Annual Report 2002

Illinois Pollution Control Board

Mission Statement

The Illinois Environmental Protection Act (Act) was enacted in 1970 for the purpose of establishing a comprehensive State-wide program to restore, protect, and enhance the quality of the environment in our State. To implement this mandate, the Act established the Illinois Pollution Control Board (Board) and accorded it the authority to adopt environmental standards and regulations for the State, and to adjudicate contested cases arising from the Act and from the regulations.

With respect for this mandate, and with recognition for the constitutional right of the citizens of Illinois to enjoy a clean environment and to participate in State decision-making toward that end, the Board dedicates itself to:

The establishment of coherent, uniform, and workable environmental standards and regulations that restore, protect, and enhance the quality of Illinois' environment;

Impartial decision-making which resolves environmental disputes in a manner that brings to bear technical and legal expertise, public participation, and judicial integrity; and

Government leadership and public policy guidance for the protection and preservation of Illinois' environment and natural resources, so that they can be enjoyed by future generations of Illinoisans.

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Message from the Chairman

Honorable George H. Ryan, Governor of Illinois and Esteemed Members of the General Assembly:

In fiscal year 2002, the Pollution Control Board continued to handle many important rulemakings and contested cases brought before it under the Environmental Protection Act. The Board's decisions, both regulatory and adjudicatory, have helped to restore, protect, and enhance our air, land, and water for all Illinoisans. The actions of the Board over the past year also reflect its commitment to providing technically and legally sound solutions in a timely manner—while maximizing stability and public participation in State environmental decision-making.

In July 2001, the Board adopted Illinois' first regulated recharge area—the Pleasant Valley Regulated Recharge Area, located in Peoria County. A regulated recharge area is a delineated region with enhanced regulations to protect vulnerable groundwater resources. Later in 2001, the Board awarded its largest civil fine ever in a non-settling case. The Board fined Panhandle Eastern Pipe Line Company $850,000 for violating air emissions standards, including requirements of the federal Prevention of Significant Deterioration (PSD) program. Panhandle emitted excess nitrogen oxides (NOx) into the air for approximately 10 years. The Board also awarded the State over $115,000 in costs and attorney fees.

The Board, in January 2002, amended its regulations for the Tiered Approach to Corrective Action Objectives (TACO). TACO is used to determine the extent of environmental cleanup needed based on the risk that contamination poses to present and future property uses at "brownfields" and leaking tank sites. The TACO amendments specifically addressed cleanup standards for methyl tertiary-butyl ether (MTBE), a common gasoline additive designed to improve air emissions. The Board also adopted groundwater quality standards for MTBE.

As required by the federal Clean Water Act, the Board, in February 2002, shored up how Illinois protects its surface water resources, especially its most pristine rivers. The Board's rules more specifically define the Illinois Environmental Protection Agency's role in performing antidegredation reviews of applications for new or renewed National Pollutant Discharge Elimination System (NPDES) permits. The rules also provide a process through which anyone may file a rulemaking proposal requesting that the Board designate specific waters as outstanding resource waters (ORWs). Before taking any final action on a proposal, the Board would hold public hearings and allow for public comments, giving participants the opportunity to address the economic reasonableness of the proposed ORW designation.

In fiscal year 2002, the Board continued to be a State leader in using digital technology to make government more efficient and more accessible to the public. Specifically, the Board made great strides toward putting its Clerk's Office on the Internet. The "Clerk's Office On-line" or "COOL," scheduled to go on-line in fiscal year 2003, will be located on the Board's Web site at www.ipcb.state.il.us. Perhaps most exciting, persons will be able to file documents electronically with the Board. Documents that are filed in paper will be electronically scanned and posted on COOL. COOL will accordingly provide an electronic "file cabinet" of pending Board rulemaking and case records. These electronic documents can be reviewed, searched, and downloaded by the public 24 hours a day. COOL will make interacting with the Board more convenient than ever.

The Board is proud to present its Annual Report for fiscal year 2002. This report contains detailed information about environmental matters and Board activities between July 1, 2001 and June 30, 2002. The Board looks forward to another productive year of serving the citizens of Illinois.

Sincerely,

Claire A. Manning

Claire A. Manning
Chairman

Illinois Pollution Control Board Members

Chairman Manning

Chairman Claire A. Manning has had extensive experience in government and administrative law. In 1993, she came to the Board, as its Chairman. Following her graduation from Loyola University School of Law in 1979, she was hired by the State's former Office of Executive Recruitment and became the Chief Labor Relations Counsel at the Department of Central Management Services. In 1984, upon passage of the Public Sector Labor Act, she was appointed one of the original members of the newly created State Labor Board. She was instrumental in establishing that Board and in creating Illinois' public sector collective bargaining structure and case law. After serving eight years at the Labor Board, she was appointed to Chair the Pollution Control Board where she has served continuously. In 2000, Chairman Manning was appointed to the Illinois Environmental Regulatory Review Commission, a body charged with clarifying, updating, and streamlining the 30-year old Environmental Protection Act. Chairman Manning is also an active member of the Illinois State Bar Association. A past Chair of ISBA's Administrative Law Section Council, Chairman Manning serves on ISBA's Environmental Law Section Council and its Standing Committee on Women and the Law. In addition, Chairman Manning is an experienced arbitrator and mediator, and is listed with the Federal Mediation and Conciliation Services, the Iowa Public Employment Relations Board, and the Wisconsin Employment Relations Commission.

Board Member Flemal

Ronald C. Flemal earned a BS from Northwestern University, and a PhD 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 was a long-term member of the Illinois State Bar Association Environmental Law Council. Dr. Flemal was appointed by Governor James R. Thompson in 1985, by Governor Jim Edgar in 1996, and most recently by Governor George H. Ryan in 1999. Dr. Flemal retired from the Board in September 2002, after the end of fiscal year 2002, but prior to printing of this publication.

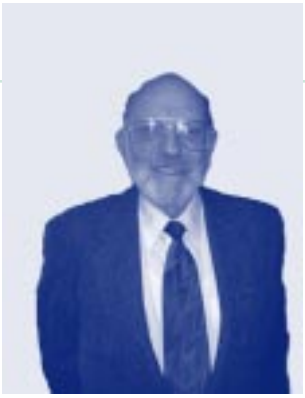
Board Member Girard

G. Tanner Girard was appointed in 1992 and reappointed in 1994 and 1998 by Governor Jim Edgar. Governor George H. Ryan reappointed Dr. Girard to the Board in 2000. Dr. Girard has a PhD 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 from 1977 to 1992, and Visiting Professor at Universidad del Valle de Guatemala in 1988. 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 Johnson

Thomas E. Johnson was appointed to the Board for a term beginning in July 2001. Mr. Johnson has spent more than a decade in private legal practice after graduating from Northern Illinois University School of Law in 1989 and holds a BS in Finance from the University of Illinois at Urbana-Champaign. Mr. Johnson has also served the public in many capacities including: Champaign County Board Member, Special Assistant Attorney General, Special Prosecutor for the Secretary of State, and Central Office Director to the Illinois Department of Transportation. He lives in Urbana with his wife and two children.

Samuel T. Lawton, Jr. ended his second tenure on the Board when his term expired on June 30, 2002, returning to private practice with the law firm Altheimer & Gray. Mr. Lawton continues to serve as a distinguished professor of law at John Marshall Law School. He was one of the original members of the Board, serving from July 1970 to August 1973 and was Acting Chairman from December 1972 to August 1973. The Board thanks Mr. Lawton for his many years of dedicated service to the Board and to the citizens of Illinois. Everyone at the Board wishes Mr. Lawton continued success in his future endeavors.



Board Member Lawton

Board Member Melas

Nicholas J. Melas was appointed to the Board in 1998 by Governor Jim Edgar and reappointed in 2000 by Governor George H. Ryan. Mr. Melas served as Commissioner of the Metropolitan Water Reclamation District of Greater Chicago for 30 years and as President of its Board for the last 18 years. He has acted as the President of N.J. Melas & Company, Inc., and as 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. He is currently on the Board of Directors of the Canal Corridor Association. An active member of the Greek Orthodox Church, he was named Archon of the Ecumenical Patriarchate of Constantinople and member of the Order of St. Andrew. Mr. Melas received his PhB and BS in Chemistry from the University of Chicago and an MBA in Labor and Industrial Relations from the Graduate School of Business at the University of Chicago. Upon graduation he served five years as Research Associate and Project Director at the University's Industrial Relations Center.

Board Member Tristano

Michael E. Tristano was first appointed to the Board for a term beginning in December 2001. Mr. Tristano received an MBA from the University of Illinois at Urbana-Champaign, an MS in Political Science from Illinois State University, and a BS in Social Science from Illinois State University. He is a Doctoral candidate in Public Policy Analysis at the University of Illinois-Chicago. Mr. Tristano has served as the Chief of Staff to the Republican Leader of the Illinois House, as Director of the Illinois Department of Central Management Services, and as Executive Deputy Director of the Illinois Department of Public Aid. At the University of Illinois-Chicago, he has served as Vice Chancellor and Executive Associate Vice Chancellor for Administration and Human Resource. Mr. Tristano has also held various teaching positions at the college and high school level.

Board Member Marovitz

William A. Marovitz joined the Board on July 1, 2002. Prior to joining the Board, Marovitz was a former State Senator, former State Representative, lawyer, and teacher. During his 18-year tenure in the Senate and House, Marovitz was known for his sponsorship of most of the meaningful gun control legislation from 1975-1992. He also authored the Illinois Hate Crimes Law and many other important laws positively effecting Illinois citizens. He also served as Chairman of the Senate Judiciary Committee and Senate Executive Committee. After leaving the legislature, Marovitz became a major real estate developer in the Chicago area. He is a member of the Anti-Defamation League, the Gene Siskel Film Center of the Art Institute, the Chicago Convention & Tourism Bureau, and Illinois Health Facilities Planning Board. Marovitz received a JD from DePaul University College of Law and a BA from the University of Illinois.

Rulemaking Review

Section 5(b) of the Environmental Protection Act (Act) (415 ILCS 5/5(b) (2000)) directs the Board to "determine, define and implement the environmental control standards applicable in the State of Illinois." When the Board promulgates rules, it uses both the authority and procedures in Title VII (Sections 26-29) of the Act and its own procedural rules at 35 Ill. Adm. Code Part 102.

The Act and Board rules allow anyone to file regulatory proposals with the Board. The proposals are then discussed at quasi-legislative public hearings at which the Board gathers information and comments to assist it in making rulemaking decisions. The Board also accepts written public comments. Notice of a rule proposal and adoption are published in the *Illinois Register,* as required by the rulemaking provisions of the Illinois Administrative Procedure Act (5 ILCS 100/5-10 through 5-160 (2000)). The Board issues written opinions and orders, which review the testimony, evidence, and public comment in the rulemaking record and explain the reasons for the Board's decision.

Additionally, Section 7.2 of the Act establishes special procedures for adoption, without holding hearings, of rules that are "identical-in-substance" to rules adopted by the United States Environmental Protection Agency (USEPA) in certain federal programs. Notice of the Board's proposal and adoption of identical-in-substance rules is published in the *Illinois Register,* and the Board considers in its opinions any written public comments it has received.

Finally, under Section 5(d) of the Act, the Board may conduct such other non-contested or informational hearings as may be necessary to accomplish the purposes of the Act. As the Board explains in its procedural rules, such "hearings may include inquiry hearings to gather information on any subject the Board is authorized to regulate." See 35 Ill. Adm. Code 102.112. The Board has held inquiry hearings on its own motion as well as on requests to do so from the Governor or a State agency.

The following is a summary of the most significant rulemakings completed in fiscal year 2002, arranged by docket number. Unlike previous years, air rulemaking was at a minimum during FY 2002. Instead, the bulk of the Board's Section 27 general rulemakings involved issues of groundwater and surface water protection, and of standards for clean-up of these resources in the event contamination has occurred. The Board additionally timely processed the 14 identical-in-substance rulemaking dockets required by Section 7.2 of the Act.

Rules Adopted in Fiscal Year 2002

Proposed Regulated Recharge Area for Pleasant Valley Public Water District, Proposed Amendments to 35 Ill. Adm. Code Part 617, R00-17

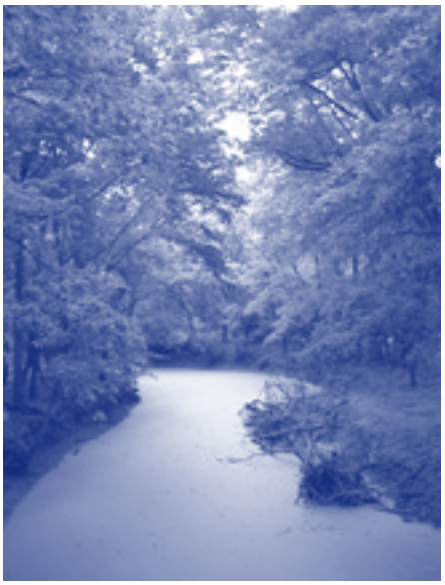
On July 26, 2001, the Board adopted regulations that amend 35 Ill. Adm. Code Part 617 to create the State's first regulated recharge area under Section 17.3 of the Act (415 ILCS 5/17.3 (2000)). This rule protects the area served by the Pleasant Valley Public Water District in Peoria County, Illinois.

This rulemaking was filed with the Board under Section 17.3 of the Act, which authorizes the Illinois Environmental Protection Agency (IEPA) to propose regulated recharge area regulations to the Board. The IEPA developed its proposal in consultation with the Groundwater Advisory Council (GAC), an agency and citizen body established under the Illinois Groundwater Protection Act (415 ILCS 55/1 *et seq*. (2000)) to "review, evaluate and make recommendations regarding State laws, regulations and procedures that relate to groundwater protection." The IEPA additionally sought and received advice from the Central Priority Groundwater Protection Planning Region Committee (CRPC), a broad-based local government and citizen group as provided for at Section 17.2 of the Act (415 ILCS 5/17.2(b) (2000)). The IEPA, CRPC, and GAC, conducted a regulatory development workshop and solicited and obtained additional comments on the proposal from various members of environmental associations and private citizens groups.

In Part 617, the Board has added and amended rules in Subpart A that apply to all regulated recharge areas, and has added a new Subpart B that applies only to the Pleasant Valley regulated recharge area. Among other things, the Subpart A rules contain several new

definitions and provisions applicable to any regulated recharge area. The rules prohibit the siting within a regulated recharge area of any new low level radioactive waste sites, class V injection wells or special or hazardous waste landfills. They also specify certain technology control regulations for activities within 2,500 feet of wellheads and within a regulated recharge area. Specified new potential pollution sources must prepare recharge area suitability assessments, which must be evaluated by the IEPA prior to commencement of operations at a new facility. The Department of Public Health and the Department of Natural Resources are authorized to develop an assistance program for abandoned and improperly plugged water supply wells.

In Subpart B, the rules require the registration with the IEPA of the location of new sources of potential groundwater contamination. The IEPA was directed to hold an informational and registration meeting during September 2001 for owners of some potential sources who are required now to develop and implement systems for chemical substance management and attend training programs to be conducted by the IEPA.



Sugar Creek

Proposed Amendments to Tiered Approach to Corrective Action Objectives (TACO): 35 Ill. Adm. Code 742, R00-19(B)

On July 26, 2001, the Board adopted regulations amending 35 Ill. Adm. Code Part 742 of the Board's land regulations, which are commonly referred to as the Tiered Approach to Corrective Action Objectives (TACO) rules. Part 742 contains procedures for developing remediation objectives based on risks to human health and the environment posed by environmental conditions at sites undergoing remediation in the Site Remediation Program, the Leaking Underground Storage Tank Program, and pursuant to Resource Conservation and Recovery Act Part B permits and closures.

On May 15, 2000, the IEPA filed a proposal to amend 35 Ill. Adm. Code 742. On July 27, 2000, the Board sent the proposal to first notice without commenting on its merits, separating the proposal into two subdockets, R00-19(A) and R00-19(B). Three hearings were held in this matter during the first-notice period. In addition to the testimony and exhibits presented at hearing, the Board also received numerous public comments in this matter.

Among noteworthy changes, this Subdocket B in R00-19 amended existing rules for determination of soil saturation limits, demonstrations of compliance with remediation objectives, contaminant source and free product determinations, and highway authority agreements. The appendices to Part 742 were also amended to add arsenic remediation objectives and to update acceptable detection limits for various chemicals.

Clean-up standards had also been originally proposed in this Subdocket for methyl tertiary-butyl ether (MTBE). The Board did not take action on this proposal, which was then transferred into its own Subdocket C for later, additional consideration. See Proposed Amendments to Tiered Approach to Corrective Action Objectives (TACO): 35 Ill Adm. Code 742, R00-19(C).

Proposed Amendments to Tiered Approach to Corrective Action Objectives (TACO) (MTBE): 35 Ill. Adm. Code 742, R00-19(C)

On January 24, 2002, the Board adopted final amendments to 35 Ill. Adm. Code 742, Tiered Approach to Corrective Action Objectives (TACO), of the Board's land regulations.

This docket was opened by the Board on June 7, 2001, for the purpose of addressing the MTBE clean-up standards that were originally contained in the May 15, 2000 proposal by the IEPA to amend 35 Ill. Adm. Code 742 of the Board's land regulations. By creating a separate Subdocket C for the MTBE amendments, the Board intended to coordinate this rulemaking with another then-pending IEPA proposal that would add groundwater quality standards for MTBE. *See generally* Proposed MTBE Groundwater Quality Standards Amendments: 35 Ill. Adm. Code 620, R01-14.

The amendments adopted by the Board in R00-19(C) added MTBE as a constituent to be tested for during a site remediation, and included specific values to test for in soil and groundwater analysis.

Revisions to Antidegradation Rules: 35 Ill. Adm. Code 302.105, 303.205, 303.206, 102.800-102.830, R01-13

On February 21, 2002, the Board adopted final amendments in Revisions to Antidegradation Rules: 35 Ill. Adm. Code 302.105, 303.205, 303.206, 102.800-102.830.

This rulemaking was initiated by a proposal filed on August 30, 2000, by the IEPA. The amendments implement the concepts of antidegradation and outstanding resource waters in the State of Illinois as required by the federal Clean Water Act. The adopted rules add new requirements to the Board's rules concerning antidegradation of waters in the State to the Board's current rules found at 35 Ill. Adm. Code 302.105.

The rules designate the State's water resources to reflect the three tiers of the federal program. Tier 1 sets the minimum level of protection and is intended to be the absolute floor of water quality protection for all waters of the United States. Tier 2 of the federal program addresses waters whose quality exceeds the levels necessary to support the propagation of fish,

Illinois River

shellfish, or wildlife and recreation in and on the water. Water quality cannot be lowered below the level necessary to protect the "fishable/swimmable" uses and other existing uses. Tier 3 of the federal regulations requires that high quality water, which constitutes outstanding resource waters, must be maintained and protected. The rules also add procedures for the implementation of the program as a part of the National Pollutant Discharge Elimination System permit process.

Additionally, the amendments at 35 Ill. Adm. Code 303 create the category of waters classified as "outstanding resource waters" or ORWs. Because the designation of ORWs will be handled as rulemakings, the Board added a new Subpart to the Board's procedural rules at 35 Ill. Adm. Code 102 to regulate the process for classification of Outstanding Resource Waters.

Proposed MTBE and Compliance Determination Amendments to Groundwater Quality Standards: 35 Ill. Adm. Code 620, R01-14

On January 24, 2002, the Board adopted final amendments to the Board's public water supply regulations at 35 Ill. Adm. Code 620.

The adopted regulations amended the Board's groundwater quality regulations to include a preventative response level, in addition to Class I and Class II groundwater standards, for MTBE. The Class I Potable Resource Groundwater standard and Class II General Resource Groundwater standard for MTBE is 70 ppb. In addition, the Board adopted a preventive response level for MTBE of 20 ppb. The regulations also clarified sampling procedures for certain existing drinking water supply wells.

Amendments to Regulation of Petroleum Leaking Underground Storage Tanks: 35 Ill. Adm. Code 732, R01-26

On April 18, 2002, the Board adopted a final opinion and order in Amendments to Regulation of Petroleum Leaking Underground Storage Tanks: 35 Ill. Adm. Code 732, R01-26

The adopted amendments to 35 Ill. Adm. Code 732 include requirements for certification of laboratories that analyze samples from underground storage tank (UST) sites; new procedures for UST owners or operators to follow at High Priority UST sites where off-site access is required; the addition of MTBE as an indicator contaminant; procedures for the Illinois Department of Transportation (IDOT) to enter into a memorandum of agreement (MOA) for USTs on IDOT right-of-ways and to allow the federal government to enter into a MOA for USTs on federally-held properties; and, if the IEPA determines that a UST owner or operator's corrective action plan has not achieved the desired outcome, the IEPA can require the owner or operator to submit a revised corrective plan.

Additionally, the Board added language to the UST rules to clarify the trigger date for the Early Action reimbursement period. To qualify for Early Action

reimbursement, activities must now be initiated within 45 days "plus seven" of the initial notification to the Illinois Emergency Management Agency (IEMA) of a release. This provision incorporates the policy in the Office of the State Fire Marshal's regulations that requires owners or operators to notify IEMA upon confirmation of a release (*see* 41 Ill. Adm. Code 170.600), while allowing for seven days to complete steps related to confirmation of a release.

Site Remediation Program: Amendments to 35 Ill. Adm. Code 740; Site Remediation Program: Proposed 35 Ill. Adm. Code 740, Subpart H (Public Schools), R01-27/R01-29 (Consolidated)

On April 18, 2002, the Board adopted a final opinion and order in Site Remediation Program: Amendments to 35 Ill. Adm. Code 740; Proposed 35 Ill. Adm. Code 740, Subpart H (Public Schools), R01-27/R01-29 (Consolidated).

The Site Remediation Program (SRP) rules establish a voluntary program that participants may use to investigate releases and clean up contaminated sites. The SRP regulations give participants the opportunity to obtain IEPA approval of remediation costs before applying for environmental remediation tax credits for the cleanup. The amendments adopted by the Board include mandatory laboratory accreditation for facilities that perform analyses for participants of the SRP program by January 1, 2003, the development of soil management zones to manage contaminated soil during remediation projects, and the inclusion of MTBE as a contaminant to be tested for in the process of a remediation project.

Additionally, the rulemaking included amendments proposed to the Board by the Citizens for a Better Environment to add enhanced protections for public schools. These regulations are specified in a new Subpart H "Requirements Related to Schools" that includes requirements targeted specifically at sites undergoing remediation that are intended to eventually be used as schools. Specifically, the new Subpart requires completion of all remedial activities, and the receipt of a No Further Remediation letter, prior to the use of a site as a school. Included in this rulemaking are additional requirements, such as the establishment of a document repository, that are intended to enhance public participation in the site remediation process.

Amendments to Livestock Waste Regulations: 35 Ill. Adm. Code 506, R01-28

On November 1, 2001, the Board adopted final amendments to 35 Ill. Adm. Code 506 (Part 506) regarding the design and construction of livestock waste handling facilities.

The legislature has amended Livestock Management Facilities Act (LMFA) twice since the Board adopted the Part 506 rules in 1997 (*see* P.A. 90-565, eff. Jan. 2, 1998; P.A. 91-110, eff. July 13, 1999). The legislative amendments require the Department of Agriculture (Department) to promulgate rules governing all sections of LMFA other than design and construction standards for livestock waste handling facilities (510 ILCS 77/55 (2000)). Accordingly, the Department adopted rules at 8 Ill. Adm. Code 900 on January 1, 2001. The amendments also require the Board, pursuant to a proposal filed by the Department, to promulgate standards for designing and constructing livestock waste handling facilities (510 ILCS 77/55 (2000)).

The amendments adopted by the Board contain design and construction standards for livestock waste lagoons and livestock waste handling facilities other than lagoons, and repealed certain administrative regulatory requirements, which had originally been promulgated as Board Part 506 rules. This rulemaking then, deletes Board rules which were effectively superseded by rules promulgated by the Department.

Some of the specific construction requirements adopted by the Board included requirements for rigid construction materials for all facilities in karst areas and the use of sampling ports to detect waste in areas with a seasonal high water table. In response to a study conducted by the poultry industry, the Board modified the hydraulic conductivity standard for poultry facilities. To address cost concerns raised by the regulated industry, the Board adjusted the concrete thickness standards to match those of the MWPS-36 guidance documents.

Enhanced Vehicle Inspection and Maintenance (I/M) Regulations: Amendments to 35 Ill. Adm. Code 240.191 – 240.193, R02-8

On December 6, 2001, the Board adopted final rules amending 35 Ill. Adm. Code 240.192 and 240.193. The rules amend three Sections of the Board's vehicle inspection and maintenance (I/M) regulations dealing with the applicability of the program, the onboard diagnostic (OBD) test standards, and compliance determination.

The Board's amendments were based on an August 20, 2001, proposal filed by the IEPA to amend the regulations dealing with inspecting and maintaining vehicles to control air emissions. Sections 182(b) and (c) of the federal Clean Air Act (42 U.S.C §§ 7511a(b), (c)) require states to implement vehicle "inspection and maintenance" programs in areas that do not meet National Ambient Air Quality Standards (NAAQS) for ozone or carbon monoxide. Areas that do not meet NAAQS are referred to as "nonattainment" areas.

In Illinois, there are two areas that do not meet the NAAQS for ozone; the Chicago metropolitan nonattainment area, and the Metro-East St. Louis nonattainment area. Under Illinois' Vehicle Emissions Inspection Law of 1995 (Vehicle Emissions Law) (625 ILCS 5/13B-1 *et seq.* (2000)), the IEPA proposed, and the Board adopted, as amendments to 35 Ill. Adm. Code 240, an enhanced I/M program for these two nonattainment areas. *See* Enhanced Vehicle Inspection and Maintenance (I/M) Regulations: Amendments to 35 Ill. Adm. Code 240, R98-24 (July 8, 1998); R94-20 (Dec. 1, 1994); R94-19 (Dec. 1, 1994).

The amendments adopted by the Board refined certain test requirements by incorporating necessary "flexibility" provisions for OBD testing as authorized by recent USEPA rulemaking and guidance.

In adopting these rules on December 6, 2001, the Board complied with the Vehicle Emissions Law requirement that rulemaking be completed within 120 days of the filing of the IEPA proposal.

Semi-Annual Identical-In-Substance Update Dockets

Section 7.2 and various other sections of the Act require the Board to adopt regulations identical in substance to federal regulations or amendments thereto promulgated by the Administrator of the USEPA in various federal program areas. See 415 ILCS 5/7.2 (2000). 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 at least 14 update dockets in order to translate federal rules into State rules within one year of USEPA rule adoption. Additional update dockets are initiated as necessary to provide expedited adoption of some USEPA rules in response to public comments, or to correct rules for various reasons including in response to federal litigation.

Timely completion of identical-in-substance rules requires inter-agency coordination and inter-governmental cooperation. Entities who must act in concert to successfully complete these rulemakings include the Board, the IEPA, USEPA, and the Office of the Attorney General. The Attorney General must certify the adequacy of, and authority for, Board regulations required for federal program authorization.

Judicial Review

Introduction

Pursuant to Section 41 of the Environmental Protection Act (Act) (415 ILCS 5/41 (2000)), any party to a Board hearing, anyone who filed a complaint on which a hearing was denied, anyone denied a permit or variance, anyone who is adversely affected by a final Board order, or anyone who participated in the public comment process under subsection (8) of Section 39.5 of the Act, may file a petition for review of the Board's order with the appellate court. The petition for review must be filed within 35 days of service of the Board order from which an appeal is sought.

Administrative review of the Board's final order or action is limited in scope by the language and intent of Section 41 (b) of the Act. 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. Board decisions in rulemaking, imposing conditions in variances, and setting penalties are quasi-legislative. The standard of review for the Board's quasi-legislative actions is whether the Board's decision is arbitrary or capricious. All other Board decisions are quasi-judicial in nature and the Illinois Supreme Court has recently stated that in reviewing State agency's quasi-judicial decisions (1) findings of fact are reviewed using a manifest weight of the evidence standard, (2) questions of law are decided by the courts de novo, and (3) mixed questions of law and fact are reviewed using the "clearly erroneous" standard (a standard midway between the first two). See City of Belvidere v. Illinois State Labor Relations Board, 181 Ill. 2d 191, 692 N.E.2d 295 (1998).

In fiscal year 2002, there were final orders entered by the Illinois appellate courts in six cases involving appeals from Board opinions and orders. The Board's decision was affirmed, in total or in part, in three of these cases. In two cases, the court granted the appellant's motion to withdraw. In another case, the court reversed the Board's decision and remanded the case back to the Board for further consideration. The following, organized first by case type and then by date of final determination, includes summaries of written appellate decisions in Board cases for fiscal year 2002. (A seventh case is also summarized below, involving an appeal of a circuit court order refusing to enjoin the Board from proceeding to hear a citizen's cost recovery action dismissed by the court for want of prosecution.)

Rulemaking

Section 5(b) 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 VI 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.

EnviroPower, LLC v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, No. 01-0234 (1st Dist. July 11, 2001) (unpublished Rule 23 order)

On July 11, 2001, in an unpublished order issued under Illinois Supreme Court Rule 23 (155 Ill. 2d R. 23), the First District granted EnivroPower, LLC's motion to withdraw its January 24, 2001 petition for review of a Board air rulemaking. The rulemaking at issue was Proposed New 35 Ill. Adm. Code 217, Subpart W, the NOx Trading Program for Electrical Generating Units, and Amendments to 35 Ill. Adm. Code 211 and 217, R01-9 (Dec. 21, 2000).

Between December 26, 2000 and April 17, 2001, the Board completed four rulemakings amending regulations of emissions of nitrogen oxides (NOx) by various sources, and establishing NOx emissions trading programs for various sources. Each proposal was filed under Section 28.5 of the Act (415 ILCS 5/28.5 (2000)). Section 28.5 provides for "fast-track" adoption of certain regulations necessary for compliance with the Clean Air Act Amendments of 1990 (42 U.S.C. §§ 7401 *et seq*. (1990)).

Each of these four rulemakings was intended to assist the State in attaining compliance with the one-hour National Ambient Air Quality Standards (NAAQS) for ozone. Currently, two areas of the State are not in compliance with the ozone NAAQS: the Chicago and Metro-East non-attainment areas.

In October 1998, the United States Environmental Protection Agency (USEPA) promulgated a document titled *Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Regions for Purpose of Reducing Regional Transport of Ozone*. This document, commonly known as the "NOx SIP Call," requires the State to develop NOx emissions to a specified budget. USEPA has given the State a budget of 270,560 tons of NOx per yearly ozone season, based on NOx emissions in 2007 taking into account required NOx reductions.

In response to the NOx SIP Call, in Section 9.9 of the Act, the General Assembly specifically mandated the Illinois Environmental Protection Agency (IEPA) to propose, and the Board to adopt, responsive rules. Section 9.9 required establishment of a NOx Trading System, as well as rules for NOx reductions for cement kilns and stationary internal combustion engines.

The IEPA filed its R01-9 regulatory proposal as a fast-track rulemaking on July 11, 2000. During the R01-9 rulemaking hearings, EnviroPower challenged the amount of allocations of NOx emissions set-aside for new sources. Additionally, EnviroPower argued that the procedure to obtain the allocations unduly favored the existing electrical generating units (EGUs) over the new EGUs.

EnviroPower's January 24, 2001 petition for review alleged the Board and the IEPA "failed to comply with the laws of Illinois, including but not limited to the Illinois Environmental Protection Act." Enviropower withdrew the appeal prior to any briefing by the parties.

Enforcement

Sections 30 and 31.1 of the Act (415 ILCS 5/30 and 31.1 (1998)), respectively, provide for standard enforcement actions and for the more limited administrative citations. 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 the "respondent has caused or threatened to cause air or water pollution or that the respondent has violated or threatens to violate any provision of this Act or any rule or regulation of the Board or permit or term or condition thereof." 415 ILCS 5/31(e)(1998). The Board is authorized under 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 securities to assure correction of violations. An administrative citation is initiated by the Illinois Environmental Protection Agency or a unit of local government and imposes a statutory fine for, among other things, causing or allowing open dumping of any waste.

Gilmer v. People & Pollution Control Board, No. 4-00-0809 (4th Dist. April 8, 2002) (unpublished Rule 23 order)

On April 8, 2002, the Fourth District Appellate Court affirmed the Board's finding of violation and assessing of a $40,000 penalty in the Board's docket People of the State of Illinois v. James and Carol Gilmer, Respondents/Third-Party Complainants v. CL Industries, PCB 99-27 (Aug. 24, 2000). The court issued an unpublished order under Supreme Court Rule 23 (155 Ill.2d R. 23) in Gilmer v. People and Pollution Control Board, No. 4-00-0809 (4th Dist. April 8, 2002).

The Gilmer case involved a piece of property near Villa Grove, Douglas County. The Gilmers had leased a portion of it to Multi-County Landfill, Inc. that operated a permitted landfill on the property from about 1975 to mid-1990. At that time, IEPA filed a circuit court enforcement action alleging various operating violations. This resulted in a 1995 Douglas County Circuit Court order assessing a $350,00 penalty, and enjoining the corporation from further violations. The corporation then abandoned the site without properly closing it. Since 1997, the IEPA has spent $4.1 million to properly close this abandoned site, and more work is necessary.

The Attorney General filed the action before the Board against the Gilmers in 1998, alleging failure to properly 1) close the landfill, 2) control leachate to prevent groundwater contamination, 3) provide cover and control litter and leachate, and 4) monitor and establish a groundwater protection plan. The Board found the then-63 year old couple in violation of the Act and landfill rules.

The record contained no evidence on the amount of income the Gilmers had received from the lease, although it did contain evidence about their financial circumstances at the time of hearing. After summarizing the record, the Board in its opinion levied a $40,000 penalty to deter similar future violations.

On appeal, the Gilmers challenged only the fine, which they argued was an abuse of discretion. In its opinion, the court quoted the Board's findings on the various 33(c) factors, and noted the Board's statement that the possible penalty that could be imposed was $19 million. (slip op. 6-10).

The court stated that the "crux of the Gilmers' argument is the Board did not consider their ability to pay, their ages, and their lack of culpability in determining the amount of penalties." (slip op. p. 9) But, the court's own "reading of the Board's finding indicates the penalty was assessed to ensure the Gilmers' future compliance with the Act and to deter other landowners from committing similar violations." *Id*.

The court concluded, "the Board did consider the Gilmers' ability to pay . . . [and even if it did not] no statutory provision limits the amount of penalties to the violators' ability to pay. Given these facts, we find the penalty ordered by the Board was not clearly arbitrary, capricious, or unreasonable. The $40,000 penalty was necessary to aid in the enforcement of the Act and to deter the Gilmers or other similarly situated landowners from future violation." (slip op. pp. 10-11).

In an affidavit mailed April 26, 2002, the Gilmers advised the Board and court of their intention to appeal this case to the Illinois Supreme Court.

Dalise Enterprises, Inc. d/b/a Barge-Way Company v. Illinois Pollution Control Board, No. 1-00-3391 (1st Dist., February 14, 2002) (unpublished Rule 23 order)

The following case is not strictly speaking an appeal of a Board decision. Instead, it is an action arising out of the attempt of a party in a Board enforcement action to have a circuit court enjoin further proceedings in that enforcement action. The effect of the court actions was to affirm a ruling of the Board in the enforcement action.

On February 14, 2002, an appeal of a Cook County Circuit Court decision holding that the Board had the authority to award cleanup costs to a citizen was dismissed by the First District Appellate Court for want of prosecution. The case involves leaking underground storage tanks at a former gasoline service station in Glendale Heights, DuPage County.

The Cook County Circuit Court decision arose out of a citizen enforcement action still pending before the Board. In the Board proceeding, the current owner of the DuPage County property, Union Oil Company of California d/b/a UNOCAL (UNOCAL) seeks to recover approximately $600,000 in cleanup costs from several alleged former owners or operators of the service station. UNOCAL argues that these respondents violated water pollution prohibitions of the Act (415 ILCS 5/12(a), (d) (2000)). UNOCAL, which acquired the property in 1982, allegedly incurred the costs cleaning up petroleum contamination from leaking underground storage tanks. The Board proceeding is docketed as PCB 98-169.

After the Board denied a motion to dismiss UNOCAL's enforcement action, one of the respondents before the Board, Dalise Enterprises, Inc. d/b/a Barge-Way Company (Barge-Way), filed a complaint for declaratory judgment and an emergency motion for a temporary restraining order and preliminary injunction in Cook County Circuit Court. With these filings, Barge-Way sought to enjoin the Board from further action in PCB 98-169, alleging that the Board lacked jurisdiction over private cost recovery actions. The Board moved to dismiss with prejudice. The Board noted that Section 31(d) of the Act (415 ILCS 5/31(d) (2000)) allows for "any person" to file a complaint before the Board alleging violations of the Act. And the Illinois General Assembly, in Section 33(a) of the Act (415 ILCS 5/33(a) (2000)), gave the Board broad authority to fashion appropriate remedies in enforcement actions. The Board also noted that the Illinois Supreme Court, in People v. Fiorini, 143 Ill. 2d 318, 350, 574 N.E.2d 612, 625 (1991), refused to hold that cleanup costs would not be an available remedy for a violation of the Act under appropriate facts.

Following oral argument, the Cook County Circuit Court, on September 12, 2000, granted the Board's motion to dismiss with prejudice, stating that the Board has jurisdiction over the matters pending before it in PCB 98-169. *See* Dalise Enterprises, Inc. d/b/a Barge-Way Company v. Illinois Pollution Control Board, No. 00 CH 12113 (Cook County Cir. Ct., Sept. 12, 2000). Barge-Way appealed the circuit court's decision to the First District Appellate Court. On February 14, 2002, the appellate court, on its own motion, dismissed the appeal for want of prosecution—Barge-Way failed to file its brief by the due date of November 5, 2001. *See* Dalise Enterprises, Inc. d/b/a Barge-Way Company v. Illinois Pollution Control Board, No. 1-00-3391 (1st Dist., Feb. 14, 2002). Accordingly, the circuit court ruling that the Board can order a violator to reimburse a citizen's cleanup costs stands.

Permit Appeal

The Board is authorized to require a permit for the construction installation, and operation of pollution control facilities and equipment. Under Section 39 of the Act, it is the duty of the IEPA to issue those permits to applicants. Permits are issued to those applicants who prove that the permitted activity will not cause a violation of the Act or the Board regulations under the Act. The IEPA has the statutory authority to impose conditions on a permit to further ensure compliance with the act. An applicant who has been denied a permit or who has been granted a permit subject to conditions may contest the IEPA decision at a Board hearing pursuant to Section 40 of the Act.

ESG Watts, Inc. v. Pollution Control Board, Nos. 3-00-0773 and 3-00-0774 (consolidated)(3rd Dist. September 14, 2001) (unpublished Rule 23 order)

On September 14, 2001, in an unpublished order issued pursuant to Illinois Supreme Court Rule 23 (155 Ill. 2d R. 23), the Third District affirmed the Board in the court's consolidated cases ESG Watts, Inc. v. Pollution Control Board, Nos. 3-00-0773 and 3-00-0774. The Board had affirmed permit denials by the IEPA in the Board's consolidated cases ESG Watts, Inc. v. IEPA, PCB 00-158 (Viola Landfill) and PCB 00-159 (Taylor Ridge Landfill) (Aug. 24, 2000) (consolidated). The cases involved solid waste landfills known as the Viola Landfill located in Sangamon County and the Taylor Ridge/Andalusia Landfill located in Rock Island County, Illinois.

In two separate orders, the Board declined to review a pre-enforcement letter issued by the IEPA under Section 31 of the Act (415 ILCS 5/31 (2000)) directed to ESG Watts. The Board held that the letter did not constitute a final determination from which an appeal could be sought and accordingly was not subject to review. ESG Watts appealed each Board order to the Third District.

The Third District agreed that the Board lacked subject matter jurisdiction. The court noted that, under Section 31(b) of the Act, "before any referral [to the Attorney General] occurs, the [Agency] must issue and serve, by certified mail, a written notice informing the violator that the [Agency] intends to pursue legal action." 415 ILCS 5/31(b) (2000). The court emphasized that the IEPA's letter at issue in this appeal "does not state that it is [the Agency's] final action, determination, or intention to pursue legal action regarding Watts' financial assurances for the landfills. Thus, the letter is a facet of pre-enforcement activities according to [S]ection 31 of the Act that does not create an actual controversy."

ESG Watts also argued that, if the Board lacks jurisdiction to hear its petition, ESG Watts lacks means to gain release of its funds held in trust. In response, the court stated "other possible remedies were, and continue to be, available to Watts in the circuit court."

ESG Watts, Inc. v. Pollution Control Board, Case No. 4-00-0861, 326 Ill. App. 3d 432, 760 N.E.2d 1004 (4th Dist. 2001)

On December 5, 2001, the Fourth District Appellate Court issued an opinion in ESG Watts, Inc. v. Pollution Control Board, Case No. 4-00-0861. The Fourth District reversed the Board's ruling and remanded the case to the Board "for hearing on the sufficiency of the insurance policy" that ESG Watts had tendered to the Illinois Environmental Protection Agency (IEPA) as financial assurance. The court found that, under the circumstances of the case, the letter should have been construed as an IEPA disapproval of financial assurance under Section 21.1 of the Act (415 ILCS 5/21.1 (2000)). The Board accordingly would have had jurisdiction of ESG Watts' appeal, which the court found to be timely filed. 760 N.E.2d at 1008.

This case involved a permit appeal of an IEPA Section 31 pre-enforcement letter that concerned the adequacy of post-closure care. 415 ILCS 5/31 (2000). The Board declined to review, finding that it was not a final appealable order. ESG Watts also filed two companion appeals to the Third District Appellate Court. The Fourth District appeal concerned ESG Watts' Sangamon Valley Landfill, while the Third District appeals related to the Viola and Taylor Ridge landfills.

The Fourth District's finding was contrary to the result in the Third District in which, in an unpublished order issued pursuant to Illinois Supreme Court Rule 23 (155 Ill. 2d R. 23), the Third District affirmed the Board in the court's consolidated cases ESG Watts, Inc. v. Pollution Control Board, Nos. 3-00-0773 and 3-00-0774. The Board had affirmed permit denials by the IEPA in the Board's consolidated cases ESG Watts, Inc. v. IEPA, PCB 00-158 (Viola Landfill) and PCB 00-159 (Taylor Ridge Landfill) (Aug. 24, 2000) (consolidated). (These cases are described immediately above this synopsis of the Fourth District's ruling.)

In the special written concurrence, concern was expressed about the IEPA's actions, stating in part

A business has a right to appeal under section 21.1 of the Act, and it is improper for [the Agency] to attempt to defeat that right by issuing unclear orders which it argues are final if no appeal is taken but argues are nonfinal in the event an appeal is taken. 760 N.E. 2d at 1008-9.

The sufficiency of the insurance policy as to Sangamon County was addressed in another case before the Board, PCB 00-206. However, this case was withdrawn by the petitioner on December 6, 2001.

Community Landfill Company and the City of Morris vs. Illinois Environmental Protection Agency, No. 3-02-0024 (3rd Dist. May 15, 2002 as modified July 17, 2002)

On May 15, 2002, the Third District Appellate Court affirmed the Board's decision in Community Landfill Company and City of Morris v. IEPA, PCB 01-170 December 6, 2001. In an opinion scheduled to be published, the court agreed with the Board that the IEPA had properly denied a supplemental landfill permit.

In its decision, the court addressed several important subjects on permitting in addition to the primary issue of permit denial for not meeting the surety/financial assurance requirements. These other subjects include permit denial on the basis of a felony conviction; "Wells letter" notice and opportunity to respond to reasons for potential permit denial (see Wells Manufacturing Co. v. IEPA, 195 Ill. App.3d 593, 552 N.E.2d 1074 (1st Dist. 1990); enforcement through permitting; equitable estoppel; and standard of review.

The Board's December 6, 2001 opinion affirmed the IEPA's decision denying a supplemental waste disposal permit to Community Landfill Company (operator) and the City of Morris (owner) for the Morris Community Landfill. The Board found that the IEPA properly denied the permit because the surety on the performance bonds proposed for the landfill was not on the U.S. Department of Treasury's approved list of sureties (Circular 570) at the time of the IEPA's decision. The Board's financial assurance regulations (35 Ill. Adm. Code 811.712(b)) require that sureties be on the federal approved list.

The court affirmed the Board's decision on this ground: the landfill's surety did not comply.

The Board found that the IEPA's second ground of the two grounds for permit denial was improper for procedural, not substantive, reasons. The IEPA's second ground was based on the felony conviction of the company president. The Board found that the IEPA served its "Wells letter" on the company so late that the company had insufficient time to respond to the felony conviction issue. Under the Wells decision, because the felony conviction basis for permit denial was outside of the permitting process, the company was entitled to an opportunity to respond to the issue before the IEPA denied the permit on that ground.

The court did reach the merits of the Board's decision on the felony conviction issue because "the Board agreed with the company that the IEPA had improperly considered the felony conviction." The court cited a recent decision for the proposition that it is improper to provide a forum in a reviewing court to a party who succeeded but simply did not agree with the reasoning of the lower court. Here, the company succeeded before the Board on the felony conviction ground, but the reason was procedurally based, not based on the substance of the IEPA's decision with which the company disagreed.

Though the court does not cite Wells, the court agreed with the Board that the IEPA did not have to provide the permit applicant with notice and an opportunity to respond (a "Wells letter") before denying the permit on the surety ground. The court held that "the company was well aware that financial assurance must be obtained from an approved surety and that the permit application could be denied for failure to do so. Therefore, the fact that the surety was removed from the Circular 570 list was not a matter outside the permitting process . . . ."

The court affirmed the Board's rulings on two arguments that are often raised. First, the court agreed with the Board that the permit denial was not an impermissible use of the permitting process as an enforcement tool. Rather, with the unapproved surety, any IEPA permit issuance would simply have violated the Board regulation. Consequently, Section 39(a) of the Act required permit denial.

Second, the court reiterated that a public entity cannot be equitably estopped unless, among other things, it is demonstrated that the public entity made a misrepresentation with knowledge that the misrepresentation was untrue: "the company failed to prove that the IEPA knowingly represented that the bonds were compliant with the applicable regulations when it knew that they were not." Accordingly, the court agreed with the Board that the IEPA could not be estopped from rejecting the bonds.

On July 17, 2002, the court denied the petition for rehearing filed by Community Landfill and the City of Morris on June 5, 2002. The court also slightly modified its earlier opinion.

Pollution Control Facility Siting Decisions

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 principles of fundamental fairness and whether the decision was against the manifest weight of the evidence. The Boards final decision is then reviewable by the appellate court.

ESG Watts, Inc. v. Sangamon County and Pollution Control Board, No. 4-99-0746 (4th Dist. March 26, 2002) (unpublished Rule 23 order)

On March 26, 2002, the Fourth District Appellate Court granted appellant ESG Watts Inc.'s motion to dismiss its appeal of a 1999 Board decision in a landfill siting appeal involving the ESG Watts' Sangamon Valley Landfill. ESG Watts, Inc. v. Sangamon County and Pollution Control Board, No. 4-99-0746 (4th Dist. Mar. 26, 2002**).** After filing its appeal, ESG Watts sold the now-closed Sangamon Valley Landfill to a third party, Allied Waste Systems (Allied), a national waste disposal firm. Allied then negotiated with the State to try to resolve legal issues allegedly bearing on the appeal.

After briefing the case, ESG Watts successfully moved the appellate court to defer oral argument based on the potential for Allied's negotiations to "moot" the appeal. ESG Watt's motion to dismiss followed a period of almost two years in which oral argument was deferred. The Fourth District's one-sentence dismissal order was issued pursuant to Illinois Supreme Court Rule 23 (155 Ill. 2d R. 23).

In the case before the Board, ESG Watts had appealed the 1997 denial by the Sangamon County Board (County) of site location suitability approval under Section 39.2 of the Act. ESG Watts, Inc. v. Sangamon County Board, PCB 98-2 (June 17, 1999). ESG Watts had sought County approval to leave in place about 500,000 cubic yards of waste. In an enforcement action against ESG Watts filed in the Circuit Court of Sangamon County, the court found that the landfill had been expanded both vertically and laterally beyond its permitted boundaries. People of the State of Illinois and County of Sangamon v. Watts Trucking Service, Inc. and ESG Watts, Inc., No 91-CH-242 (Cir. Ct. Sangamon Co.). The circuit court order directed ESG Watts to excavate and properly dispose of this 500,000 cubic yard "overfill," unless alternatively, it received County approval to leave it in place.

The County denied ESG Watt's siting application, finding that the application did not meet all of the criteria of Section 39.2 of the Act. Watt's appealed the denial to the Board under Section 40.1(a) of the Act. Watt's alleged that the County decision was 1) fundamentally unfair and 2) against the manifest weight of the evidence.

The Board did not reach either issue in its June 1999 decision. Instead, as a threshold issue, the Board found that the Sangamon County Board lacked jurisdiction to hear the request to site the overfill because ESG Watts failed to timely notify certain nearby property owners of the request under Section 39.2(b) of the Act. Accordingly, the Board vacated the County's decision.

A Summary Of Environmental Legislation

Air

Public Act 92-0574 (House Bill 5557) Effective June 26, 2002

Amends numerous sections of the Environmental Protection Act (415 ILCS 5/1 *et seq.* (2000). At the request of Governor Ryan, the Illinois Environmental Regulatory Review Commission (IERRC) was charged with recommending ways of making the Environmental Protection Act "more effective, understandable and useful," without changing the Act's "fundamentally sound" policy underpinnings.

Public Act 92-0574 contains nearly 100 IERRC-recommended changes to the Act, none of which are substantive in nature, but all of which are important. Upon becoming law, these changes will streamline, clarify, and update the 30-year old statute. In addition to the IERRC's recommendations, Public Act 92-0574 contains an amendment to Section 28.5 of the Act, extending the sunset provision on the Clean Air Act "fast-Tract" rulemaking from December 31, 2002 to December 31, 2007.

Public Act 92-0682 (House Bill 5255) Effective July 16, 2002

Amends Chapter 13B of the Illinois Vehicle Code (625 ILCS 5/13-100 *et seq.* (2000)). Public Act 92-0682 specifies certain inspection procedures that must be followed on model year 1996 and newer vehicles equipped with on-board computer diagnostic equipment. Until January 1, 2004, allows the owners of certain vehicles to avoid the loaded mode exhaust gas analysis or idle exhaust gas analysis by choosing to repair the vehicles to a higher standard. Repeals Chapter 13A of the Illinois Vehicle Code (now obsolete) on January 1, 2003.

Public Act 92-0682 further provides that the owner of a vehicle that fails to meet the standard for the complete on-board computer diagnostic test must be informed that he or she has the option to have the vehicle tested using the less stringent loaded mode exhaust gas analysis or the idle exhaust gas analysis, as appropriate, for one test cycle. The on-board computer diagnostic test is not required for vehicles with known on-board diagnostic communications or software problems, as determined by the Illinois Environmental Protection Agency (IEPA). By April 15, 2003, the IEPA shall submit to the General Assembly a report detailing the effectiveness of the use of the on-board computer diagnostic test. Requires the report to include the number of failures, the reason for each failure, the number of vehicle damage complaints, and the average wait time at the test stations.

Public Act 92-0762 (House Bill 1081) Effective January 1, 2003

Adds Section 8.20 to the Fire Protection District Act (70 ILCS 705/1 et seq. (2000)). Public Act 92-0762 allows a fire protection district to adopt an ordinance regulating open burning in the district. Provides that the fire protection district may require notice of an open burn, but may not require a permit for an open burn. Provides that an open burning ordinance must be consistent with the Department of Natural Resources' standards for controlled burns. Additionally, an open burning ordinance may not be enforced by the district in a municipality with a population of 1,000,000 or more. Persons setting an open burn on agricultural land may voluntarily comply with the ordinance and the Department of Natural Resources' standards. The measure also allows the fire department of a fire protection district to extinguish certain open burns.

A fire protection district may regulate open burning for the purpose of preventing and controlling unreasonable fire risk. Fire protection district shall not require a permit for open burning. In addition to a municipality with a population with 1,000,000 or more, a county with a population of 3,000,000 or more is exempt from any fire protection district's ordinance to regulate open burning. A fire protection district may, by ordinance, require that the district be notified of open burning within the district before it takes place.

Public Act 92-0675 (House Bill 4696) Effective July 1, 2003

Adds Sections 11, 11.5, 12, 13, 14, 19, 22, 62, 62.5, 62.10, 62.15, 62.20, and amends Sections 5, 10, 35, 55, and 60 of the Crematory Regulation Act (410 ILCS 18/1 *et seq.* (2000)). Public Act 92-0675 provides for licensure (instead of registration) of crematory authorities by the Comptroller. Adds information that must be provided in a crematory authority's license application and in its annual report. Provides grounds on which the Comptroller may refuse to issue a license or suspend or revoke a license, and provides for a hearing for the applicant or licensee. Adds criminal penalties for the operation of a cremation service by an untrained person and for the willful or knowing destruction or damaging of human remains or the desecration of human remains; adds a civil penalty for the intentional violation of the Act or of a final order of the Comptroller. Authorizes the Comptroller to investigate unlawful practices under the Act and to investigate the actions of any person providing cremation services or holding or claiming to hold a license under the Act.

Additionally, as part of the Comptroller's inspections of such facilities, the measure requires the crematory owner or operator to post within the facility proof of a valid air permit from the IEPA. Specifies that the IEPA shall have the authority to adopt rules providing for what is included in the air permit.

Land

Public Act 92-0554 (House Bill 4471) Effective June 24, 2002

Adds Section 57.14A and amends Sections 57.1, 57.2, 57.5, 57.6, 57.7, 57.8, 57.10, and 57.13 of the Environmental Protection Act (415/ILCS 5/1 *et seq.* (2000)). Public Act 92-0554 replaces the system of physical soil classification, groundwater investigation, and site classification for leaking underground storage tanks with a system of site investigation and corrective action. As a part of this system, the owner or operator must submit various documents, including a site investigation plan, a site investigation budget (for owners and operators seeking payment from the Underground Storage Tank Fund), a site investigation completion report, a corrective action plan, a corrective action budget (for owners and operators seeking payment from the Underground Storage Tank Fund), and a corrective action completion report.

The measure also increases the maximum amount that an owner or operator of 101 or more tanks in Illinois may be paid from the Underground Storage Tank Fund for costs of corrective action during a calendar year to $3,000,000. The IEPA shall not pay costs associated with a corrective action plan incurred after the IEPA provides notification to the owner or operator that a revised corrective action plan is required. For purposes of payment for early action costs, fill material shall not be removed in an amount in excess of four feet from the outside dimensions of an underground storage tank. Investigations, plans, and reports conducted or prepared under the section concerning leaking underground storage tank site investigations shall be conducted by a licensed professional engineer and in accordance with the requirements of this title.

Additionally, the measure increases from $1,000,000 to $2,000,000 the maximum amount the IEPA may approve from the Underground Storage Tank Fund in a calendar year for corrective action or indemnification to an owner or operator with fewer than 101 tanks. Public Act 92-0554 also increases from $1,000,000 to $1,500,000 the maximum amount per occurrence the IEPA may approve from the Fund for corrective action or indemnification.

Public Act 92-0735 (Senate Bill 1968) Effective July 25, 2002

Amends Sections 57.2, 57.7, 57.8, 57.10, 58.2, 58.6, 58.7, and 58.11 of the Environmental Protection Act (415/ILCS 5/1 *et seq.* (2000)). In the Titles concerning Petroleum Underground Storage Tanks and Site Remediation Program, Public Act 92-0735 provides that licensed professional geologists may perform and review site investigations. Makes other related changes. In provisions relating to the certification of reports by a licensed professional engineer, allows certification of a site investigation report by the licensed professional geologist who prepared or supervised the report, based upon generally accepted principles of professional geology.

Public Act 92-0715 (Senate Bill 1803) Effective July 23, 2002

Repeals Section 5.545 of the State Finance Act (30 ILCS 105/1 *et seq.* (2000)). Amends Sections 58.3, 58.13, and repeals Section 58.15 of the Environmental Protection Act (415/ILCS 5/1 *et seq.* (2000)). Public Act 92-0715 is an extension of last year's Brownfields legislation (P.A. 92-0486). The measure provides that the IEPA is authorized to administer funds made available to the IEPA under federal law for brownfield cleanup activities. Limits grant amounts given under the Municipal Brownfields Redevelopment Grant Program to a maximum of $240,000. Adds remedial action plans and remedial completion reports to the list of activities eligible for moneys under the Municipal Brownfield Redevelopment Program.

In the provisions concerning the Brownfields Site Restoration Program, the measure provides that the application fee for eligibility reviews must be made payable to the Department of Commerce and Community Affairs (DCCA) for deposit into the Workforce, Technology, and Economic Development Fund (rather than the Brownfields Redevelopment Fund), and the fees shall be used by DCCA for the administrative expenses of the program.

Within six months after the statute's effective date, the IEPA and DCCA are required to propose rules to the Board prescribing procedures and standards for administrating the program. The Board must adopt rules for second notice within nine months after receiving the proposed rules.

Water

Public Act 92-0550 (House Bill 3768) Effective June 24, 2002

Amends Sections 10 and 15 of the MTBE Elimination Act (415 ILCS 122/1 *et seq.* (2000)). Public Act 92-0550 defines "trace amount,", provides an exception to the MTBE prohibition in motor fuel for motor fuel containing a trace amount.

Public Act 92-0652 (Senate Bill 2072) Effective July 11, 2002

Adds Section 9.1 and amends Section 9 of the Illinois Groundwater Protection Act (415 ILCS 55/1 *et seq*. (2000)). Public Act 92-0652 requires the IEPA to notify the Department of Public Health (DPH), unless notification is already provided, of the discovery of any

volatile organic compound in excess of the Board's Groundwater Quality Standards or the Safe Drinking Water Act maximum contaminant level. The measure does not apply to a community water supply that is regulated under the Environmental Protection Act.

Requires the DPH to notify the public within 60 days of the receipt of the notice from the IEPA that the owner of any private water system, semi-private water system, or non-community public water system needs to test his or her system for potential contamination. Provides guidelines for the publication of notice. Additionally, the IEPA is required to notify the unit of local government of the discovery of any volatile organic compound in excess of the Board's Groundwater Quality Standards or the Safe Drinking Water Act maximum contaminant level. The unit of local government shall take any action that it deems appropriate within a reasonable time after notification by the IEPA.

Public Act 92-0539 (House Bill 3771) Effective January 1, 2003

Amends Section 255-5 of the Township Code (60 ILCS 1/1 *et seq.* (2000)). Public Act 92-0539 provides that townships in counties with a population of 50,000 (instead of 500,000) or more may, by resolution,

transfer from the road and bridge fund any balance no longer needed for road and bridge purposes to any other township fund or funds. For the period of one year, allows townships, by resolution, to transfer funds from the road and bridge fund to a township fund used for the purpose of the construction or maintenance of sewage or water treatment facilities.

Miscellaneous

Public Act 92-0618 (House Bill 1815) Effective July 11, 2002

Creates the Petroleum Equipment Contractors Licensing Act and amends numerous other Acts. Public Act 92-0618 regulates petroleum equipment contractors through licensure requirements. Provides enforcement guidelines. Preempts home rule powers. Amends the Regulatory Sunset Act to repeal the new Act on January 1, 2012. Amends the Gasoline Storage Act. Removes the power of the State Fire Marshal to make rules, to assess civil penalties, or to revoke the registration of petroleum equipment contractors from the Act. Removes the registration fees for petroleum equipment contractors from the Act. Additionally, the measure also provides that a municipality with a population over 500,000 and the Office of the State Fire Marshal may enter into contracts with petroleum equipment contractors pursuant to the provisions in the Gasoline Storage Act.

Sugar Creek Covered Bridge

Public Act 92-0767 (House Bill 3774) Effective August 6, 2002

Adds Section 19b-1.05 and amends Sections 19b-1.1, 19b-1.3, 19b-1.4, 19b-2, 19b-3, 19b-4, 19b-5, 19b-6, 19b-7, 19b-8, and 19b-9 of the School Code (105 ILCS 5/1 *et seq.* (2000)), and other Acts. Public Act 92-0767 makes the provisions of the School Energy Conservation Article applicable to area vocational centers, not just school districts. Amends the State Mandates Act to require implementation without reimbursement. Increases the number of years (from 10 years to 20 years) within which an energy savings contract guarantees that either the energy or operational cost savings, or both, will meet or exceed the costs of the energy conservation measures.

The measure also increases the maximum number of years (from 10 years to 20 years) over which an energy savings contract may provide for payments. Repeals a provision requiring the transfer of guaranteed energy savings amounts to the fire prevention and safety fund or to the bond and interest fund.

Public Act 92-0768 (House Bill 4023) Effective August 6, 2002

Public Act 92-0768 creates the Local Planning Technical Assistance Act. The measure requires the Department of Commerce and Community Affairs (DCCA) to promote the principles of sensible planning. Defines "sensible planning." Allows DCCA to make grants to counties and municipalities to develop, update, administer, and implement comprehensive plans, subsidiary plans, land development regulations, and development incentives that conform to the principles of sensible planning. Requires DCCA to set eligibility criteria for the grants, criteria for the use of grant funds, and reporting requirements. Allows DCCA to prepare model ordinances, manuals, and other technical publications that are founded upon the principles of sensible planning. Allows DCCA to provide educational and training programs promoting the principles of sensible planning.

The measure further requires DCCA to report at least annually to the Governor and the General Assembly on (i) the results and impacts of county and municipal activities funded by the grants; (ii) the distribution of the grants; (iii) model ordinances, manuals, and technical publications prepared by DCCA; and (iv) educational and training programs required by DCCA. Amends the State Finance Act to create the Local Planning Fund. Recommends that a municipality or county receiving assistance to write or revise a comprehensive plan use land development regulations and actions consistent with the comprehensive plan

(instead of requiring the consistency). Changes the listed purpose of the telecommunications infrastructure.

Public Act 92-0757 (Senate Bill 1565) Effective August 2, 2002

Adds Sections 7.91, 7.92, and 7.94 to the Illinois Development Finance Authority Act (20 ILCS 3505/1 *et seq.* (2000)). Public Act 92-0757 provides that it is in the public interest to reduce the costs of energy supplies and services by providing loans and by financing the administration of loans and the provision of technical assistance related thereto to fund energy efficiency improvements in governmental, commercial, and certain multi-family and other buildings. Authorizes the Illinois Development Finance Authority to provide loans at no more than 2% interest for this purpose, with repayment periods of no longer than 8 years. In provisions concerning the loan program, provides that loans may be made for the purchase and installation of any energy efficiency measure having a financial payback of no more than seven years.

Public Act 92-0707 (Senate Bill 1645) Effective July 19, 2002

Amends Section 6-6 of the Renewable Energy, Energy Efficiency, and Coal Resources Development Law of 1997 (20 ILCS 687/1 *et seq.* (2000)). Public Act 92-0707 distributes the Energy Efficiency Trust Fund money to programs for the benefit of customers rather than to the customers directly. Adds using market incentives to encourage energy efficiency to the list of projects eligible for grants.

Public Act 92-0610 (Senate Bill 1649) Effective July 1, 2002

Amends Sections 5, 10, 30, and 35 of the Illinois Petroleum Education and Marketing Act (225 ILCS 728/1 *et seq.* (2000)). Public Act 92-0610 provides that assessments to fund the Illinois Petroleum Resources Board shall be imposed on persons who own an interest in the gross production of oil or gas produced from a well in Illinois rather than from a person who derives the majority of his or her income from a working interest or who produces oil and gas. Provides for the continued existence of the Illinois Petroleum Resources Board until January 1, 2008, the scheduled sunset date for the Act.

Public Act 92-0736 (Senate Bill 1999) Effective July 25, 2002

Amends Section 3 of the Energy Conservation and Coal Development Act (20 ILCS 1105/1 *et seq.* (2000)). Adds Sections 6.5 and 6.6 to the Southern Illinois University Management Act (110 ILCS 520/1 *et seq.* (2000)). Public Act 92-0736 transfers the corn to ethanol research facility duties and the Illinois Ethanol Research Advisory Board from the Department of Commerce and Community Affairs to Southern Illinois University. Revises the membership of the Board.

Executive Order (Number 5) For The Interagency Coordinating Committee On Groundwater To Establish A Water Quantity Planning Program

Executive Order Number 5 establishes the Interagency Coordinating Committee on Groundwater. The Order provides that the Coordinating Committee must designate a subcommittee to develop an integrated groundwater and surface-water resources agenda and assessment report. The report will analyze the burdens on Illinois' finite water-resources, quantify Illinois' water-resources, and prioritize an agenda to plan for the protection of these water-resources. The subcommittee is to be chaired by the Director of the Department of Natural Resources or the Director's designee. The Interagency Coordinating Committee on Groundwater and the Groundwater Advisory Council (created under Section 5 of the Illinois Groundwater Protection Act, 415 ILCS 55/5) will use the subcommittee's agenda and report to establish a water-quantity planning procedure for the State by implementing the following programs:

a. A coordinated groundwater and surface-water resource program with information that is accessible and usable by governmental agencies and the public to support the State's water-resources quantity programs;

b. A statewide groundwater and surface-water resource program to serve as the basis for the information of priority water-quantity planning areas; and

c. A statewide program for the identification and recommendation of the appropriate organizational structure for priority water-quantity planning areas.

Before January 1st of each calendar year, the Interagency Coordinating Committee on Groundwater must report to the Governor on the progress of the assessments and programs mandated by this Executive Order.

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