rejected this idea in its opinion, stating instead that the "new pollution control facility" included not only the new area which was to be expanded but also the area where continued use was planned. The Board found that the definition of "facility" encompassed the structures and administrative buildings located within Geneva's corporate limits.

The Second District disagreed with the Board, finding instead that the plain language of Section 3.32(b) of the Act limits new pollution control facilities for which siting approval must be obtained to the area beyond the boundary of the currently permitted facility. The court found that, by including the language "area beyond the boundary" in the statute, the legislature did not intend to include any of the existing facility in the definition of a "new pollution control facility."

Although the court conceded that, "the reasoning of the Board in making its findings in this case has a certain logical appeal," it concluded that, since the proposed expansion of the Settler's Hill Landfill included only land within the County, WMII was required to obtain siting approval only from the County. The decision of the Board was accordingly reversed.

John C. Justice d/b/a Microcosm v. The Pollution Control Board and the Illinois Environmental Protection Agency, No. 1-96-1491 slip op. (1st Dist., January 28, 1998) (unpublished order under Illinois Supreme Court Rule 23).

John C. Justice, d/b/a Microcosm (Justice), appealed a decision of the Illinois Environmental Protection Agency (IEPA) denying him an air operating permit to the Board. The Board affirmed the IEPA's denial. On Justice's appeal of the Board decision, the First District Appellate Court affirmed the denial in a Supreme Court Rule 23 order issued January 28, 1998.

In order to comply with a consent order he entered into with the Illinois Attorney General and the IEPA, Justice submitted, in September 1994, an air permit application to the IEPA. The application pertained to Justice's operation of his lamination and coating business. In October 1994, the IEPA issued Justice a Notice of Incompleteness Letter, that requested additional information. Additional information was thereafter provided by Justice. However, in February 1995, the IEPA denied Justice's air permit because he had not demonstrated that the applicable portions of the Environmental Protection Act (Act) and Board regulations would not be violated. In March 1995, Justice filed his appeal with the Board of the IEPA's denial of his permit application.

The Board affirmed the IEPA's denial, stating that, "[a]s a result of the lack of information submitted by Mr. Justice, the Agency was unable to determine whether or not the Microcosm facility complied with the Act and Board regulations." In this appeal, the appellate court agreed that the Board and the IEPA were correct.

Before addressing the merits of the case, the appellate court had to consider the arguments of the Board and the IEPA that the court lacked jurisdiction. This was the second time the jurisdictional issue was considered by the court. On a motion to dismiss the petition, the Board and the IEPA alleged that the court lacked jurisdiction due to Justice's failing to timely name the Board as a respondent in his initial petition for review with the court. The court

initially granted the dismissal. However, on motion to reconsider by Justice, the court reversed itself and granted Justice 21 days to properly name and serve the Board, which he did. In their arguments on the merits of the appeal, the IEPA and the Board argue that the reconsideration was erroneous and that the appeal should be dismissed.

The court's analysis centered on the Administrative Review Law, which governs the direct review of administrative orders by the appellate court. The Administrative Review Law requires that the "agency and all other parties of record" be named as respondents on appeal. Additionally, if the appellate court determines that a party of record to the administrative proceeding was not named as a "defendant", then the appellate court must allow "the plaintiff" an opportunity to serve the unnamed party, so long as the party was not named by the administrative agency as a party of record in its final order. The court found that since the Board is a "party of record" before the appellate court, and since the Board did not name itself as a party of record in the Board's final order, it was appropriate to allow Justice an additional 21 days in which to name and serve the Board.

The court's analysis centered on the Administrative Review Law. . .

Having found that it did have jurisdiction over the appeal, the appellate court analyzed the substantive issues raised by Justice in his appeal. In affirming the denial of the air operating permit, the appellate court pointed out that when a permit applicant appeals a permit denial to the Board, the applicant has the burden of proof before the Board. Additionally, the court recognized that the Board's decision cannot be reversed unless it is against the manifest weight of the evidence.

The court found that Justice failed to satisfy his burden of proof in a number of ways. First, he failed to show that the subject system was a permanent total enclosure, a fact which would entitle it to a presumption of 100% capture efficiency. Second, he failed to satisfy his burden regarding the use of the generator. The court reasoned that if the system was a permanent total enclosure, as Justice claimed, then the generator must be a pollution control device, for which Justice must present evidence regarding its destruction efficiency. Justice, however, denied that it was a control device and offered no evidence regarding destruction efficiency. Because of the seemingly contradictory arguments advanced by Justice, the court concluded that he had not satisfied his burden of proof regarding his claim that the generator be exempt from permit requirements.

The court also found Justice's other arguments, regarding the alleged overreaching of the IEPA and the IEPA's allegedly improper determination, equally unconvincing. Based on the foregoing, the appellate court concluded that Justice had failed to satisfy his burden of proof and that the Board decision affirming the denial of the air operating permit was not against the manifest weight of the evidence.

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 and filing, public hearings, jurisdiction and time limits, specific criteria, and other information that the local government must use to reach its 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.

Concerned Citizens of Williamson County, et al. v. Illinois Pollution Control Board, et al., No. 5-96 -0194 slip op. (5th District, July 10, 1997) (unpublished rule 23 order).

This case was heard by the appellate court for the Fifth District on an appeal by the Concerned Citizens of Williamson County *et al*. (Citizens) from the decision of the Board in PCB 96-60 (formerly docketed as PCB 94-262) (February 15, 1996) in which the Board had affirmed the approval by the Williamson County Board (County) of the siting application of Kibler Development Corporation (Kibler) for a regional pollution control facility. The court affirmed the Board's decision in its unpublished Supreme Court Rule 23 order.

In PCB 94-262, the first appeal before the Board involving these parties, the Board found that the proceedings before the County were fundamentally unfair because there had been an *ex parte* contact between the County and Mr. Bill Kibler. The *ex parte* occurred when Bill Kibler provided information to the County, but was not available for cross-examination by the public. Therefore, the Board reversed the County's decision granting siting and remanded the case to the County for further proceedings.

More specifically, the Board ordered the County to hold a new public hearing and comment period on the application. The hearing was to include a presentation of the *ex parte* statements and any rebuttal regarding the statements. After the Board decision, both parties filed a motion to reconsider with the Board. In response to the motions, which expressed confusion about how the proceedings should continue after the remand, the Board issued a clarification order. In the clarification order, the Board required notice of the new hearing pursuant to Section 39.2 of the Environmental Protection Act (Act) (415 ILCS 5/39.2) and a post hearing comment period. Additionally, the Board directed that the County's decision should be based upon the entire record and be rendered within 120 days beginning 35 days after the entry of the clarification order. The parties subsequently appealed the Board's order in PCB 94-252, but the appeals were dismissed as being premature.

On August 17, 1995, after the new hearing and public comment period, the County met to act on Kibler's pending application. However, the County adjourned without taking any action. On August 18, 1995, the 120-day decision period expired without the County taking any action. By statute, failure to act means the application is approved (415 ILCS 5/39.2(e)).

In PCB 96-60, the Citizens again appealed the County's grant of siting approval to the Board. This time, the Board affirmed the County's grant of siting approval. This decision was the basis for the Citizens' appeal.

On appeal, the Citizens first contended that the County erred by finding the proposed facility was compatible with the surrounding area in accordance with Section 39.2(a)(3) of the Act. In examining this criteria, the court found that, "given the timing of the special meeting related to Kibler's application, the Board could have easily assumed that the County's failure to act was an implicit finding of criteria satisfaction." However, the court went on to point out that even overlooking the "County's tacit approval," the record contained enough evidence to satisfy the criterion.

The Citizens next argued that the County failed to conduct a new public hearing pursuant to Section 39.2 of the Act. More specifically, the Citizens argue that Kibler should have had to start the application process anew, instead of the County's additional public hearing on the original application. The court disagreed finding that the Board order was clear that the County needed to open Bill Kibler's testimony to the public and that he should be available to the public for questions concerning his prior statements at the new hearing. The court also found that the record did not show that the Citizens were in any way prejudiced by the limited nature of the new hearing. Thus, the court found that the Board's decision that the hearing satisfied its prior order was not erroneous.

The Citizens additionally argued that the Board erred in affirming the County hearing officer's rulings limiting the Citizens' cross-examination of Bill Kibler. The Citizens' arguments related to three instances. In one of the instances at issue on appeal, the attorney for the Citizens withdrew his question before the hearing officer ruled on the objection. In the other two instances, the Board overruled the County hearing officer and accepted the offer of proof thus allowing the information into evidence. The appellate court found that there was no evidence that the Citizens were in any way prejudiced by the County hearing officer's cross-examination restrictions and that the restrictions did not result in a fundamentally unfair proceeding. The court also found that on this issue, the Board's affirmance of the County's decision was not against the manifest weight of the evidence.

Citizens also argued on appeal that Bill Kibler's remarks at the new hearing did not sufficiently address the information which was part of the *ex parte* discussion with the County and that, because of this, the new hearing was fundamentally unfair. The court again disagreed finding that, even though the testimony was vague and generalized, the Citizens were not substantially prejudiced.

Finally, the Citizens contended that the hearing notice of the new hearing was insufficient and that the Board's affirmance of the notice was against the manifest weight of the evidence. Specifically, the Citizens argued that the notice should have specifically stated that witnesses and parties could present re-creation testimony. The court disagreed, finding that as long as the notice was not confusing, "it need not be completely accurate." Additionally, the court stated that the Citizens did not establish that they were prejudiced by the notice's wording. The court noted that the Citizens chose not to call witnesses at the new hearing because they adopted the position that they were not obligated to call witnesses. They did not argue that they were unable to or unprepared to call witnesses. The court found the notice was legally sufficient and resulted in a fundamentally fair hearing. The court also found that the Board's finding that the notice was sufficient was not contrary to the manifest weight of the evidence.

Residents Against A Polluted Environment and The Edmund B. Thornton Foundation v. Illinois Pollution Control Board, Landcomp Corporation, and the County of LaSalle 293 Ill. App. 3d 219, 687 N.E. 2d 552 (3rd Dist. , November 20,1997).

The Illinois Appellate Court, Third District, upheld a decision by the Board affirming a LaSalle County (County) decision granting local siting approval for a new regional pollution control facility. In its decision, the Board held that the County's decision was not fundamentally unfair and that the Board had no statutory authority to consider evidence of preapplication contacts between the siting applicant and the county.

In October 1995, Landcomp Corporation (Landcomp) filed a siting application with the County. On April 25, 1996, after extensive public hearings, the county board granted siting approval. On appeal to the Board, the Board found the proceedings before the county board to have been fundamentally unfair and remanded the matter to the County for additional hearings. After additional hearings were held, the siting application was again approved in January 1997.
A group of concerned citizens, Residents Against a Polluted Environment and the Edmund B. Thornton Foundation, appealed the grant of local siting to the Board alleging, among other things, that the proceedings were fundamentally unfair because the citizens were precluded from introducing evidence of presiting application contacts between the County and Landcomp. The citizens argued that they should have been allowed to introduce evidence of Landcomp's involvement in the County's amendment of its Solid Waste Management Plan, in order to show bias on the part of the County.

Citizens United for a Responsible Environment v. Illinois Pollution Control Board, Browning Ferris Industries of Illinois, Inc. and Village of Davis Junction, No.2-96-1481 slip. op. (2nd Dist., August 25, 1997) (unpublished order under Supreme Court Rule 23).

This case was before the Second District on an appeal by Citizens United for a Responsible Environment (CURE) from the Board's decision in PCB 96-238 (September 19, 1996) which affirmed the Village of Davis Junction's (Village) decision to grant siting approval to Browning Ferris Industries of Illinois (BFI). The Board found that the Village's decision that the proposed landfill was designed, located, and proposed to be operated so as to protect the public health and welfare was not against the manifest weight of the evidence. Additionally, the Board found that the Village's decision that the proposed landfill was consistent with the county's Solid Waste Management Plan (Plan) was not against the manifest weight of the evidence. The Second District Appellate Court affirmed the Board's decision in an unpublished Supreme Court Rule 23 order.

On appeal, CURE argued that the proposed landfill was not designed, located, and proposed to be operated so as to protect the public health; that the proposed landfill violated section 1220(d) of the Federal Aviation Reauthorization Act of 1996 (FARA) (Pub. L. No. 104-264, 110 Stat. 3213 (1996)); and that the proposed landfill violated the siting criterion requirement that the landfill be consistent with the local solid waste management plan.
CURE first argued that the proximity of the proposed landfill to the Greater Rockford Airport created the potential for a bird strike hazard. This, CURE argued, meant that the proposed landfill threatened public safety and did not satisfy siting criterion two of the Environmental Protection Act (Act) 415 ILCS 5/39.2(a)(ii) (1994). BFI responded by contending that it did not need to include evidence of airport safety in its application and that the Village was not required to consider airport safety in assessing whether criterion two was satisfied.

The court agreed with BFI, finding that a local municipality when reviewing the record for siting does not need to consider compliance with all regulations. The court went on to state that it was more appropriate for the Illinois Environmental Protection Agency (IEPA) to evaluate the consistency of the proposed landfill with State and federal regulations during the permitting phase. Additionally, the court rejected BFI's argument that the landfill's increased waste volume would cause a greater risk of hazardous bird activity. In evaluating the witness testimony, the court found that there was evidence to support the Village's findings that criterion two was satisfied and "the existence of conflicting evidence is not a sufficient ground for reversal."

. . .the court upheld the Board's decision. . .

The Second District next addressed CURE's argument that the proposed landfill violated section 1220(d) of FARA. CURE argued for a remand in order to determine the applicability of the statute since it was enacted after the Board had affirmed the Village's siting decision. CURE also stated that it was not aware of the enactment of FARA when it filed its motion for reconsideration with the Board (which was denied by the Board on November 21, 1996). BFI contended that CURE had waived

this argument by failing to include it in the motion for reconsideration. BFI pointed out that the statute was enacted on October 9, 1996, and that the motion for reconsideration was filed on October 23, 1996. Alternatively, BFI argued that a remand was not appropriate since the Village was not required to consider applicability of FARA to determine if the proposed landfill met the siting criteria of the Act.

The court found that CURE had waived its argument by failing to raise it in the motion for reconsideration. However, the court on its own motion addressed the merits of CURE's arguments and rejected them. The court deferred to the Board's interpretation of local siting and found that the applicability of FARA was a decision for the IEPA to make during the permit stage of the siting process. Thus, the court denied CURE's request for a remand.

Finally, the court addressed CURE's argument that the Village's decision and the Board's affirmance that the proposed landfill was consistent with the Plan was against the manifest weight of the evidence. The court found that there was evidence to support the Board's affirmance of the Village's decision that the proposed landfill was consistent with the Plan. Therefore, the court upheld the Board's decision that the proposed facility was consistent with the Plan.

Underground Storage Tank Fund

On Septmeber 13, 1993, Governor Edgar signed into law Public Act 88-496, "Petroleum Leaking Underground Storage Tanks (LUST)." Public Act 88-496, also known as House Bill 300, added new Sections 57 through 59 to the Illinois Environmental Protection (Act) and repealed Sections 22.13, 2218, 2218(b), and 22.18c of the Act. The new law did not create new programs, but instead substantially amended the administration of the LUST program and the method by which petroleum leaks are remediated in Illinois. One significant change was the division of program administration between the Illinois Environmental Protection Agency (IEPA) and the Office of the State Fire Marshall (OSFM). Under the 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 the 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 law focuses on risk-based cleanup and site assessment. The law contains several points at which an owner or operator can appeal various IEPA decisions to the Board while going through the remediation process.

R.P. Lumber v. Office of the State Fire Marshall, 293 Ill. App. 3d 402, 688 N.E. 2d 379 (5th Dist. 1997)

On December 17, 1997, the Illinois Appellate Court, Fifth District, affirmed the Board's order in ***R. P. Lumber v. Office of the State Fire Marshal*** (July 7, 1995), PCB 94-184. In that opinion, the Board found that the deductible to be applied to R. P. Lumber in its application for reimbursement from the Underground Storage Tank Fund (Fund) was $100,000 not $15,000. R. P. Lumber appealed, contending that under the applicable statutory provisions a $15,000 deductible was appropriate.

The land involved in this appeal is located in Edwardsville, Madison County, Illinois and was owned solely by Illinois Lumber until September 1986. On April 14, 1986, Illinois Lumber registered an underground storage tank (UST) with the Office of the State Fire Marshal (OSFM). Later that year, in September 1986, R. P. Lumber purchased a parcel of property from Illinois Lumber. At that time R. P. Lumber did not know that there were two unregistered USTs on the parcel. In 1992, R. P. Lumber discovered the first unregistered UST, but was not required to register it because of the early date that it had been removed from service. On December 3, 1992, R. P. Lumber removed this UST and discovered a second unregistered UST. On December 16, 1992, R. P. Lumber registered the second UST with the OSFM. On February 18, 1993, R. P. Lumber removed the second UST and discovered a significant petroleum release requiring remediation.

On May 20, 1994, the OSFM deemed R. P. Lumber eligible to access the Fund for reimbursement and determined that the applicable deductible was $100,000. In December 1994, R. P. Lumber purchased the remaining parcel of Illinois Lumber property which contained the UST registered on April 14, 1986, by Illinois Lumber. Between 1988 and 1991, R. P. Lumber had purchased two other parcels of the Illinois Lumber property. R. P. Lumber appealed the OSFM's decision to the Board. The Board affirmed the OSFM's determination that the $100,000 deductible was applicable, and R. P. Lumber thereafter appealed the Board's decision to the appellate court.

Under Illinois law, a deductible amount is applied to application for Fund reimbursement. See 415 ILCS 5/57.9(b) (1994). If none of an owner's USTs were registered prior to the legislation's effective date of July 28, 1989, the applicable deductible is $100,000. See 415 ILCS 5/57.9(b)(1) (1994). If one or more, but not all, of an owner's USTs were registered prior to July 28, 1989, and the appropriate agency received notice of the release after that date, the applicable deductible is $15,000. 415 ILCS 5/57.9(b)(3) (1994).

Based on a review of the applicable law, the appellate court affirmed the Board's decision. The court found that since no registered USTs were located on any of the properties owned by R. P. Lumber when it reported the release and applied for access to the fund, the $15,000 deductible was not applicable. The court also rejected R. P. Lumber's argument that the $15,000 deductible applied because Illinois Lumber registered a UST prior to July 28, 1989. The court reasoned that R. P. Lumber did not own that portion of the Illinois Lumber property containing the UST registered on April 14, 1986, at the time R. P. Lumber sought access to the Fund. Moreover, the UST which R. P. Lumber relied upon, no longer existed when it reported the release to the OSFM because the UST registered by Illinois Lumber had already been removed from the ground.

Enforcement

The Illinois Environmental Protection Act (Act) provides for standard enforcement actions in Section 30 of the Act and for the more limited administrative citation 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 a provision of the Act or any rule or regulation the Board or permit or term or condition thereof." The Board is authorized by Sections 33 and 42 of the Act to direct a party to cease and desist from violation, to revoke a permit, to impose civil penalties, and to require posting of bonds or other security to assure correction of violations.

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and UAW Local 974; and Citizens for a Better Environment v. Illinois Pollution Control Board, Illinois Environmental Protection Agency, and Caterpillar, Inc., No. 3-96-0931 (3rd Dist. , September 10, 1997) (unpublished order under Illinois Supreme Court Rule 23, petition for rehearing denied, October 9, 1997).

On September 10, 1997, the Third District Appellate Court affirmed the Board's decision in the above-captioned case. In the Board's August 1, 1996, opinion and order, the Board found that Caterpillar, Inc. (Caterpillar) was in violation of several of the State's Resource Conservation and Recovery Act (RCRA) regulations as well as a groundwater violation pursuant to the Illinois Environmental Protection Act (Act). See International Union et al. v. Caterpillar (August 1, 1996), PCB 94-240. Concurrently, the Board found that Caterpillar had properly managed the excavated soil, which contained hazardous waste. The Board concluded that no civil penalty or other remedy was warranted because Caterpillar was fully in compliance with the RCRA requirements for approximately one year prior to the filing of this citizens' enforcement action. The Board further reasoned that a penalty was unwarranted because Caterpillar had committed to a RCRA closure plan and was remediating its groundwater contamination problem as agreed to with the Illinois Environmental Protection Agency (IEPA).

The Caterpillar site, which was the subject of this appeal, was located at Caterpillar's East Peoria, Illinois facility. During excavation of the site in November 1990, workers complained of odors, lightheadedness, nausea, and headaches. Caterpillar's environmental personnel thereafter performed testing at the excavation site which disclosed the existence of chemicals consistent with those present at a former dry-cleaning operation that had been discontinued by Caterpillar in 1976. Based on this finding, Caterpillar entered the IEPA's prenotice program for the cleanup of the contaminated soil. The excavated, contaminated soil was stored in two other buildings which were managed under a RCRA closure plan. Caterpillar had a RCRA Part A interim status permit for the facility, which expired in November 1992.

On appeal, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and UAW Local 974, and Citizens for a Better Environment (collectively UAW and CBE) contended that the Board erred when it decided that Caterpillar did not need to file a Part B permit application in order to fully comply with RCRA. UAW and CBE further argued that the Board improperly found that Caterpillar could amend its Part A permit application and that the Board improperly relied on Caterpillar's participation in the IEPA's pre-notice program in determining whether Caterpillar violated RCRA. UAW and CBE also asserted that the Board should have imposed penalties against Caterpillar and that the Board should have allowed the second motion to reconsider filed by UAW and CBE.

In the cross-appeal, Caterpillar argued that the contaminated soil excavated and managed by Caterpillar was not a hazardous waste, and that Caterpillar was not in violation of the groundwater provision found at Section 12(a) of the Act. 415 ILCS 5/12(a) (1996). Caterpillar also argued that the Board should have imposed sanctions against UAW and CBE for discovery violations.

The Third District Appellate Court affirmed the Board's decision in its entirety in an unpublished Supreme Court Rule 23 order. The court found that Caterpillar did not need to submit a Part B permit application for the contaminated soil stored in Building X, which was one of two buildings that housed the excavated soil removed from the contaminated area. Because UAW and CBE failed to cite any case law supporting the proposition that a Part B permit was required under the exact circumstances of this case, the court agreed that the Board's decision was reasonable and not contrary to the applicable regulations. The court also concurred with the Board's reasoning that after Caterpillar's Part A application of interim status terminated in 1992, and it entered into an IEPA-approved closure plan under RCRA, a Part B permit was not necessary. Accordingly, the court concluded that the Board reasonably found that Caterpillar could amend its Part A permit while continuing with its closure plan after the termination of interim status.

The court further agreed with the Board that Caterpillar appropriately participated in the pre-notice program under the auspices of the IEPA. Although UAW and CBE argued that the Board should have ordered a penalty against Caterpillar, the court disagreed, relying on the Board's broad discretionary powers in imposing civil penalties. In its unpublished opinion, the court also concluded that, while the Board considered the Section 33(c) factors (415 ILCS 5/33(c) (1996)) in making its decision to impose a penalty, the Board need not issue a distinct finding as to each enumerated factor of Section 33(c). The court also agreed with the Board that the Section 42(h) factors (415 ILCS 5/42(h) (1996)) need only be considered when a fine is actually imposed against a party. Finally, the court decided that the Board acted appropriately in denying UAW and CBE's second motion to reconsider since the Board's rules did not allow for multiple motions to reconsider.

In Caterpillar's cross-appeal, the court agreed with the Board that the evidence was sufficient to support a determination that the soil was contaminated with hazardous wastes. The court concurred with the Board in its reasoning which found that the IEPA had correctly applied the "contained-in" rule to the contaminated soil. With regard to the groundwater violation under Section 12(a) of the Act, the court agreed that the evidence showed chemicals in the groundwater. In conclusion, the court disagreed with Caterpillar's request for attorney fees as a sanction against UAW and CBE since the court had recently held that the Board lacked such authority in ESG Watts, Inc. v. Pollution Control Board, 286 Ill. App. 3d 325, 338-39, 676 N.E.2d 299, 308-09 (3rd Dist. 1997). Finding no reason to reverse or remand, the Third District Appellate Court affirmed the Board's order in its entirety.

The People of the State of Illinois, ex rel. Illinois Environmental Protection Agency v. Illinois Pollution Control Board and Unique Marble Products, Inc., No. 5-97-1054 slip op. (May 26, 1998) (unpublished order under Supreme Court Rule 23).

The People of the State of Illinois *ex rel*. Illinois Environmental Protection Agency (IEPA) appealed from a decision of the Board dismissing a complaint filed by the IEPA against Unique Marble Products, Inc. (Unique) for lack of jurisdiction. The Board dismissed the complaint on the basis that the IEPA had failed to provide notice to Unique, as required by Section 26b-6 of the Act, of the violations alleged in the complaint. Following denial of its motion for reconsideration, IEPA filed a petition for administrative review with the appellate court. The appellate court dismissed the appeal as untimely.

The IEPA's initial complaint (PCB 97-64) was dismissed by the Board on August 7, 1997. On September 16, 1997, the IEPA filed a motion for reconsideration. The proof of service on the motion for reconsideration was dated September 12, 1997. Unique filed a motion to strike the motion for reconsideration as untimely. Unique argued that the motion was not filed within 35 days as Section 101.246 of the Board's procedural rules require.

The Board denied Unique's motion to strike and on November 6, 1997, denied the IEPA's motion for reconsideration on the merits. In so doing, the Board considered the question of timeliness and interpreted Section 101.246, which provides that the 35-day period is to be computed from the date of the Board order, in light of recent amendments to Section 41 of the Act. The Board determined that the 35-day period for the filing of a motion to reconsider should be computed from the date of service of the Board's order on a party, rather than from the date of the Board order itself. The IEPA thereafter appealed the Board's ruling to the appellate court.

Unique moved to dismiss the appeal as untimely, stating that the IEPA's motion for reconsideration before the Board was untimely and therefore failed to toll the time in which review could be sought with the appellate court. The court agreed and dismissed the appeal for lack of jurisdiction.

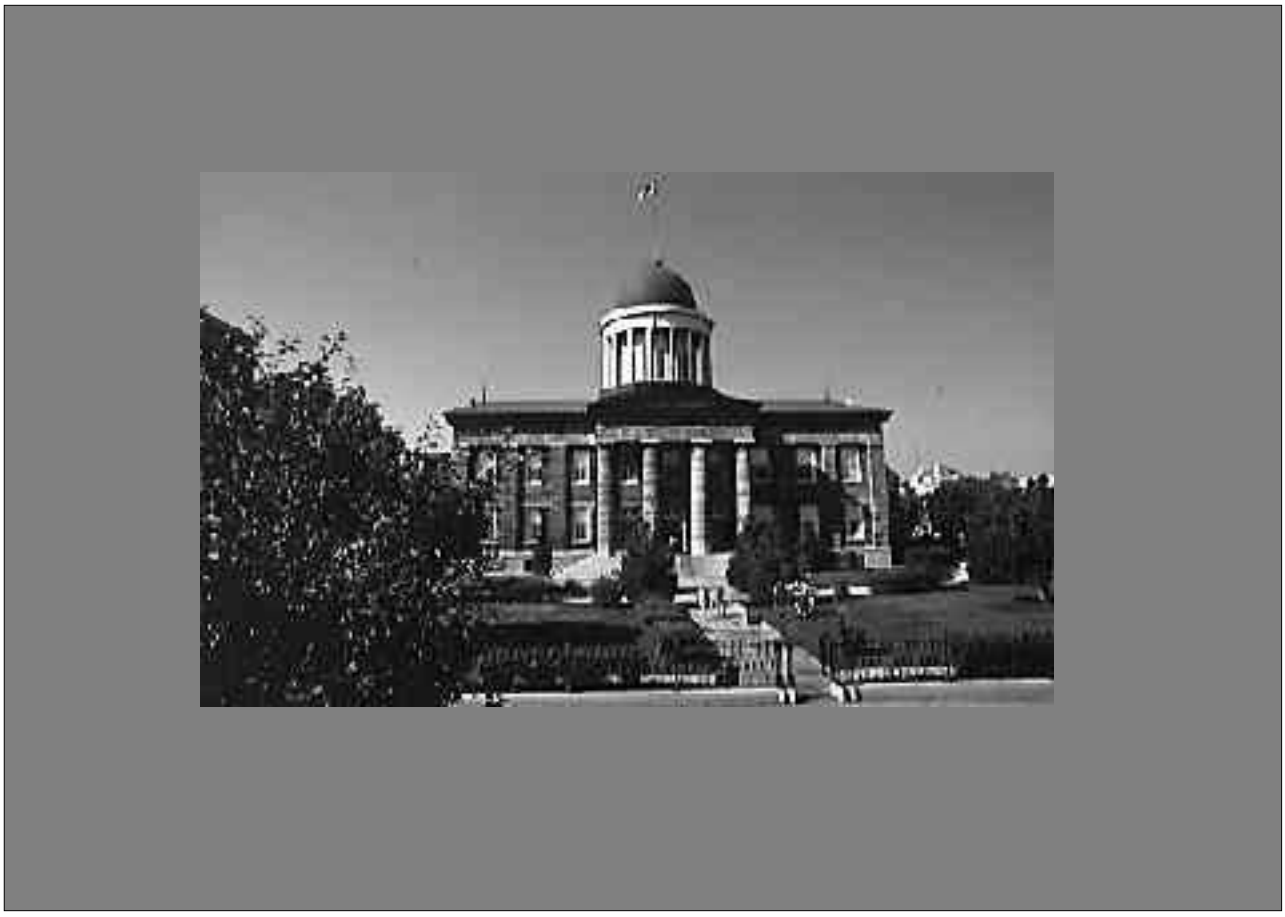
In determining that the motion for reconsideration with the Board was untimely, the court relied upon Sections 101.246 and 101.102 of the Board's procedural rules. See 35 Ill. Adm. Code 101.246 and 101.102. Section 101.246 states that, "any motion for reconsideration or modification of a final Board order shall be **filed** within 35 days of the **adoption** of the

order." (emphasis added) Section 101.102 provides that "filing" occurs when a document is file stamped by the Clerk of the Board, but if the document is received after the due date, the mailing date will control.

In light of these rules, the court found the IEPA's motion for reconsideration should have been "filed" no later than 35 days after August 7, 1997, the date on which the Board order dismissing the complaint was adopted. The 35 days expired on September 11, 1997. The IEPA's motion for reconsideration was filed on September 16, 1997, with a proof of service dated September 12, 1997, one day after expiration of the 35-day period. As the motion for reconsideration was untimely, the time in which to file a petition for administrative review with the appellate court was not tolled. Therefore, the court ruled that the petition for administrative review in the appellate court was also untimely.

In reaching its decision, the court expressly rejected the Board's argument that the 35-day period did not commence until after service of the order on the person seeking a reconsideration. In rejecting this argument the court looked to the plain meaning of Section 101.246, which states that any motion to reconsider be filed within 35 days from the adoption of the order. The court characterized the Board's order as relying upon one of its proposed rules that, if adopted, would provide for the commencement of the 35-day period after service of the order, rather than the date of adoption. The appellate court found this alleged reliance misplaced due to the fact that a proposed rule cannot be relied upon as controlling until it is actually adopted.

For these reasons, the appellate court dismissed the petition for review for lack of jurisdiction.



Rulemaking Updates

Emissions Reduction Market System R97-13

On November 20, 1997, the Board adopted rules creating an Emissions Reduction Market System (ERMS). These regulations at 35 Ill. Adm. Code 205 create an ERMS program for volatile organic material (VOM) for the Chicago nonattainment area. See Emissions Market Reduction System Adoption of 35 Ill. Adm. Code 205 (October 2, 1997), R97-13. The ERMS is one component of the Illinois Environmental Protection Agency's (IEPA) plan to achieve a 9% reduction in VOM by 1999 in the Chicago nonattainment area. Initiated by an October 7, 1996 proposal by the IEPA, the rules were adopted after ten days of hearing.

New Part 205 regulates stationary point sources that are: (1) located in the Chicago nonattainment area, (2) required to obtain a Clean Air Act Permit Program (CAAPP) permit, and (3) have seasonal emissions of at least ten tons of VOM. New Part 205 regulates these sources by establishing a historical emissions baseline for each source and requiring each source to reduce its emissions from that baseline by 12%. A source will establish its baseline by averaging its VOM emissions during any two of the "ozone seasons" (*i.e.*, May 1 to September 30) of the years 1994, 1995, or 1996. The IEPA will then issue source allotment trading units (ATUs) in an amount equal to 88% of each source's baseline, (*i.e.*, 100% of the source's baseline less the 12% required reduction).

The rules require sources to hold ATUs in the amount equal to their seasonal emissions of VOM. Sources can either reduce their emissions by 12% or purchase ATUs from the market created by the rule to meet their emissions need for each seasonal period. The rules were filed and became effective on November 25, 1997. See 21 Ill. Reg. 15777 (December 5, 1997).

Conforming Amendments for the Great Lakes Initiative R97-25

On December 18, 1997, after two public hearings, the Board adopted final rules to implement in Illinois the federal Great Lakes Initiative (GLI). The United States Environmental Protection Agency published the GLI as a final rule on March 23, 1995, at 60 Fed. Reg. 15366. The Illinois Environmental Protection Agency's (IEPA) May 19, 1997 proposal was filed in accordance with Section 28.2 of the Environmental Protection Act (415 ILCS 5/28.2 (1996)). The rules affect the Illinois portion of Lake Michigan and its drainage basin which includes about 18 dischargers to the Lake Michigan Basin. In general, the rules address water quality criteria and methodology as well as antidegradation procedures which are required by the GLI.

More specifically, the GLI rule adopts procedures to protect water quality which reflect the special concerns and scientific uniqueness of the Great Lakes Basin. The Board adopted standards for several parameters which were not previously regulated by the Board, including separate standards to protect aquatic life from acute and chronic effects, to protect wildlife, and to protect human health. Although the GLI has human health standards to protect against both cancer and noncancer effects for eight substances, only the cancer effects standards were adopted by the Board.

The GLI rule also adds a procedure for the calculation of bioaccumulation, or the increase in concentration of substances through the food chain instead of bioconcentration, or the increase in concentration due to substances present only in the water. As in the existing regulations, the GLI rule includes criteria or value derivation procedures to protect for short term (acute) and long term (chronic) effects and also provisions to modify the criteria or values depending on water chemistry, such as hardness or pH.

In the GLI rule, a criterion or value may be calculated on the basis of both carcinogenic or noncarcinogenic effects, if there is sufficient data. If the substance is a carcinogen, usually the criterion or value based on this effect will be lower. Criteria or values may be derived to protect drinking water and non drinking water sources.

In calculating the human health threshold criterion or value, the method now allows consideration for other sources of the pollutant from the air or other food sources. The human health nonthreshold criterion or values will now reflect improved methods to calculate substances that bioaccumulate in organisms and will change the different risk levels for individual substances and mixtures into a consistent risk level of one in one hundred thousand or 10^{-5}.

The GLI rule also improves on the existing regulations for nondegredation by prohibiting increased loading of bioaccumulative chemicals of concern unless there is proof that an increase is necessary for important economic or social development.

The rules were filed and became effective on December 24, 1997. See 21 Ill. Reg. 1356 (January 1, 1998).

Standards for Universal Waste Management
R98-12

On April 2, 1998, the Board adopted amendments to Parts 703, 720, 721, 724, 725, 728, and 733 as they relate to standards for universal waste management. This rulemaking was mandated by Public Act 90-502 (Pub. Act 90-502, eff. August 19, 1997 (amended 415 ILCS 5/22.23a (1996))). This legislation designated high intensity discharge lamps and flourescent lamps as a category of universal waste. The legislation further required that the Board complete the rulemaking on or before April 15, 1998, to integrate this designation into the Board's hazardous waste rules.

The rules amend Part 733 to designate mercury-containing lamps, which are currently classified as hazardous waste, as universal waste. The purpose of classifying the waste as universal waste is to reduce the amount of hazardous waste in the municipal solid waste stream, to encourage recycling and proper disposal of common hazardous wastes, and to reduce the regulatory burden on businesses that generate waste.

The rules were filed and became effective on April 15, 1998. See 22 Ill. Reg. 7590 (May 1, 1998).

Remediation Costs for Environmental Remediation Tax Credit
R98-27

On April 16, 1998, the Board adopted for first-notice publication in the *Illinois Register* amendments to 35 Ill. Adm. Code 740 implementing Public Act 90-123, which created an environmental remediation tax credit (tax credit). See Pub. Act 90-123 (1997), eff. July 21, 1997. The bill amended Section 201(l) of the Illinois Income Tax Act (35 ILCS 5/101 et seq. (1996)) and Section 58.14 of the Environmental Protection Act (Act) (415 ILCS 5/1 et seq. (1996)). The Illinois Environmental Protection Agency (IEPA) filed its proposal on January 1, 1998. Section 58.14 of the Act requires the Board to adopt tax credit rules for second notice within six months thereafter: the second-notice proposal was adopted by the Board on July 8, 1998, and the Board anticipates final adoption in Fall 1998.

The tax credit allows taxpayers to credit against their Illinois tax liability a portion of the costs that taxpayers have spent to clean up certain contaminated properties (or "brownfields"). The tax credit is intended to spur the cleanup and redevelopment of brownfields. A taxpayer who wishes to claim the tax credit must first submit to the IEPA an application for review of its cleanup (or "remediation") costs (see Section 740.710). The Board's first-notice proposal establishes the procedures and standards under which the IEPA will consider these applications (see Sections 740.715 and 740.720). Finally, the rules contain a nonexhaustive list of examples of costs that the IEPA may and may not approve as remediation costs (see Sections 740.725 and 740.725).

Amendments to Livestock Waste Regulations Regarding Financial Assurance
R97-15(B)

On May 21, 1998, the Board proposed for first-notice publication in the *Illinois Register* amendments to 35 Ill. Adm. Code 506, Livestock Waste Regulations. Prior to first notice, the Board issued a request for proposal. In response to the Board's request, both the Illinois Environmental Protection Agency and the Department of Agriculture (Department) filed proposals for amendments regarding financial assurance. The amendments address issues concerning a facility's proving its ability to pay, also known as financial assurance for lagoon closure, as required under Section 17 of the Livestock Management Facilities Act (LMFA) (510 ILCS 77/17 (1998)).

The proposed rules require lagoon owners to have financial assurance in place either within 180 days after the effective date of the proposed rules or before the lagoon is placed in service, whichever is later. This can be accomplished by posting a bond, guarantee, commercial or private insurance, letter of credit, or other "surety instrument" with a financial institution such as a bank. This can also be established by participating in a livestock waste lagoon closure fund managed by the Illinois Farm Development Authority. The proposed rules also set forth criteria for each of the six surety instruments, as well as the procedures under which such instruments are drawn. The initial term of the surety instrument must be at least three years, and the term of coverage may never be less than two years. This requirement is to ensure that the lagoon can be closed within the statutory time period (see 501 ILCS 77/15(e) (1998)).

The proposed rules also include conditions under which a lagoon is considered removed from service. Removal from service triggers the lagoon owner's obligation to submit a closure plan to the Department. The proposed rules provide that surety liability is triggered if an owner fails to follow an approved closure plan and does not cure noncompliance within 30 days of notice from the Department. Once surety liability is triggered, the Department sends a notice to the financial institution, which must then deposit the proceeds of the surety instrument in an account upon which the Department is authorized to draw for lagoon closure. The Department uses the proceeds to close the lagoon. Alternatively, the financial institution may assume liability for lagoon closure itself.

The public comment period closed on July 29, 1998, and the Board will finalize the rules before the end of 1998.

Amendments to Requirements for Landscape Waste Compost Facilities R97-29

On June 17, 1998, the Board adopted for first-notice publication in the ***Illinois Register*** amendments to 35 Ill. Adm. Code 830.203(c), 831.107, and 831.109(b)(3) which set requirements for landscape waste compost facilities. This rulemaking arises out of a proposal filed on May 6, 1997, by two citizens, Dr. Renuka Desai and Susan Garrett (proponents).

After two public hearings, the Board proposed a modified version of proponents' proposal. Specifically, proposed rules require certain composting areas established after January 1, 1999, to be located at least 1/8 mile from health care facilities, pre-school and child care facilities, and primary and secondary school facilities. The proposal also includes corresponding changes to requirements for site location maps and other information in permit applications.

After additional hearings, the Board anticipates finalizing the rules before the end of 1998.

Semi-Annual Identical-in-Substance Update Dockets

Section 7.2 and various other sections of the Environmental Protection Act require the Board to "adopt regulations identical in substance to federal regulations or amendments thereto promulgated by the Administrator or the United States Environmental Protection Agency" in various federal program areas. See 415 ILCS 5/7.2 (1996). These program areas include: drinking water; underground injection control; hazardous and nonhazardous waste; underground storage tanks; wastewater pretreatment; and the definition of volatile organic material.

Identical-in-substance update dockets are usually opened twice a year in each of the seven program areas, so that the Board annually processes 14 update dockets in order to translate federal rules into state law within one year of the United States Environmental Protection Agency (USEPA) rule adoption. Timely completion of identical-in-substance rules requires the coordination of the Board, the Illinois Environmental Protection Agency, the USEPA, and the Attorney General who must certify the adequacy of, and authority for, Board regulations required for program authorization.

Board Member Profiles

Current Illinois Pollution Control Board Members bring a balance of various qualifications and backgrounds to the environmental cases they process. Comprised of legal, engineering, biological, geological, and environmental science expertise, the Board reviews nearly 500 environmental cases annually and holds public hearings on more than 250 of those cases.

Chairman Claire A. Manning was first appointed to the Board and designated Chairman by Governor Jim Edgar in May 1993. She was reappointed in 1995, and again in June 1998. 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. Currently Chairman Manning serves on the Illinois State Bar Association's Administrative Law Section Council and the Special Committee on Women and the Law.

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's 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. He was reappointed in 1994 and again in June 1998, 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.

Board Member Kathleen M. Hennessey 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 as attorney at Schiff, Hardin and Waite.

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 former Board Member J. Theodore Meyer, and as an Enforcement Staff Attorney for the Air and Public Water Divisions at the Illinois Environmental Pro-

tection 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 1993, and reappointed again in 1995 and in June 1998, by Governor Jim Edgar.

Board Member Nicholas J. Melas was appointed to the Board effective July 1, 1998. Mr. Melas served as the former president and commissioner of the Metropolitan Water Reclamation District of Greater Chicago. He has acted as the president of N.J. Melas & Company, Inc., and was the former president of the Illinois Association of Sanitary Districts. Additionally, Mr. Melas served as a commissioner of the Northeastern Illinois Planning Commission and the Chicago Public Building Commission. Mr. Melas received his Bachelor of Science in Chemistry from the University of Chicago and a Masters of Business Administration in Labor and Industrial Relations from the Graduate School of Business at the University of Chicago. He is a resident of Chicago and will work out of the Board's Chicago Office.

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.

ILLINOIS POLLUTION CONTROL BOARD

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LEGISLATIVE REVIEW

A SUMMARY OF ENVIRONMENTAL AND BOARD RELATED STATE LEGISLATION PASSED IN 1998

OVERVIEW

The 1998 spring session was dominated by growing concerns over the continued growth of large factory hog farms throughout downstate Illinois. No less than 26 new bills dealing with the issue were introduced, including one proposal by House Speaker Michael Madigan, that would have granted local siting control over such farms to every county in the State. Fierce debate between the State's agricultural industry (the Farm Bureau, the Pork Producers, and the Illinois Beef Association) and the environmental community (the Illinois Stewardship Alliance and the Illinois Environmental Council) raged throughout the session, causing all but one bill to eventually die in either one chamber or the other. The one bill that did not die, Senate Bill 1707 (Sieben/Michael Smith), passed the Senate with the agriculture industry proposal only to be completely rewritten in the House with the environmentalists' proposal. While negotiations between the two groups continued into the final days of the session, no final compromise was reached, stranding the bill until the fall veto session when it may be further acted upon.

As well as the issue of livestock management, the 1998 spring session saw a small number of bills in other areas acted upon including air pollution and compliance with the federal Clean Air Act. Specifically, fears among the State's business leaders of states moving forward with rules to reduce greenhouse gases akin to those proposed in the Kyoto Protocol led the General Assembly to pass House Bill 3129 this spring to expressly prohibit both the Board and the IEPA from proposing or adopting any rules to reduce greenhouse gases. And while no state (including Illinois) has yet or likely will move before the federal government does to embark on such a politically controversial issue, it was pointed out that the bill sets a bad precedent in singling out a specific category of environmental rule the two agencies may not deal with. To this end, the Governor amendatorily vetoed House Bill 3129 to narrow the prohibition, thereby maintaining much of the Board's current leeway in adopting rules. Final action on House Bill 3129 will be taken during the fall veto session.

Other bills passed and signed into law this spring included House Bill 2668, an underground storage tank bill that created the "Red Tag/Green Tag" program to assure compliance by the end of this year, Senate Bills 1291 and 1705 that made modifications to the Brownfields site remediation tax credit law passed in 1997, and Senate Bill 545, an omnibus environmental bill that (among other things) made changes to reflect the 4th District Appellate Court's decision in the 1997 COLOR COMMUNICATIONS V. ILLINOIS POLLUTION CONTROL BOARD case.

The following summary of laws passed during the spring legislative session (January through May 1998), details not only 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 conservation, recycling, nuclear safety, etc. Additionally, any bills vetoed by the Governor for which final action will not take place until the fall veto session (November 17-19 and December 1-3, 1998) are listed at the end of the summary.

SUMMARY OF BILLS SIGNED BY THE GOVERNOR

The following are summaries of Board related bills signed or vetoed by the Governor during fiscal year 1998. The bills are broken into the following categories:

AIR POLLUTION/CLEAN AIR ACT COMPLIANCE
LAND POLLUTION
WATER POLLUTION
ENVIRONMENTAL LIABILITY, ENFORCEMENT, AND POLLUTION PREVENTION
MISCELLANEOUS

AIR POLLUTION/CLEAN AIR ACT COMPLIANCE

PUBLIC ACT 90-90-773 (SENATE BILL 545)
Effective August 14, 1998

Amends Section 39.5 of the Environmental Protection Act to change the definition of a stationary air pollution source to clarify that determinations of what constitutes a separate source shall be made on a case-by-case basis, whether or not any group of stationary sources are located on contiguous or adjacent properties, whether any group of stationary sources are under common control, or whether the pollutant-emitting activities at such group of stationary sources constitute a "support facility." Intended to reflect the 4th District Appellate Court's decision in the 1997 COLOR COMMUNICATIONS V. ILLINOIS POLLUTION CONTROL BOARD case.

This law also contains unrelated provisions dealing with pretreatment market credit trading, public water supplies, potentially infectious medical waste, toxic chemical reporting requirements, the Chemical Safety Act, and interest on moneys deposited into the Hazardous Waste Transporter account of the Environmental Protection Trust Fund. See Public Act 90-773/Senate Bill 545 under the other categories within this summary.

Public Act 90-726 (Senate Bill 1840)
Effective August 7, 1998

Amends Sections 10, 15, 20, 25, 30, 25, and 40 of the Alternative Fuels Act. Changes the definition of a "covered area" to include Cook County and all portions of the five collar counties (as opposed to only those portions currently within the Chicago metropolitan ozone nonattainment area). Extends the duration of the ethanol fuel research program until December 31, 2002. Authorizes the Secretary of State to promulgate rules concerning user fees for the program. Requires the Secretary of State to collect the user fees through calendar year 2002. Deletes provisions concerning the collection of user fees prior to fiscal year 1999, and limits the user fees only to those vehicles registered with the "covered area." Exempts from the user fees owners of vehicles registered under the International Registration Plan. Removes the requirements that the Alternative Fuels Advisory Board prepare and recommend to the IEPA rules implementing the ethanol fuel research program. Extends until calendar year 2002 the time during which a person may apply for certain rebates under the program. Allows moneys in the Alternative Fuels Fund to be appropriated to the Secretary of State's Office to cover its cost of administering programs under the Act.

Land Pollution

Public Act 90-662 (House Bill 2668)
Effective July 30, 1998

Adds a new Section 3.5 and amends Section 7 of the Gasoline Storage Act. Makes necessary changes to implement the USEPA's "Red Tag/Green Tag" program for underground storage tanks. Requires the Office of the State Fire Marshal (OSFM) to certify that underground storage tanks (USTs) comply with OSFM's regulations. The Act prohibits anyone from placing petroleum, petroleum products, hazardous substances, or regulated substances in a UST at any facility that does not display evidence of compliance or displays evidence that one or more of the facility's USTs are not in compliance with OSFM regulations. Provides that a violation of this bill is a business offense carrying a maximum penalty of $10,000 per offense. Authorizes the OSFM to adopt any rules necessary for the implementation of this bill.

Public Act 90-761 (House Bill 3257)
Effective August 14, 1998

Amends Sections 3.78, 3.78a, and 21 of the Environmental Protection Act to alter last year's Operation Silver Shovel bill (House Bill 1736/P.A. 90-344). Deletes provisions prohibiting persons from conducting any operation for the receipt, transfer, recycling, or other management of clean construction or demolition debris without the maintenance of load tickets and certain other manifests. Requires such persons to maintain certain documentation for three years, except for permitted pollution control facilities that transfer or accept such debris for final disposal, recycling, or treatment. Exempts the Department of Transportation from the documentation requirements. Further exempts from the definition of "generation" and "recycling" clean construction or demolition debris when such debris is used as fill, erosion control, or aggregate in roadway shoulder construction.

Public Act 90-90-773 (Senate Bill 545)
Effective August 14, 1998

Amends Sections 56 and 56.4 of the Environmental Protection Act to provide that potentially infectious medical waste (PIMW) is tracked on the same manifest from the point the PIMW was generated to the final point where it is disposed of. This replaces the old process under which a separate manifest was required from the generator of the waste to be carried by the transporter to the waste transfer station, followed by a separate manifest to be filled out by the waste transfer station to be sent with the transporter to the final disposal site.

This law also contains unrelated provisions dealing with the definition of Clean Air Act sources, pretreatment market credit trading, public water supplies, toxic chemical reporting requirements, the Chemical Safety Act, and interest on moneys deposited into the Hazardous Waste Transporter account of the Environmental Protection Trust Fund. See Public Act 90-773/Senate Bill 545 under the other categories within this summary.

Public Act 90-717 (Senate Bill 1291)
Effective August 7, 1998

Amends Sections 201 and 203 of the Illinois Income Tax Act dealing with the Brownfields site remediation tax credit program enacted in July, 1997 with the passage of Senate Bill 939/P.A. 90-123. Deletes the provision that "unreimbursed eligible remediation costs" do not include approved eligible remediation costs that are deducted under the provisions of the Internal Revenue Code or costs that are taken into account in calculating an environmental remediation tax credit granted against a tax imposed under the Internal Revenue Code. This bill will effectively allow persons that remediate Brownfields sites to take advantage of both the State and federal Brownfields tax credits. As originally enacted, P.A. 90-123 provided a disincentive to do so because the federal tax credit proved to be more lucrative, thereby dissuading persons from applying for the State tax credit.

Public Act 90-792 (Senate Bill 1705)
Effective January 1, 1999

Amends Section 58.14 of the Environmental Protection Act and Section 201 of the Illinois Income Tax Act to broaden the Environmental (Brownfields) Site Remediation tax credit for unreimbursed eligible remediation costs by allowing any such sites in an enterprise zone to take advantage of the tax credit; not just those located in areas with moderate or low income persons as originally provided for in P.A. 90-123.

Water Pollution

Public Act 90-773 (Senate Bill 545)
Effective August 14, 1998

Adds a new Section 13.4 to the Environmental Protection Act to require the IEPA to design a pretreatment market credit trading system, using economic incentives and market-based approaches, to provide flexibility for municipalities and their industrial users in developing cost-effective solutions for publicly-owned water treatment facilities to reduce the level of water pollutants in order to meet national discharge standard requirements. Authorizes the IEPA to adopt rules to implement the program.

Also amends Sections 15 and 18 of the Environmental Protection Act. Beginning October 1, 1999, requires all new public water supplies to demonstrate technical, financial, and managerial capacity and capability as a condition for issuance by the IEPA of any construction or operating permit consistent with the federal Safe Drinking Water Act. Authorizes the IEPA to adopt rules to implement the program.

This law also contains unrelated provisions dealing with the definition of Clean Air Act sources, potentially infectious medical waste, toxic chemical reporting requirements, the Chemical Safety Act, and interest on moneys deposited into the Hazardous Waste Transporter account of the Environmental Protection Trust Fund. See Public Act 90-773/Senate Bill 545 under the other categories within this summary.

Environmental Liability, Enforcement, and Pollution Prevention

Public Act 90-773 (Senate Bill 545)
Effective August 14, 1998

Amends Section 42 of the Environmental Protection Act to place a maximum cap of $6,000 on the total penalty that can be levied for any individual facility for failure to file a toxic chemical release form on time. The penalty had been $100 per day for each day the form is late, although there continued to be no maximum limit.

Also amends Section 3 of the Chemical Safety Act to redefine the term "business" to exclude any facility regulated under similar federal law, provided that such businesses conduct and document in writing, within 30 days, an assessment for any instance where the IEPA notifies the business in writing that a significant release of a chemical substance has occurred. This provision is intended to eliminate a duplicative reporting requirement. Specifically, the Illinois Chemical Safety Act (CSA) was adopted prior to the adoption of either the federal OSHA Process Safety Standard (PSS) or the USEPA Risk Management Program (RMP). These federal regulations prescribe chemical safety management planning, response, and assessment activities that are much more comprehensive than those required by the CSA. Under the old law, a business that was regulated under the PSS and the RMP was also required to comply with the CSA resulting in a duplication of the reporting requirements. This change simply removes those businesses that are subject to either the PSS or the RMP from also being regulated under the Illinois Chemical Safety Act.

This law also contains unrelated provisions dealing with the definition of Clean Air Act sources, pretreatment market credit trading, public water supplies, potentially infectious medical waste, and interest on moneys deposited into the Hazardous Waste Transporter account of the Environmental Protection Trust Fund. See Public Act 90-773/Senate Bill 545 under the other categories within this summary.

Miscellaneous

Public Act 90-773 (Senate Bill 545)

Effective August 14, 1998

Amends Section 22.2 of the Environmental Protection Act to delete the requirement that directs the State Treasurer to credit interest and earnings from investments in the Hazardous Waste Transporter account within the Environmental Protection Permit and Inspection Fund. This provision is technical in nature in that the Hazardous Waste Transporter account is a non-interest bearing account.

This law also contains unrelated provisions dealing with the definition of Clean Air Act sources, pretreatment market credit trading, public water supplies, potentially infectious medical waste, toxic chemical reporting requirements, and the Chemical Safety Act. See Public Act 90-773/Senate Bill 545 under the other categories within this summary.

Bills Vetoed by the Governor

Amendatory Vetoes

The following bill was amendatorily vetoed by the Governor and must, therefore, await final action by the General Assembly until the fall veto session (November 17-19) and December 1-3, 1998). In order for the bill 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 Governor's amendatory veto (simple majority required - 30 votes in the Senate and 60 in the House) or both must vote to override the amendatory veto (3/5 majority required - 36 votes in the Senate and 71 in the House).

House Bill 3129

Creates the Kyoto Protocol Act of 1998. Prohibits the IEPA and the Pollution Control Board from proposing or adopting any new rules intended to reduce the emission of greenhouse gases. Further provides that, in the absence of an Act by the General Assembly, the Director of the IEPA shall not submit any legally enforceable commitments related to the reduction of greenhouse gases to the USEPA or to any other agency of the federal government. Does not limit or impede in any way State or private participation in any on-going voluntary initiatives to reduce the emission of greenhouse gases. Provides that the provisions of this bill become inoperative upon ratification of the Kyoto Protocol or some other similar directive passed by Congress. The Governor amendatorily vetoed this bill to expand the exemption from this prohibition in the bill to continue to allow the Board and the IEPA to propose, adopt, and enforce rules and laws to implement the federal Clean Air Act as well as any laws or rules intended to attain or maintain ambient air quality standards.

Also amends the Alternative Fuels Act to add to the list of fuels covered by the Alternative Fuels Program E85 blend fuel (fuel composed of 85% ethanol blended with 15% gasoline).