

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

WRB REFINING, LLC)
Ultralow Sulfur Diesel Hydrotreater)
)
)
) PCB 12-040
) (Tax Certification - Air)
PROPERTY IDENTIFICATION NUMBER)
19-1-08-35-00-000-001 or portion thereof)

NOTICE

TO: [Electronic filing] John Therriault, Assistant Clerk
Illinois Pollution Control Board
State of Illinois Center
100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601

[Service by mail] Michael Kemp
WRB Refining, LLC
404 Phillips Building
Bartlesville, Oklahoma 74004

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[Service by mail] Steve Santarelli
Illinois Department of Revenue
101 West Jefferson
P.O. Box 19033
Springfield, Illinois 62794

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Pollution Control Board the **MOTION FOR LEAVE TO FILE INSTANTER RESPONSE TO MOTION FOR RECONSIDERATION** and **RESPONSE TO MOTION FOR RECONSIDERATION** of the Illinois Environmental Protection Agency, and a paper copy of which is herewith served upon the applicant and its attorney, the attorney for the Roxana Community Unit School District No. 1, and a representative of the Illinois Department of Revenue.

Respectfully submitted by,

/s/ Robb H. Layman

Robb H. Layman
Assistant Counsel

Date: December 16, 2011

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
Telephone: (217) 524-9137

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**MOTION FOR LEAVE
TO FILE INSTANTER RESPONSE TO
MOTION FOR RECONSIDERATION**

NOW COMES the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Illinois EPA”), through its attorneys, and pursuant to 35 Ill. Adm. Code 101.500(a) of the ILLINOIS POLLUTION CONTROL BOARD’S (“Board”) procedural regulations, files this Motion for Leave to File Instanter a Response to the Motion for Reconsideration submitted by attorneys for the Roxana Community Unit School District No. 1 (hereinafter “Petitioner”) in the above-captioned proceeding. In support thereof, the Illinois EPA states the following:

1. Petitioner filed a Motion for Reconsideration with the Board on November 23, 2010, challenging the Board’s order of October 20, 2011, denying Petitioner’s Motion for Intervention.
2. The Illinois EPA was served with the Motion for Reconsideration on November 28, 2011. The strictest reading of 35 Ill. Adm. Code 101.520(b) required the filing of any response to the Motion for Reconsideration by December 7, 2011.
3. The undersigned attorney was assigned the responsibility of handling this matter by virtue of his prior involvement in the filing of the Recommendation. However, the undersigned attorney did not thoroughly search his incoming mail or make inquiries

of the Board's docket in this proceeding to discover the latest development until on or after the filing deadline.

4. The undersigned attorney's delay in learning of the recent filing is due to two predominant reasons. First, given a long history of involvement with tax certification proceedings before the Board, it was assumed, albeit erroneously, that no further litigation would ensue in this proceeding following the Board's certification and closure of the docket. More significantly, the undersigned attorney was engaged in the press of other agency matters that effectively dictated his schedule during the relevant time period, including the preparation of numerous other tax certification filings in late November and, more recently, participation in a series of high-level meetings, both internal and involving other governmental parties, regarding the resolution of pending CAAPP appeals before the Board.¹

5. Upon review of the Motion for Reconsideration, the Illinois EPA has found that the Petitioner relies upon several erroneous arguments and/or assumptions concerning the substance of the Board's decision to certify WRB's project as a pollution control facility under the Illinois Property Tax Code. The granting of this Motion will ensure that the Board receives a full airing of the contentions raised by Petitioner. In addition, the granting of this Motion will also not result in any hardship or prejudice to the Petitioner.

¹ Although the undersigned attorney worked approximately 35 hours of overtime from the date of the Motion's filing through the present date, the bulk of that time has been devoted to these separate legal matters.

WHEREFORE, the Illinois EPA requests that the Board grant leave to file instanter the accompanying Response to the Motion for Reconsideration or, in the alternative, order such relief as may be deemed just and appropriate.

Respectfully submitted by,

/s/ *Robb H. Layman*

Robb H. Layman
Assistant Counsel

Date: December 16, 2011

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**RESPONSE TO MOTION
FOR RECONSIDERATION**

NOW COMES the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Illinois EPA”), through its attorneys, and pursuant to 35 Ill. Adm. Code 101.502(b) of the ILLINOIS POLLUTION CONTROL BOARD’S (“Board”) procedural regulations, files a Response to the Motion for Reconsideration (“Response”) submitted by attorneys for the Roxana Community Unit School District No. 1 (hereinafter “Petitioner”) in the above-referenced matter for tax certification of pollution control facilities requested by WRB Refining, LLC (“WRB”). By this Response, the Illinois EPA urges the Board to deny the Petitioner’s Motion for Reconsideration on the grounds that no compelling reason exists to challenge the underlying ruling by the Board in approving WRB’s request for tax certification.

RELEVANT BACKGROUND

1. On August 25, 2011, the Illinois EPA filed a formal Recommendation with the Board in the above-captioned matter recommending issuance of a tax certification for the Ultralow Sulfur Diesel Hydrotreater (also referenced as “project”) identified by WRB in an underlying application. The application, previously submitted by WRB to the Illinois EPA in October 2010, sought certification of the project as a pollution control facility in accordance with the requirements of the Illinois Property Tax

Code, 35 ILCS 200/11-5 through 11-30 (2008), and implementing regulations at 35 Ill. Adm. Code Part 125.

2. On September 8, 2011, the Board certified that WRB's project met the requirements of "pollution control facilities," as defined in the Property Tax Code, and issued an order to that effect.

3. On September 13, 2011, Petitioner sought leave for intervention in this proceeding from the Board.

4. On October 20, 2010, the Board denied Petitioner leave to intervene on the grounds that the request was moot, as the Board had "already granted" certification of WRB's project.

5. On November 23, 2011, Petitioner filed a Motion for Reconsideration ("Motion") of the Board's order denying intervention.

ARGUMENT

6. Petitioner raises both substantive and procedural contentions regarding the Board's decision to grant certification of the Ultralow Sulfur Diesel Hydrotreater. These contentions do not present sufficient grounds for the Board to reverse its judgment in this proceeding. As such, the Board should deny the Motion on all points.

A. The Ultralow Sulfur Diesel Hydrotreater plainly satisfies the criteria for certification as "pollution control facilities."

7. At the heart of Petitioner's filing is the complaint that the Ultralow Sulfur Diesel Hydrotreater should not qualify for tax certification under the Property Tax Code. Petitioner raises the general contention that the project does not meet the statutory definition of "pollution control facilities" under the applicable requirements of the Illinois Property

Tax Code.¹ Petitioner advances the following reasons for this contention: 1) the project's "primary purpose" is purportedly for profit, not pollution control; 2) the project purportedly does not achieve any reduction or prevention of air pollution; and 3) the project purportedly causes an "increase" in air emissions. [See, Motion for Reconsideration, page 9].

8. Petitioner first asserts that because the Ultralow Sulfur Diesel Hydrotreater refines low-sulfur diesel that can purportedly be sold "more easily and profitably" than other product streams (i.e., nonroad, locomotive and marine diesel, as well as diesel manufactured for export), it must not be intended for the "primary purpose" of pollution control. [Motion for Reconsideration, page 12]. This argument presumes too much. It is neither intuitively obvious nor empirically evidenced by Petitioner that the types of fuel exempted by the United States' Environmental Protection Agency ("USEPA") from Tier II standards for cleaner diesel fuel are necessarily more difficult or less profitable to refine than fuel refined for conventional diesel-powered engines. Similarly, that a pollution control facility may permit a for-profit entity to be more competitive or profitable does not disqualify the project for tax certification.²

¹ Petitioner can be seen as raising another substantive argument in this case but it does not warrant serious attention from the Board. In several paragraphs primarily relating to the subject matter of another tax certification proceeding (i.e., Gasoline SZorb Unit at PCB 12-039), the Petitioner challenges the adequacy of the Illinois EPA's Recommendation. In one of the paragraphs that arguably relates to this proceeding, Petitioner quibbles with the use of term "underlying" in reference to the nature of the project's purpose. Admittedly, the use of that term appears in one paragraph to the document but it was not intended to establish or rely upon a criteria different from the statute's "primary purpose" test. The supporting documents to the Recommendation make clear that this statutory directive was satisfactorily addressed. Moreover, as discussed in the other certification proceeding, the Illinois EPA's formal Recommendation is not determinative to this type of proceeding; it is merely a *recommendation* to aid the Board in its deliberations. The Board's decision in this matter ultimately represents the formal adjudicative ruling under the Part 125 regulations as to whether a proposed project is eligible for tax certification. However, if the Board would prefer that the Illinois EPA resubmit a corrected recommendation in order to address this issue, the Illinois EPA would certainly honor the Board's request following a remand to allow the same.

² If anything, the consideration of a pollution control facility's earnings potential or profitability relates to the assessment value of the project, which is undertaken by the Illinois Department of Revenue, and is not part of the Board's purview in the certification process. See, 35 ILCS 200/11-15; see also, *Reed-Custer Community Unit School Dist. No. 255-U v. Pollution Control Board*, 222 Ill. App.3d 571, 597 N.E.2d 802, 809 (1st Dist. App. Ct. 1992).

9. Under the definition of “pollution control facilities,” WRB’s project is eligible for tax certification from the Board if its design, construction or operation is for the “primary purpose” of “eliminating, preventing or reducing” air pollution. *See*, 35 ILCS 200/11-10(a). The application demonstrates that the project’s design, construction and operation is to reduce the sulfur content of diesel fuel to meet the USEPA’s fuel content requirements for ultralow sulfur diesel. In its most fundamental form, the project reduces or prevents emissions of conventional pollutants³ that would otherwise be emitted to the atmosphere. These facts fulfill the statutory requirement of “primary purpose.”

10. In *Central Illinois Light Company v. Department of Revenue*, 117 Ill. App.3d 911, 453 N.E.2d 1167 (3rd Dist. App. Ct. 1983), the appellate court addressed, among other things, whether both a cooling pond and truck scales installed by an electric generating company satisfied the definition of “pollution control facilities” under the Illinois Use Tax Act.⁴ In construing language containing a similar “primary purpose” test, the court upheld the certification of both projects. The court observed that the cooling pond served as a means of eliminating thermal pollution from the heated cooling water, which previously had been discharged directly to the Illinois River, and allowed the company to comply with environmental requirements. The court emphasized that:

“Had there been no regulations preventing the disposal of heated water into the river there would have been no cooling pond. Its primary purpose was and is to prevent pollution.”

³ As referenced in the Illinois EPA’s recommendation and the supporting documents contained therein, the project ultimately prevents or reduces SOx emissions from the diesel pool supplied to consumers and, further, facilitates the use of more advanced emission control systems for diesel engines, thereby resulting in lower emissions of nitrogen oxides (“NOx”) and particulate matter.

⁴ Formerly codified at 120 Ill. Rev. Stat. 439.2a (1979).

Id. at 117 Ill. App.3d at 915. The court struck a similar chord in approving the certification of the truck scales, noting that had it not been for environmental and safety requirements regulating fly ash disposal, the company would not have had reason to purchase the equipment. *Id.*

11. The facts and holding of the *Central Illinois Light Company* ruling are closely analogous to the present case. The Ultralow Sulfur Diesel Hydrotreater is a type of desulfurization process that, by its intended and fundamental design, acts to achieve a reduction or prevention of air emissions that would not otherwise occur absent the process. Given the backdrop of USEPA's Tier II regulations, WRB undertook implementation of the project to reduce air emissions and maintain regulatory compliance. These facts serve to support the Board's determination that WRB's project meets the "primary purpose" test and should be granted certification as a pollution control facility.

12. It should be noted that during a span of the last decade, the basic framework of analysis described above has been consistently followed by both the Illinois EPA and the Board in administering the tax certification provisions of the Property Tax Code. Specifically, the Illinois EPA has recommended, and the Board has approved, substantially similar projects for tax certification in the following proceedings: *Aux Sable Liquid Products v. Illinois EPA*, PCB 02-123 (March 21, 2002)(Merox Treating Process Unit, whose primary purpose was to remove sulfur compounds from natural gas liquids); *ConocoPhillips Company v. Illinois EPA*, PCB No. 04-214 (June 17, 2004)(Low Sulfur Gasoline Project, whose primary purpose was to remove sulfur from certain gasoline streams); *Exxon Mobil Corporation v. Illinois EPA*, PCB 05-122 (January 6, 2005)(Ultra-low Sulfur Diesel Project, whose primary purpose was to facilitate reduction of sulfur content from diesel streams); *Marathon Ashland Petroleum*,

LLC, v. Illinois EPA, PCB 06-94 (January 5, 2006)(DHT-Coker Naptha Project, whose primary purpose was to enable a hydrotreater unit to remove sulfur from gasoline); *Marathon Ashland Petroleum, LLC, v. Illinois EPA*, PCB 07-56 (January 26, 2007)(Gasoline Desulfurization Unit, whose primary purpose was to reduce sulfur content of gasoline); *Marathon Petroleum Company, LLC, v. Illinois EPA*, PCB 11-84 (June 2, 2011)(Routing of Light Straight Run, whose primary purpose was to ensure the movement of a feed-stream to the main desulfurization unit); *Marathon Petroleum Company, LLC, v. Illinois EPA*, PCB 12-5 (July 21, 2011)(Ultra-Low Sulfur Diesel Project, whose primary purpose was to construct reactors and modify an amine treatment unit to facilitate desulfurization of diesel fuel feed-stream).

13. Petitioner contends that the advanced emission control systems facilitated by the use of low-sulfur diesel are “pollution control facilities” but that the Ultralow Sulfur Diesel Hydrotreater is not, as the former reduces pollution while the latter only keeps the cleaner diesel product from poisoning the former. [Motion at pages 10-11]. This argument overlooks the forest for the trees. These control systems may themselves constitute a form of pollution control, but their use of the cleaner diesel fuel is still considered a beneficial component of the project.⁵ More importantly, any such recognition does not diminish the separate, and arguably more significant, justification for the project. The prevention of emissions that is achieved through the manufacture of cleaner diesel fuel, consistent with a federal regulatory scheme aimed at reducing air pollution at the point of manufacture, should not be so casually dismissed.

⁵ As previously discussed, the cleaner diesel fuel produced as a result of the Ultralow Sulfur Diesel Hydrotreater allows consumers to make use of advanced emission control systems due to the lower sulfur content of the diesel fuel. As reflected in the Recommendation and supporting documents, and as recognized in past certifications approved by the Board, the use of such systems has the added environmental benefit of reducing or preventing NOx and particulate matter emissions.

14. Lastly, Petitioner speculates that the Ultralow Sulfur Diesel Hydrotreater can be shown to “actually increase” air pollution from the refinery and should therefore be denied certification. Petitioner offers no legal or empirical support for this argument. However, even if emissions from the operation of new process or control equipment increased above a given baseline of source emissions, it should not affect the eligibility of the equipment for which tax certification is sought. For one thing, the statute does not support such a construction. For another thing, the interpretation would lead to absurd results by disqualifying even the most conventional types of pollution control facilities.⁶

15. Petitioner has presented no substantive reasons for setting aside the Board’s earlier decision certifying the Ultralow Sulfur Diesel Hydrotreater under the Property Tax Code or for reopening the proceeding. The project falls within the plain meaning of the definition of “pollution control facilities” under the Property Tax Code, which reflects a public policy designed to encourage the use of a broad range of pollution controls.⁷ The Board’s decision is also consistent with a long line of past rulings certifying similar, if not virtually identical, pollution control facilities. For these reasons, the Motion should be denied.

B. The procedural arguments raised by Petitioner are unpersuasive or lacking in relevancy.

16. Petitioner raises several procedural arguments in its Motion that attempt to persuade the Board to reverse its decision denying intervention and reopen the

⁶ For example, a thermal oxidizer employed to eliminate or reduce emissions will nonetheless emit a certain amount of uncontrolled emissions. Such a control device, independently or when introduced with new or modified process units, could emit emissions above some historical baseline for a source. Petitioner’s argument would seemingly deny tax certification for such control equipment on the basis of a new baseline of emissions, irrespective of the equipment’s function and purpose in achieving pollution control.

⁷ *Cf., Columbia Quarry Company v. Department of Revenue*, 154 Ill. App.3d 129, 506 N.E.2d 795 (5th Dist. App. Ct. 1987), *appeal denied*, 116 Ill.2d 549, 515 N.E.2d 104 (Ill. 1987)(pollution control exemption in Retailers’ Occupation Tax Act designed to “encourage diverse means for reducing pollution” through tax policy).

proceeding to allow Petitioner to participate in a further investigation of the underlying application. [Motion at pages 3-5; 13-18]. These arguments are mostly specious and, except for a few minor points, the Illinois EPA will not address them here.

17. Petitioner's principal argument is that the Board erred in denying the earlier Motion for Intervention as moot because the Board's order had not yet become final. [Motion at pages 3-5]. This argument appears to confuse the mootness doctrine with the Board's requirements that compute the effectiveness of Board orders for purposes of a statutory decision deadline or an appeal. The crux of the Board's order rested on the grounds that there is no longer a cause or controversy warranting adjudication. As the Petitioner fails to grasp this distinction and, further, fails to address why the Board's order denying intervention should not be considered moot, the Motion should be denied as to this contention.

18. Petitioner also makes a number of statements concerning various procedural matters in Section III of its Motion. Much of this discussion seems rhetorical and not in dispute. However, it is perhaps noteworthy in revealing Petitioner's active role in litigation with WRB over local taxation issues relating to the refinery and its promise to engage in "substantial litigation" in this and other proceedings regarding the eligibility of WRB's projects as pollution control facilities. The Board may wish to consider these facts, which imply a certain zeal for litigiousness, in weighing the merits of Petitioner's claims.

19. As a general matter, the Illinois EPA does not dispute that Petitioner or other taxing bodies may possess an interest in the outcome of these types of proceedings. However, neither the statute nor the Board's implementing regulations governing this matter provide a suitable framework for the kind of fishing expedition sought by

Petitioner. More significantly, Petitioner simply does not make a case for challenging the basis of the certification that has been granted here, both because of the transparent nature of the project and the long-standing treatment by the Illinois EPA and the Board of similar project types.

20. Because the Petitioner has presented no procedural reasons for setting aside the Board's earlier decision certifying the Ultralow Sulfur Diesel Hydrotreater under the Property Tax Code or for reopening the proceeding, the Motion should be denied.

WHEREFORE, the Illinois EPA requests that the Board deny Petitioner's Motion or, in the alternative, order such relief as may be deemed just and appropriate.

Respectfully submitted by,

/s/ Robb H. Layman

Robb H. Layman
Assistant Counsel

DATED: December 16, 2011

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Telephone: (217) 524-9137

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of December, 2011, I electronically filed the following instruments entitled **NOTICE, MOTION FOR LEAVE TO FILE INSTANTER RESPONSE TO MOTION FOR RECONSIDERATION** and **RESPONSE TO MOTION FOR RECONSIDERATION** with:

John Therriault, Assistant Clerk
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

and, further, that I did send a true and correct paper copy of the same foregoing instruments, by First Class Mail with postage thereon fully paid and deposited into the possession of the United States Postal Service, to:

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WRB Refining, LLC
404 Phillips Building
Bartlesville, Oklahoma 74004

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