Illinois Pollution Control Board

2007

ANNUAL REPORT

Contents

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 2007. Between July 1, 2006 and June 30, 2007, 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.

During FY 2007, there have been no changes in sitting Board Members. I continue my tenure as Acting Chairman. Board Members Nicholas J. Melas, Thomas E. Johnson and Andrea S. Moore also continue to serve. We have had one open seat on the Board since December 2005.

Board rulemaking during FY 2007 covered most areas of the Illinois environmental regulations. Rulemakings governing air emissions generated the most public interest. Significant rulemakings concluded during the FY 2007 are outlined in the following paragraphs.

The rulemaking proposal from the IEPA to control mercury emissions from large coal-fired electrical generating units (EGU's) produced the most public interest in recent Board history. On December 21, 2006, the Board adopted new rules for controlling mercury emissions from large coal-fired EGU's in R06-25 (Proposed New 35 Ill. Adm. Code 225 Control of Emissions from Large Combustion Sources (Mercury)). In this proceeding, the Board received over 7,300 public comments, held 18 days of hearings, and entered 130 exhibits into the record. The rule requires 90% reduction of mercury emissions by 2009. EGU's are provided additional flexibility to manage mercury emissions reductions through a temporary technology based standard and a multi-pollutant control system that can be used to achieve compliance at a later date.

On August 17, 2006, the Board adopted Clean Construction or Demolition Debris Fill Operations Under P.A. 94-272 (35 Ill. Adm. Code Part 1100), R06-19. The regulations establish a permit program for the use of clean construction or demolition debris (CCDD) as fill material in current or former quarries, mines, or other excavations. Public Act 94-272, effective July 19, 2005, required the Board to adopt these rules by September 1, 2006.

On September 7, 2006, the Board adopted Standards and Requirements for Potable Water Well Surveys and for Community Relations Activities Performed in Conjunction with Agency Notices of Threats from Contamination (35 Ill. Adm. Code 1505), R06-23. This rulemaking adds standards and requirements for potable water well surveys and for community-relations activities in response to impacts or threats from soil and groundwater contamination. The IEPA filed this proposal in response to Public Act 94-314, effective July 25, 2005, which added a new Title VI-D ("Right-To-Know") to the Act.

During FY 2007 the Board has also accepted several rulemakings, which will require substantial resources from the Board. The Board has accepted proposals including rulemakings entitled Fast-Track Rules Under Nitrogen Oxide (NO_x SIP Call Phase II: Amendments 35 Ill. Adm. Code Section 201.146, Parts 211 and 217 R07-18, Section 27 Proposed Rules for Nitrogen Oxide (NO_x) Emissions from Stationery Reciprocating Internal Combustion Engines and Turbines: Amendments to 35 Ill. Adm. Code Parts 211 and 217 R07-19, Procedures Required by P. A. 94-849 for Reporting Releases of Radionuclides at Nuclear Power Plants R07-20.

The Board had an active contested case docket in FY 2007. Board decisions were also overwhelmingly upheld on appeal. Most significantly, on March 22, 2007, the Illinois Supreme Court ruled in favor of the Board by reversing a Third District Appellate Court decision reversing a Board decision in a landfill siting appeal (Town & Country Utilities, Inc., et al. v. Illinois Pollution Control Board, et al., Nos. 101619, 101652). Details follow 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 and the Advisory Board for the Planet Earth Forum Planning Committee. 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 Condell Medical Center and 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 Reveiw

Rulemaking is one of the Board's most visible functions. The Board and its staff interact with individual citizens, State agency personnel, and representatives of industry, trade associations, 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 (1) holds quasi-legislative public hearings on the proposals to receive testimony and other evidence, and (2) accepts written public comments, all to assist the Board in rendering its rulemaking decisions.

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 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 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 motions 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 2007. Under Section 27 of the Act, the Board adopted rules in nine significant rulemakings of Statewide applicability, and adopted two rulemakings of site-specific applicability. The Board also processed 16 identical-in-substance rulemaking dockets as required by Section 7.2 of the Act.

The summary begins with a narrative of a rule adopted by the Board implementing a gubernatorial initiative for greater controls of mercury emissions into the air, followed by the other completed rules arranged by docket number. The Board completed rulemakings implementing legislative initiatives, two site-specific rules, and IEPA proposals. Finally, the Board closed a docket without rulemaking action, at the proponent's request, Amendments to 35 Ill. Adm. Code 201 (New Section 201.501 PSD Construction Permits), R06-27.

RULES ADOPTED IN FISCAL YEAR 2007

Proposed New 35 Ill. Adm. Code 225 Control of Emissions From Large Combustion Sources (Mercury), R06-25 (final rules adopted Dec. 21, 2006)

On December 21, 2006, the Board adopted final rules in Proposed New 35 Ill. Adm. Code 225 Control of Emissions from Large Combustion Sources (Mercury), R06-25. IEPA filed the proposal with the Board on March 14, 2006, in response to Governor Rod Blagojevich's January 2006 request that IEPA propose rules requiring Illinois coal-fired electrical generating plants to reduce mercury emissions by an average of 90% by July 2009. The adopted rules were filed with the Secretary of State's Index Department and became effective December 21, 2006. The rules were published at 31 Ill. Reg. 129 (Jan. 5, 2006).

Substance of the Mercury Rules

In brief, the new Part 225 requires Illinois coal-fired electrical generating units (EGUs) that serve a generator greater than 25 megawatts producing electricity for sale, to begin to utilize control technology for mercury to achieve the numerical standards set by the rule beginning July 1, 2009.

To achieve this goal while preserving flexibility, the regulations provide new and existing sources with two alternative mercury emission standards to demonstrate compliance. The first alternative allows a source to comply with a mercury emission standard of 0.0080 lb mercury/GWh gross electrical output for each EGU. In the second alternative, sources may control emissions by a minimum of 90% from input

mercury levels. In addition, through December 31, 2013, companies with several EGUs may utilize averaging demonstrations between the sources. Those sources that have no sister plants are grouped into a co-op so that they may also average amongst the listed facilities. However, every source in the averaging demonstration must attain at least a 75% reduction of input mercury or 0.020 lb mercury/GWh gross electrical output. The proposal also sets forth permitting, monitoring, recordkeeping, and reporting requirements for affected sources.

The new rule contains Sections addressing additional flexibility for the regulated community, the Multi Pollutant Standard (MPS) and the Temporary Technology Based Standard (TTBS). The MPS allows an additional level of flexibility for mercury control, if a source commits to making specified reductions in nitrogen oxides (NO_x) and sulfur dioxide (SO_2) emissions within a set timeframe. The TTBS addresses both new and existing sources with EGUs. Those EGUs satisfying specified eligibility requirements can demonstrate compliance with control requirements for mercury emissions via the TTBS provisions for a specified, and limited, time frame.

The Mercury Proceeding

IEPA filed the rule proposal under Sections 9.10, 27, and 28.5 of the Act (415 ILCS 5/9.10, 27, and 28.5 (2006)). IEPA certified that the rule qualified as a Clean Air Act (CAA) "fast-track" rule as defined by Section 28.5 of the Act. That Section sets up a compressed schedule for Board hearing and deliberation of the proposal. Section 28.5 requires that two sets of hearings be completed in rapid succession following a rigid time frame, with a possible third set of hearings to be held upon IEPA request only. Section 28.5(o) requires the Board to adopt:

> a second notice order no later than 130 days after receipt of the proposal if no third hearing is held, and no later than 150 days if the third hearing is held. If the order includes a rule, the Illinois Board shall file the rule for second notice under the Illinois Administrative Procedure Act within five days after adoption of the rule. 415 ILCS 5/28(o) (2006).

The Board accepted the proposal for hearing as a Section 28.5 CAA fast-track rule, adopting a first-notice order without comment on the merits of the proposal. The order set up hearings as required under the Section 28.5 timeframes. In so doing, the Board reserved ruling on claims that IEPA's proposal did not qualify for the "fast-track" rulemaking provisions of Section 28.5 (and that the Board therefore lacked authority to proceed under that Section) and the associated requests that the proposal proceed instead under the general rulemaking provisions of Section 27.

In April 2006, various power companies took the statutory authority dispute to the Sangamon County Circuit Court, seeking preliminary and permanent injunctive relief to prevent R06-25 from proceeding under Section 28.5. Dynegy Midwest Generation, Inc., Kincaid Generation, LLC, and Midwest Generation, LLC. v. Illinois Pollution Control Board and Illinois Environmental Protection Agency, No. 06CH213 (Sangamon County Circuit Court, filed Apr. 4, 2006). The complaint alleged irreparable harm to the power companies "as a result of IPCB's illegal rulemaking procedure and the IEPA's illegal filing of a proposed rule with the IPCB." On May 1, 2006, the court issued a preliminary injunction enjoining the Board

from proceeding pursuant to the hearing and rulemaking schedule required by Section 28.5. The court concluded that the mercury rule as proposed was not one the CAA Amendments of 1990 "requires to be adopted" as defined in Section 28.5(c). More information about the Sangamon County Circuit Court case is contained in the Judicial Review section of the 2006 Annual report.

On May 4, 2006, the Board decided to proceed to hear the IEPA March 14, 2006 proposal under the Board's general rulemaking authority of Section 27 of the Act. In compliance with the court order, the Board cancelled the hearings scheduled under Section 28.5 and authorized publication of a second first notice citing only Section 27 as the authority for the rulemaking.

During the summer of 2007, the Board held 18 days of hearings and entered over 100 exhibits into the

record. Additionally, the Board received over 7,000 public comments.

After carefully reviewing the entirety of the record, the Board, on November 2, 2006, found that the proposal as amended at second notice is technically feasible and economically reasonable. Further, the Board found that the Board had authority to include the MPS in the proposal for second notice.

The Board issued its final opinion and order adopting the rules on December 21, 2006, filing them with the Secretary of State that same day.

On January 10, 2007, the Board received two petitions for adjusted standards from the new mercury rules. Petition of Midwest Generation, LLC, Waukegan Generating Station for an Adjusted Standard from 35 Ill. Adm. Code 225.230, AS 07-3 and Petition of Midwest Generation, LLC, Will County Generating Station for an Adjusted Standard from 35 Ill. Adm. Code 225.230, AS07-4. Generally, Section 28.1 of the Act (415 ILCS 5/28.1(e), (f) (2006)) provides that when an adjusted standard petition is filed within 20 days after the effective date of a rule from which the petitioner seeks relief, the rule is inapplicable to the petitioner while the adjusted standard proceeding is pending.

The Board received two petitions seeking appellate court review of the Board's December 21, 2006 decision in R06-25: Kincaid Generation, LLC v. Illinois Environmental Protection Agency and Illinois Pollution Control Board, No. 4-07-0075 (4th Dist., filed Jan. 24, 2007); and Midwest Generation, LLC v. Illinois Environmental Protection Agency and Illinois Pollution Control Board, No. 3-07-0061 (3rd Dist., filed Jan. 26, 2007). Both appeals were pending as of June 30, 2007.

Amendments to the Board's Administrative Rules: 2 Ill. Adm. Code 2175, R04-9 (final rules adopted July 20, 2006)

On July 20, 2006, the Board, on its own motion, adopted amendments to its administrative rules in Amendments to the Board's Administrative Rules: 2 Ill. Adm. Code 2175, R04-9. The Board's administrative rules are codified at Part 2175 of Title 2 of the Illinois Administrative Code. Section 5-15 of the IAPA, 5 ILCS 100/5-15 (2006), requires each State agency to have such rules. The administrative rules describe the Board's organization, the types of Board proceedings, how to pay filing and copying fees, and how the public may access information.

These amendments were needed primarily to: (1) codify statutory changes affecting the Board; (2) reference the Board's overhauled procedural rules (35 Ill. Adm. Code 101-130); and (3) update information about the Board, including how filings with the Board may be viewed, downloaded, and searched on-line through the Board's Web-based Clerk's Office On-Line (COOL). Statutory changes reflected in the rules include amendments made to the Act, 415 ILCS 5/1 *et seq.* (*e.g.* Public Act 93-509 (eff. Aug. 11, 2003) reducing the number of Board Members from seven to five) and the Open Meetings Act, 5 ILCS 120/2 *et seq*. (*e.g.* Public Act 93-523 (eff. Jan. 1, 2004) requiring verbatim recording of closed meetings and Public Act 94-28 (eff. Jan. 1, 2006) requiring posting of various information on the Web).

Proposed Amendments to Tiered Approach to Corrective Action Objectives (35 Ill. Adm. Code 742), R06-10 (final rules adopted Feb. 15, 2007)

On February 15, 2007, the Board adopted final amendments in Proposed Amendments to Tiered Approach to Corrective Action Objectives (35 Ill. Adm. Code 742), R06-10. IEPA proposed amendments to the Board's Tiered Approach to Corrective Action Objectives (TACO) regulations to update standards and improve procedures, and make various needed corrections and clarifications. The amendments reflect experience gained since the rules were last amended in 2002.

The Board's TACO regulations at 35 Ill. Adm. Code 742 provide methods for developing risk-based remediation objectives to be used in environmental contamination cleanups under various regulatory programs, including those for Leaking Underground Storage Tanks (LUST); Site Remediation Program (SRP); and Resource Conservation and Recovery Act (RCRA) Part B Permits and Closure Plans.

The adopted amendments update many provisions of the TACO remediation rules, which are critical to addressing the risks posed by contaminated properties. Among the amendments is the addition

of background soil levels as remediation objectives for polynuclear aromatic hydrocarbons (PAHs), reflecting that significant levels of PAHs are ubiquitous throughout much of Illinois. Additionally, the Board adopted revisions to protect construction workers at properties cleaned up to residential levels.

To close a potential loophole in Section 742.105(h), the Board clarified that landfills cannot use TACO in lieu of the procedures and requirements applicable to landfills under 35 Ill. Adm. Code 807, 811-814. The amendments add and explain the uses of new institutional controls, such as Highway Authority Agreements. These agreements are typically between the highway authority and the property owner. The Board adopted changes to enhance flexibility in using ordinances as institutional controls to restrict groundwater usage.

Lastly, the Board added new institutional control forms to be used by participants in regulatory programs subject to TACO remediation objectives. These forms are based on model documents that IEPA had posted on its Web site.

Proposal of Vaughan & Bushnell Manufacturing Company of Amendment to a Site-Specific Rule, 35 Ill. Adm. Code 901.121, R06-11 (final rules adopted Jan. 4, 2007)

On January 4, 2007, the Board adopted rules in a final opinion and order in Proposal of Vaughan & Bushnell Manufacturing Company of Amendment to a Site-Specific Rule, 35 Ill. Adm. Code 901.121, R06-11. The amendments are based on an October 2005 proposal filed by the Vaughan & Bushnell Manufacturing Company (V&B), requesting amendment of its existing site-specific noise rule for its forging facility in Bushnell, McDonough County. The amended rule allows the company to operate 24-hours a day.

V&B stated that it needed an extension on its operational hours to operate a third shift at its facility. V&B stated that it produces hammers, hatchets, heavy striking tools, and pry bars, and has contracts with distributors that require timely delivery of its products. V&B asserted that the predominate industrial character of the area surrounding the facility creates heavy truck, vehicle and train traffic that combine to create an abundance of noise far in excess of the noise created at its facility.

In considering the character of the surrounding areas and land uses, the Board found that the V&B facility is appropriately located in an area that is heavily industrial in nature, and that the amendments would not have an adverse environmental impact on the area. All of the testimony presented at hearing on the proposal supported the proposed extension of V&B's operating hours. V&B provided testimony at the hearing to explain why it was technically and economically infeasible to equip its facility with additional noise abatement technology. V&B stated that it is the largest employer in Bushnell and last year paid $137,000,000 for water, gas and electricity, as well as $39,000 in property taxes.

Clean Construction or Demolition Debris Fill Operations Under P.A. 94-272 (35 Ill. Adm. Code 1100), R06-19 (final rules adopted Aug. 17, 2006)

On August 17, 2006, the Board adopted a final opinion and order in Clean Construction or Demolition Debris Fill Operations Under P.A. 94-272 (35 Ill. Adm. Code 1100), R06-19. The Board's action fulfilled its statutory obligation to amend its land pollution control regulations through the addition of standards for clean construction and demolition debris (CCDD) regulations no later than September 1, 2006. The final amendments, filed and effective August 22, 2006, were published at 30 Ill. Reg. 14534 (Sept. 8, 2006).

IEPA proposed the amendments January 26, 2006, to allow the use of clean construction or demolition debris as fill material in current and former quarries, mines, and other excavations.

The new Part 1100 of Title 35 of the Illinois Administrative Code establishes a permit program for the use of CCDD in former quarries, mines, or other excavations. Permits issued under Part 1100 will have a term of ten years.

As explained in Subpart A of Part 1100, because the landfill permitting rules are more protective of the environment, CCDD fill operations at facilities that are permitted as landfills under 35 Ill. Adm. Code 807, or 811 through 814 (municipal, chemical, or putrescible waste landfills) are exempt from the proposed Part 1100 CCDD permitting rules. Facilities permitted under Parts 807 or 811 through 814 can accept CCDD without obtaining a permit under Part 1100.

Subpart B of Part 1100 sets forth the standards applicable to the operation of CCDD facilities, CCDD load inspections, and closure and postclosure plans, including recordkeeping requirements and annual reports.

Subpart C of Part 1100 identifies what information an applicant must include in the permit application, which includes notification to local and State government officials, location and facility maps, facility description, proof of ownership, surface water controls, and plans for closure and postclosure.

Subpart D of Part 1100 includes the procedural rules that both IEPA and applicants must follow for permitting. These include standards for IEPA permit

approval and denial, and deadlines for review of permit applications. IEPA must make a final decision on an application within 90 days of receiving the application or the permit is deemed issued.

Organic Material Emissions Standards and Limitations for the Chicago and Metro-East Areas: Proposed Amendments to 35 Ill. Adm. Code 218 and 219, R06-21 (final rules adopted Apr. 19, 2007)

On April 19, 2007, the Board adopted a final opinion and order in Organic Material Emission Standards and Limitations for the Chicago and Metro-East Areas: Proposed Amendments to 35 Ill. Adm. Code 218 and 219, R06-21.

The adopted rulemaking, based on a proposal filed by IEPA on December 22, 2005, amends the Board's volatile organic material (VOM) rules at 35 Ill. Adm. Code 218 and 219 to allow for the use of add-on controls as a compliance option for operations using cold cleaning solvent degreasing in the Chicago and Metro-East ozone nonattainment areas.

The amendments allow the use of add-on controls as an alternative to using solvents with vapor pressure of 1.0 millimeters of mercury (mmHg) or less. Additionally, the amendments allow the use of an equivalent alternative control plan to comply with the control measure requirements. The amendments include testing procedures and recordkeeping requirements for add-on controls and equivalent alternative controls.

Standards and Requirements for Potable Water Well Surveys and for Community Relations Activities Performed in Conjunction with Agency Notices of Threats from Contamination Under P.A. 94-314: New 35 Ill. Adm. Code Part 1600, R06-23 (final rules adopted Sept. 7, 2006)

On September 7, 2006, the Board adopted a final opinion and order in Standards and Requirements for Potable Water Well Surveys and for Community Relations Activities Performed in Conjunction with Agency Notices of Threats From Contamination Under P.A. 94-314 (35 Ill. Adm. Code 1600), R06-23. Public Act 94-314, effective July 25, 2005, added a new Title VI-D ("Right-To-Know") to the Act (415 ILCS 5/1 *et seq.*). Public Act 94-314 required the Board to adopt well survey and community relations rules within 240 days of its effective date (by Sept. 17, 2006). The final rule was effective September 15, 2006, and published at 30 Ill. Reg. 15756 (Sept. 29, 2006).

Public Act 94-314 directed IEPA to propose rules requiring potable water well surveys and community relation activities in response to releases of contaminants that have impacted or may impact offsite groundwater or soil. The new Part 1600 of Title 35 of the Illinois Administrative Code adopted by the Board codifies procedures currently followed by IEPA in conducting potable water supply well surveys when those surveys are required under the Act or Board rules. Also as required by Public Act 94-314, the new Part 1600 defines how IEPA, or any party authorized by IEPA, must conduct community relation activities in response to releases of contaminants that have impacted or may impact offsite potable water supply wells. The regulations governing community relation activities are in addition to, but not in lieu of, any existing reporting and notification requirements.

The new Part 1600 contains three subparts. Subpart A contains general information. Subpart B contains the procedures for performing potable water well surveys as part of response actions taken to address releases of contaminants. Subpart C contains the standards and requirements for community relation activities to be developed and implemented when the authorized party agrees to take on IEPA's notice obligations as part of IEPA-approved community relation activities.

Part 1600 dictates that specified potable water well surveys and community relation activities must be taken in response to releases of contaminants that have impacted or may impact offsite groundwater or soil. The rule includes minimum standards for the performance and documentation of water well surveys required under applicable Board rules. When water well surveys are required, Subpart B requires compliance with minimum standards during site investigations to ensure complete and accurate identification of the existence and location of potable water supply wells.

Revisions to Water Quality Standards for Total Dissolved Solids in the Lower Des Plaines River for ExxonMobil Oil Corporation: Proposed 35 Ill. Adm. Code 303.445, R06-24 (final rules adopted Feb. 15, 2007)

On February 15, 2007, the Board adopted a final opinion and order in Revisions to Water Quality Standards for Total Dissolved Solids in the Lower Des Plaines River for ExxonMobil Oil Corporation: Proposed 35 Ill. Adm. Code 303.445, R06-24. ExxonMobil proposed the rule change in February 2006, to allow it to comply with the conditions of a federal consent decree in an air pollution action. The site-specific rulemaking governs discharges of Total Dissolved Solids (TDS) from the ExxonMobil Joliet Refinery in Will County during the months of November through April.

ExxonMobil's Joliet Refinery is located in Channahon Township on a 1,300-acre tract of land in unincorporated Will County. The site is adjacent to Interstate 55, approximately 50 miles southwest of Chicago. The refinery employs more than 500 full-time employees, and approximately 100 additional ExxonMobil employees who provide regional support services.

The adopted amendments apply to a specific stretch of the Des Plaines River from the ExxonMobil refinery wastewater treatment plant discharge point located at I-55 and Arsenal Road to the Interstate 55 bridge. The new rule sets 1,686 milligrams per liter (mg/L) as the TDS level for both Secondary Contact and Indigenous Aquatic Life Use Waters and General Use Waters. This 1,686 mg/L standard applies instead of the general use standard of 1,000 mg/L and the secondary contact use standard of 1,500 mg/L. *See* 35 Ill. Adm. Code 302.208 and 302.407.

On October 11, 2005, ExxonMobil was a party to a consent decree involving the United States of America, as well as the States of Illinois, Louisiana, and Montana. Under that consent decree, ExxonMobil must, among other things, make substantial investments in air emissions reductions at the Joliet Refinery. The consent decree calls for the use of a wet gas scrubber in addition to added technology, which will contribute to additional sulfate and TDS to the wastewater treatment system.

ExxonMobil explained that because of occasional observed TDS violations in the Des Plaines River and in light of 35 Ill. Adm. Code 302.102(b)(9), IEPA could not issue the wastewater construction permit needed by ExxonMobil. ExxonMobil and IEPA demonstrated that Board adoption of the proposed 1,686 mg/L TDS standard would allow for issuance of a permit approvable by USEPA.

Semi-Annual Identical-In-Substance Update Dockets

Section 7.2 and other sections of the Act require the Board to adopt regulations "identical-in-substance" to federal regulations or amendments thereto promulgated by the USEPA 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, so that the Board annually processes at least 14 update dockets in order to translate federal rules into State rules within one year of USEPA rule adoption. Additional update dockets are initiated as necessary to provide expedited adoption of some USEPA rules in response to public comments, or to correct rules for various reasons, including in response to federal litigation.

Timely completion of IIS rules requires inter-agency coordination and inter-governmental cooperation. Entities who must act in concert to successfully complete these rulemakings include the Board, 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 07. Summaries of these dockets are included in the Board's newsletter entitled the *Environmental Register*, Nos. 625 through 636 (July 2006 through June 2007), and are available on the Board's Web site at www.ipcb.state.il.us. Additional information is available on the various individual dockets from the Clerk's Office On-Line (COOL) system on the Board's Web site.

RULES PENDING AT END OF FISCAL YEAR 2007

At the close of FY 07, there were 13 open dockets, exclusive of reserved IIS dockets (R08-1 through R08-7, reserved to cover the update period January 1, 2007 through June 30, 2007).

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 after first notice 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 includes brief notations in parentheses of significant Board actions. For reasons of space, the substance of these dockets carried over from FY07 into FY08 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)

R04-25 In the Matter of: Proposed Amendments to Dissolved Oxygen Standard 35 Ill. Adm. Code 302.206 (five hearings held, first notice scheduled for adoption July 2007)

R06-8 Proposed Site-Specific Perlite Waste Disposal Regulation Applicable to Silbrico Corporation (35 Ill. Adm. Code Part 810) (pre-first notice, prehearing, petitioner intends to withdraw proposal in Summer 2007)

R06-20 Proposed Amendments to the Board's Special Waste Regulations Concerning Used Oil, 35 Ill. Adm. Code 808,809 (pre-first notice, two hearings held)

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

R06-26 Proposed New Clean Air Interstate Rule (CAIR) SO_2, NO_x Annual and NO_x Ozone Season Trading Programs, 35 Ill. Adm. Code 225.Subparts A, C, D and E (pre-first notice, hearings scheduled October 10 through October 20, 2006)

R07-8 Proposed Amendments to Solid Waste Landfill Rules, 35 Ill. Adm. Code 810 and 811 (two hearings held, first-notice adoption scheduled for July 2007)

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, first-notice adoption scheduled for Fall 2007)

R07-17 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 (in first notice, one hearing held, last scheduled for August 9, 2007)

R07-18 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 (in first notice, two hearings held, August 9, 2007 second-notice order statutorily required)

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 (in first notice, two hearings scheduled September 18-28, 2007 and November 5-16, 2007)

R07-20 Procedures Required by P.A. 94-849 for Reporting Releases of Radionuclides at Nuclear Power Plants: New 35 Ill. Adm. Code Part 1010 (hearings scheduled September 5 and October 2, 2007; rule adoption statutorily required by May 25, 2008)

R07-21 Site-Specific Rule for City of Joliet Wastewater Treatment Plant Fluoride and Copper Discharges, 35 Ill. Adm. Code 303.432 (hearings to be scheduled)

The Board presently expects that it will adopt rules in many of these dockets during FY08.

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)), 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 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 its 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 has stated that in reviewing a 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. *See* AFM Messenger Service, Inc. v. Department of Employment Security, 198 Ill. 2d 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 fiscal year 2007, the Illinois appellate courts entered final orders in five cases involving appeals from Board opinions and orders. The Board was affirmed in appeals of its decisions in an enforcement action and an underground storage tank determination. In an appeal involving a city's landfill siting decision, the Illinois Supreme Court reinstated and affirmed a Board decision that had been reversed and set aside by the Third District Appellate Court earlier in the year. In another siting case appeal, the Third District again reversed the Board. The courts dismissed an appeal of a non-final order in an administrative citation appeal, and entered an agreed order dismissing an injunction action involving a completed Board rulemaking.

The following summaries of the five written appellate decisions in Board cases for fiscal year 2007 are organized first by case type and then by date of final determination. A description of the circuit court ruling in the injunction action is also included.

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 which 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). Sections 33 and 42 of the Act authorize the Board 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 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 fiscal year 2007, the appellate court for the Fourth District affirmed a Board decision in a land enforcement action. The appellate court for the Second District dismissed an appeal of a non-final Board order in an administrative citation case.

Jersey Sanitation Corp. v. Illinois Pollution Control Board and People of the State of Illinois, No. 4-05-0618 (4th Dist., Apr. 23, 2007) (petition for leave to appeal pending, No. 102168) (unpublished Rule 23 order affirming Board order in PCB 97-2)

In an April 23, 2007 final order, with one justice dissenting, the Fourth District Appellate Court affirmed the Board's decision in a State enforcement case, captioned on appeal as Jersey Sanitation Corporation v. Illinois Pollution Control Board and People of the State of Illinois, No. 4-05-0618 (4th Dist., Apr. 23, 2007) (hereinafter Jersey Sanitation (4th Dist.)) The majority decision, authored by Justice McCullough, with Justice Steigmann concurring and Justice Appleton dissenting, was a non-precedential order issued under Supreme Court Rule 23 (155 Ill.2d R. 23), affirming the Board's order in People v. Jersey Sanitation Corporation, PCB 97-2 (Feb. 3, 2005) (hereinafter People v. Jersey Sanitation, PCB 97-2).

Board Decision

Jersey Sanitation Corp. (Jersey) operated a ten-acre sanitary landfill two miles from Jerseyville in Jersey County. The landfill opened in 1975 and stopped accepting waste in September 1992. The current owners acquired the landfill in 1989.

The Attorney General filed the original complaint July 8, 1996, filed an amended complaint on August 14, 2000, and a second amended complaint on January 8, 2001. In the second amended complaint, the People alleged nine counts of violations regarding the landfill: (1) groundwater contamination; (2) failing to monitor and control leachate; (3) refuse in waters of the State; (4) failing to comply with permit conditions; (5) failing to provide adequate cover on refuse; (6) failing to meet financial assurance requirements; (7) failing to comply with closure requirements; (8) open burning landscape waste; and (9) failing to have a properly certified chief operator.

On April 4, 2002, the Board granted partial summary judgment to Jersey regarding several alleged violations that concerned conditions in a post-closure permit issued in 1999 by the Illinois Environmental Protection Agency (IEPA). Those permit conditions had been stricken in a related permit appeal before the Board brought by Jersey. IEPA appealed that Board permit decision, and the Fourth District Appellate Court affirmed the Board in a published opinion. *See* Jersey Sanitation Corp. v. Illinois Environmental Protection Agency, PCB 00-82 (June 21, 2001), aff'd *sub nom*. Illinois Environmental Protection Agency v. Jersey Sanitation Corp., 336 Ill. App. 3d 582, 784 N.E.2d 867 (4th Dist. 2003).

On February 3, 2005, the Board issued a final opinion and order finding that Jersey knowingly, willfully, and repeatedly violated numerous provisions of the Act and Board regulations. The violations included contaminant exceedences of Board groundwater quality standards for over a dozen years. The Board imposed a civil penalty of $65,000 on Jersey, awarded the People $24,100 in attorney fees, and ordered Jersey to cease and desist from further violations. The Board also directed Jersey to take specific steps to bring the landfill site into compliance and prevent further violations.

On March 21, 2005, Jersey moved the Board to reconsider. The People opposed the motion. In a June 16, 2005 order, the Board granted Jersey's motion to reconsider, but declined to modify the Board's final opinion and order. Jersey appealed to the Fourth District Appellate Court.

Court Decision

By a 2-1 majority, the Fourth District Appellate Court affirmed the Board's decision. Jersey Sanitation (4th Dist.), slip op. at 19-20. The court stated the issues on appeal at the outset of its order: "whether the Board erred by (1) finding Jersey violated the Act and Board regulations; (2) imposing on Jersey a civil penalty in the amount of $65,000; (3) ordering Jersey to take affirmative steps to remedy its violations; and (4) awarding the State attorney fees in the amount of $24,100." *Id*. at 1.

Groundwater Violation: Jersey argued that the Board's ruling on groundwater allegations was against the manifest weight of the evidence. The Board found that the State showed by a preponderance of the evidence that Jersey's landfill caused inorganic groundwater exceedences. In a detailed review of the evidence, the court stated that downgradient groundwater samples showed exceedences of contaminants such as dissolved solids, iron, arsenic, sulfate, and chlorides, while upgradient wells showed no exceedences of these contaminants. Jersey Sanitation (4th Dist.), slip op. at 7-8. The court concluded: ""Given the consistent correlation between the upgradient wells and downgradient exceedences, and further, evidence of leachate seeps and escaping gas, the Board's finding that the State 'has shown by a preponderance of the evidence that the Jersey Sanitation landfill caused the inorganic exceedences' is not contrary to the manifest weight of the evidence." *Id.* at 8.

Engineer to Develop Action Plan: Jersey contended that the Board's finding that Jersey failed to retain a professional engineering firm to develop an action plan for IEPA approval was against the manifest weight of the evidence. The Fourth District noted that this was required of Jersey under its 1999 supplemental permit. Jersey Sanitation (4th Dist.), slip op. at 9-10. The Board's finding was not against the manifest weight of the evidence, held the court, because the record does not show that Jersey's engineering firm developed an action plan for IEPA approval. *Id*.

Waiver: Jersey then argued that, although it failed to contest many alleged violations of supplemental permit conditions before the Board, the Board's ruling was against the manifest weight of the evidence to the extent the Board determined that those violations existed and exacerbated any penalty. Jersey Sanitation (4th Dist.), slip op. at 10. The court, however, agreed with the Board and the People on appeal that Jersey waived these arguments. The court stated that the waiver rule, under which issues not raised by the parties before an administrative agency will

generally not be considered for the first time on administrative review, is "necessary to avoid piecemeal litigation and to permit opposing parties an opportunity to refute the arguments presented to the agency." *Id*. at 10-11. The court recognized that waiver is a limitation on the parties and not on the appellate court's jurisdiction, but chose not to relax the waiver rule, declining to reach the waived arguments' merits. *Id*. at 11.

Closure Violations: Jersey challenged, as contrary to law, the Board's finding that Jersey violated closure requirements after September 1994. Jersey contended the finding was flawed since the landfill was certified closed in October 1999, effective September 30, 1994. The court was unconvinced:

> Contrary to Jersey's argument, the certificate of closure certified only that closure was completed in accordance with the closure plan, as evidenced by the receipt of certification of completion of closure on June 7, 1999. Further, the [October 1999] permit provided that the postclosure care period began on September 30, 1994. The certificate of closure did not immunize Jersey from liability for violations of the Act and Board regulations over the many years during which Jersey attempted to complete closure. Jersey Sanitation (4th Dist.), slip op. at 12-13 (emphasis in original).

Civil Penalty: Jersey asserted that the Board erred in imposing a penalty in the amount of $65,000. The Fourth District, quoting its decision in ESG Watts, Inc. v. Illinois Pollution Control Board, 282 Ill. App. 3d 43, 50-51 (4th Dist. 1996), articulated the Board's authority and the court's standard of review: "The Board is vested with broad discretionary powers in the imposition of civil penalties, and its order will not be disturbed upon review unless it is clearly arbitrary, capricious or unreasonable." Jersey Sanitation (4th Dist.), slip op. at 13-14. The court noted that the Board, in assessing the Act's Section 33(c) factors, found that a penalty was warranted, relying on the fact that some of Jersey's violations had persisted for 13 years despite the technical feasibility and economic reasonableness of compliance. *Id.* at 14. As for the magnitude of penalty, the court explained, the Board noted that the Act authorized it to impose a penalty of up to $50,000 per violation and $10,000 per day for each day the violation continued.

The court affirmed the Board's imposition of the $65,000 civil penalty, holding that the "penalty imposed reflects proper consideration of the applicable statutory factors and is not clearly arbitrary, capricious, or unreasonable." *Id*. at 15.

Remediation Order: Jersey took issue with the Board's decision to order Jersey to take affirmative steps to remedy the violations found. Among other things, the Board ordered Jersey to perform a trend analysis of groundwater sample results and retain a professional engineering firm to develop a groundwater assessment plan. If the results of this work demonstrated exceedences attributable to Jersey, then the Board required Jersey to submit a corrective action plan to IEPA and to implement the plan within 30 days of IEPA approval. The Board also ordered Jersey to cease and desist from further violations. People v. Jersey Sanitation, PCB 97-2, slip op. at 37-38.

Jersey objected to what it described as the Board's "mandatory injunction" because it is unauthorized under People *ex rel*. Ryan v . Aqpro, Inc., 214 Ill. 2d 222, 224, 824 N.E.2d 270, 272 (2005). Jersey Sanitation (4th Dist.), slip op. at 16. The Fourth District disagreed with this argument, noting that the Illinois Supreme Court in Agpro construed Section 42(e) of the Act, not Section 33(a). The Fourth District stated: "The plain language of section 33(a), under which the Board acted in the instant case, grants the Board the power to make such orders 'as it shall deem appropriate under the circumstances.'" *Id*. Moreover, the court reasoned, "in ordering that Jersey perform a trend analysis and develop an action plan, the Board simply required compliance with the permit requirements that Jersey agreed to in its 1999 supplemental permit." *Id*. at 17.

Attorney Fees: Lastly, the court addressed Jersey's position that the Board erred by granting the People's request for $24,100 in attorney fees because the Board lacked sufficient information to determine fees and Jersey was not given an opportunity to object to the fees. Jersey Sanitation (4th Dist.), slip op. at 17. The court initially noted that Section 42(f) of the Act authorizes the Board to award costs and reasonable attorney fees and that the trier of fact has the discretion to determine the reasonableness of requested attorney fees. *Id*. Turning to the facts of the case, the court observed that the People requested costs and reasonable attorney fees in the second amended complaint, in their opening posthearing brief, and in their reply brief. *Id*. at 17-18. In their opening posthearing brief, the court noted, the People advised that they would provide a calculation of costs and fees with their reply brief. In turn, the People's reply brief included a request for $24,100 in attorney fees supported by an affidavit of the Assistant Attorney General "who averred that she expended more than 154 hours on the case but requested only 154 hours, at a rate of $150 per hour." *Id*. at 18.

The court stated that Jersey did not object and the Board granted the People's request after finding that Jersey knowingly, willfully, and repeatedly committed violations and had not contested the rate or number of hours provided by the People. Jersey Sanitation (4th Dist.), slip op. at 18-19. The court noted that Jersey then filed a motion asking the Board to reconsider its order, "availing itself of an opportunity to object to the fees." *Id*. at 19. Jersey did not, the court observed, request an evidentiary hearing on attorney fees. The court therefore held that "[b]ased on the foregoing, the Board did not err by granting the State's request for attorney fees in the amount of $24,100." *Id*.

Dissent: In dissent (Jersey Sanitation (4th Dist.), slip op. at. 21-29 (Appleton, J., dissenting)), Justice Appleton stated that he would have reversed the Board decision based on "manifest weight, collateral estoppel, a paucity of evidence of economic benefit, and a denial of due process with regard to the imposition of attorney fees." *Id.* at 29. The dissent characterized the situation as an "environmental disaster." *Id*. at 27. The source of the problem, according to the dissent, was not found to be Jersey's actions, but instead was identified as IEPA failure to inspect and enforce against the prior owner: "IEPA, through its nonaction, is the primary cause of the problems addressed in this case, and, ultimately, the current owners of Jersey are paying for the IEPA's nonfeasance." *Id.* at 21-22. The dissent also found fault with the Board's rationale and reasoning concerning the remediation order (*id*. at 22-23), penalty and amount (*id*. at 23-27), and attorney fees grant (*id*. at 27-29).

Northern Illinois Service Co. v. Illinois Environmental Protection Agency and Illinois Pollution Control Board, No. 2-06-1237 (2nd Dist., Jan. 19, 2007) (unpublished Rule 23 order dismissing appeal of Board order in AC 05-40)

In a January 19, 2007 unpublished order under Supreme Court Rule 23 (155 Ill.2d R. 23), the Second District Appellate Court dismissed this case, for lack of jurisdiction. Northern Illinois Service Company (NISC) appealed the Board's opinion and order issued November 16, 2006, in an administrative citation action brought by the Illinois Environmental Protection Agency (IEPA). IEPA v. Northern Illinois Service Company, AC 05-40 (order of Nov. 16, 2006, vacated Dec. 7, 2006). The court found, as the Board had argued in its January 13, 2007 motion to dismiss, that there was "no final appealable order." Northern Illinois Service Co. v. Illinois Environmental Protection Agency and Illinois Pollution Control Board, No. 2-06-1237, slip op. at 1 (2nd. Dist, Jan. 19, 2007). As detailed in the chronology of events in this case below, NISC's premature appeal was the result of two separate mail misadventures.

On November 22, 2004, the IEPA filed an administrative citation against NISC as the result of an October 4, 2006 site inspection. The citation alleged that NISC violated Sections 21(p)(1) and 21(p)(7) of the Act (415 ILCS 5/21(p)(1), (7) (2006)) by causing or allowing the open dumping of waste resulting in litter and the deposition of general construction or demolition debris or clean construction or demolition debris, at its Roscoe Quarry located at 4960 Rockton Road, Roscoe, Winnebago County. NISC filed a timely petition for review by the Board, and the Board held a public hearing April 20, 2006. On September 21, 2006, the Board issued an interim opinion and order in which the Board found the violations as alleged, and stated that it would issue a final order assessing the mandatory $3,000 statutory penalty after the Board and IEPA each filed statements of hearing costs and NISC had an opportunity to reply to those statements. Statements of hearing costs were due to be filed on or before October 11, 2006, and any NISC replies were due 21 days thereafter.

In its November 6, 2006 order, the Board noted that the IEPA had filed no statement of costs, noted that NISC had filed no response to the Board's statement, and assessed $406.50 in hearing costs against NISC. IEPA v. Northern Illinois Service Co., AC 05-40, slip op. at 2 (Nov. 16, 2006). Accordingly, the final order assessed a total amount of $3,406.50, due from NISC no later than January 2, 2007. *Id*.

But, in a December 7, 2006 order, the Board, on its own motion, reconsidered and vacated its November 6, 2006 order. The December 7 order relayed that on December 1, 2006, the Board received IEPA's statement of hearing costs in the amount of $265.75. Although the mailing envelope showed no specific postmarked date, the proof of service filed with that statement showed that the IEPA timely filed it by placing it in the U.S. Mail on October 11, 2006. Due to the delay of seven weeks between service of the IEPA's statement and its arrival in the Board's office, the Board vacated its order of November 16, 2006. The Board allowed NISC 21 days, or until December 22, 2006, to file a response limited to the issue of the IEPA's claimed costs. *See* 35 Ill. Adm. Code 108.506(a). The IEPA was then given 14 days after service of the response to file any reply. *See* 35 Ill. Adm. Code 108.506(b). IEPA v. Northern Illinois Service Company, AC 05-40 (Dec. 7, 2006) (vacating order of Nov. 16, 2006).

But, unaware of the Board's December 7 order, NISC filed its petition for review of the vacated November 16, 2006 order in the Second District Appellate Court.

On December 18, 2006, NISC moved the Board to stay enforcement of the Board's November 16, 2006 order, pending review by the appellate court. On December 22, 2006, the court issued its docketing and scheduling order concerning the appeal. On January 3, 2007, NISC filed a motion asking the court to stay its order, acknowledging that the Board had vacated its November 16, 2006 order. NISC asked the court to stay all matters in its scheduling order and to refrain from dismissing the appeal until after NISC filed a separate appeal of the Board's then-yet-to-come final order. In the court's January 19, 2007 order, dismissing the appeal, the court also denied NISC's motion to stay the court's December 22, 2006 order. Northern Illinois Service Co. v. Illinois Environmental Protection Agency and Illinois Pollution Control Board, No. 2-06-1237, slip op. at 1 (2nd Dist., Jan. 19, 2007).

The Board issued its final order in the case on January 26, 2007. Noting the foregoing events, the Board denied the motion for stay before it. The Board assessed the civil penalty of $3,000 against NISC for the violations, as well as hearing costs totaling $672.25, for a total amount due of $3,672.25. Under the January 26, 2007 final order, NISC was directed to pay $3,672.25 no later than March 12, 2007. IEPA v. Northern Illinois Service Company, AC 05-40 (Jan. 26, 2007).

NISC appealed the Board's January 26, 2007 order to the Second District Appellate Court, but only as to the Section 21(p)(1) violation. Northern Illinois Service Co. v. Illinois Environmental Protection Agency and Illinois Pollution Control Board, No. 2-07-0213. On April 19, 2007, the Board granted NISC's motion for modification of the Board's January 26, 2007 order in light of the second appeal. Consistent with Illinois Supreme Court Rule 335(g), the Board stayed payment of the penalty associated with Section 21(p)(1) and the Board's and the IEPA's hearing costs. But, NISC was required, in accordance with the Board's January 26, 2007 opinion and order, to pay the civil penalty of $1,500 associated with the uncontested found violation of Section 21(p)(7) of the Act within 45 days of the date of April 19, 2007 order. IEPA v. Northern Illinois Service Company, AC 05-40 (Apr. 19, 2007).

At the close of fiscal year 2007, NISC's appeal of the Board's January 26, 2007 order was fully briefed and awaiting the court's scheduling of oral argument.

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 fiscal year 2007, the Illinois Supreme Court reversed an appellate decision that had mischaracterized the Board's role in siting cases. This decision in the case known as "Town and Country I" calls into question another decision reached earlier in fiscal year 2007 by the same appellate court in the case known as "Town & Country II."

Town & Country Utilities, Inc., et al. v. Illinois Pollution Control Board, et al., 225 Ill.2d 103, 866 N.E. 2d 227 (2007) (Illinois Supreme Court affirms Board order in PCB 03-31, PCB 03-33, PCB 03-35 (cons.) and reverses Third District Appellate Court)

On March 22, 2007, the Supreme Court of Illinois filed an opinion confirming the decision of the Board in a landfill siting appeal, captioned Town & Country Utilities, Inc., *et al*. v. Illinois Pollution Control Board, *et al*., Nos. 101619, 101652 (cons.) (Mar. 22, 2007). The published opinion can be cited as Town & Country Utilities, Inc., *et al*. v. Illinois Pollution Control Board, *et al*., 225 Ill.2d 103, 866 N.E. 2d 227 (2007) (hereinafter Town & Country I, 866 N.E.2d 227). In so doing, the Supreme Court reversed the September 7, 2005 order issued by the Appellate Court for the Third District under Supreme Court Rule 23 (155 Ill.2d R.23) in Town & Country Utilities, Inc. and Kankakee Regional Landfill, LLC v. Illinois Pollution Control Board, County of Kankakee, Edward D. Smith as State's Attorney of Kankakee County, the

City of Kankakee, Illinois City Council, Byron Sandberg, and Waste Management of Illinois, Inc., No. 3-03-0025 (3rd Dist., Sept. 7, 2005) (hereinafter Town & Country I (3rd Dist. 2005)). In that order, the Third District had reinstated the grant by the City of Kankakee (City) of siting approval to Town and Country Utilities, Inc. and Kankakee Regional Landfill (collectively, Town and Country). Town and Country had sought siting approval from the City for a new landfill. The Board had reversed the City's decision to grant siting approval, finding that it was against the manifest weight of the evidence.

Justice Fitzgerald authored the Illinois Supreme Court opinion, in which Chief Justice Thomas and Justices Freeman, Kilbride, Garman, Karmeier, and Burke concurred. The Supreme Court's mandate issued April 26, 2007.

This case concerns a siting application filed in 2002 by Town and Country concerning a proposal under Section 39.2 of the Act, 415 ILCS 5/39.2 (2006), to site a new municipal solid waste landfill on approximately 400 acres in the City. The Supreme Court's decision in Town & Country I is an important one, which reaffirms that Section 40.1 of the Act requires the courts to review the Board's decision, not that of the local government, to determine whether the Board's decision is against the manifest weight of the evidence. The Supreme Court's decision is expected to impact the Third District's decision on reconsideration of its March 2007 decision concerning the related and still-pending "Town & Country II."

Board Order

The Board decided consolidated, third-party appeals concerning the City's approval of Town and Country's proposed landfill on January 9, 2003. 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.; 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., PCB 03-31, PCB 03-33, PCB 03-35 (cons.). (Jan. 9, 2003). Petitioners variously alleged that (1) the City lacked jurisdiction over the siting application due to alleged deficiencies in Town and Country's service of notice of the application as required by Section 39.2(b) of the Act; (2) the procedures used by the City to assess the application were fundamentally unfair; and (3) that the City's decision was against the manifest weight of the evidence as to three of the nine siting criteria listed in Section 39.2 of the Act.

In its January 9, 2003 opinion and order, the Board found that the City did have jurisdiction over the application and that its procedures were fundamentally fair. The Board affirmed the City's decisions that the applicant had satisfied two out of the three challenged criteria: that the operation plan minimized danger to the surrounding area, and that the facility was consistent with the County's solid waste management plan. 415 ILCS 5/39.2 (v), (viii) (2004).

But, the Board reversed the City of Kankakee's decision that Town and Country had satisfied criterion ii of Section 39.2(a): that the proposed "facility is so designed, located and proposed to be operated that the public health, safety, and welfare will be protected." 415 ILCS 5/39.2(a)(ii) (2004). The Board found an absence of evidence in the local siting record addressing the potential vertical flow of contaminants at the site or the prospect that groundwater under the landfill is an aquifer rather than the assumed aquitard. The Board therefore held that the City's decision on criterion ii was against the manifest weight of the evidence.

Third District Order

On September 7, 2005, the Third District Appellate Court reversed the Board, reinstating the City's grant of siting approval. The Third District's order addresses the issue of fundamental fairness. The appellate court first noted that it held in Land & Lakes v. Pollution Control Board, 319 Ill. App. 3d 41, 48 (2000) that "Board determinations that the siting hearing proceedings were fundamentally fair are subject to *de novo* review." Town and Country I (3rd Dist.), slip op. at 4. But, the court went on to acknowledge the Board's argument that this analysis was no longer effective since the decision of the Illinois Supreme Court in AFM Messenger, Inc. v. Dept. of Employment Security, 198 Ill. 2d 380 (2001), where the more deferential "clearly erroneous" standard was applied to a mixed question of law and fact. The court then stated that "[p]ursuant to AFM Messenger, we will affirm the Board's decision unless it is against the manifest weight of the evidence." Town and Country I (3rd Dist.), slip op. at 5. The court considered arguments that several circumstances caused fundamental unfairness, including various alleged deficiencies in the conduct of the hearing, and *ex parte* contacts. The court concluded that "[o]n the issue of fundamental fairness, we find no basis upon which to overturn the decision of the [City] Council." *Id*.

The court began its analysis of the issues involving the statutory criteria by quoting a statement from

Concerned Adjoining Owners v. Pollution Control Board, 288 Ill. App. 3d 565, 576. (1997): "[o]n review, the court is limited to a determination of whether the siting authority's decision was contrary to the manifest weight of the evidence." Town and Country I (3rd Dist.), slip op. at 7-8. The court then concluded that "[i]t is clear by this statement that the court is not reviewing the decision of the PCB." *Id*. at 8. In a lengthy footnote following this remark, the court suggested:

> There is some dispute as to the standard of review an appellate court will apply to the ruling of the PCB. *See*, Turlek v. Pollution Control Board, 274 Ill. App. 3d 244, 249 (1995) ("On review, we are to determine whether the Board's decision is against the manifest weight of the evidence."): File v. D&L Landfill, Inc., 219 Ill. App. 3d 897, 901 (1991) ("Standard of review to be exercised by the [PCB] and this court is whether, respectively, the decision of the county board and [PCB] are contrary to the manifest weight of the evidence."). But *see* Concerned Adjoining Owners v. Pollution Control Board, 288 Ill. App. 3d 565 (1997); Waste Management of Illinois v. Pollution Control Board, 160 Ill. App. 3d 434 (1987); City of Rockford v. Pollution Control Board, 125 Ill. App. 3d 384 (1984). The manifest weight of the evidence standard of review is applicable to a tribunal with an adjudicatory function that is called upon to weigh evidence. It is not applicable to a tribunal which reviews the decision of an adjudicatory body. If an appellate court were to review both the local body and the PCB under manifest weight of the evidence standard of review, it might have to affirm two contradictory decision (sic). A situation could arise where both the decision of the local body and the decision of the PCB were each supported by evidence. Indeed the hallmark of the manifest weight of the evidence standard of review is that the evidence could support two opposite conclusions, and only when an opposite conclusion to that reached by the adjudicatory body is clearly apparent is the decision against the manifest weight of the evidence. Town and Country I (3rd Dist.), slip op. at 8, n.1.

In reviewing the parties' arguments as to the statutory criteria, the appellate court does not evaluate any of the Board's rationale for decision. Instead, the court appears to review the City's decision directly, using a "manifest weight of the evidence" standard, as if there were no Board decision.

The ultimate conclusion of the court was that the City's decision approving siting:

> was fundamentally fair and not contrary to the manifest weight of the evidence. Accordingly, the order of the Illinois Pollution Control Board overturning the decision of the city council is reversed and the decision of the city council is reinstated. Town and Country I (3rd Dist.), slip op. at 11.

Dissenting opinion: In his short, written dissent, Justice Barry observes that the appeal was brought under Section 41(b) of the Act. Under that section:

> any final order of the Board shall be based solely on the evidence in the record of the particular proceeding involved, and any such final order for permit appeals shall be invalid if it is against the manifest weight of the evidence. 415 ILCS 5/41(b)(West 2000). As recognized by our Supreme Court in Environmental Protection Agency v. Pollution Control Board (115 Ill. 2d 65, 70, 503 N.E.2d 343, 345-46 (1986)), it is the duty of this court, under the plain language of section 41(b), to evaluate all the evidence in the record to determine if the Pollution Control Board's findings were contrary to the manifest weight of the evidence. Town and Country I (3rd Dist.), slip op. at 1-2 (Barry, J., dissenting).

Illinois Supreme Court Decision

At the outset of the opinion, the court states the "central issue" in the case: "whether we must apply the manifest weight of the evidence standard of review to the City's decision or to that of the Board." Town & Country I, 866 N.E.2d at 229. The court then provides background on the Board, the Act, and the pollution control facility siting scheme, noting that the "authority of the Board finds its roots in the Illinois Constitution of 1970" and that the "legislature established the Illinois Environmental Protection Agency...and the independent Pollution Control Board...to implement the Act." *Id*. at 230.

The court also noted that Town & Country filed its siting application with the City on March 13, 2002, proposing a new municipal solid waste landfill of approximately 400 acres, with a 236-acre waste footprint. Town & Country I, 866 N.E.2d at 231. The court states that the "salient evidentiary issue presented by this appeal concerns the potential groundwater impact of the proposed landfill. *** The parties disputed whether the geology underneath the proposed site was an 'aquifer' or an 'aquitard.' An aquifer is a geologic formation that permits the flow of water. An aquitard is a geologic formation that retards the flow of water." *Id*.

The court quotes liberally from the Board's opinion concerning criterion (ii). For example, the court states: "the Board held the City's conclusion that the

'design of the landfill will protect the public health, safety, and welfare is against the manifest weight of the evidence because * * * the landfill is located on an aquifer and T & C's design does not adequately address that fact.' The Board concluded on criterion (ii): 'Town & Country failed to address research indicating that the Silurian dolomite, upon which the proposed landfill would rest, is an aquifer.'" Town & Country I, 866 N.E.2d at 233-234.

Judicial Review

In its analysis, the Illinois Supreme Court dismisses the notion that there is any "purported split in authority in the appellate court" over whether the court should review the Board's decision or the decision of the local siting authority. Town & Country I, 866 N.E.2d at 234. Instead, relying on familiar rules of statutory construction, the court interpreted Sections 41(a) and (b) of the Act as providing for judicial review of the Board's final decision. That final Board decision in a landfill siting appeal, the court ruled, constitutes a "permit appeal" decision, under the Act's Title X, subject to the "manifest weight of the evidence" standard of review. *Id.* at 236. The court emphasized that Section 40.1(b) "grants the Board an important role in the permit process. Section 40.1 requires the Board's technically qualified members to conduct a 'hearing'." *Id.* at 237. The court concluded: "Because the legislature has deemed the decision of the Board, rather than the decision of the locality, to be 'final' in section 41, local decisions cannot be subject to direct judicial review within the provisions of section 41. The appellate court may then review the Board's decision concerning the petition contesting the propriety of the underlying local decision, based only on the evidence presented during the local proceedings." *Id*.

The court found that this result is not contrary to its decision in Environmental Protection Agency v. Pollution Control Board, 115 Ill. 2d 65 (1986). The court explained the differences between Board review of Illinois Environmental Protection Agency (IEPA) permit decisions and Board review of local siting decisions, and how both such Board decisions are judicially reviewed:

> While this court stated [in Environmental Protection Agency] that there was a distinction between permit and siting cases, this court never considered whether the local siting authority or that of the Board is the final decision. It is true that the Board's consideration of an IEPA permit decision differs from its consideration of a local siting decision. But we based that distinction on the lack of an adversarial hearing under the regular permitting process. Environmental Protection Agency, 115 Ill. 2d at 70. Accordingly, we found that the Board was not required to apply the manifest weight of the evidence standard to review of an Agency's decision to deny a permit. The appellate court's review of the Board's decisions on either an appeal from an Agency permit decision or a local siting decision is the same. Town & Country I, 866 N.E.2d at 237.

The court also made quick work of Town & Country's argument that the Board's decision in a siting appeal is "irrelevant" and that technical decisions should be made solely by the local authority. Town & Country I, 866 N.E.2d at 238. The court found that this position conflicts with "the Act's purpose 'to establish a unified, state-wide program' to protect the citizens of Illinois from environmental harm," citing Section 2(b) of the Act. *Id*. The court further stated that to accord the Board "no meaningful role in the process yet still require its participation would lack sense." *Id.* Nor does the Board being restricted to reviewing the local siting record mean, in the court's view, that the Board's technical expertise is not brought to bear:

> "The fact that the Board undertakes consideration of the record prepared by the local siting authority rather than preparing its own record does not render the Board's technical expertise irrelevant. Instead, the Board applies that technical expertise in examining the record to determine whether the record supported the local authority's conclusions." *Id*.

Board Decision on Criterion (ii) Affirmed

The court stated that the "essential issue, as expressed in the Board's underlying reversal of the city council decision, is its disagreement with Town & Country's characterization of the underlying bedrock." The court noted that the Board found (1) the evidence insufficient to show that the bedrock was an aquitard; and (2) the landfill design to be based on "inaccurate scientific assumptions." Town & Country I, 866 N.E.2d at 239. The court held that the Board's conclusion on criterion (ii) (proposed facility designed, located, and proposed to be operated so as to protect public health, safety, and welfare) is not against the manifest weight of the evidence: "The witness testimony, the fact that Town & Country's application was based on only one deep boring into competent bedrock on a 236-acre site, and that the 1966 study upon which the application was based has been superceded provides significant evidence that the site application did not meet criterion (ii)." *Id*.

Court's Conclusion

After confirming the Board's decision on criterion (ii), the court found: "Because resolution of this issue is

sufficient to decide this case, we need not discuss the remaining arguments in the briefs." Town & Country I, 866 N.E.2d at 238. (The County had also contested the Third District's decision affirming the Board's rulings that the City's siting procedures were fundamentally fair and that the City's decision on criterion (viii) (consistency of proposal with county solid waste management plan) was not against the manifest weight of the evidence).

As a result of the Illinois Supreme Court's decision in Town & Country I, Town & Country has no approval for its proposed landfill expansion based on its 2002 application.

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. 3-04-0271, 3-04-0285, 3-04-0289 (cons.) (3rd Dist., Sept. 17, 2006) (petition for rehearing pending) (unpublished Rule 23 order reversing Board order in PCB 04-33, PCB 04-34, PCB 04-35 (cons.))

In 2003, Town and Country again applied to the City of Kankakee for siting approval, which the City granted. This action on the 2003 application was appealed to the Board by three separate sets of petitioners, and handled by the Board as a single consolidated action. 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).

In a non-precedential Rule 23 order issued on September 17, 2006, the Third District Appellate Court again reversed the Board, with one justice dissenting. 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. 3-04-0271, 3-04-0285, 3-04-0289 (cons.) (3rd Dist., Sept. 17, 2006) (hereinafter Town & Country II (3rd Dist.)).

Board Decision

In Town & Country II, the Board affirmed the City's grant of siting approval. Sandberg, the County, and Waste Management appealed on the grounds that the City lacked jurisdiction to hear the landfill siting application, the City's landfill siting procedures were fundamentally unfair, and the City's findings were against the manifest weight of the evidence with regard to siting criteria (ii) and (viii) of Section 39.2(a) of the Act. 415 ILCS 5/39.2(a) (2006). The petitioners argued that the City did not have jurisdiction to hear Town & Country's 2003 landfill siting application for three reasons: (1) Town & Country failed to properly serve Section 39.2(b) notices; (2) the 2003 application was substantially the same as the 2002 application; and (3) Town & Country failed to submit a complete siting application. The Board found that the City had jurisdiction to hear Town & Country's 2003 application, and that the landfill siting procedures were fundamentally fair. After reviewing the record concerning the criteria, the Board affirmed the City's decision to grant siting approval for Town & Country's proposed landfill. This March 18, 2004 decision of the Board was appealed to the Third District.

Court Decision

On appeal of the Board's decision, petitioners argued that the Board erred in upholding the City's siting approval decision because (1) Town & Country was barred from filing the 2003 siting application by Section 39.2(m) of the Act; (2) the 2003 application did not meet all of the Section 39.2(a) siting criteria; and (3) the local siting proceedings were fundamentally unfair.

The Third District reversed the Board's decision, finding that Town & Country was barred from filing its 2003 siting application with the City because that application violated Section 39.2(m). Town & Country II, (3rd Dist.), slip op. at 2. 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 of the criteria (i) through (ix) of subsection (a) of this Section within the preceding 2 years." *Id*. at 8.

Having found that the Board had "disapproved" the 2002 siting application within the meaning of Section 39.2(m), the court addressed "whether the 2003 application, which was filed within two years of the 2002 application, was barred on the ground that the applications were substantially similar." Town & Country II (3rd Dist.), slip op. at 11. The Third District held that the acknowledged differences between the two applications concerning hydrogeologic data "pale in comparison to the similarities" between the two applications. *Id*. at 14. The court focused on how

both applications were the same regarding such uncontested items as the site's legal description, size, capacity, waste footprint, tonnage of waste received, stormwater management plan, closure and post-closure plan, leachate collection system, gas management and monitoring system, and final contours and cover configuration. *Id*. at 13-14. The Third District concluded that the Board "manifestly erred" in ruling that Section 39.2(m) did not apply to the 2003 application. Having ruled that Section 39.2(m) barred the 2003 application, the court reversed the Board's Town & Country II decision affirming the City and the City's corresponding grant of siting. *Id*. at 14.

Town & Country's petition for rehearing, in which the Board joined, is pending before the Third District Appellate Court.

RULEMAKING

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

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

In fiscal year 2007, two appeals were initiated of Board orders adopting final rules. There was also one case filed in the circuit court that, in effect, sought judicial review of a Board ruling construing one of the Act's rulemaking provisions: the "fast-track" rulemaking provisions of Section 28.5. ANR Pipeline Co., Natural Gas Piple Co., Trunkline Gas Co., and Panhandle Easter Pipe Line Co. v. Illinois Pollution Control Board and Illinois Protection Environmental Agency, No. 07MR190 (Sangamon County Circuit Court) (filed May 14, 2007, seeking declaratory and injunction relief regarding the Board's April 19, 2007 order concerning use of fast-track rulemaking procedures as requested in the Illinois Environmental Protection Agency's April 6, 2007 regulatory proposal under Section 28.5 in docket R07-18). A similar case challenging Board use of Section 28.5 fast-track rulemaking procedures filed in fiscal year 2006 was dismissed by agreed order.

Dynegy Midwest Generation, Inc., Kincaid Generation, LLC, and Midwest Generation, LLC. v. Illinois Pollution Control Board and Illinois Protection Environmental Agency, No. 06CH213 (Sangamon County Circuit Court) (case dismissed by agreed order of Jan. 26, 2007) (R06-25)

On January 26, 2007, the Sangamon County Circuit court entered an agreed order dismissing, without prejudice, the case captioned Dynegy Midwest Generation, Inc., Kincaid Generation, LLC, and Midwest Generation, LLC. v. Illinois Pollution Control Board and Illinois Protection Environmental Agency, No. 06CH213 (hereinafter Dynegy). The case was an action for declaratory and injunctive relief regarding the procedures the Board was to use in hearing the Illinois Environmental Protection Agency's (IEPA) March 14, 2006 regulatory proposal in docket R06-25, In the Matter of: Proposed New 35 Ill. Adm. Code 225 Control of Emissions From Large Combustion Sources (Mercury).

On May 1, 2006, the Sangamon County Circuit Court had issued a preliminary injunction precluding the Board from proceeding with the rulemaking under the procedures of Section 28.5 of the Act, 415 ILCS 5/28.5 (2004). On May 4, 2006, the Board had issued an order that R06-25 would proceed under the rulemaking procedures of Section 27 of the Act, 415 ILCS 5/27 (2004). On May 8, 2006, the Board and IEPA had filed a joint motion for dismissal of the court action as moot. Detailed information about R06-25 can be found in the Rulemaking section of this report.

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 Illinois Environmental Protection Agency (IEPA) approval of remediation plans and budgets, 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 cleanup 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 fiscal year 2007, the appellate court affirmed the Board decision in one appeal involving an IEPA UST Fund determination.

Midwest Petroleum Company v. Illinois Environmental Protection Agency and Illinois Pollution Control Board, No. 5-06-0056 (5th Dist., May 14, 2007) (unpublished Rule 23 order affirming Board order in PCB 06-28)

On May 14, 2007, the Fifth District Appellate Court affirmed the Board in Midwest Petroleum Company v. Illinois Environmental Protection Agency and Illinois Pollution Control Board, No. 5-06-0056 (5th Dist., May 14, 2007). In a non-precedential Rule 23 order, authored by Justice Chapman with Justices Welch and Donovan concurring, the court affirmed the Board's order. The Board affirmed the July 18, 2005 rejection by IEPA of an amended corrective action plan budget, declaring unreasonable a request for an additional $13,555 in personnel costs.

Board Order

The site at issue is located in Shiloh, St. Clair County, operated by Midwest Petroleum Inc. (Midwest). Midwest hired environmental consultant United Science Industries (USI) to remediate contamination caused by gasoline and diesel fuel leaking from four USTs. In 2004, Midwest and USI submitted, and the IEPA approved, an amended corrective action plan (2004 CAP) and budget for a remediation project involving excavation, transportation, and disposal of 15,148 cubic yards of contaminated soil, and 5,565 cubic yards of overburden.

The IEPA-approved 2004 budget provided for an estimated 270 hours for an environmental technician to perform excavation and required overburden screening, manifesting, sampling, surveying, and sample shipment. The 2004 plan and budget estimated that it would take 27 days to complete the excavation, transportation, disposal, and backfilling of contaminated soil and an additional two days for excavation and replacement of overburden.

Midwest and USI conducted remediation activities at the site from October 2004 through March 2005. Having found that the project took longer to complete and involved more work than originally estimated, Midwest and USI requested the IEPA to modify the budget approved in 2004. The 2005 budget sought approval of time for activities associated with excavation over an additional 16 days, as well as total additional personnel costs of $13,555.

The IEPA rejected the requested budget amendment in July 2005 on the grounds that the costs were unreasonable because the approved 2004 CAP did not include approval for soil remediation to include a span of approximately five months.

The Board affirmed the IEPA's budget amendment rejection, finding Midwest did not meet its burden to show that the costs incurred were reasonable.

Court Order

In its order, the court noted that on administrative review the Board's factual findings are deemed *prima facie* true and correct, while substantial deference is given to its interpretation of its statutes. Midwest Petroleum Company v. Illinois Environmental Protection Agency and Illinois Pollution Control Board, No. 5-06-0056 (5th Dist., May 14, 2007), slip op. at 6. The court further noted that the Leaking Underground Storage Tank (LUST) Fund does not have a broad remedial purpose, so that eligibility requirements must be strictly construed, and "[i]n determining whether to approve a proposed budget, the [I]EPA must be guided, in part, by its obligation to manage the LUST fund so that its limited resources are directed where they are most needed." *Id.* at 7.

The court observed that:

> Although the [proposed] amended budget did not call for any additional type of work to be performed or for a greater volume of soil to be excavated than what was contemplated in the approved [2004] CAP, it did call for the dig-and-haul portion of the project to extend for 16 days over the 27 days that were originally anticipated. This is an increase of more than 50%. We agree with the agencies that a budget calling for a payroll for 43 days' worth of work is inconsistent with a CAP calling for only 27 days' worth of work. *Id.* at 8.

Accordingly, the court concluded that it did "not find the decision to be against the manifest weight of the evidence or arbitrary and capricious," and affirmed the Board's affirmance of the IEPA decision. *Id.*

Legislative Review

Summarized below are 13 bills, each of which amends the Environmental Protection Act (Act) or creates a new act or amends an existing act relating to the Board's work.

Legislation Amending the Environmental Protection Act

Public Act 95-0403 (House Bill 277)
Effective August 24, 2007

The bill provides that, if the Illinois Environmental Protection Agency (IEPA) has formed a priority list for payment after completion of underground storage tank corrective action measures, then an owner or operator on the priority list may assign a full approved payment amount on the priority list for which the owner or operator is awaiting payment to any bank, financial institution, lender, or other person that provides factoring or financing to an owner or operator, or to a consultant of an owner or operator. The bill also provides that an assignment shall not affect an owner's or operator's right to appeal an IEPA decision and that no assignee shall have a right to appeal an IEPA decision regarding an assignment. In addition, the bill provides that an owner or operator's assignment is irrevocable and may be made to only one assignee. Finally, the bill provides that the State shall pay the assigned amount, subject to the off-set rights of the State Comptroller, to the one assignee only, and that the State is discharged of all liability upon payment of the assigned amount to the assignee.

Public Act 95-0288 (House Bill 316)
Effective August 20, 2007

The bill provides that, (i) for proof of location approval in permit applications to develop or construct new pollution control facilities and (ii) for local siting approval of pollution control facilities, the appropriate county board or governing body of the municipality for the facility shall be the county board of the county or the governing body of the municipality, in which the facility is to be located as of the date when the application for siting approval is filed. The bill also provides that facilities subject to provisions of the Act relating to garbage transfer stations must be in compliance with the location requirements of those provisions as of the date the application for siting approval is filed, in order to obtain local siting approval for the pollution control facility. The bill also repeals the Illinois Pollution Prevention Act.

Public Act 95-0121 (House Bill 496)
Effective August 13, 2007

The bill provides that reclaimed "or other" asphalt pavement is included in the definition of "general construction or demolition debris" and in the definition of "clean construction or demolition debris" at Section 3.160 of the Act. The bill further provides that reclaimed or other asphalt pavement shall not be considered speculatively accumulated if: (i) it is not commingled with any other clean construction or demolition debris or any waste; (ii) it is returned to the economic mainstream in the form of raw materials or products within four years (now, 30 days) after its generation; (iii) at least 25% of the total amount present at a site during a calendar year is transported off of the site during the next calendar year; and (iv) it is used as a fill material outside a setback zone if certain conditions are met.

Public Act 95-0066 (House Bill 516)
Effective August 13, 2007

In Section 13.6 of the Act, concerning releases of radionuclides at nuclear power plants, the bill removes a provision allowing self-inspection by the owner or operator of the plant in lieu of inspections by the IEPA and the Illinois Emergency Management Agency.

Public Act 95-0131 (House Bill 937)
Effective August 13, 2007

Public Act 95-0177 (House Bill 3638)
Effective January 1, 2008

Public Act 95-0408 (Senate Bill 126)
Effective August 24, 2007

Each of these three bills amends the definition of "pollution control facility" at Section 5.330 of the Act. Under Public Act 05-131, certain sites or facilities used for wood combustion facilities for energy recovery that accept and burn only wood material are not included in the definition.

Under Public Act 95-0177, a site or facility is not a pollution control facility if it temporarily holds in transit for ten days or less, non-putrescible solid waste in original containers, no larger in capacity than 500 gallons, provided that such waste is further transferred to a recycling, disposal, treatment, or storage facility on a non-contiguous site and provided such site or facility complies with certain federal requirements. The bill also defines "non-putrescible solid waste."

Public Act 95-0408 excludes from the definition a transfer station used exclusively for landscape waste where the waste is held no longer than 24 hours from the time it was received.

Public Act 95-0049 (Senate Bill 154)
Effective August 10, 2007

The bill addresses the 50-cent new or used tire fee collected from retail customers. The bill eliminates a provision terminating the fee on January 1, 2008.

Public Act 95-0452 (Senate Bill 1241)
Effective August 27, 2007

The bill provides that, beginning July 1, 2008, no person shall install, sell, offer to sell, distribute, or offer to distribute a mercury thermostat in Illinois.

Public Act 95-0460 (Senate Bill 1419)
Effective August 27, 2007

The bill gives the Pollution Control Board express authority to adopt regulations and emission standards concerning stationary emission sources that are (i) required by federal law; (ii) otherwise part of the State's attainment plan and are necessary to attain the National Ambient Air Quality Standards; or (iii) are necessary to comply with the requirements of the federal Clean Air Act.

Legislation Amending or Creating Other Statutes

Public Act 95-0087 (House Bill 943)
Effective August 13, 2007

The bill first changes the title of the Mercury Fever Thermometer Prohibition Act to the Mercury-added Product Prohibition Act. The bill defines "mercury-added product" and provides that, on and after July 1, 2008, no person shall sell, offer to sell, or distribute certain mercury-added products in Illinois. The bill also provides exemptions to this prohibition.

Public Act 95-0268 (Senate Bill 303)
Effective January 1, 2008

The bill creates the Plastic Bag Recycling Act and the Plastic Bag Recycling Task Force and sets out the composition and duties of the Task Force. The bill sets out a voluntary plastic bag recycling pilot program for certain retailers of Lake County. The bill further provides that this statute is repealed on June 1, 2010.

Public Act 95-0115 (Senate Bill 376)
Effective August 13, 2007

The bill creates the Regulation of Phosphorus in Detergents Act and provides that, on and after July 1, 2010, no person may use, sell, manufacture, or distribute for sale any cleaning agent containing more than 0.5% phosphorus by weight, expressed as elemental phosphorus, in Illinois, except as provided under this statute. The bill sets forth certain exceptions. The bill also provides that the Pollution Control Board may authorize the use of certain cleaning agents containing phosphorus under certain conditions and that the Board shall promulgate rules for the administration and enforcement of this statute. Finally, the bill also provides that no home rule unit may regulate phosphorus in detergents.

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