

SURVEY OF ILLINOIS LAW: ENVIRONMENTAL LAW

Kyle Rominger,* Thomas J. Hunter** and Monica T. Rios***

I. INTRODUCTION

The following is a review of legislative, regulatory and case law developments in the field of environmental law in Illinois in 2007. The year presented several significant legislative and regulatory developments, and a noteworthy precedent.

II. 2007 LEGISLATIVE UPDATE

The following is a review of environmental-related legislation signed into law in 2007.

A. Construction or Demolition Debris. *Public Act 95-121 (effective August 13, 2007).*

Section 3.160(b) of the Environmental Protection Act was amended to provide that, for the purposes of defining “clean construction or demolition debris,” asphalt pavement is not 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 4 years 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) if used as fill material, it is [used as below-grade fill outside of a setback zone and covered with a road,

* Kyle Rominger is an Assistant Counsel with the Illinois Environmental Protection Agency where he is involved in the drafting and adoption of legislation and administrative rules, and provides general legal counsel on various environmental issues. The views expressed in this article are the views of the author and are not necessarily those of the Illinois Environmental Protection Agency.

** Thomas J. Hunter is a clerk for the Hon. Richard P. Goldenhersh, Appellate Court of Illinois, Fifth District.

*** Monica T. Rios practices environmental law at Hodge Dwyer Zeman in Springfield, Illinois. She earned her J.D. (cum laude) from the American University Washington College of Law.

a structure, or sufficient uncontaminated soil to support vegetation within 30 days after completion of the filling].¹

Sections 3.160(a) and (b) of the Environmental Protection Act were amended to clarify that the terms “general construction or demolition debris” and “clean construction or demolition debris” can include types of asphalt pavement other than reclaimed asphalt pavement.² Sections 3.160(a) and (b) were also amended to repeal the requirement that certain material used as below-grade fill must be used within 30 days of its generation in order to be considered “general construction or demolition debris” or “clean construction or demolition debris.”³

B. Mercury-Added Products. Public Act 95–87 (*effective August 13, 2007*).

The Mercury Fever Thermometer Prohibition Act was renamed the Mercury-added Product Prohibition Act and a prohibition on the sale, offers to sell, and distribution of certain mercury-added products was added.⁴ The new prohibition takes effect July 1, 2008.⁵ Exemptions are provided for mercury-added products where use is federally required or where the only mercury-added component is a button cell battery.⁶ In addition, the manufacturers of mercury-added products subject to the prohibition can petition the Illinois Environmental Protection Agency (“Illinois EPA”) for renewable five-year exemptions.⁷

C. Mercury-Added Products. Public Act 95–452 (*effective August 27, 2007*).

Section 22.23b(f) was added to the Environmental Protection Act to prohibit the installation, sale, distribution, and offers to sell or distribute mercury thermostats used to sense and control room temperature.⁸ Excluded from the prohibition are thermostats used as a part of a manufacturing or

1. 415 ILL. COMP. STAT. 5/3.160(b) (2007).

2. *Id.* § 5/3.160(a) and (b).

3. *Id.*

4. 410 ILL. COMP. STAT. 46/1, 46/27 (2007).

5. *Id.* § 46/27(a).

6. *Id.* § 46/27(b).

7. *See id.* § 46/27(c).

8. 415 ILL. COMP. STAT. 5/22.23b(f) (2007).

industrial process.⁹ The prohibition took effect July 1, 2008.¹⁰ The Public Act also repealed the deadline to apply for exemptions from the prohibitions that apply to (i) mercury and certain mercury-containing items used in primary or secondary schools and (ii) mercury switches and relays.¹¹

D. NPDES Permits. *Public Act 95–516 (effective August 8, 2007).*

Section 12.5(c) of the Environmental Protection Act was amended to allow annual fees for new construction site stormwater discharge permits to be charged on a calendar year basis instead of a fiscal year basis.¹² Section 12.5(i) of the Environmental Protection Act was amended to authorize the Illinois EPA to adopt rules regarding the refunding of NPDES fees.¹³ Finally, Section 12.6(c) of the Environmental Protection Act was amended to require applicants for state water quality certifications mandated by section 401 of the federal Clean Water Act to pay the prescribed certification fee prior to Illinois EPA's issuance of the certification.¹⁴ Previously, the fee was due with the application for certification.¹⁵

E. Phosphorus Cleaning Agents. *Public Act 95–115 (effective August 13, 2007).*

The Regulation of Phosphorus in Detergents Act was enacted to prohibit the use, sale, manufacture, and distribution for sale of cleaning agents that contain more than 0.5% phosphorus by weight.¹⁶ The prohibition takes effect on July 1, 2010.¹⁷ Cleaning agents used in certain applications are exempted from the Act, as well as those used solely outside of Illinois or regulated under federal law.¹⁸ The Act allows the Illinois Pollution Control Board to authorize the use of cleaning agents not specifically exempted from the Act if the Board finds “that there is no adequate substitute for [the cleaning agents] or that compliance with [the Act] would otherwise be unreasonable or create significant hardship on the user.”¹⁹ The Act also directs the Board to adopt

9. *Id.*

10. *Id.*

11. *Id.* § 5/22.23b(c).

12. *Id.* § 5/12.5(c).

13. *Id.* § 5/12.5(i).

14. *Id.* § 5/12.6(c).

15. *Id.*

16. 415 ILL. COMP. STAT. 92/5(a) (2007).

17. *Id.*

18. *See* 415 ILL. COMP. STAT. 92/5(c); *see also id.* § 92/5(d).

19. *Id.* § 92/5(e).

rules for the Act's administration and enforcement.²⁰ Home rule units are denied the power to regulate phosphorus in detergents.²¹

F. Pollution Control Facilities.

Two general exclusions were added to the Environmental Protection Act's definition of "pollution control facility." Public Act 95-177 (effective August 14, 2007) added an exclusion for sites and facilities that hold non-putrescible solid waste for ten days or less under certain circumstances.²² The circumstances include holding the waste in transit and in original containers no larger than 500 gallons in capacity; further transferring the waste to "a recycling, disposal, treatment, or storage facility on a non-contiguous site;" and site or facility compliance with "applicable 10-day transfer requirements of the federal Resource Conservation and Recovery Act of 1976 and United States Department of Transportation hazardous material requirements."²³ Public Act 95-408 (effective August 24, 2007) added an exclusion for transfer stations used exclusively for landscape waste if the landscape waste is held no longer than twenty-four hours after its receipt.²⁴ The exclusion expressly includes transfer stations "where landscape waste is ground to reduce its volume."²⁵

G. Pollution Control Facilities. *Public Act 95-288 (effective August 20, 2007).*

Section 39(c) of the Environmental Protection Act was amended to clarify that the appropriate body for granting local siting approval for new pollution control facilities is 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."²⁶ Section 39.2(a) of the Environmental Protection Act was amended to clarify that for purposes of local siting approval, compliance with the location restrictions in Section

20. *Id.*

21. *Id.* § 92/5(f).

22. Environmental Protection Act, Pub. Act 95-177, § 5 (2007), available at www.ilga.gov/legislation/publicacts/fulltext.asp?Name=095-0177&GA=095 (last visited Apr. 8, 2008).

23. *Id.*

24. Environmental Protection Act, Pub. Act 95-408, § 5 (2007), available at www.ilga.gov/legislation/publicacts/fulltext.asp?Name=095-0408&GA=95 (last visited Apr. 8, 2008).

25. *Id.*

26. 415 ILL. COMP. STAT. 5/39(c) (2007).

22.14 of the Environmental Protection Act is to be determined “as of the date the application for siting approval is filed.”²⁷ The changes to Sections 39(c) and 39.2(a) apply to siting applications filed on or after August 20, 1997, the effective date of the Public Act.²⁸ The Public Act also repealed the Illinois Pollution Prevention Act.²⁹

H. Prescribed Burning. *Public Act 95–108 (effective August 13, 2007).*

The Illinois Prescribed Burning Act was enacted to promote and authorize the continued use of prescribed burning for land management purposes.³⁰ It sets forth steps that must be taken prior to conducting a prescribed burn under the Act.³¹ Prescribed burns under the Act are declared to be in the public interest, not a nuisance when conducted in accordance with applicable laws, and are a property right if naturally occurring vegetative fuels are used.³² The Act states that property owners and persons conducting prescribed burns under the Act are liable for actual damages and injuries caused by the fire or resulting smoke if negligence is shown.³³ The Department of Natural Resources is directed to adopt implementing rules in consultation with the Office of the State Fire Marshal.³⁴ The Department of Natural Resources is also authorized to charge application fees for safety training and prescribed burn manager certifications.³⁵ The Act does not affect obligations or liabilities under the Illinois Environmental Protection Act or rules adopted thereunder, nor does it affect obligations or liabilities under federal laws or rules that apply to prescribed burning.³⁶ In addition, the Act does not supercede local burning laws.³⁷

27. *Id.* § 5/39.2(a).

28. Environmental Protection Act, Pub. Act 95–288, § 97 (2007), available at www.ilga.gov/legislation/publicacts/fulltext.asp?Name=095-0288&GA=95 (last visited Apr. 8, 2008). (repealed Illinois Pollution Act, 415 ILL. COMP. STAT. 115 (2007)).

29. *Id.* § 10.

30. 525 ILL. COMP. STAT. 37/5(b) (2007).

31. *See id.* § 37/15(a). *But see id.* § 37/25(1) (persons conducting prescribed burns on their own land or on the land of another with the landowner’s permission are not required to be certified prescribed burn managers).

32. *Id.* § 37/15(c).

33. *Id.* § 37/15(b).

34. 525 ILL. COMP. STAT. 37/20 (2007).

35. 525 ILL. COMP. STAT. 37/30 (2007).

36. 525 ILL. COMP. STAT. 37/25(2) (2007).

37. *Id.* § 37/25(3).

I. Recycling. *Public Act 95–119 (effective August 13, 2007).*

Section 85–13 of the Township Code was amended to authorize township boards to administer recycling programs. In addition, a new Section 6–132 was added to the Illinois Highway Code to authorize road districts to “organize, administer, or participate in one or more recycling programs.”³⁸

J. SLAPP Suits. *Public Act 95–506 (effective August 28, 2007).*

The Citizen Participation Act was enacted to help curtail Strategic Lawsuits Against Public Participation, or “SLAPPs.”³⁹ SLAPPs are described as “[c]ivil actions for money damages . . . filed against citizens and organizations . . . as a result of their valid exercise of their constitutional rights to petition, speak freely, associate freely, and otherwise participate in and communicate with government.”⁴⁰ They are often used in the context of real estate development, such as for a landfill or a factory farm.⁴¹ The Act declares that “[a]cts in furtherance of the constitutional rights to petition, speech, association, and participation in government are immune from liability, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome.”⁴² It requires motions to dispose of claims based on, related to, or in response to such constitutional acts to be heard and decided within ninety days.⁴³ It further requires appellate courts to expedite appeals or other writs when trial courts have denied or failed to rule on such motions.⁴⁴ Courts are directed to grant the motions and dismiss the claims unless clear and convincing evidence shows “that the acts of the moving party are not immunized from, or are not in furtherance of acts immunized from, liability [under the Act].”⁴⁵ Moving parties who prevail are entitled to reasonable attorney’s fees and costs.⁴⁶

38. 605 ILL. COMP. STAT. 5/6–132 (2007).

39. 735 ILL. COMP. STAT. 110/5 (2007).

40. *Id.*

41. Helen Gunnarsson, *SLAPP Suits Take a Hit*, 95 ILL. B. J. 454, 454 (2007).

42. 735 ILL. COMP. STAT. 110/15 (2007).

43. 735 ILL. COMP. STAT. 110/20(a) (2007).

44. *Id.*

45. *Id.* § 110/20(c).

46. 735 ILL. COMP. STAT. 110/25 (2007).

K. Stationary Emission Sources. *Public Act 95–460 (effective August 27, 2007)*.

Section 10(B) of the Environmental Protection Act was amended to clarify that the Illinois Pollution Control Board may adopt regulations and emission standards for stationary emission sources that are required by federal law, are a part of the State’s attainment plan and necessary to attain national ambient air quality standards, or are necessary to comply with Clean Air Act requirements.⁴⁷

L. Underground Storage Tank Fund. *Public Act 95–403 (effective August 24, 2007)*.

Section 57.8a was added to the Environmental Protection Act to allow underground storage tank (“UST”) owners and operators to assign payment amounts that have been approved by the Illinois EPA but that have not yet been paid from the UST Fund.⁴⁸ Payments eligible for assignment are those listed on the UST Fund Payment Priority List maintained by the Illinois EPA.⁴⁹ Payments can be assigned to “any bank, financial institution, lender, or other person that provides factoring or financing” to an owner or operator or their consultant.⁵⁰ Assignments are irrevocable and can be made to only one person.⁵¹ Subsequent reassignments of the payment will not be recognized by the State.⁵² Assigned payments remain subject to deductions and offsets by the State Comptroller.⁵³

III. 2007 REGULATORY DEVELOPMENTS

The Illinois Pollution Control Board (“Board”) was created by the Illinois Environmental Protection Act (“Act”)⁵⁴ and is responsible under that Act for adopting many of the environmental regulations at force in the State of Illinois.⁵⁵ At any given time, the Board has several rulemaking proposals pending before it, as well as enforcement cases and petitions for regulatory

47. 415 ILL. COMP. STAT. 5/10(B) (2007).

48. 415 ILL. COMP. STAT. 5/57.8a (2007).

49. *Id.* § 5/57.8a(a).

50. *Id.*

51. *Id.* § 5/57.8a(c).

52. *Id.*

53. *Id.* § 5/57.8a(a), (c).

54. 415 ILL. COMP. STAT. 5/1–58.17 (2007).

55. 415 ILL. COMP. STAT. 5/5 (2007).

relief. During 2007, the Board amended existing regulations and adopted new regulations, including amending regulations addressing remediation objectives (“ROs”) for contaminated sites, updating public water supply regulations, and establishing a cap and trade program to reduce emissions of nitrogen oxides and sulfur dioxides from sources located in Illinois. As discussed in more detail below, the Board also will continue in 2008 to address several rulemakings that were initiated prior to or during 2007.

A. Land-related Rulemakings and Activities

On February 15, 2007, the Board adopted its final amendments to its Tiered Approach to Corrective Action Objectives (“TACO”) regulations.⁵⁶ TACO is used by the Illinois Environmental Protection Agency (“Illinois EPA”), environmental consultants, and site owners or operators to develop “risk based remediation objectives” in order to remediate contaminated sites.⁵⁷ “Under TACO, persons assess the site conditions, evaluate the risks to human health, and propose remediation objectives to ‘mitigate conditions at the site so that they no longer pose a threat to human health.’”⁵⁸ The final amendments adopted by the Board include, but are not limited to, revisions to TACO’s applicability section, revisions to institutional control provisions, and adoption of background soil levels for polynuclear aromatic hydrocarbons (“PAHs”) and of new lead ROs.⁵⁹

The Board adopted the following significant revisions to the Part 742 TACO regulations:

- Because of the technical issues involved in remediating landfill sites, the Board adopted new subsection (h) to TACO’s applicability provision in order to clarify that “landfills cannot use TACO in lieu of the procedures and requirements applicable to landfills under Part 807 or Parts 811 through 814.”⁶⁰
- The Board adopted revisions to the institutional control provisions to address the situation where the owner or operator of a LUST site is not the owner of the property for which a Highway Authority Agreement

56. Final Order, *In the Matter of: Proposed Amendments to Tiered Approach to Corrective Action Objectives (35 Ill. Adm. Code 742)*, R06–10 (Ill. Pollution Control Bd. Feb. 15, 2007) (hereinafter “TACO Final Order”).

57. *Id.* at 1.

58. *Id.* at 5 (quoting Statement of Reasons, *In the Matter of: Proposed Amendments to Tiered Approach to Corrective Action Objectives (35 Ill. Adm. Code 742)*, R06–10, 2 (Ill. Pollution Control Bd. Sept. 30, 2005) (hereinafter “TACO SOR”)); see generally ILL. ADMIN. CODE tit. 35, § 742.

59. TACO Final Order at 5.

60. *Id.* at 6.

(“HAA”) is needed.⁶¹ In addition, the Board added a new provision that requires that in circumstances where ordinances are used as institutional controls, Illinois EPA must be notified if the ordinance is repealed or amended.⁶² Finally, in regards to institutional controls, the Board adopted new mandatory forms for HAAs, Environmental Land Use Controls, Memoranda of Understanding, and HAA Memoranda of Agreement.⁶³

- According to Illinois EPA, PAHs are located throughout the State at significant levels.⁶⁴ Because background levels of PAHs were not accounted for prior to this rulemaking, owners or operators of contaminated sites would at times have to remediate below background levels in order to meet current TACO ROs.⁶⁵ In order to resolve this issue, the Board added a new Table H, which enumerates background levels for PAHs, to Appendix A of Part 742.⁶⁶
- The Board also revised Table A in Appendix B of Part 742 by adding footnote x to address situations where a site remediated to TACO’s residential levels still would not meet all the objectives for construction workers.⁶⁷ Footnote x applies to twenty-eight chemicals and “is designed to apply the more stringent objectives for those 28 chemicals.”⁶⁸
- The Board adopted new lead soil objectives for industrial/commercial properties and the construction worker ingestion pathway based on the United States Environmental Protection Agency’s (“USEPA”) Adult Blood Lead Model.⁶⁹

The Board also amended the solid waste landfill regulations at Parts 810 and 811.⁷⁰ On November 15, 2007, the Board adopted rules “intended primarily to update the Board’s regulations in order to reflect practical experience gained through the implementation of those rules and the expanded technical and scientific knowledge achieved since the Board first adopted

61. *Id.*

62. *Id.* at 7.

63. *Id.* at 8.

64. *Id.* at 9 (citing TACO SOR at 7).

65. *Id.* at 9.

66. *Id.* at 9; ILL. ADMIN. CODE tit. 35, § 742. Appendix A.

67. *Id.* at 11; ILL. ADMIN. CODE tit. 35, § 742. Appendix B. Table A.

68. *Id.* at 11.

69. *Id.* at 11; ILL. ADMIN. CODE tit. 35, § 742. Appendix B.

70. ILL. ADMIN. CODE tit. 35 §§ 810, 811 (2007) [Final Notice, *In the Matter of: Proposed Amendments to Solid Waste Landfill Rules*, R07–8 (Ill. Pollution Control. Bd. Nov. 15, 2007)] (hereinafter “Solid Waste Final Notice”).

these standards in 1990.⁷¹ The Board substantively amended the provisions on leachate monitoring and groundwater monitoring systems.⁷²

In regards to the leachate monitoring provisions, the Board revised the leachate monitoring parameters to require monitoring for 202 constituents from certain units.⁷³ In addition, a new section was added to require a “minimum number of leachate monitoring locations,” including at least four monitoring locations and one location for each twenty-five acres within the waste boundary unless the owner or operator of the landfill can show that fewer locations are needed.⁷⁴ Further, the newly adopted rules “now require quarterly leachate monitoring at least for the first two years of operation, followed by semi-annual monitoring.”⁷⁵

The Board also revised the requirements for groundwater monitoring at solid waste landfill sites. The amendments include, but are not limited to, the following:

- Revised requirements for measuring groundwater monitoring well depths;⁷⁶
- A minimum list of fourteen indicator contaminants that must be monitored, which includes “the monitoring of certain metals in the assessment monitoring;”⁷⁷
- A specific list of organic chemicals that must be monitored on a semi-annual basis;⁷⁸
- New requirements for confirmation monitoring;⁷⁹ and
- New requirements for filing, implementing, and conducting an assessment monitoring plan.⁸⁰

In addition, the Board adopted revisions to the groundwater quality standard provisions. The new requirements “replace references to public water supply standards with groundwater standards, clarify the establishment of background concentrations, and update statistical analysis procedures.”⁸¹

71. *Id.* at 1.

72. *Id.* at 2.

73. *Id.* at 3.

74. *Id.* at 4.

75. *Id.* at 5; ILL. ADMIN. CODE tit. 35, § 811.309(g)(1).

76. Solid Waste Final Notice, *supra* note 69 at 7; ILL. ADMIN. CODE tit. 35, § 811.318(e)(7).

77. Solid Waste Final Notice, *supra* note 69 at 9; ILL. ADMIN. CODE tit. 35, § 811.319.

78. Solid Waste Final Notice, *supra* note 69 at 10.

79. *Id.* at 10–13.

80. *Id.* at 13; ILL. ADMIN. CODE tit. 35, § 811.319(b)(2).

81. Solid Waste Final Notice, *supra* note 69 at 14; ILL. ADMIN. CODE tit. 35, § 811.320.

On November 15, 2007, the Board also adopted final rules amending its underground storage tank (“UST”) regulations.⁸² According to the Board, the adopted amendments revised the UST regulations in order to make the “regulations consistent with recent amendments to the Act.”⁸³ In order to update the UST regulations, the Board made the following revisions: amended the definition of “owner” to include those persons who elect to proceed as owner, amended the NFR provision to state that an NFR letter does not apply to off-site contamination that has not been remedied because the owner or operator was denied access, and amended the definition of “pollution control facility” to include several exceptions to the definition.⁸⁴

B. Water-related Rulemakings and Activities

The Act provides for the adoption of identical substance regulations that mirror USEPA’s adoption of regulations pursuant to several sections of the Safe Drinking Water Act.⁸⁵ In accordance with this provision, the Board on July 26, 2007, issued its final order and adopted rules amending the State’s public water supply regulations.⁸⁶ The Board’s amendments to the regulations included the adoption of the Stage 2 Disinfectants and Disinfection Byproducts Rule, which “regulates drinking water disinfection practices and the content of disinfection byproducts in drinking water;”⁸⁷ the Long Term 2 Enhanced Surface Water Treatment Rule, which provides “enhanced protection against *cryptosporidium* and *Giardia lamblia*,”⁸⁸ and the Groundwater Rule, which “applies microbial quality standards to suppliers using groundwater sources.”⁸⁹

On December 6, 2006, the Board also issued for First Notice proposed regulations establishing requirements for reporting releases of radionuclides from nuclear power plants proposed by Illinois EPA pursuant to Section

82. ILL. ADMIN. CODE tit. 35, §§ 101.202, 732.103, 732.702, 734.115, 734.710 (2007) [Final Notice, *In the Matter of: Proposed Amendments to the Board’s Procedural Rules and Underground Storage Tank Regulations to Reflect P.A. 94-0274, P.A. 94-0276, P.A. 94-0824, P.A. 95-0131, P.A. 95-0177, P.A. 95-0408*, R07-17 (Ill. Pollution Control Bd. Nov. 15, 2007)].

83. *Id.* at 1.

84. *Id.* at 2-5; ILL. ADMIN. CODE tit. 35, §§ 732.103, 734.115, 732.702(d), 734.710(d), 101.202.

85. 415 ILL. COMP. STAT. 5/7.2 and 17.5 (2007). See 42 U.S.C. §§ 300f-300j-18 (2007).

86. Final Order, *In the Matter of: SDWA Update, USEPA Amendments (January 1, 2006 though [sic] June 30, 2006)*, R07-2 and *In the Matter of: SDWA Update, USEPA Amendments (July 1, 2006 though [sic] December 31, 2006)*, R07-11 (Ill. Pollution Control Bd. July 26, 2007).

87. *Id.* at 2.

88. *Id.* at 12.

89. *Id.* at 15.

13.6(e) of the Act.⁹⁰ The proposed regulations “establish a requirement that within 24 hours of any unpermitted release of radionuclides into the groundwater, surface water, or soil, the licensee must evaluate the release to determine whether it needs to be reported and, if reporting is necessary, make [] a report to the Agency and the IEMA [Illinois Emergency Management Agency] within that same 24 hours.”⁹¹ The Board will continue to address Illinois EPA’s proposal during the next year.

In addition, during 2007, the Board issued orders on several other water-related rulemakings. On September 20, 2007, the Board issued its First Notice Opinion on a rulemaking proposal to amend the water quality standard for sulfate and eliminate the total dissolved solids water quality standard for general use waters.⁹² The Board also sent to Second Notice proposed amendments to the dissolved oxygen water quality standard for general use waters.⁹³ Finally, the Board accepted for hearing Illinois EPA’s rulemaking proposal to amend water quality standards and effluent limitations for the Chicago Area Waterway System and Lower Des Plaines River.⁹⁴

C. Air-related Rulemakings and Activities

In 2007, the Board adopted the Clean Air Interstate Rule (“CAIR”) for electric generating units (“EGUs”)⁹⁵ operating in Illinois.⁹⁶ In order to meet the State’s obligations under the Clean Air Act⁹⁷ to control PM2.5 and ozone, Illinois EPA proposed a cap and trade program to control emissions of

90. First Notice, *In the Matter of: Procedures Required by P.A. 94-849 for Reporting Releases of Radionuclides at Nuclear Power Plants: New 35 Ill. Adm. Code 1010*, R07-20 (Ill. Pollution Control Bd. Dec. 6, 2007).

91. *Id.* at 3.

92. First Notice, *In the Matter of: 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, 406.209, and Part 407; and Proposed New 35 Ill. Adm. Code 302.208(h)*, R07-9 (Ill. Pollution Control Bd. Sept. 20, 2007).

93. Second Notice, *In the Matter of: Proposed Amendments to Dissolved Oxygen Standard 35 Ill. Adm. Code 302.206*, R04-25 (Ill. Pollution Control Bd. Nov. 15, 2007).

94. Order, *In the Matter of: Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and Lower Des Plaines River Proposed Amendments to 35 ILL. ADMIN. CODE 301, 302, 303, and 304*, R08-9 (Ill. Pollution Control Bd. R08-9).

95. “Electric generating unit” is defined as “a fossil fuel-fired stationary boiler, combustion turbine or combined cycle system that serves a generator that has a nameplate capacity greater than 25 MWe and produces electricity for sale.” ILL. ADMIN. CODE tit. 35, § 225.130.

96. Final Order, *In the Matter of: Proposed New Clean Air Interstate Rules (CAIR) SO₂, NO_x, Annual and NO_x Ozone Season Trading Programs*, 35 Ill. Adm. Code 225, Subparts A, C, D, E, and F, R06-26 (Ill. Pollution Control Bd. Aug. 23, 2007) (hereinafter “CAIR Final Order”).

97. 42 U.S.C. §§ 7401-7671q (2003).

nitrogen oxides (“NOx”) and sulfur dioxide (“SO2”).⁹⁸ According to the Board, “by adopting the CAIR SO2 trading program, the CAIR NOx annual trading program, and the CAIR NOx ozone season trading program, with specific allocations for NOx and retirement ratios for SO2, this rulemaking is designed to reduce intra- and interstate transport of SO2 and NOx emissions from fossil fuel-fired electric generating units.”⁹⁹

The CAIR trading programs affect existing and new EGUs and require that EGUs subject to the regulations comply with Part 225 Subparts A, C, D, E, and F, as well as the applicable requirements of 40 C.F.R. Part 96, obtain a CAIR permit, and comply with all monitoring, reporting, and recordkeeping requirements.¹⁰⁰ In addition, the CAIR trading programs include a New Unit Set-Aside provision, which provides that Illinois EPA can allocate allowances to units that commenced operation after January 1, 2006,¹⁰¹ and a Clean Air Set-Aside (“CASA”), which allows a project sponsor to “apply for allowances from the CASA for sponsoring an energy efficiency and conservation, renewable energy, or clean technology project.”¹⁰²

On September 20, 2007, the Board also adopted regulations “intended to reduce interstate and intrastate transport of nitrogen oxides (NOx) emissions on ozone season and annual bases by reducing NOx emissions from stationary reciprocating internal combustion engines addressed in the NOx State Implementation Plan (SIP) Call Phase II.”¹⁰³ The newly adopted Part 217 Subpart Q applies to stationary reciprocating internal combustion engines or turbines listed in Appendix G of the adopted rule.¹⁰⁴ In addition, Subpart Q:

98. CAIR Final Order, *supra* note 95 at 1.

99. *Id.*

100. ILL. ADMIN. CODE tit. 35, Part 225. Subparts C, D, E, F (2007).

101. ILL. ADMIN. CODE tit. 35, § 225.445 (2007).

102. *Id.*

103. Final Notice, *In the Matter of: Fast-Track Rules Under Nitrogen Oxide (NOx) SIP Call Phase II: Amendments to 35 Ill. Adm. Code Section 201.146 and Parts 211 and 217*, R07–18 (Ill. Pollution Control Bd. Sept. 20, 2007) (hereinafter “NOx SIP Call Final Notice”)

104. *Id.* at 8. On May 17, 2007, the Board split the original R07–18 rulemaking into two separate rulemakings because the Board concluded that a portion of the proposal was not required to be adopted pursuant to the Clean Air Act. “Accordingly, the Board bifurcated this proposal by continuing to consider the portion applicable to the 28 internal combustion engines affected by the NOx SIP Call Phase II under the fast-track procedures of Section 28.5 of the Act.” The Board will consider the remainder of the proposal in a separate docket R07–19, under Section 27. Board Order, *In the Matter of: Fast-Track Rules Under Nitrogen Oxide (NOx) SIP Call Phase II: Amendments to 35 Ill. Adm. Code Section 201.146 and Parts 211 and 217*, R07–18, 2 (Ill. Pollution Control Bd. May 17, 2007) and *In the Matter of: Section 27 Proposed Rules for Nitrogen Oxide (NOx) Emissions from Stationary Reciprocating Internal Combustion Engines and Turbines: Amendments to 35 Ill. Adm. Code Parts 211 and 217*, R07–19, 2 (Ill. Pollution Control Bd. May 17, 2007).

- Provides that an owner or operator of an affected unit has the option of complying with an averaging plan rather than concentration limits, and that units that commenced operation after January 1, 2002, can be included in an emissions averaging plan;¹⁰⁵
- Establishes requirements for initial performance testing, subsequent performance testing, and testing procedures;¹⁰⁶
- Establishes monitoring requirements, which allow monitoring frequency to vary depending on the hours of operation of the unit and whether a performance test was conducted during the year;¹⁰⁷ and,
- Sets out recordkeeping and reporting requirements for units listed in Appendix G.¹⁰⁸

The Board also amended its regulations for cold cleaning degreaser operations located in nonattainment areas.¹⁰⁹ The amendments “allow the use of add-on controls as an alternative to using solvents with vapor pressure of 1.0mmHg or less;” “allow the use of an equivalent alternative control plan to comply with the control measure requirements;” and establish “testing procedures and record keeping requirements for add-on controls and equivalent alternative controls.”¹¹⁰

IV. CASE LAW

In 2007, the Appellate Court of Illinois rendered a paucity of precedent in the field of environmental law. In *Town & Country Utilities, Inc. v. Illinois Pollution Control Board*, the Supreme Court of Illinois established that the Illinois Pollution Control Board will be afforded deference in reviews of local siting approval—and we discuss that case in depth.¹¹¹ A few other opinions

105. NOx SIP Call Final Notice at 8.

106. *Id.* at 10–11.

107. *Id.*

108. *Id.* at 11–12.

109. Final Order, *In the Matter of: Organic Material Emission Standards and Limitations for the Chicago and Metro-East Areas: Proposed Amendments to 35 Ill. Adm. Code 218 and 219*, No. R06–21 (Ill. Pollution Control Bd. April 19, 2007).

110. *Id.* at 3.

111. *Town & Country Util., Inc., v. Ill. Pollution Control Bd.*, 225 Ill. 2d 103, 116, 866 N.E.2d 227, 234 (2007), *abrogating* *Concerned Adjoining Owners v. Pollution Control Bd.*, 288 Ill. App. 3d 565, 680 N.E.2d 810, (1997); *Fairview Area Citizens Taskforce v. Pollution Control Bd.*, 198 Ill. App. 3d 541, 555 N.E.2d 1178, (1990); *Waste Mgmt. of Ill., Inc., v. Pollution Control Bd.*, 160 Ill. App. 3d 434, 513 N.E.2d 592, (1987); *City of Rockford v. Pollution Control Bd.*, 125 Ill. App. 3d 384, 465 N.E.2d 996, (1984).

The Third District of the Appellate Court issued a non-precedential Rule 23 order. Appellate Court of Illinois, No. 3–03–0025 (unpublished order under Supreme Court Rule 23) (Barry, J., dissenting). The IPCB issued a lengthy consolidated order for PCB 03–31, PCB 03–33 and PCB

addressed matters of a limited degree of relevance to practitioners in the field—and a couple of those cases are discussed briefly.¹¹²

Town & Country involved siting approval for a pollution control facility.¹¹³ Before an applicant can obtain a permit from the IEPA for a pollution control facility, the applicant must obtain siting approval by applying to the local government delineated as the siting authority under Title X of the Environmental Protection Act (“Act”).¹¹⁴ The Act requires the local siting authority to hold a transcribed public hearing and issue a written decision on any application.¹¹⁵ The application is to be granted only if it meets nine discrete criteria.¹¹⁶ The decision of the local government may be appealed to the Board.¹¹⁷ Title X also outlines the procedures for Board

03–35, available at www.ipcb.state.il.us (last visited Aug. 12, 2008).

Town & Country filed a subsequent application with the City of Kankakee in 2003. The 2003 application was granted by the City and approved by the Board. (PCB 04–33, PCB 04–34, PCB 04–35 consolidated (March 18, 2004)). The appellate court, however, reversed Board in a Rule 23 Order No. 03–04–0271, 3–04–0285, 3–04–0289 consolidated (Sept. 17, 2006). The court found the application was substantially similar to the prior action and, thus, untimely under Section 39.2(m). A petition for rehearing was filed in this litigation. Several publications, such as those on the IPCB website, refer to the litigation on the second application as *Town & Country II*.

The County of Kankakee and Waste Management of Illinois, Inc., objected to both *Town & Country* applications. The Board upheld a denial by the County of Kankakee of an application by Waste Management in PCB 04–186.

112. The appellate court issued several unpublished decisions. The following cases have no precedential effect, but may be a resource on certain issues. *Jersey Sanitation Corp. v. IPCB*, Rule 23 order No. 4–05–0618 (4th Dist., April 23, 2007) (land enforcement action); *N. Ill. Serv. Co., v. IEPA & IPCB*, Rule 23 order No. 2–06–1237 (2d Dist., Jan. 19, 2007) (administrative citation case); *Midwest Petroleum Co. v. IEPA & IPCB*, Rule 23 order No. 5–06–0056 (5th Dist. May 14, 2007) (LUST Fund). A discussion of these cases can be found in the IPCB 2007 Annual Report, available at www.ipcb.state.il.us/documents/dsweb/Get/Document–60000 (last visited Aug. 8, 2008).
113. For an excellent overview of practice before the IPCB see CLAIRE A. MANNING & JANE E. MCBRIDE, ENVIRONMENTAL LAW FOR NON-ENVIRONMENTAL LAWYERS 93–108 (ISBA 2006). See also O’RIELLY, STATE & LOCAL GOVERNMENT SOLID WASTE MANAGEMENT, Chapter 8 (2007) (Landfill Options: Siting and Closure).

Another resource for practice before the IPCB is the ISBA Environmental Law Newsletter. Recent articles include: “Pollution Control Board of Appeals,” (35:3); “Pollution Control Board rules, January 2006,”(36:3); “Clerk’s Office On-Line: Illinois Pollution Control Board’s “COOL”” (33:3); “An overview of the Illinois Pollution Control Board” (32:5); “Private Actions to Enforce the Illinois Environmental Protection Act—Look to the Board!” (34:2), available at www.isba.org/newsletters/home.asp (last visited Aug. 8, 2008).

114. *Town & Country*, 225 Ill. 2d at 119, 866 N.E.2d at 236. (Title X: Permits 415 ILL. COMP. STAT. 5/39–40.2 (West 2004)). Section 39(c) was amended in 2008 to clarify which entity is the local siting authority. Pub. Act 95–288 (effective August 20, 2007).
115. *Town & Country*, 225 Ill. 2d at 108, 866 N.E.2d at 230. 415 ILL. COMP. STAT. 5/39.2 (West 2004). Subparagraphs of 39.2 establish requirements: (a) substantive criteria, (b) notice, (c) transcribed record, (d) public hearing, (e) written decision, etc.
116. *Town & Country*, 225 Ill. 2d at 108, 866 N.E.2d at 230; 415 ILL. COMP. STAT. 5/39.2(a) (West 2004).
117. *Town & Country*, 225 Ill. 2d at 108, 866 N.E.2d at 230; 415 ILL. COMP. STAT. 5/40.1 (West 2002).

review of local siting approval.¹¹⁸ The Board must review the transcribed record of the underlying hearing and consider the written decision of the local government.¹¹⁹ Of particular relevance, the Board is prohibited from accepting new evidence on the substantive criteria.¹²⁰

Town & Country Utilities, Inc. filed an application to site a landfill with the City of Kankakee, the local siting authority.¹²¹ The hearing lasted 11 days and formed a formidable record.¹²² The factual question that became relevant to the Supreme Court's opinion was whether the proposal met the criteria for protection of public health and safety.¹²³ Both sides presented experts on the potential impact on groundwater.¹²⁴ Experts for Town & Country testified that any impact on groundwater would be minimal as the geology under the site revealed a competent aquitard that had low permeability.¹²⁵ Opposition experts testified that Town & Country's testing was insufficient and that a

-
118. *Town & Country*, 225 Ill. 2d at 109, 866 N.E.2d at 231; 415 ILL. COMP. STAT. 5/40.1 (governing Board review of local siting approval. Section 40.1 refers to other provisions of the Act governing enforcement proceedings, but makes clear that no new evidence will be admitted on a substantive finding of the local government); 415 ILL. COMP. STAT. 5/32, 33 (West 2002). The City was a necessary party to the Board review under section 40.1.
119. *Town & Country*, 225 Ill. 2d at 108, 866 N.E.2d at 230; 415 ILL. COMP. STAT. 5/40.1(a) (West 2002).
120. The Board may accept evidence on whether the procedures used by the local government were fundamentally fair, but must base its decision on the transcribed record of the local government proceeding and is otherwise prohibited from accepting new evidence; 415 ILL. COMP. STAT. 5/40.1(a) (West 2004). See *Land and Lakes Co. v. Ill. Pollution Control Bd.*, 245 Ill. App. 3d 631, 643, 616 N.E.2d 349, 356 (3d Dist. 1993).
121. *Town & Country*, 225 Ill. 2d at 106, 866 N.E.2d at 229; 415 ILL. COMP. STAT. 5/39.2 (West 2002). The IPCB order and the appellate Rule 23 order explain the status of the parties. Kankakee Regional Landfill, LLC also signed the Town & Country application. Waste Management of Illinois, Inc., had filed an application with the County of Kankakee for local siting approval to expand a nearby landfill. Waste Management and the County filed objections to the Town & Country application. See discussion in note 1 of IPCB 04-186. See also IPCB 04-33, PCB 04-34, PCB 04-35 consolidated (March 18, 2004); Rule 23 Order No. 03-4-0271, 3-04-0285, 3-04-0289 consolidated (Sept. 17, 2006) referred to in other publications as *Town & Country II*.
122. The appellate court noted that the hearing transcript was 2,002 pages long. The IPCB order discussed actions of the hearing officer and the evidence at the hearing in depth. See 415 ILL. COMP. STAT. 5/39.2 (West 2004).
123. The relevant factual question in the Supreme Court's opinion was whether the proposed landfill's potential impact on groundwater violated criteria 415 ILL. COMP. STAT. 5/39.2(a)(ii) (West 2004). The IPCB and the appellate court both addressed issues of whether the facility was consistent with the local solid waste management plan according to criteria (viii) and whether the City's hearing was fundamentally fair. This article focuses on the legal question before the Supreme Court, but the court also addressed the factual question of whether the Board's decision was against the manifest weight of the evidence. The Supreme Court reversed the appellate court and confirmed the Board's order.
124. The IPCB order discusses the evidence at length. In contrast, the appellate court succinctly stated "extensive expert testimony came before the Council, both in favor of and in opposition to the proposed site. Ultimately, a dispute developed over whether the site was an aquifer or an aquitard." 415 ILL. COMP. STAT. 5/39.2 (West 2004).
125. *Town & Country*, 225 Ill. 2d at 110-11, 866 N.E.2d at 420-21. See IPCB order 03-31 cons.

survey indicated the site was on a major aquifer.¹²⁶ The City approved the application.¹²⁷ On appeal, the Board found that the site was on an aquifer, reversed the City's decision and denied the application.¹²⁸

The Board's decision was submitted directly to the appellate court pursuant to the Act.¹²⁹ In a Rule 23 order, the appellate court reversed the Board. The appellate court held that the City's decision was entitled to the deferential standard of manifest weight of the evidence.¹³⁰ In an extensive footnote, the appellate court noticed a split in precedent.¹³¹ Relying primarily on language from *Concerned Adjoining Owners v. IPCB* and *Waste Management of Illinois v. IPCB*, the appellate court found that the local government was entitled to deference because it was in a better position to evaluate the credibility of witnesses, resolve conflicts and weigh the evidence.¹³² A dissent contended that section 41 called for deference to the findings of the Board.¹³³ The Illinois Supreme Court reversed the appellate court and confirmed the order of the Board.¹³⁴

In reversing the appellate court, the Supreme Court held that the deferential standard of manifest weight of the evidence should be given to the

-
126. *Town & Country*, 225 Ill. 2d at 112–13, 866 N.E.2d at 421–22. See IPCB order 03–31 cons.
127. *Town & Country*, 225 Ill. 2d at 113, 866 N.E.2d at 233. The City found that evidence supported the conclusion that the bedrock formed an aquitard and that, in any event, the design was adequate to contain the movement of contaminants. The appellate court noted that the City approved the application unanimously, 13–0 with an abstention, and issued a lengthy 32 page decision.
128. *Id.* at 114, 866 N.E.2d at 223. The IPCB consolidated three separate petitions for review filed by the County (PCB 03–31), WMI (PCB 03–35) and a citizen (PCB03–33). 415 ILL. COMP. STAT. 5/40.1 (West 2002). The Board found that the City's finding that the application met criterion (ii) was against the manifest weight of the evidence citing *Land and Lakes*, 319 Ill. App. 3d at 53, 743 N.E.2d at 197. 415 ILL. COMP. STAT. 5/39.2(a)(ii) (West 2004).
129. 415 ILL. COMP. STAT. 5/41(a) (West 2004).
130. Appellate Court of Illinois, No. 3–03–0025 (unpublished order under Supreme Court Rule 23) (Barry, J., dissenting).
131. Appellate Court of Illinois, No. 3–03–0025 (unpublished order under Supreme Court Rule 23) (Barry, J., dissenting) at page 8, n. 1 citing *Turlek v. IPCB*, 274 Ill. App. 3d 244, 249, 653 N.E.2d 1288 (1st Dist. 1995); *File v. D&L Landfill, Inc.*, 219 Ill. App. 3d 897, 901, 579 N.E.2d 1288 (5th Dist. 1991); *Concerned Adjoining Landowners v. IPCB*, 288 Ill. App. 3d 565, 680 N.E.2d 810 (5th Dist. 1997); *Waste Mgmt. of Ill. v. IPCB*, 160 Ill. App. 3d 434, 513 N.E.2d 592 (2d Dist. 1987); *City of Rockford v. IPCB*, 125 Ill. App. 3d 384, 465 N.E.2d 996 (2d Dist. 1984).
132. Appellate Court of Illinois, No. 3–03–0025 (unpublished order under Supreme Court Rule 23) at pages 7–9. *Concerned Adjoining Landowners v. IPCB*, 288 Ill. App. 3d 565, 680 N.E.2d 810 (5th Dist. 1997); *Waste Mgmt. of Ill. v. IPCB*, 160 Ill. App. 3d 434, 513 N.E.2d 592 (2d Dist. 1987). (P.9 citing *Concerned Adjoining Owners*, 288 Ill. App. 3d at 565, *File v. D&L Landfill*, 219 Ill. App. 3d 897, 899, 579 N.E.2d 1228, 1231 (5th Dist. 1991).
133. Appellate Court of Illinois, No. 3–03–0025 (unpublished order under Supreme Court Rule 23) (Barry, J., dissenting). In a short dissent, Justice Barry cited 415 ILL. COMP. STAT. 5/41 (2000) and *Environmental Protection Agency v. IPCB*, 115 Ill. 2d 65, 70, 503 N.E.2d 343, 345–6 (1986).
134. *Town & Country*, 225 Ill. 2d at 115, 866 N.E.2d at 234. The County and the Board filed separate petitions for leave to appeal under Ill. Sup. Ct. R. 315. The appeals were consolidated.

decision of the Board, and not the local siting authority.¹³⁵ The court wove a history lesson into its description of the facts of the case.¹³⁶ The court described how the public policy of maintaining “a healthful environment,” as proclaimed in the Illinois Constitution of 1970, provided the impetus for the creation of the Board and the IEPA.¹³⁷ The court then addressed the legislative history of Title X.¹³⁸ The original version of the Act preempted zoning ordinances of non-home-rule units of local government if the ordinances addressed facilities.¹³⁹ In 1981, the Act was amended to require approval of siting by the local government prior to issuance of an IEPA permit—giving the local government “concurrent jurisdiction” with the IEPA regarding siting approval.¹⁴⁰

The court began the portion of its opinion devoted to analysis by noting a “purported split” in authority, but concluded the opinions “provided little to no analysis.”¹⁴¹ Instead, the court delved into statutory construction.¹⁴² The court discussed the provisions governing permitting in Title X and the procedures for judicial review in Title XI.¹⁴³ The court quoted at length section 41, the only section in Title XI, twice quoting the following portion of paragraph (b): “any such final order for permit appeals, enforcement actions and variance proceedings, shall be invalid if it is against the manifest weight

135. *Town & Country*, 225 Ill. 2d at 106, 866 N.E.2d at 229. Ill. Sup. Ct. R. 315.

136. *Town & Country*, 225 Ill. 2d at 107–09, 866 N.E.2d at 229–30.

137. *Town & Country*, 225 Ill. 2d at 107, 866 N.E.2d at 107. Ill. Const. 1970, art. XI, sec. 1. The court quoted the directive in the Constitution: “The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy.”

138. *Town & Country*, 225 Ill. 2d at 107, 866 N.E.2d at 230; 415 ILL. COMP. STAT. 5/39-40.2 (West 2004).

139. *Town & Country*, 225 Ill. 2d at 108, 866 N.E.2d at 230. See *County of Cook v. John Sexton Contractors Co.*, 75 Ill. 2d 494, 389 N.E.2d 553 (1979); *City of Elgin v. County of Cook*, 169 Ill. 2d 53, 64, 660 N.E.2d 875, 881 (1995).

140. *Town & Country*, 225 Ill. 2d at 108, 866 N.E.2d at 230; Pub. Act 82–682, effective Nov. 12, 1981; 415 ILL. COMP. STAT. 5/39(c) (West 2002).

141. *Town & Country*, 225 Ill. 2d at 116, 866 N.E.2d at 234–35. See *Turlek v. Pollution Control Bd.*, 274 Ill. App. 3d 244, 249, 653 N.E.2d 1288 (1st Dist. 1995); *File v. D & L Landfill, Inc.*, 219 Ill. App. 3d 897, 901, 579 N.E.2d 1228 (5th Dist. 1991); *Concerned Adjoining Owners v. Pollution Control Bd.*, 288 Ill. App. 3d 565, 576, 680 N.E.2d 810 (5th Dist. 1997); *Fairview Area Citizens Taskforce v. Pollution Control Bd.*, 198 Ill. App. 3d 541, 555 N.E.2d 1178 (3d Dist. 1990); *Waste Mgmt. of Ill., Inc., v. Pollution Control Bd.*, 160 Ill. App. 3d 434, 513 N.E.2d 592 (2d Dist. 1987); *City of Rockford v. Pollution Control Bd.*, 125 Ill. App. 3d 384, 386–87, 465 N.E.2d 996 (2d Dist. 1984).

142. *Town & Country*, 225 Ill. 2d at 117, 866 N.E.2d at 235. The court applied the “familiar rules of statutory construction” to fulfill the legislature’s intent by applying the plain language in the context of the statute as a whole.

143. *Town & Country*, 225 Ill. 2d at 117–18, 866 N.E.2d at 235. Title X: Permits (415 ILL. COMP. STAT. 5/39 through 40.2); Title XI: Judicial Review (415 ILL. COMP. STAT. 5/41) (West 2004).

of the evidence.”¹⁴⁴ The court noted that Board decisions, and not those of local authorities, were referred to as “final” and read section 41 as calling for judicial review of final decisions of the Board.¹⁴⁵

The court held that Board review of a local siting approval is a “permit appeal” under section 41(b). In detailed analysis, the court rejected attempts to limit the term “permit appeals” to review of IEPA denials. The court noted that siting approval, like IEPA permission, is a necessary prerequisite to issuance of a permit and that both are addressed as part of the landfill permitting process under Title X.¹⁴⁶ The court found that Board review of local siting approval was similar to Board review of permit denial by the IEPA in that both called for the Board to conduct a hearing where the petitioner must sustain a burden of proof.¹⁴⁷ The court rejected precedent drawing a distinction between IEPA permit and local siting cases as irrelevant to the issue of what constitutes a final decision on siting.¹⁴⁸

The court found that deference to the Board was required by the Administrative Review Law.¹⁴⁹ The court noted that appellate review is based in special statutory jurisdiction which is limited to final decisions of the Board.¹⁵⁰ Additionally, the Administrative Review Law calls for review of decisions of administrative agencies, not those of local governments.¹⁵¹

The court saw their decision as consistent with public policy. Although the legislature could have written the Act to give deference to the decisions of local siting authorities, this would have prevented a more uniform state-wide

144. *Town & Country*, 225 Ill. 2d at 118, 866 N.E.2d at 236. 415 ILL. COMP. STAT. 5/41(b) (West 2002).

145. *Town & Country*, 225 Ill.2d at 118, 866 N.E.2d at 236.

146. *Id.* at 119, 866 N.E.2d at 236.

147. *Id.* at 120, 866 N.E.2d at 237. 415 ILL. COMP. STAT. 5/40, 415 ILL. COMP. STAT. 5/40.1 (West 2004).

148. *Town & Country*, 225 Ill. 2d at 121, 866 N.E.2d at 237. Interestingly, the case the court distinguishes on this point (*EPA v. Pollution Control Bd.*, 115 Ill. 2d 65, 503 N.E.2d 343 (1986)) is the only precedent relied on by the dissent in the appellate court. A closer look at *EPA* and *Landfill* poses some problems for T&C's distinction.

149. *Town & Country*, 225 Ill. 2d at 121–22, 866 N.E.2d at 426–27; 735 ILL. COMP. STAT. 5/3–101 *et seq.* (West 2004).

150. *Town & Country*, 225 Ill. 2d at 121–22, 866 N.E.2d at 426–27. Ill. Const. 1970, art. VI secs. 6, 9. See *Collinsville Cmty. Unit Sch. Dist. No. 10 v. Reg'l Bd. of Sch. Teachers of St. Clair County*, 218 Ill. 2d 175, 181, 843 N.E.2d 273 (2006).

151. *Town & Country*, 225 Ill. 2d at 122, 866 N.E.2d at 427; 735 ILL. COMP. STAT. 5/3–101 (West 2002); 735 ILL. COMP. STAT. 5/3–102 (West 2002).

standard sought by the Act.¹⁵² Furthermore, deference to the Board recognizes the technical expertise the Board is designed to provide.¹⁵³

In the end, the Supreme Court engaged in a detailed exercise in statutory construction. The court applied section 41 and those studying *Town & Country* are well-advised to read that statute first. The issue is whether paragraph (b) of section 41 applies to Board reviews of local siting decisions. The applicants appropriately relied on paragraph (a) for direct appellate review, but needed to convince the court that paragraph (b) does not apply to all appeals under section 41 and, in particular, to Board reviews of local siting decisions. The opinion can be read as a rejection of the applicants' attempts to distinguish the order from a "permit appeal" under 41(b).

Town & Country resolved the standard of review to be given to Board decisions on appeal; but did not discuss what standard the Board, itself, must apply to the findings of a local government. In continuing practice, as in *Town & Country*, the Board applies the manifest weight of the evidence standard to local government findings on substantive criteria.¹⁵⁴ This deference appears to be rooted in precedent.¹⁵⁵

152. *Town & Country*, 225 Ill. 2d at 122–23, 866 N.E.2d at 427; See 415 ILL. COMP. STAT. 5/2(b) (West 2002). For a discussion of the handling of solid waste in Illinois, see LISLE STATLER, ENVIRONMENTAL LAW FOR NON-LAWYERS 73–84 (ISBA Dec. 2006). See also, *Solid Waste Management Plans*, 61C AM. JUR. 2D POLLUTION CONTROL § 1138 (2007).

153. See generally, *Town & Country*, 225 Ill. 2d at 123, 866 N.E.2d at 427. The technical expertise has been recognized elsewhere. E.P.A. v. IPCB, 308 Ill. App. 3d 741, 721 N.E.2d 723 (2d Dist. 1999), Granite City Div. of Nat. Steel Co., v. IPCB, 155 Ill. 2d 149, 613 N.E.2d 719 (1993). Then again, the IEPA has also been seen as having technical expertise. *City of Elgin v. County of Cook*, 169 Ill. 2d 53, 660 N.E.2d 875 (1995).

154. The Board applied the manifest weight standard to the City's substantive findings in *Town & Country*. After *Town & Country* the Board continues to apply the manifest weight standard to local decisions. See e.g., *Waste Mgmt. of Ill., Inc., v. County Bd. of Kankakee County*, PCB 04–186 (January 24, 2008), *American Bottoms Conservancy & Sierra Club v. City of Madison*, PCB 07–84 (Dec. 6, 2007) (applying manifest weight standard in WMI's related application).

155. See e.g., *Waste Mgmt of Ill.*, PCB 04–186 (citing cases abrogated by *Town & Country*, although the PCB decision was issued after the abrogation, for the principle that the Board should apply the deference weight of the evidence standard to local government findings.) *Waste Mgmt. of Ill., Inc., v. IPCB*, 160 Ill. App. 3d 434, 513 N.E.2d 592 (2d Dist. 1987); *City of Rockford v. IPCB*, 125 Ill. App. 3d 384, 465 N.E.2d 996 (2nd Dist. 1984).

The Board rules are not explicit. The Board's rule on petition content requirements specifies that the petition should specify the grounds for appeal including which finding on criteria is alleged to be against the manifest weight of the evidence. 35 ILL. ADMIN. CODE 107.208 (2008). The Board's rule on burden of proof, however, simply refers to Section 40.1(a). 35 ILL. ADMIN. CODE 107.506 (2008). Section 40.1(a) places a burden of proof on the petitioner. Section 40.1(a) states "the Board shall include in its consideration the written decision and the reason for decision of" the local siting authority, but the section does not set a standard of deference for Board review of findings of a local siting authority. 415 ILL. COMP. STAT. 5/40.1(a). In 2000, Proposed Rules explicitly stated that a manifest weight standard, but this section of the proposed rule was not enacted. ILL. ADMIN. CODE tit. 35, § 107.506 (2008). 35 ILL. ADMIN. CODE Subt. A, Ch. I(1), Pt. 107, Refs & Annos (West

A comparison of Supreme Court's decision to the underlying appellate court decision sheds light on these prior opinions. Whereas the Supreme Court engaged in extensive statutory construction and dismissed precedent as providing "little to no analysis"; the appellate court relied on precedent and did not discuss section 41. Citing to precedent, the appellate court pointed out that the local government was in a better position to evaluate the witnesses and weigh the evidence.¹⁵⁶ In those cases, however, the decision of Board had always been affirmed—and the Board, in turn, had always applied the manifest weight of the evidence standard to local government findings.¹⁵⁷ The fact that the appellate court reversed the Board's decision could be seen as forcing a discussion of the standard for appellate review of Board decisions, but this did not force a discussion of the standard the Board must itself apply to local government decisions. After *Town & Country*, the apparent process is for the Board to reverse the local government only if a finding is against the manifest weight of the evidence, but, upon appellate review, the Board finding is to be given deference.¹⁵⁸

The term "excavation" is used repeatedly in the Environmental Protection Act¹⁵⁹ and in several other statutes of concern to practitioners in the field of environmental law.¹⁶⁰ In *Quality Saw and Seal, Inc., v. Illinois*

2008).

156. Appellate Court of Illinois, No. 3–03–0025 at 8, n.1 (unpublished order under Supreme Court Rule 23) (Barry, J., dissenting) (citing *Turlek v. IPCB*, 274 Ill. App. 3d 244, 249, 653 N.E.2d 1288 (1st Dist. 1995); *File v. D&L Landfill, Inc.*, 219 Ill. App. 3d 897, 901, 579 N.E.2d 1288 (5th Dist. 1991); *Concerned Adjoining Landowners v. IPCB*, 288 Ill. App. 3d 565, 680 N.E.2d 810 (5th Dist. 1997); *Waste Mgmt. of Ill. v. IPCB*, 160 Ill. App. 3d 434, 513 N.E.2d 592 (2d Dist. 1987); *City of Rockford v. IPCB*, 125 Ill. App. 3d 384, 465 N.E.2d 996 (2d Dist. 1984)).
157. Appellate Court of Illinois, No. 3–03–0025 at 8, note 1 (unpublished order under Supreme Court Rule 23) (Barry, J. dissenting).
158. See discussion of *Waste Mgmt. v. County Board of Kankakee*, PCB 04–186 (Jan. 28, 2008), and *American Bottoms Conservancy*, PCB 07–84 (Dec. 6, 2007), discussed above. Worker's compensation cases also present questions of what deference should be afforded when a decision is based on a transcribed record. See *S&H Floor Covering, Inc., v. Comm'n*, 373 Ill. App. 3d 259, 870 N.E.2d 821 (4th Dist. 2007).
159. Environmental Protection Act of 1971, 415 ILL. COMP. STAT. 5/3.285 (West 2006) (Title I: General Provisions (MSWLF unit)); 415 ILL. COMP. STAT. 5/3.350 (West 2006) (Potential Route); 415 ILL. COMP. STAT. 5/3.400 (West 2006) (Remedial Action); 415 ILL. COMP. STAT. 5/14.2 (West 2006) (Title IV: Public Water Supplies); 415 ILL. COMP. STAT. 5/22.51 (Title V: Land Pollution and Refuse Disposal); 415 ILL. COMP. STAT. 5/57.5–57.6 (West 2006) (Title XVI: Petroleum Underground Storage Tanks).
160. See e.g., Illinois Water Well Construction Code, 415 ILL. COMP. STAT. 30/3 (West 2006); Hazardous Substances Construction Disclosure Act, 415 ILL. COMP. STAT. 70/2 (West 2006); Hazardous Waste Laborers Licensing Act, 225 ILL. COMP. STAT. 221/4 (West 2006); Illinois Low-Level Radioactive Waste Management Act, 420 ILL. COMP. STAT. 20/3 (West 2006); Gasoline Storage Act, 430 ILL. COMP. STAT. 15/2 (West 2006); Tax Increment Allocation Redevelopment Act, 65 ILL. COMP. STAT. 5/11–74.4–3 (West 2006); Hazard Waste Crane and Hoisting Equipment Operators Licensing Act,

Commerce Commission, the Second District addressed the meaning of the term.¹⁶¹ The defendant damaged a 3/4 inch thick pipe carrying natural gas when saw-cutting concrete pavement.¹⁶² The Illinois Commerce Commission found the defendant violated a provision of the Illinois Underground Utility Facilities Damage Prevention Act (IUUFDA) which requires anyone who plans to engage in "excavation" to notify the owners and operators of nearby gas lines.¹⁶³

On direct appeal, the court found that the activity constituted an excavation. The defendant argued that the saw-cutting did not fit within the IUUFDA definition of excavation as the concrete was manmade unlike "earth, rock, or other material."¹⁶⁴ The court looked at the IUUFDA as a whole and concluded that the General Assembly was not addressing the type of material moved, but the location and way the material is displaced.¹⁶⁵ Furthermore, saw-cutting the concrete necessarily entailed moving earth and rock at its base and the provision did not contain a threshold minimum on how much earth and rock must be moved.¹⁶⁶ In contrast, such actions as roadway surface milling do not disturb the underlying soil.¹⁶⁷

One other case of potential interest for practitioners in the field of environmental law is *Kajima Construction Services, Inc., v. St. Paul Fire & Marine Insurance Company*.¹⁶⁸ In *Kajima*, the Illinois Supreme Court discussed the doctrines of horizontal exhaustion and targeted tender. As the court noted, the doctrine of horizontal exhaustion originated from long-term environmental and hazardous waste claims.¹⁶⁹ The doctrine of horizontal exhaustion requires an insured to exhaust all available primary insurance

225 ILL. COMP. STAT. 220/4 (West 2006); Surface-Mined Land Conservation and Reclamation Act, 225 ILL. COMP. STAT. 715/6 (West 2006).

161. *Quality Saw and Seal, Inc., v. Ill. Commerce Comm'n*, 374 Ill. App.3d 776, 871 N.E.2d 260 (2d Dist. 2007).

162. *Id.* at 778, 871 N.E.2d at 262. The court pointed out that the defendant had notice of the law as the Commission had dismissed a claim against the defendant for a previous incident.

163. *Quality Saw*, 374 Ill. App. 3d at 777, 871 N.E.2d at 262; 220 ILL. COMP. STAT. 50/4(d) (West 2006).

164. *Quality Saw*, 374 Ill. App. 3d at 782, 871 N.E.2d at 266; 220 ILL. COMP. STAT. 50/2.3 (2007); 220 ILL. COMP. STAT. 50/4(d) (West 2006).

165. *Quality Saw*, 374 Ill. App. 3d at 783, 871 N.E.2d at 267.

166. *Id.* at 782, 871 N.E.2d at 266.

167. *Id.* at 374 Ill. App. 3d at 783, 871 N.E.2d at 267; 220 ILL. COMP. STAT. 50/2.11 (West 2006).

168. *Kajima Construction Servs., Inc., v. St. Paul Fire & Marine Ins. Co.*, 227 Ill. 2d 102, 879 N.E.2d 305 (2007).

169. *Id.* at 246, 879 N.E.2d at 313. The Court stated, "Although it is true that horizontal exhaustion originated in cases involving a continuous tort or long-term environmental and hazardous waste claims, we find no evidence that horizontal exhaustion is limited to such claims." See *U.S. Gypsum Co., v. Admiral Ins. Co.*, 268 Ill. App. 3d 598, 643 N.E.2d 1226 (1st Dist. 1994), *AAA Disposal Sys., Inc., v. Aetna Cas. & Sur. Co.*, 355 Ill. App. 3d 275, 821 N.E.2d 1278 (2d Dist. 2005).

before seeking coverage from an excess policy. In contrast, the targeted tender doctrine allows an insured who is covered by multiple policies to select which insurer will defend and indemnify against a particular claim. The court limited application of the targeted tender doctrine to situations where there is concurrent primary insurance for additional insureds. Thus, the doctrine of horizontal exhaustion, which originated for Illinois in environmental claims, has been expanded.

V. CONCLUSION

In 2007, the field of environmental law was shaped by numerous legislative and regulatory developments. The field also saw the Illinois Supreme Court issue precedents affecting the Pollution Control Board. The developments of 2007 suggest the field continues to evolve.

