Illinois

Pollution Control Board

Annual Report

2008

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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Letter From The Chairman

Honorable Rod R. Blagojevich, Governor of Illinois, and Members of the General Assembly:

The Pollution Control Board is proud to present the Board's Annual Report for Fiscal Year 2008. Between July 1, 2007 and June 30, 2008, the Board continued to handle a large volume of rulemaking procedures and contested cases while operating within the constraints posed by the State's budget difficulties.

Under the Environmental Protection Act (Act), the Board has two major responsibilities: determining, defining, and implementing environmental control standards for the State of Illinois, and adjudicating complaints that allege non-criminal violations of the Act. The Board also reviews appeals arising from permitting and other determinations made by the Illinois Environmental Protection Agency (IEPA), as well as pollution control facility siting determinations made by units of local government.

Board rulemaking during FY 2008 covered most areas of the Illinois environmental regulations. Rulemakings governing water quality standards generated the most public interest. Significant rulemakings concluded during the FY 2008 are outlined in the following paragraphs.

On January 24, 2008, the Board adopted final amendments to Proposed Amendments To Dissolved Oxygen (DO) Standard 35 Ill. Adm. Code 302.206, R04-25. The rulemaking amended the Illinois general use water quality standards for DO based on a proposal filed by the Illinois Association of Wastewater Agencies with changes suggested by the Illinois Department of Natural Resources and the Illinois Environmental Protection Agency (IEPA). The new DO rules take into account the natural variability of DO and aquatic organisms in Illinois waters, based on additional research conducted since the original DO rules were adopted by the Board in 1972.

On May 1, 2008, the Board adopted final rules on procedures for reporting unpermitted releases of radionuclides from nuclear power plants to the IEPA. The rulemaking is docketed as Procedures Required by PA 94-849 For Reporting Releases of Radionuclides at Nuclear Power Plants: New 35 Ill. Adm. Code 1010, (R07-20). On May 25, 2007, the IEPA filed the proposal, pursuant to PA 94-849, which added Section 13.6 to the Environmental Protection Act. The Board held two hearings and accepted comments on this proposal.

On November 15, 2007, the Board adopted final amendments in Proposed Amendments to Solid Waste Landfill Rules, 35 Ill. Adm. Code 810 and 811, (R07-8). The Board amended Parts 810 and 811 of regulations governing solid waste disposal and standards for new solid waste landfills. The Illinois Chapter of the National Solid Wastes Management Association originally filed the proposal to reflect expanded technical and scientific knowledge, as well as practical implementation experience, achieved since the Board first adopted these standards in 1990.

During FY 2008 the Board has also accepted several rulemakings that will continue into FY 2009 and that will require substantial resources from the Board. The most significant rulemaking proposal accepted by the Board include: Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and Lower Des Plaines River Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303, and 304, R08-9; Proposed Amendments to Groundwater Quality Standards 35 Ill. Adm. Code 620, R08-18; and Standards and Limitations for Organic Material Emissions for Area Sources Proposed New 35 Ill. Adm. Code Part 223, R08-17.

The Board had an active contested case docket in FY 2008 that included numerous enforcement cases, permit appeals, adjusted standard petitions, and landfill siting appeals. In addition, Board decisions were overwhelmingly upheld on appeal at both the Appellate and Supreme Court levels. Most significantly, the Board was affirmed in two cases dealing with the Board's interpretation of the underground storage tank rules. A more thorough discussion of those two cases, FedEx Ground Package System, Inc. v. IPCB, No. 07-0236 (1st Dist.) and Village of Wilmette v. IPCB, No. 1-07-2265 (1st Dist.), is presented below in the annual report.

Sincerely,

G. Tanner Girard

G. Tanner Girard
Acting Chairman

Meet the Board Members

Chairman G. Tanner Girard was appointed Acting Chairman in December 2005. Dr. Girard was originally appointed to the Board in 1992, and reappointed in 1994 and 1998, by Governor Jim Edgar. Governor George H. Ryan reappointed Dr. Girard to the Board in 2000. Governor Rod R. Blagojevich reappointed Dr. Girard in 2003 and 2005. 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 Thomas E. Johnson was appointed to the Board for a term beginning in July 2001. He served as Chairman from January 2003 until December 2003, and was then reappointed to a three-year term as Board Member by Governor Rod R. Blagojevich. Johnson 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. 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. Johnson is currently serving on the Podiatric Medical Licensing Board. He is a lifelong resident of Champaign County and lives in Urbana with his wife and two children.

Board Member Nicholas J. Melas was appointed to the Board in 1998 and reappointed in 2000, 2003 and 2005. Mr. Melas served as Commissioner of the Metropolitan Water Reclamation District of Greater Chicago for 30 years and President of its Board for the last 18 of those years. He has acted as the President of N.J. Melas & Company, Inc., and as President of the Illinois Association of Sanitary Districts. Mr. Melas also 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 and is a member of the Sierra Club, National Wildlife Federation, The Lake Michigan Federation, Open Lands Project and the American Civil Liberties Union. He was a Director of the Chicago Urban League, on the Board of the Chicago College of Osteopathic Medicine and Member of the American Association for the Advancement of Science and the Industrial Relations Association. Mr. Melas also served on the General Board of the Church Federation of Greater Chicago and, as an active member of the Greek Orthodox Church, was named Archon of the Ecumenical Patriarchate of Constantinople — the Order of St. Andrew. He has an MBA from the Graduate School of Business of The University of Chicago as well as a PhB and a BS in Chemistry also from The University of Chicago.

Board Member Andrea S. Moore was first appointed to the Board by Governor Rod R. Blagojevich in 2003. Prior to joining the Board, Ms. Moore was Assistant Director of the Illinois Department of Natural Resources. Board Member Moore was elected to the Illinois House of Representatives in 1993 where she remained until 2002. She was Spokesperson of the House Revenue Committee and served on the Environment and Energy, Public Utilities, Cities and Villages, Labor and Commerce, and Telecommunications Rewrite Committees. She also served on the Illinois Growth Task Force and was a member of the National Caucus of Environmental Legislators. From 1984 to 1992, Ms. Moore was a member of the Lake County Board, serving two years as Vice Chair. She was also a member of the Lake County Forest Preserve Board, serving as president in 1991 and 1992. Additionally, she was the Clerk of the Village of Libertyville and was a Village Trustee. Ms. Moore is a member of the Board of Directors of the University Center of Lake County. She was a member of the Board of Directors of the National Association of Counties. Additionally, she was Chief Financial Officer and co-owner of a small advertising and sales promotion agency.

Rulemaking Review

Rulemaking is one of the Board's most visible functions. During the public notice, comment, and hearing process in any given rule docket, the Board and its staff may interact with scores of individual citizens, state agency personnel, and representatives of industry, trade association, and environmental groups. The common goal is to refine regulatory language and to ensure that adopted rules are economically reasonable and technically feasible as well as protective of human health and the environment.

Section 5(b) of the Environmental Protection Act (Act) (415 ILCS 5/5(b) (2006)) 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 Illinois Environmental Protection Agency (IEPA) is the entity that most often files rule proposals. The Board holds quasi-legislative public hearings on the proposals to gather information and comments to assist the Board 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 (IAPA) (5 ILCS 100/5-10 through 5-160 (2006)). The Board issues written opinions and orders, in which the Board reviews all of the testimony, evidence, and public comment in the rulemaking record, and explains the reasons for the Board's decision.

There are also special procedures in Section 7.2 of the Act for Board 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 2008, arranged by docket number. During FY 2008, under Section 26 of the Act, the Board completed one rulemaking amending its procedural rules. Under Section 27 of the Act, the Board adopted rules in four significant rulemakings of statewide applicability (two air, one land, one radionuclide reporting). The Board also completed one air rulemaking under the Clean Air Act fast track procedures of Section 28.5. These six rules are briefly summarized below.

The Board also closed one rulemaking of site-specific applicability without adopting rules at proponent's request: Proposed Site Specific Perlite Waste disposal Regulation Applicable to Silbrico Corporation (35 Ill. Adm. Code Part 810), R06-8 (July 7, 2007). Finally, the Board completed some 16 identical-in-substance rulemaking dockets as required by Section 7.2 of the Act.

RULES ADOPTED IN FISCAL YEAR 2008

Proposed Amendments to Dissolved Oxygen Standard 35 Ill. Adm. Code 302.206, R04-25 (final rules adopted Jan. 24, 2008)

On January 24, 2008, the Board adopted final rules in Proposed Amendments to Dissolved Oxygen Standard 35 Ill. Adm. Code 302.206, R04-25 (Jan. 24, 2008). The rules, adopted after five days of public hearings, are based on aspects of both the original proposal filed by the Illinois Association of Wastewater Agencies, and the joint proposal later filed by the Illinois Department of Natural Resources and IEPA. The Board updated the existing general use water quality standard for dissolved oxygen or "DO" to make them consistent with the National Criteria

Document or "NCD" for DO of the USEPA, *Ambient Aquatic Life Water Quality Criteria for Dissolved Oxygen (Freshwater)* (USEPA, Chapman 1986).

The adopted amendments include a two-season numeric DO standard with values based on daily minima and 7- and 30-day averages. The "early life stages" season of the two-season numeric DO standard run from March 1st through July 31st. (The egg, embryo, larval, and recently-hatched juvenile life stages of fish are more sensitive to low DO concentrations than later juvenile and adult stages.) Additionally, the rulemaking designates stream segments (approximately 8% of general-use stream miles in Illinois) to receive "enhanced" numeric dissolved oxygen standards to protect DO-sensitive fish and macroinvertebrate species present in meaningful amounts. The adopted amendments also include a narrative DO standard to protect quiescent and isolated sectors of general use waters.

Proposed New Clean Air Interstate Rule (CAIR) SO2, NOx Annual and NO_x Ozone Season Trading Programs, 35 Ill. Adm. Code 225. Subparts A, C, D, E and F, R06-26 (final rules adopted Aug. 23, 2007)

On August 23, 2007, the Board adopted a final opinion and order in Proposed New Clean Air Interstate Rules (CAIR) SO_2, NO_x Annual and NO_x Ozone Season Trading Programs, 35 Ill. Adm. Code 225, Subparts A, C, D, E, and F, R06-26, (Aug. 23, 2007). The Board held five days of hearing on the May 30, 2006 proposal filed by the IEPA.

The adopted rules are intended to satisfy Illinois' obligations under the USEPA's "Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone; Revisions to Acid Rain Program; Revisions to the NO_x SIP Call" (known as the "federal CAIR"), 70 Fed. Reg. 25162 (May 12, 2005). The amendments also address, in part, the State's obligation to meet federal Clean Air Act requirements for the control of fine particulate matter ($PM_{2.5}$) and ozone in the Chicago and Metro East/St. Louis nonattainment areas.

The adopted rules are codified at 35 Ill. Adm. Code 225, and amend Subpart A and add new Subparts C, D, E, and F. In very brief summary, the rules:

- established a sulfur dioxide (SO_2) trading program in Illinois (Subpart C);
- control NO_x emissions from large electrical generating units (EGUs) through a NO_x trading program (Subpart D). Among other things, the rules establish recordkeeping and reporting provisions for units to earn Clean Air Set Aside (CASA) credits if the company sponsors a project that qualifies as energy efficiency and conservation, renewable energy, or clean technology project;
- created a NO_x emission control program for the ozone season, including standards for new units set-asides and clean air set-asides (Subpart E);
- introduced a new system for Combined Pollutant Standards (CPS), an alternative means of compliance with the emissions standards for mercury in Subpart B of Part 225. Section 225.230(a) and sets specific emissions levels for NO_x, particulate matter (PM), and SO_2. New Subpart F embodies a memorandum of understanding between IEPA and Dynegy Midwest Generation. Reductions in mercury, NO_x, PM, and SO_2 emissions will be accomplished through a combination of permanent shut-downs of EGUs, installation of activated halogenated carbon injection systems for reduction of mercury, and the installation of pollution control equipment for NO_x, PM, and SO_2 emissions that will also reduce mercury emissions as a co-benefit. EGUs identified for compliance with Subpart F are referred to as a "CPS Group".

Proposed Amendments to Solid Waste Landfill Rules, 35 Ill. Adm. Code 810 and 811, R07-8 (final rules adopted Nov. 15, 2007)

On November 15, 2007, the Board adopted a final opinion and order in Proposed Amendments to Solid Waste Landfill Rules, 35 Ill. Adm. Code 810 and 811, (R07-8). The adopted rules are based on a July 27, 2006 proposal filed by the Illinois Chapter of the National Solid Waste Management Association with the concurrence of the IEPA.

The adopted amendments to Parts 810 and 811 update the Board's solid waste disposal regulations to reflect practical experience gained by both the waste disposal industry and the IEPA through the implementation of those rules and the expanded technical and scientific knowledge achieved since the Board first adopted these standards in 1990. *See* Development, Operating, and Reporting Requirements for Non-Hazardous Waste Landfills, R 88-7 (Aug. 17, 1990).

Amendments to the Board's Procedural Rules and Underground Storage Tank Rules to Reflect P. A. 94-0274, P.A. 94-0276, and P.A. 94-0824 (35 Ill. Adm. Code 101.202, 732.103, 732.702, 634.115, and 734.710, R07-17 (final rules adopted Nov. 15, 2007)

On November 15, 2007, the Board adopted a final opinion and order in Amendments to the Board's Procedural Rules and Underground Storage Tank Regulations to Reflect P.A. 94-0274, P.A. 94-0276, P.A. 94-0824, P.A. 95-031, P.A. 95-0177, and P.A. 95-0408 (35 Ill. Adm. Code 101.202, 732.103, 732.702, 734.115, 734.710), (R07-17). The final rules make changes to Parts 101, 732, and 734 to incorporate recent statutory changes to the Act (415 ILCS5 /1 et seq.).

First, the amendments to Part 101 were driven by legislative changes to the Act's definition of "pollution control facility." *See* 415 ILCS 5/3.330(a)(11.5). Changes were required by Public Act 94-0824, effective June 2, 2006; Public Act 95-0131 effective August 13, 2007; Public Act 95-0177, effective January 1, 2008; and Public Act 95-0408, effective August 24, 2007.

Next, the amendments to Parts 732 and 734 were driven by changes to provisions of the Act's definitions governing the underground storage tank (UST) program. Public Act 94-0274 effective January 1, 2006, changed the Act's definition of owner. *See* 415 ILCS5/57.2 (2006). The Board's adopted amendments incorporate the statutory changes to the definition of "owner" in Sections 732.103 and 734.115 of the UST regulations (35 Ill. Adm. Code 732.103, 734.115).

Last, Public Act 94-0276 effective January 1, 2006, amended the Act's provisions regarding no further remediation (NFR) letters. *See* 415 ILCS 5/57.10(c). The Board amended its regulations regarding NFR letters in Sections 732.702 and 734.710 (35 Ill. Adm. Code 732.702, 734.710) to reflect the statutory amendment enacted by P.A. 92-0276.

Fast-Track Rules Under Nitrogen Oxide (NO_x) SIP Call Phase II: Amendments to 35 Ill. Adm. Code Section 201.146, Parts 211 and 217, R07-18 (final rules adopted Sept. 20, 2007)

On September 20, 2007, the Board timely adopted a final opinion and order in Fast-Track Rules Under Nitrogen Oxide (NO_x) SIP Call Phase II: Amendments to 35 Ill. Adm. Code Section 201.146, Parts 211 and 217, R07-18 (Sept. 20, 2007). The rulemaking was initiated by an April 4, 2007 proposal by the IEPA, under the fast-track rulemaking provisions of Section 28.5 of the Act, 415 ILCS 5/28.5.

The adopted rules amend Parts 211 and 217 to reduce interstate and intrastate transport of NO_x emissions, on both yearly and ozone season bases. Regulated sources must reduce NO_x emissions from stationary reciprocating internal combustion engines, as required by the USEPA in its NO_x State Implementation Plan (SIP) Call Phase II. *See* 69 Fed. Reg. 21603 (Apr. 21, 2004).

The amendments to Part 217 add a new Subpart Q and Appendix G that address the control of NO_x emissions from stationary reciprocating internal combustion engines, including a number of compliance, reporting, and recordkeeping requirements. They update measurement methods and materials that are incorporated by reference in Part 217. The applicability section clarifies that the requirements of Subpart Q are applicable to the engines that are listed in Appendix G. The amendments contain specific requirements regarding testing and monitoring that

address both initial performance and ongoing testing requirements.

Subpart Q's control and maintenance requirements include limits on the discharge of NO_x and offer compliance options to owners and operators through emissions averaging plans (as an alternative to the use of concentration limits). The amendments also adopt conditions for units that use continuous emissions monitoring systems (CEMS) in lieu of stack testing and portable monitoring. Units that are equipped with CEMS that meet specific federal requirements or that are following alternative procedures that have been approved by the IEPA or the USEPA in a federally enforceable permit are allowed alternative testing and monitoring requirements.

Procedures Required by PA 94-849 for Reporting Releases of Radionuclides at Power Plants: New 35 Ill. Adm. Code Part 1010, R07-20 (final rules adopted May 1, 2008)

On May 1, 2008, the Board adopted final rules to specify when an unpermitted release of radionuclides must be reported to the IEPA. Procedures Required by PA 94-849 For Reporting Releases of Radionuclides at Nuclear Power Plants: New 35 Ill. Adm. Code 1010, (R07-20) (May 1, 2008). The proposal, filed May 25, 2007 by the IEPA, implemented the mandate of PA 94-849. As required by that mandate, the Board timely adopted the final rules within one year of receipt of the IEPA proposal.

Public Act 94-849 added Section 13.6 to the Act. Section 13.6 requires the IEPA to propose rules to the Board "prescribing standards for detecting and reporting unpermitted releases of radionuclides." The IEPA developed the proposal in consultation with the Interagency Coordinating Committee on Groundwater, the Groundwater Advisory Committee, the Illinois Emergency Management Agency (IEMA) and Exelon Corporation.

Under the rules, a radionuclide is deemed to have been detected if an unpermitted release of liquids either: 1) results in tritium concentrations of 200 picocuries per liter (pCi/L) or more outside the licensee-controlled area, or 2) contains tritium at quantities of 0.002 Curies (Ci) or more. The adopted rules require that, within 24 hours of any unpermitted release of radionuclides into the groundwater, surface water, or soil, the licensee must evaluate the release to determine whether it needs to be reported. If reporting is necessary, the licensee must make a report to the IEPA and IEMA within that same 24 hours.

The rules give the proper procedure for reporting the releases, including the appropriate reporting phone numbers for IEPA and IEMA as well as instructions on electronic reporting. The rules further require a follow-up written report be sent to the IEPA and IEMA within five days after reporting the release. This follow-up report must contain the information required for the initial report as well as supplemental information on the release utilizing the best data available.

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 United States Environmental Protection Agency Administrator in various federal program areas. *See* 415 ILCS 5/7.2 (2006). These program areas include: drinking water; underground injection control; hazardous and non-hazardous waste; underground storage tanks; wastewater pretreatment; and the definition of volatile organic material.

Identical-in-substance (IIS) update dockets are usually opened twice a year in each of the seven program areas 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 IIS 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.

For reasons of space, the Board has not included the listing of identical-in-substance dockets completed in FY 08. Summaries of these dockets are included in the Board's newsletter the *Environmental Register*, They are available on the Board's Web site at www.ipcb.state.il.us

RULES PENDING AT END OF FISCAL YEAR 2008

One measure of the increase in rulemaking activity before the Board is the increase in pending rulemakings going into the next fiscal year. At the close of FY 08, there were 11 open dockets, exclusive of reserved IIS dockets (R 09-1 through R 09-7, reserved to cover the update period Jan. 1, 2008 through June 30, 2008).

The Board typically holds hearings on proposals filed with it, prior to adoption of the "first notice" orders required under the IAPA. If the Board substantially changes rule text as a result of public hearings and comment, the Board may adopt a "second first notice" order, hold additional hearings and receive additional comment.

The list of pending dockets below (not including identical in substance rule dockets) includes brief notations in parentheses of significant Board actions. For reasons of space, the substance of these dockets carried over from FY08 into FY09 is not summarized below. Additional information is available from the Board's Web site at www.ipcb.state.il.us

R04-8 In the Matter of: Amendments to the Board's Procedural Rules to Accommodate Electronic Filing: 35 Ill. Adm. Code 101-130 (pre-first notice proposal in development following completion of electronic filing pilot project)

R06-20 Proposed Amendments to the Board's Special Waste Regulations Concerning Used Oil, 35 Ill. Adm. Code 808,809 (in first notice, two hearings held, third set for Oct. 1, 2008)

R06-22 NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217 (first notice, hearings being scheduled in coordination with R07-19, below)

R07-9 Triennial Review of Sulfate and Total Dissolved Solids Water Quality Standards: Proposed Amendments to 35 Ill. Adm. Code 302.102(b)(6), 302.102(b)(8),302.102(b)(10), 302.208(g), 309.103(c)(3), 405.109(b)(2)(A), 409.109(b)(2)(B), 406.100(d); Repealer of 35 Ill. Adm. Code 406.203 and Part 407; and Proposed New 35 Ill. Adm. Code 302.208(h) (two hearings held, in second notice, final adoption expected Fall 2008)

R07-19 Section 27 Proposed Rules for Nitrogen Oxide (NO_x) Emissions From Stationary Reciprocating Internal Combustion Engines and Turbines: Amendments to 35 Ill. Adm. Code Parts 211 and 217 (pre-first notice, two sets of hearings held, first notice expected Fall 2008)

R07-21 Site Specific Rule for City of Joliet Wastewater Treatment Plant Fluoride and Copper Discharges, 35 Ill. Adm. Code 303.432 (pre-first notice, hearings to be scheduled after receipt of proponent's readiness motion)

R08-8 Abbott Laboratories' Proposed Site-Specific Amendment to Applicability Section of Organic Material Emission Standards and Limitations for the Chicago Area: Subpart T: Pharmaceutical Manufacturing (35 Ill. Adm. Code 218.480(b)) (one hearing held, in second notice, final adoption expected Fall 2008)

R08-9 Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and the Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303 and 304 217 (pre-first notice, three sets of hearings held with two more scheduled in Fall 2008)

R08-17 Standards and Limitations for Organic Material Emissions for Area Sources Proposed New 35 Ill. Adm. Code Part 223 (pre-first notice, three sets of hearings held, first notice expected Fall 2008)

R08-18 Proposed Amendments to Groundwater Quality Standards, 35 Ill. Adm. Code 620 (pre-first notice, three sets of hearings held, first notice expected Fall 2008)

R08-19 Nitrogen Oxides Emissions From Various Source Categories, Amendments to 35 Ill. Adm. Code Parts 211 and 217 (pre-first notice, two sets of hearings scheduled Oct. 14-17 and Dec. 9-12, 2008)

The Board presently expects that it will adopt rules in many of these dockets during FY09.

Judicial Review

Introduction

Board decisions can be appealed to the Illinois appellate courts pursuant to Section 41 of the Environmental Protection Act (Act) (415 ILCS 5/41 (2006)). Section 41 of the Act provides that 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. The standard of review for the Board's quasi-legislative actions is whether the Board's decision is arbitrary or capricious. The Board's quasi-legislative decisions include rulemaking, imposing conditions in variances, and setting penalties. All other Board decisions are quasi-judicial in nature. The Illinois Supreme Court stated that in reviewing State agency's quasi-judicial decisions: findings of fact are reviewed using a manifest weight of the evidence standard, questions of law are decided by the courts *de novo*, and mixed questions of law and fact are reviewed using the "clearly erroneous" standard (a standard midway between the first two). *See* AFM Messenger Service, Inc. v. Department of Employment Security, 198 Ill. Ed 380, 763 N.E.2d 272 (2001) and City of Belvidere v. Illinois State Labor Relations Board, 181 Ill. 2d 191, 692 N.E.2d 295 (1998).

In FY08, the Illinois appellate courts entered orders in eight cases (some consolidating multiple Board cases) involving appeals from Board opinions and orders. The Board was affirmed in seven of those appeals and the courts granted a joint motion to dismiss an appeal of adopted rules. Also, the circuit court entered a consent decree dismissing a circuit court injunction action involving a completed Board rulemaking.

The following summaries of the written appellate decisions in Board cases for Fiscal Year 2008 are organized first by case type, and then by date of final determination.

Enforcement

Sections 30 and 31.1 of the Act (415 ILCS 5/30 and 31.1 (2006)), 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 by a citizen or by the Attorney General's Office. A public hearing is held. At the hearing, the complainant must 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) (2006). 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. 415 ILCS 5/33 and 42 (2006). An administrative citation is initiated by the Illinois Environmental Protection Agency (IEPA) or a unit of local government and imposes a fixed statutory fine for, among other things, causing or allowing open dumping of any waste. 415 ILCS 5/21(o, p) and 31.1 (2006).

In FY08, the appellate court for both the Second District and the Fifth District affirmed Board decisions finding violations and imposing civil penalties in administrative citation cases.

William Shrum v. Illinois Environmental Protection Agency and Illinois Pollution Control Board, No. 5-06-0310 (5th Dist. July 27, 2007) (unpublished Rule 23 order affirming Board orders in AC 05-18 (March 16, 2006 interim order and May 18, 2006 final order)

On July 27, 2007, the Fifth District Appellate Court issued a Rule 23 order (166 Ill. 2d R. 23) affirming the Board in William Shrum v. Illinois Environmental Protection Agency and Illinois Pollution Control Board, No. 5-06-0310 (5th Dist. July 27, 2007). In an administrative citation (AC) case, the Board had found that site-owner William Shrum "allowed" open dumping where Shrum controlled the site and did not clean up waste placed there by the previous owner. Illinois Environmental Protection Agency v. William Shrum, AC 05-18, (March 16, 2006 interim order and May 18, 2006 final order).

Board Orders

On February 19, 2004, William Shrum purchased the site, located north of the intersection of Shamrock and Corgan Roads approximately three and one-half miles northwest of Tamaroa, Perry County. The IEPA inspected the site July 2, 2004. The IEPA inspector observed waste materials covering an area approximately 90 feet wide by 75 feet long. The materials appeared to have been spread out to fill a low-lying area since a June 2004 inspection. On August 4, 2004, the IEPA issued an AC alleging that Shrum violated Sections 21(p)(1) and (7) of the Act by causing or allowing the open dumping of waste resulting in litter and the deposition of general or clean construction or demolition debris.

Shrum filed a petition for review with the Board. On March 16, 2006, the Board found that a prior owner had placed the waste materials on the site in 2000-2001. Shrum purchased the property in February 2004, and in fact removed some of the waste from the site. The dispute between the parties was whether Shrum "allowed" the open dumping under these facts.

The Board found Shrum violated Sections 21(p)(1) and (7) of the Act as alleged. Consistent with long-standing Board precedent, the Board found that Shrum exercised control over the site as its owner and "allowed" the open dumping by failing to remedy the prior waste disposal. Because Shrum had previously been found in violation of Section 21(p)(1), this second adjudicated violation required imposition of a $3,000 civil penalty. The violation of Section 21(p)(7) required imposition of a $1,500 civil penalty.

On May 18, 2006, the Board issued its final opinion and order, incorporating by reference its findings of fact and conclusions of law from the interim opinion and order and assessing the $4,500 civil penalty, along with the documented hearing costs totaling $306.88. Illinois Environmental Protection Agency v. William Shrum, AC 05-18, slip op. at 1-2 (May 18, 2007 final order).

Court Decision

The court determined that the proper standard of review to apply to the Board's decision was the "clearly erroneous" standard. Shrum, slip op. at 2

The court declined to construe Shrum's moving of the debris around on the site as "causing" open dumping and instead, the court focused on the meaning of "allowed." Shrum, slip op. at 4. The court stated that "[t]he question is simply whether Shrum allowed the waste to remain on his property. By purchasing property with waste present and by failing to remove that waste, is Shrum guilty of open dumping?" *Id*. The court noted that the Act does not define the term "allow" and that courts will consider the administrative interpretation when the statutory language is "reasonably debatable." *Id*.

The court described relevant Board decisions as standing for the proposition that "passive conduct in failing to remediate the property" qualifies as the "requisite allowance." Shrum, slip op. at 4-5. The Court noted Illinois Supreme Court precedent on how knowledge or intent is not necessary to establish a violation of the Act. *Id*. at 5. The court concluded: "The IEPA is not required to establish that Shrum intended to allow open dumping. Taking no steps to rectify the waste left behind by the previous landowner was sufficient to establish Shrum's guilt of allowing open dumping on his land." Shrum, slip op. at 5-6. The court therefore found that the Board's judgment was not clearly erroneous and affirmed the Board. *Id*. at 6.

Northern Illinois Service Co. v. Environmental Protection Agency and Pollution Control Board, 381 Ill. App. 3d 171, 885 N. E. 2d 447 (2nd Dist. 2008) (petition for leave to appeal pending)(affirming Board orders in AC 05-40 (affirming July 26, 2007 final order as modified Apr. 19, 2007))

On March 11, 2008, the Second District Appellate Court issued an opinion affirming the Board in Northern Illinois Service Co. v. Environmental Protection Agency and Pollution Control Board, 381 Ill. App. 3d 171, 885 N. E. 2d 447 (2nd Dist. 2008**)** (hereinafter NISC). In an AC case, the Board had found that Northern Illinois Service Co. (NISC) committed two violations of the Act, 415 ILCS 5/1 *et seq.* (2006) at NISC's "Roscoe Quarry." IEPA v. Northern Illinois Service Company, AC05-40 (July 26, 2007 final order as modified April 19, 2007). The Board found that NISC violated the open dumping of waste prohibitions of Sections 21(p)(1) (litter) and (p) (7) (general construction or demolition debris) of the Act, 415 ILCS 5/21(p)(1) and (7) (2006), and imposed the corresponding statutory civil penalty of $3,000, along with Board and IEPA hearing costs.

NISC petitioned the Second District for review of the Board's decision, but only regarding the violation of Section 21(p)(1).

Board Order

NISC specializes in excavation and demolition contracting at its site known as the Roscoe Quarry, located at 4960 Rockton Road in Roscoe, Winnebago County. In the course of business, Northern uses sand from the Roscoe Quarry to complete its projects. Workers also haul dirt and other material

back from other excavations to the Roscoe Quarry site. The IEPA conducted two site investigations at the Roscoe Quarry, the first inspection in July of 2004 and the second inspection on October 4, 2004. At the time of the October inspection, the IEPA observed over 150 cubic yards of concrete debris with protruding rebar that filled low-lying areas of the quarry and a debris pile containing steel conduit. In addition, approximately 9,700 cubic yards of landscape debris were piled northwest of the concrete debris. The landscape debris resembled "an island with a moat" and stood 10 to 13 feet high. Some of the landscape material had been on the property for more than ten years. An access road surrounded a large pile of trees, which was in turn surrounded by more landscape debris. Trees at the site were not processed in any way. In fact, trees at the base of the mounds of landscape debris showed signs of decay. Furthermore, the position of the trees did not change between the July and October inspections.

NISC did not contest the alleged violation of Section 21(p)(7) of the Act, which prohibits the open dumping of waste resulting in the deposition of general or clean construction or demolition debris. Accordingly, the Board found that NISC had committed that violation. NISC did contest the alleged Section 21(p)(1) violation, arguing that the landscape debris could be used as mulch, and that it therefore had value and was not "waste" or "litter."

The Board ruled that the pile of landscape material was "waste," both because it constituted "landscape waste," a subset of "waste," and "other discarded material," and that the pile constituted "litter" and found a violation of Section 21(p)(1) of the Act.

On January 26, 2007, the Board found that because there were two violations of Section 21(p)(1) of the Act a total civil penalty of $3,000 was assessed along with hearing costs totaling $672.75.

Court Decision

The court, interpreting the Illinois Supreme Court's decision in Alternate Fuels, Inc. v. Director of the Illinois Environmental Protection Agency, 215 Ill. 2d 219, 237-38 (2004), held that the trees were "discarded material" within the Act's definition of "waste." The court found there was no evidence presented that the trees had ever been "collected, separated or processed and returned to the economic mainstream in the form of raw materials or products." 415 ILCS 5/3.380. The court noted that the testimony indicated that the trees showed evidence of decay and did not change position between the July and October inspections. The trees "were not processed. They were just laid there to rot." In addition, NISC admitted that trees were present at the site when it acquired the property 10 years ago and that it had been placing trees on the site ever since. The court concluded that the uprooted, dead trees on NISC's property fall within the definition of waste as other discarded material. NISC, 885 N.E.2d at 451-52.

The court rejected NISC's argument that trees are not "waste" because they are unlike other items specifically mentioned in the definition of "waste," such as "garbage" and "sludge from a waste treatment plant." NISC, 885 N.E.2d at 452. The court stated that

> The trees did not appear in the Roscoe Quarry naturally; rather, NISC uprooted whole trees and hauled them to a pile in the Roscoe Quarry in the course of its excavation business. Put another way, the trees were 'generated [in that they were uprooted] and discarded [in that they were placed in a pile and left to decay] by people.' Indeed, at least some portion of the trees had been present for over 10 years. Therefore, we find that, under the facts presented, unlike the leaves in Lake Forest, the uprooted trees here are 'of the same nature as garbage or sludge which is generated and discarded by people.'" Lake Forest, 146 Ill. App. 3d at 855." NISC, 885 N.E.2d at 452.

The court then stated that it need not reach the issue of whether the trees qualified as "landscape waste" under the Act because the court had already concluded that the trees were "other discarded material" within the meaning of "waste." *Id.* The court quoted the definition of "litter" contained in the Litter Control Act, 415 ILCS 105/3(a) (2006), and then concluded that "the trees fall within the definition of litter as 'any discarded, used or unconsumed substance or waste.'" *Id.,* NISC, 885 N.E.2d at 453.

Pollution Control Facility Siting Appeals

The Act provides, in Sections 39(c) and 39.2, for local government participation in the siting of new pollution control facilities. 415 ILCS 5/39(c), 39.2 (2006). Section 39(c) requires an applicant requesting a permit for the development or construction of a new 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, and specific criteria that apply when the local government considers an application to site a pollution control facility. The decision of the local government may be contested before the Board under Section 40.1 of the Act. 415 ILCS 5/40.1 (2006).

The Board reviews the decision to determine if the local government's procedures satisfy principles of fundamental fairness and whether the decision on

siting criteria was against the manifest weight of the evidence. The Board also hears challenges to the local government's jurisdiction based on whether the siting applicant met various notice requirements of the Act. The Board's final decision is then reviewable by the appellate court.

In FY08, the courts continued their review of "Town and Country II," one of a pair of cases which had generated court opinions in FY07 and FY08. The rulings of the Third District Appellate Court and the Illinois Supreme Court in "Town and Country II" from FY08 are discussed below.

County of Kankakee, Illinois, Edward D. Smith, Kankakee County State's Attorney, Byron Sandburg and Waste Management of Illinois, Inc v. Illinois Pollution Control Board, City of Kankakee, Illinois, Kankakee Regional Landfill, LLC and Town & Country Utilities, Inc., Nos. 3-04-02713-04-02853-04-0289 (cons.) (3rd Dist. Apr. 24, 2008) (affirming Board's order affirming grant of siting approval in PCB 04-33, 34, 35 (Mar. 18, 2004)

In an April 24, 2008 unpublished order, under Supreme Court Rule 23 (166 Ill. Ed. R.23), the Third District reconsidered its November 17, 2006 decision reversing the Board's decision in County of Kankakee, Illinois, Edward D. Smith, Kankakee County State's Attorney, Byron Sandburg and Waste Management of Illinois, Inc v. Illinois Pollution Control Board, City of Kankakee, Illinois, Kankakee Regional Landfill, LLC and Town & Country Utilities, Inc., Nos. 3-04-02713-04-02853-04-0289 (cons.) (3rd Dist. Nov. 17, 2006) (hereinafter "Town and Country II" (Third Dist. 2006)). In the April 24, 2008 ruling, the Third District found that the Board had correctly affirmed the City of Kankakee's grant of siting approval to the 2003 application made by Town and Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C. (T&C) in County of Kankakee, Illinois, Edward D. Smith, Kankakee County State's Attorney, Byron Sandburg and Waste Management of Illinois, Inc v. Illinois Pollution Control Board, City of Kankakee, Illinois, Kankakee Regional Landfill, LLC and Town & Country Utilities, Inc., Nos. 3-04-02713-04-02853-04-0289 (cons.) (3rd Dist. Apr. 24, 2008) (hereinafter "Town and Country II (Third Dist. 2008)"). The Board decision which was the subject of the appeal is Byron Sandberg v. City of Kankakee, Illinois, The City of Kankakee, Illinois City Council, Town and Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C.; Waste Management of Illinois v. City of Kankakee, Illinois, City Council, Town and Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C.; County of Kankakee and Edward D. Smith, States Attorney of Kankakee County v. City of Kankakee, Illinois, The City of Kankakee, Illinois City Council, Town and Country Utilities, Inc. and Kankakee Regional Landfill, L.L.C., PCB 04-33, PCB 04-34, PCB 04-35 (cons.) (Mar. 18, 2004).

The Town and Country II (Third Dist. 2008) Rule 23 order affirmed the Board's decision on a single ground: the 2002 and 2003 siting applications were not "substantially the same," so the latter application was not barred by Section 39.2(m) of the Act. The Third District did not address other appeal grounds that were raised by the appellants (*e.g.*, compliance with siting criteria, fundamental fairness).

Board Order

The Board held that Section 39.2(m) did not bar T&C's 2003 application. Section 39.2(m) of the Act provides that:

> An Applicant may not file a request for local siting approval which is substantially the same as a request which was disapproved pursuant to a finding against the Applicant under any criteria (i) through (ix) of subsection (a) of this Section within the preceding two years. 415 ILCS 5/39.2(m).

The Board found that because the Kankakee City Council had never "disapproved" the 2002 application, the Board's reversal of the City Council in Town & Country I was not "disapproval" within the meaning of Section 39.2(m). The Board stated "[t]he Board's authority is limited to reviewing a local siting authority's decision, but not actually approving or disapproving the siting application." Because the Board found that the Section 39.2(m) prohibition was inapplicable, the Board stated that it "need not address the parties' arguments regarding whether the 2003 application is substantially the same as the 2002 application."

Court Decision

Town & Country and the Board petitioned the Third District for rehearing of its 2006 order in which the court had reversed the Board's decision to grant siting (for more detail on the court's 2006 decision see the Board's FY07 annual report). The petition for rehearing asserted that the Third District erred by giving no deference at all to the Board's statutory interpretation of Section 39.2(m). The Third District granted the petition for rehearing "to address the standard of review." Town and Country II (3rd Dist. 2006), slip op. at 8.

The Third District stated that "under the appropriate standard of review, the decision of the Board was not against the manifest weight of the evidence" and

so affirmed the Board's order. *Id.* at 3. The Third District's discussion focused on the differences and similarities between the 2002 application and the 2003 application. *Id.* at 4-7. The Third District reasserted that the Board's reversal of the City in Town & Country I constitutes Section 39.2(m) "disapproval." The Third District concludes that in light of the Supreme Court's decision in Town & Country I:

> It is the decision of the Board, not the decision of the local siting authority that is reviewed on appeal; a finding that the Board's action constituted "disapproval" within the meaning of Section 39.2(m) is consistent with our supreme court's interpretation of the Act. The reversal by the Board constituted a disapproval within the meaning of the Act. Town and Country II (3rd Dist. 2006), slip op. at 10-11.

Turning to the second step of its legal analysis, the Third District recites the similarities and differences between the 2002 and 2003 applications, and found that the Board's decision is supported by the record, and:

> Accordingly, the order of the Illinois Pollution Control Board upholding the decision of the Kankakee City Council is affirmed. Consequently, the decision of the Kankakee City Council granting T&C's 2003 application for siting approval is also affirmed. *Id.* at 12-13.

On June 5, 2008, the Illinois Supreme Court granted the County of Kankakee's motion for "supervisory order" in County of Kankakee, Illinois. *et al*. v. Hon. William E. Holdridge *et al.*, No. 106525 (June 5, 2008). The County had filed the motion in response to the Third District Appellate Court's Rule 23 order.

Supreme Court Rule 383 (155 Ill. Ed. R.383) allows the parties to a case to file a "motion requesting the exercise of the Supreme Court's supervisory authority," in which the respondent is the "person whose act is the subject of the proceeding" (here, Judge Holdridge as named author of the 3rd District's April 24, 2008 order). In its June 5, 2008 order, the Illinois Supreme Court directed the Third District to "vacate its judgment of April 24, 2008" with the following instructions:

> The appellate court is directed to reconsider the case, and if it finds that the second siting application was disapproved within the meaning of 415 ILCS 5/39.2(m), to determine whether the second application was substantially the same as the first application under the statute, acknowledging that the Pollution Control Board expressly did not reach this issue. If the appellate court then finds that the second siting application was properly filed, the appellate court is directed to address the remaining issues raised by the parties to the appeal. County of Kankakee, Illinois. *et al.* v. Hon. William E. Holdridge *et al.*, No. 106525 (June 5, 2008), slip op. at 1-2.

At the end of FY08, the Third District Appellate Court had not acted in this case.

Rulemaking

Section 5 of the Act mandates the Board to "determine, define and implement the environmental control standards applicable in the State of Illinois." The Board promulgates rules 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 pursuant to Section 41in the appellate court. Section 29 states that the purpose of judicial review is for the court to determine the validity or applicability of the regulation.

No Board rulemakings were appealed in FY08. But pending during FY08 were two appeals challenging the same Board rulemaking: Proposed New 35 Ill. Adm. Code 225 Control of Emissions From Large Combustion Sources (Mercury), R06-25 (Dec. 21, 2006). As described below, one appeal was dismissed, leaving only one appeal of the R06-25 rule pending. Also dismissed in FY08 was a case filed in the circuit court that sought judicial review of a Board ruling construing one of the Act's rulemaking provisions: the fast track rulemaking provisions of Section 28.5 in NO_x Emissions From Stationary Reciprocating Internal Combustion Engines and Turbines, 35 Ill. Adm. Code Section 201.146 and Parts 211 and 217, R07-18 (Apr. 19, 2007).

Midwest Generation, LLC v. Illinois Environmental Protection Agency and Illinois Pollution Control Board, No. 3-07-0061 (3rd Dist. June 24, 2008)

The Third District Appellate Court granted a joint motion for voluntary dismissal of an appeal of a Board rule in a June 24, 2008 order. Midwest Generation, LLC v. Illinois Environmental Protection Agency and Illinois Pollution Control Board, No. 3-07-0061 (3rd Dist. June 24, 2008). The appeal involved the Board's December 21, 2006 adoption of rules to control mercury emissions in Proposed New 35 Ill.

Adm. Code 225 Control of Emissions From Large Combustion Sources (Mercury), R06-25 (Dec. 21, 2006). One more petition for review of the rules remains pending. Kincaid Generation, LLC v. Illinois Environmental Protection Agency and Illinois Pollution Control Board, No. 4-07-0075 (4th Dist. filed Jan. 24, 2007).

ANR Pipeline Company, Natural Gas Pipeline Company, Trunkline Gas Company, and Panhandle Eastern Pipe Line Company v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, No. 07MR190 (Sangamon County Circuit Court, Jan. 9,2008)

On January 9, 2008, the Sangamon County Circuit Court entered an agreed order dismissing, without prejudice, a complaint seeking declaratory and injunctive relief filed by several natural gas companies against the Board and the IEPA. ANR Pipeline Company, Natural Gas Pipeline Company, Trunkline Gas Company, and Panhandle Eastern Pipe Line Company v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, No. 07MR190 (Sangamon County Circuit Court, Jan. 9, 2008) (hereinafter ANR Pipeline). The complaint concerned the IEPA's April 6, 2007 rulemaking proposal to control certain nitrogen oxide (NO_x) emissions, initially docketed as NO_x Emissions From Stationary Reciprocating Internal Combustion Engines and Turbines, 35 Ill. Adm. Code Section 201.146 and Parts 211 and 217, R07-18 (April 19, 2007). The plaintiff companies sought to enjoin Board use of the Clean Air Act fast track rulemaking procedures under Section 28.5 of the Environmental Protection Act (Act), 415 ILCS 5/28.5 (2006), and have the court declare Section 28.5 unconstitutional.

The complaint was filed on May 14, 2007, three days before the Board bifurcated the rulemaking into two dockets: "Fast-Track" NO_x SIP Call Phase II, R07-18 and Section 27 Proposed Rules for NO_x Emissions From Stationary Reciprocating Internal Combustion Engines and Turbines, R07-19 (combined order of May 17, 2007). The power companies had agreed that some provisions of the IEPA proposal could properly proceed under Section 28.5, and the Board deferred consideration of the challenged rule provisions to a general rulemaking, captioned as R07-19. The Board completed rulemaking and adopted fast track rules in R07-18 by order of September 20, 2007.

Underground Storage Tank Program Appeal

Petroleum leaks from underground storage tanks (USTs) are presently remediated under Title XVI of the Act. 415 ILCS 5/57-57.17 (2006). (Remediation was formerly made under the now-repealed Title V (415 ILCS 5/22.13, 22.18, 22.18b (1992).) The Act specifies what actions must be taken, provides for approval of remediation plans and budgets by the IEPA, and establishes an Underground Storage Tank Fund (Fund). Under certain conditions, a person who has registered USTs with the Office of the State Fire Marshal (OSFM) can obtain reimbursement for costs of corrective action, subject to statutorily set deductibles.

Title XVI divides program responsibilities between IEPA and OSFM. OSFM has oversight responsibility for some aspects of early action activities, such as supervising UST removals. OSFM also determines whether an owner or operator is eligible for reimbursement from the UST Fund, and if so, what the deductible amount should be. IEPA focuses on risk-based clean-up and site assessment, and makes various determinations on corrective action plans for remediation and monitoring and on the appropriateness of budgets and expenditures for which reimbursement is sought from the Fund.

Title XVI specifies several points at which a UST owner or operator can appeal IEPA or OSFM decisions to the Board. In FY08, the First District Appellate Court issued companion rulings concerning the effect of IEPA issuance of a "No Further Remediation" (NFR) letter on the ability of a UST owner or operator to seek additional reimbursement from the UST Fund.

FedEx Ground Package System, Inc. v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, 321 Ill. App. 3d 1013, 889 N. E. 2d 697 (1st Dist. 2008); PCB 07-12 (Dec. 21, 2006)

On February 22, 2008, the First District Appellate Court issued a decision affirming the Board in an appeal of an UST determination. FedEx Ground Package System, Inc. v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, 321 Ill. App. 3d 1013, 889 N. E. 2d 697 (1st Dist. 2008). The Board had granted an IEPA motion for summary judgment and affirmed the IEPA's determination rejecting an amended remediation budget requested after issuance of an NFR letter. FedEx Ground Package System, Inc. v. Illinois Environmental Protection Agency, PCB 07-12 (Dec. 21, 2006).

Board Order

FedEx Ground Package System, Inc. (FedEx), in a petition filed August 21, 2006, sought the Board's review of a July 17, 2006 IEPA determination rejecting an amended remediation budget for FedEx's underground storage tank site in Bedford Park, Cook County. On April 3, 2003, FedEx reported a leak from an underground storage tank at its site. FedEx took corrective action at the site, and received reimbursement from the UST Fund. On April 21, 2006, the IEPA received from FedEx a Corrective Action Completion Report (CACR), an engineer's certification, and a request for an NFR letter. Under Section 57.10(c)(1) of the Act, the NFR letter's issuance signifies that all statutory and regulatory requirements for remediation, and the planning and budgeting submissions therefore, have been met and that such activities are complete. On May 10, 2006, the IEPA acknowledged receiving FedEx's CACR and granted FedEx's request for an NFR letter. On May 17, 2006, FedEx recorded the NFR letter with the Cook County Recorder of Deeds.

On May 30, 2006, FedEx submitted a proposed budget amendment and claim for reimbursement to the IEPA.

In a letter dated July 17, 2006, the IEPA rejected FedEx's proposed amended budget. As its basis for doing so, the IEPA again stated that the budget was submitted after the issuance of a NFR letter and any corrective action plan or budget must be submitted to the IEPA for review and approval, rejection, or modification prior to the issuance of a NFR letter.

The Board affirmed the IEPA amended budget disapproval, ruling on cross motions for summary judgment. The Board found that the Board's rules at issue apply not only to those who proceed with no approved plan or budget at all, but also to those who go beyond the scope of an approved plan or who incur costs that go beyond the approved corrective action budget, necessitating an amendment. In this case, FedEx proceeded by incurring costs beyond amounts contained in its approved budget without first receiving IEPA approval of an amended budget. The Board held that for the IEPA to review a proposed budget amendment, the amendment must be submitted before the IEPA issues the NFR letter.

Court Decision

The court reviewed *de novo* the Board's rulings on questions of law, but added that "a reviewing court should afford substantial deference to the agency's determination of a statute which the agency administers and enforces." FedEx, 889 N.E.2d at 699. The court noted that the Act required the Board to adopt rules governing the administration of the Fund, which Fund "does not have a broad remedial purpose, presumably due to its limited resources." *Id.*, Accordingly, the court continued, "the rules and regulations administering it are not to be taken lightly and should not be ignored." FedEx, 889 N.E.2d at 700.

The court then found the Board's rules reasonable and not in conflict with the Act, stating:

> We do not find that imposing a regulation requiring budgets and plans to be submitted before an NFR letter is granted to be unduly restrictive or contrary to the purpose and language of the Act. The NFR letter signifies that no further steps need to be taken to correct the leaking storage tanks, and that the matter is essentially outside the scope of the Act, and therefore the Fund. Without such a regulation, budgets and plans for corrective actions taken in excess of the requirements set forth by the act could be submitted indefinitely for whatever costs incurred, possibly even for measures that may have been taken unnecessarily. Accordingly, although there exists a statutory right to reimbursement from the Fund, we do not find that this right is unlimited. Furthermore, we do not find that section 734.335(d) of the Illinois Administrative Code is contrary to the purpose and language of the Act, and is a reasonable and enforceable regulation limiting the statutory right to reimbursement from the fund." FedEx, 889 N.E.2d at 700.

FedEx alternatively argued that Section 734.335(d) simply did not apply in this case because FedEx already had an approved plan and budget. FedEx, 889 N.E.2d at 700. The court, "after a careful reading of the relevant sections," disagreed. *Id.* The court found that subsection (d) is not limited solely to instances where corrective action precedes the submittal of a plan or budget. Rather, the subsection applies to "those who proceed not only with no budget or plan," but also to those who "go beyond the scope of an approved plan or budget." *Id.* The court added:

> Furthermore, section 734.335(e) allows amendments to plans or budgets when revised procedures or cost estimates are necessary. Because of this, it is logical to see that section 734.335(d) is a necessary limitation specifying that plan or budget changes, or essentially the creation of a new plan or budget, should be submitted prior to the issuance of a NFR letter. *Id.*

Village of Wilmette v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, Nos. 1-07-2265 & 1-07-2439 (cons.)(1st Dist. May 23, 2008)

On May 23, 2008, the First District Appellate Court issued an order under Supreme Court Rule 23 (166 Ill.2d R. 23) affirming the Board in an appeal of an underground storage tank (UST) determination. Village of Wilmette v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, Nos. 1-07-2265 & 1-07-2439 (cons.)(1st Dist. May 23, 2008) In two separate cases involving cross-motions for summary judgment before it, the Board had granted the IEPA summary judgment and affirmed the IEPA's determinations concerning reimbursement under the Underground Storage Tank Fund (Fund) program, rejecting an amended remediation budget requested after issuance of a "No Further Remediation" (NFR) letter under the Underground Storage Tank Fund. Village of Wilmette v. Illinois Environmental Protection Agency, PCB 07-27 (July 12, 2008) and PCB 07-28 (July 26, 2008).

This is the second time the First District has affirmed the Board's holdings in cases involving the "post-NFR budget amendment" question. Both Wilmette and FedEx involved an analogous regulation under different Parts of the Board's UST rules, Wilmette under 35 Ill. Adm. Code 732 (releases reported September 23, 1994 through June 23, 2002) and FedEx under 35 Ill. Adm. Code 734 (releases reported on or after June 24, 2002). The Board held in both FedEx and Wilmette that, as argued by the IEPA, the owner or operator of a leaking UST could not amend its Fund budget after the IEPA issued an NFR letter for the incident.

Board Orders

The consolidated cases involved the IEPA's rejection of High Priority Corrective Action Plan budget amendment requests made by the Wilmette regarding a UST site at 720 Ridge Road, Cook County. Prior to issuance of the NFR, Wilmette had an IEPA-approved corrective action plan and budget, and had received reimbursement from the Fund for actions taken. After IEPA issued the requested NFR letter to Wilmette, Wilmette sought to amend its budget because the amounts within the subcategories varied from the original budget amounts. The IEPA cited as its rejection reason the previous issuance of the NFR letter for the site.

Wilmette also requested reimbursement from the Fund and the IEPA rejected Wilmette's reimbursement application, stating that the billings submitted exceeded the approved budget amounts. Wilmette appealed, alleging that its reimbursement request "was less than the IEPA approved budget amount."

In the Board's July 12, 2007 decision in PCB 07-27 the Board affirmed the denial, holding that under subsection (d), the IEPA correctly refused to review the proposed budget amendment because the amendment was submitted after the NFR letter was issued. The Board therefore granted the IEPA's motion for summary judgment and denied Wilmette's cross-motion.

On July 26, 2008, in PCB 07-48, the Board found that its findings in PCB 07-27 were dispositive of all issues in PCB 07-48. The Board granted summary judgment to the IEPA.

Court Decision

The First District applied the *de novo* standard of review to the Board's decisions, as the relevant facts were undisputed and the court was asked to review the Board's rulings on questions of law. Wilmette slip op at 3. The court noted, however, that it would "afford substantial deference to the agency's determination of a statute which the agency administers and enforces." *Id*.

Wilmette argued to the court that the relevant sections of the Board's rules did not apply to UST owners or operators which, like the Wilmette, received approval of corrective action and budget plans before commencing any corrective action. *Id.* at 3-4. The court disagreed, applying essentially the same reasoning it used in FedEx Ground Package System, Inc. v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, No. 1-07-0236 (1st Dist. Feb. 23, 2008); the court did not explicitly discuss Wilmette's argument that it was merely reallocating costs among budget subcategories.

Legislative Review

Summarized below are two bills, one of which creates a new act and one of which amends an existing act relating to the Board's work.

Public Act 95-0845 (Senate Bill 2110)
Effective January 1, 2009

The bill creates the Uniform Environmental Covenants Act, proposed by the National Conference of Commissioners on Uniform State Laws. It creates an interest in real estate called an "environmental covenant" that assures a plan of rehabilitation for contaminated real property and controls the use of the property. The Act provides for the creation of such a covenant, its termination when appropriate, priority over other real estate interests, and enforcement over the time the covenant is in place. The bill provides that the Act does not invalidate or render unenforceable any interest that is otherwise compliant with 35 Ill. Adm. Code 742, Subpart J, which addresses institutional controls in the Board regulations regarding tiered approach to corrective action objectives (TACO).

Public Act 95-0831 (Senate Bill 2111)
Effective August 14, 2008

The bill amends the Administrative Review Law of the Code of Civil Procedure by changing provisions authorizing amendment of a complaint to allow the addition of an agency or party if the court determines that the addition is required. The bill provides that the new agency or party must be added within 35 days after the court makes such a finding and gives the court the power to correct misnomers or to join agencies or parties. The bill also makes corresponding changes in provisions regarding direct review of administrative orders by the appellate court.

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