

SURVEY OF ILLINOIS LAW: ENVIRONMENTAL LAW

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I. INTRODUCTION

This article contains a review of legislative, regulatory, and caselaw developments in the field of Illinois environmental law in 2009.

II. 2009 LEGISLATIVE UPDATE

The following is a review of environmental-related legislation that was signed into law in 2009.

A. Alternate Fuels

1. *Public Act 96-173 (Effective August 10, 2009)*

Amends the Illinois Renewable Fuels Development Program Act.¹ Authorizes the Department of Commerce and Economic Opportunity to award, in excess of the annual aggregate grant total, up to \$4,000,000 per grant to grant applicants who install advanced technologies for water usage, carbon footprint reduction, and other blending improvements designed to optimize processes at the applicant's renewable fuels facility.²

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1. 20 ILL. COMP. STAT. ANN. 689 (West 2010).

2. 20 ILL. COMP. STAT. ANN. 689/20 (West 2010).

2. *Public Act 96-281 (Effective August 11, 2009)*

Amends the Illinois Vehicle Code.³ Increases from 2% to 5% the percentage of biodiesel blend required to be used by diesel powered vehicles owned or operated by the State, any county or unit of local government, any school district, any community college or public college, to any university, or any mass transit agency, when the vehicles are refueling at a bulk central fueling facility.⁴

3. *Public Act 96-537 (Effective August 14, 2009)*

Inter alia, amends the Alternate Fuels Act to change the time period during which a person can apply for an alternate fuels rebate for a vehicle conversion or new alternate vehicle purchase.⁵

B. Clean Air Act Rulemaking. *Public Act 96-308 (Effective August 11, 2009)*

Amends the Environmental Protection Act.⁶ Reinststitutes the Illinois EPA's authority to propose "fast-track" rulemakings to the Pollution Control Board.⁷ The fast-track authority is limited to rules proposed by the Illinois EPA that are required to be adopted under the federal Clean Air Act, and expires on December 21, 2014.⁸ Specifies the form in which the Illinois EPA must submit a fast-track rulemaking proposal.⁹ Sets forth requirements for the Pollution Control Board regarding hearings on fast-track rulemaking proposals and the promulgation of fast-track rules.¹⁰

3. 625 ILL. COMP. STAT. ANN. 5 (West 2010).

4. 625 ILL. COMP. STAT. ANN. 5/12-705.1(a) (West 2010).

5. 415 ILL. COMP. STAT. ANN. 120/30(a) and (b) (West 2010).

6. 415 ILL. COMP. STAT. ANN. 5 (West 2010).

7. 415 ILL. COMP. STAT. ANN. 5/28.5 (West 2010).

8. 415 ILL. COMP. STAT. ANN. 5/28.5(a) (West 2010).

9. 415 ILL. COMP. STAT. ANN. 5/28.5(d) (West. 2010).

10. 415 ILL. COMP. STAT. ANN. 5/28.5(e)-(o) (West 2010).

C. Community Water Systems. *Public Act 96-603 (Effective August 24, 2009)*

Amends the Environmental Protection Act.¹¹ Requires community water systems to maintain operation records for a minimum of 10 years.¹² Requires the Illinois EPA to provide notice to owners of contaminated off-site property when soil gas poses a threat of exposure above the vapor intrusion cleanup standards adopted by the Pollution Control Board.¹³ Requires the Illinois EPA to provide public notice of 1) enforcement referrals and seal orders related to community water systems and 2) Illinois EPA determinations that groundwater contamination poses a threat of exposure above the Class I groundwater quality standards.¹⁴ Requires the Illinois EPA to also provide notice to owners and operators of community water systems, and to owners and operators of connected community water systems, when the Illinois EPA determines that groundwater contamination poses a threat of exposure above the Class I groundwater quality standards.¹⁵ Requires community water systems to then provide notice to residents and owners of premises connected to the community water system.¹⁶ Specifies timeframes for giving notices and the content of notices.¹⁷ Provides a penalty for owners and operators of community water systems that do not provide notices as required.¹⁸ Provides that knowingly making a false, fictitious, or fraudulent material statement to the Illinois EPA, or to a unit of local government that has a delegation agreement with the Agency, is a Class 4 felony.¹⁹ Makes second and subsequent convictions a Class 3 felony.²⁰

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11. 415 ILL. COMP. STAT. ANN. 5 (West 2010).
 12. 415 ILL. COMP. STAT. ANN. 5/15(c) (West 2010).
 13. 415 ILL. COMP. STAT. ANN. 5/25d-3(a)(1) (West 2010).
 14. 415 ILL. COMP. STAT. ANN. 5/18.1 (West 2010).
 15. 415 ILL. COMP. STAT. ANN. 5/25d-3(a)(2) (West 2010).
 16. *Id.*
 17. *Id.*
 18. 415 ILL. COMP. STAT. ANN. 5/42(b)(6) (West 2010).
 19. 415 ILL. COMP. STAT. ANN. 5/44(h)(8) (West 2010).
 20. *Id.*

D. Drycleaner Environmental Response Trust Fund. *Public Act 96-774*
(Effective January 1, 2010)

Amends the Drycleaner Environmental Response Trust Fund Act.²¹ Provides for appeals of certain Drycleaner Environmental Response Trust Fund Council decisions to the Council's Administrator.²² Provides for appeals of written decisions by the Administrator to the Council's administrative law judge.²³ Provides that the administrative law judge's decisions are subject to judicial review in accordance with the Administrative Review Law.²⁴ Deems decisions that are not timely appealed to be final administrative decisions.²⁵ Authorizes the Council to appoint an administrative law judge.²⁶ Deletes a 30 day deadline for the submission of invoices and bills related to remediation work reimbursement.²⁷ For purposes of renewing drycleaning facility licenses issued by the Council, provides that the quantity of drycleaning solvents used annually shall be determined by the quantity of solvents actually purchased rather than the quantity used.²⁸ Relocates penalty provisions for dry cleaning facilities that fail to pay licensing fees, and for persons who knowingly sell or transfer drycleaning solvents to unlicensed drycleaning facilities.²⁹ Deletes a civil penalty for providing a false certification to avoid the dry cleaning solvent tax.³⁰ Provides a tax discount for sellers of dry cleaning solvents who timely submit a tax return.³¹ Sets forth civil penalties for violations of the Act.³² Authorizes the Attorney General to seek injunctions related to violations of the Act, rules, licenses, registrations, and Council orders.³³ Authorizes the Council and courts to award costs and attorney's fees to the Attorney General when he or she prevails in a case where there are knowing, willful, or repeated violations of the Act, rules, licenses, registrations or

21. 415 ILL. COMP. STAT. ANN. 135 (West 2010).

22. 415 ILL. COMP. STAT. ANN. 135/20(g) (West 2010).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. 415 ILL. COMP. STAT. ANN. 135/40(f)(6) (2010) ("not later than 30 days after the work has been performed" deleted from the end of subsection (f)(6)).

28. 15 ILL. COMP. STAT. ANN. 135/60(c)(2) (West 2010).

29. 415 ILL. COMP. STAT. ANN. 135/69(b) (West 2010).

30. 415 ILL. COMP. STAT. ANN. 135/65(d) (West 2010) (last paragraph of subsection 65(d) was deleted).

31. 415 ILL. COMP. STAT. ANN. 135/65(f) (West 2010).

32. 415 ILL. COMP. STAT. ANN. 135/69 (West 2010).

33. 415 ILL. COMP. STAT. ANN. 135/69(e) (West 2010).

Council orders.³⁴ Requires orders imposing penalties to prescribe a time for payment, and imposes interest for penalties not paid on time.³⁵

E. Food Scrap Composting. *Public Act 96-418 (Effective January 1, 2010)*

Amends the Environmental Protection Act.³⁶ Defines “food scrap” and “livestock waste.”³⁷ Exempts from the definition of “pollution control facility” (and therefore from local siting requirements) the portion of a site or facility used to compost food scrap, livestock waste, crop residue, uncontaminated wood waste, or paper waste if certain location and operation requirements are met.³⁸ Specifies the content of notices that applicants for a composting facility development or construction permit must provide prior to the Illinois EPA issuing a permit.³⁹ Clarifies that financial assurance plans for organic waste composting operations may include a performance bond or other security.⁴⁰ Amends the definition of “organic waste” to clarify that it includes food scrap, livestock waste, crop residue, and paper waste.⁴¹ Requires solid waste permits for organic waste composting facilities to include measures designed to reduce pathogens in the compost.⁴²

F. General Construction or Demolition Debris

1. *Public Act 96-235 (August 11, 2009)*

Amends the Environmental Protection Act.⁴³ Adds corrugated cardboard to the definition of “general construction or demolition debris.”⁴⁴ Provides that facilities accepting exclusively general construction or demolition debris for transfer, storage, or treatment can use recovered wood that is processed for use as fuel to help meet the requirement that 75% of incoming material be recyclable and separated from non-recyclable material.⁴⁵

34. 415 ILL. COMP. STAT. ANN. 135/69(f) (West 2010).
35. 415 ILL. COMP. STAT. ANN. 135/69(g) (West 2010).
36. 415 ILL. COMP. STAT. ANN. 5 (West 2010).
37. 415 ILL. COMP. STAT. ANN. 5/3.197, 3.282 (West 2010).
38. 415 ILL. COMP. STAT. ANN. 5/3.330(19) (West 2010).
39. 415 ILL. COMP. STAT. ANN. 5/22.26 (West 2010).
40. 415 ILL. COMP. STAT. ANN. 5/22.34(a)(5) (West 2010).
41. 415 ILL. COMP. STAT. ANN. 5/22.34(d) (West 2010).
42. 415 ILL. COMP. STAT. ANN. 5/22.34(e) (West 2010).
43. 415 ILL. COMP. STAT. ANN. 5 (West 2010).
44. 415 ILL. COMP. STAT. ANN. 5/3.160(a) (West 2010).
45. 415 ILL. COMP. STAT. ANN. 5/22.38(b) (West 2010).

2. *Public Act 96-611 (Effective August 24, 2009)*

Amends the Environmental Protection Act.⁴⁶ Limits the solid waste permitting exclusion for facilities that are located in counties with a population over 700,000 as of January 1, 2000, operated and located in accordance with section 22.38 of the Environmental Protection Act, and used exclusively for the transfer, storage, or treatment of general construction or demolition debris, to those facilities receiving general construction or demolition debris on the date the Public Act takes effect.⁴⁷ On and after the effective date of this Public Act, requires facilities accepting exclusively general construction or demolition debris for transfer, storage, or treatment to obtain a permit prior to the initial acceptance of general construction or demolition debris at the facility.⁴⁸ Clarifies that this Public Act does not remove any liability for activities conducted without a required permit or authorization prior to the effective date of the Public Act.⁴⁹

G. Great Lakes Task Force. *Public Act 96-471 (Effective August 14, 2009)*

Amends the Illinois Lake Management Program Act.⁵⁰ Establishes the Task Force on the Conservation and Quality of the Great Lakes to protect the water quality and supply of the Great Lakes, and to educate the General Assembly and public on the conditions of the Great Lakes.⁵¹ Sets forth the membership, powers, and duties of the Task Force, including specific topics the Task Force is to review and discuss.⁵² Requires the Task Force to submit to the General Assembly an annual report regarding recommended legislative action to protect the water quality and supply of the Great Lakes.⁵³

46. 415 ILL. COMP. STAT. ANN. 5 (West 2010).

47. 415 ILL. COMP. STAT. ANN. 5/21(d)(1) (West 2010).

48. 415 ILL. COMP. STAT. ANN. 5/22.38(b)(12) (West 2010).

49. 415 ILL. COMP. STAT. ANN. 5/52.3-5 (West 2010).

50. 525 ILL. COMP. STAT. ANN. 25 (West 2010).

51. 525 ILL. COMP. STAT. ANN. 25/10(a) (West 2010).

52. 525 ILL. COMP. STAT. ANN. 25/10(a), (c) (West 2010).

53. 525 ILL. COMP. STAT. ANN. 25/10(d) (West 2010).

H. Green Buildings Act. *Public Act 96-73 (Effective July 24, 2009)*

Creates the Green Buildings Act.⁵⁴ Requires new State-funded building construction and major renovations of existing State-owned facilities to meet certain energy and environmental standards of the Leadership in Energy and Environmental Design (“LEED”) program rating system, the Green Building Initiative’s Green Globes rating system, or an equivalent rating system.⁵⁵ Provides a process for obtaining waivers from such standards.⁵⁶ Requires the same projects to also implement at least one LEED alternative transportation criterion for public transportation or bicycle access.⁵⁷ Requires the Capital Development Board to analyze and evaluate the Act’s green building standards after the earlier of (i) 5 years from the effective date of the Act or (ii) the completion of 10 Board green projects.⁵⁸

I. Green Governments. *Public Act 96-74 (Effective July 24, 2009)*

Amends the Green Governments Illinois Act.⁵⁹ Provides that the Green Governments Coordinating Council, as well as a designee of the Governor, must participate in the review and award of subgrants to distribute energy efficiency and conservation block grant funds eligible for State government use under the Energy Independence and Security Act of 2007.⁶⁰ Extends the time limits by which State agencies must submit environmental sustainability plans to the Council and form internal environmental sustainability committees.⁶¹

54. 20 ILL. COMP. STAT. ANN. 3130 (West 2010).

55. 20 ILL. COMP. STAT. ANN. 3130/15(b) (West 2010).

56. 20 ILL. COMP. STAT. ANN. 3130/15(d) (West 2010).

57. 20 ILL. COMP. STAT. ANN. 3130/15(f) (West 2010).

58. 20 ILL. COMP. STAT. ANN. 3130/15(g) (West 2010).

59. 20 ILL. COMP. STAT. ANN. 3594 (West 2010).

60. 20 ILL. COMP. STAT. ANN. 3594/20(h-5) (West 2010).

61. 20 ILL. COMP. STAT. ANN. 3594/35 (West 2010).

J. Hazardous Waste Workers Licensing. *Public Act 96-537 (Effective August 14, 2009)*

Inter alia, repeals the Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act and the Hazardous Waste Laborers Licensing Act.⁶²

K. Household Hazardous Waste Collection. *Public Act 96-121 (Effective August 4, 2009)*

Amends the Environmental Protection Act.⁶³ Authorizes “household waste drop-off points” for the collection of certain types of household waste directly from individuals, including pharmaceutical products other than controlled substances.⁶⁴ Sets forth location and operating requirements for household waste drop-off points.⁶⁵ Authorizes the Illinois EPA to approve one-day collection events for household waste, and sets forth requirements for such events.⁶⁶ Authorizes the Illinois EPA to adopt rules governing household waste drop-off points.⁶⁷ Exempts household waste drop-off points and one-day collection events from permit requirements.⁶⁸ Requires the Illinois EPA to develop an educational program regarding household waste drop-off points that accept pharmaceutical products and develop a sign for providing information on the proper disposal of unused pharmaceutical products.⁶⁹

L. National Pollutant Discharge Elimination System Permits. *Public Act 96-245 (Effective August 11, 2009)*

Amends the Environmental Protection Act.⁷⁰ Changes the annual \$500 NPDES permit fee for construction site stormwater discharges to a one-time application fee of \$750 for construction projects of 5 or more acres, and a one-time application fee of \$250 for construction projects of under 5 acres.⁷¹

62. 225 ILL. COMP. STAT. 220 (repealed); 225 ILL. COMP. STAT. 221 (repealed).

63. 415 ILL. COMP. STAT. ANN. 5 (West 2010).

64. 415 ILL. COMP. STAT. ANN. 5/22.55 (West 2010).

65. 415 ILCS 5/22.55(c) (West 2010).

66. 415 ILL. COMP. STAT. ANN. 5/22.55(d) (West 2010).

67. 415 ILL. COMP. STAT. ANN. 5/22.55(e) (West 2010).

68. 415 ILL. COMP. STAT. ANN. 5/22.55(g) (West 2010).

69. 415 ILL. COMP. STAT. ANN. 5/22.55(I) (West 2010).

70. 415 ILL. COMP. STAT. ANN. 5 (West 2010).

71. 415 ILL. COMP. STAT. ANN. 5/12.5(c), (e)(10) (West 2010).

M. Pharmaceuticals Disposal

1. *Public Act 96-221 (Effective January 1, 2010)*

Creates the Safe Pharmaceutical Disposal Act.⁷² Prohibits health care institutions and their employees, staff, and contractors from flushing or otherwise discharging unused medications into public wastewater collection systems or septic systems.⁷³ Makes the violation of the prohibition a petty offense subject to a \$500 fine.⁷⁴ Requires healthcare institutions to modify their written medication protocols so they are consistent with the Act.⁷⁵ Makes each agency with regulatory oversight of a healthcare institution responsible for ensuring compliance with the Act.⁷⁶

2. *Public Act 96-369 (Effective August 13, 2009)*

Amends the Environmental Protection Act.⁷⁷ Establishes the Medication Education Disposal Solutions collaborative to promote the environmentally responsible disposal of medications.⁷⁸ Sets forth the membership, focus, and duties of the collaborative.⁷⁹ Requires the collaborative to submit a report on its program developments and recommendations for environmentally safe disposal of medications by December 31, 2010.⁸⁰ Repeals the amendments on July 1, 2011.⁸¹

N. Private Sewage Disposal. *Public Act 96-801 (Effective January 1, 2010)*

Amends the Private Sewage Disposal Licensing Act and the Environmental Protection Act.⁸² Beginning January 1, 2013, prohibits the construction or installation of a surface discharging private sewage disposal

72. 210 ILL. COMP. STAT. ANN. 150 (West 2010).

73. 210 ILL. COMP. STAT. ANN. 150/10(a) (West 2010).

74. 210 ILL. COMP. STAT. ANN. 150/10(b) (West 2010).

75. 210 ILL. COMP. STAT. ANN. 150/15 (West 2010).

76. 210 ILL. COMP. STAT. ANN. 150/20 (West 2010).

77. 415 ILL. COMP. STAT. ANN. 5 (West 2010).

78. 415 ILL. COMP. STAT. ANN. 5/17.9 (West 2010).

79. 415 ILL. COMP. STAT. ANN. 5/17.9(b) (West 2010).

80. 415 ILL. COMP. STAT. ANN. 5/17.9(c) (West 2010).

81. 415 ILL. COMP. STAT. ANN. 5/17.9(d) (West 2010).

82. 225 ILL. COMP. STAT. ANN. 225 (West 2010); 415 ILL. COMP. STAT. ANN. 5 (West 2010).

system that discharges into the waters of the United States, unless the system is included in an NPDES permit.⁸³

O. Response Action Contractor Indemnification. *Public Act 96-537 (Effective August 14, 2009)*

Inter alia, amends the Response Action Contractor Indemnification Act.⁸⁴ Transfers the balance in the Response Action Contractor Indemnification Funds (“RACIFund”) to the Brownfields Redevelopment Fund and eliminates the RACIFund.⁸⁵ Amends the Asbestos Abatement Act to delete a reference to the RACIFund.⁸⁶

P. Underground Storage Tank Fund. *Public Act 96-161 (Effective August 10, 2009)*

Extends from January 1, 2013, to January 1, 2025, the current 3/10 of one cent per gallon Motor Fuel Tax that is deposited into the Leaking Underground Storage Tank (“LUST”) Fund.⁸⁷ Provides the same extension for the current 8/10 of one cent per gallon Environmental Impact Fee imposed on the receivers of motor fuel that is also deposited into the LUST Fund.⁸⁸

Q. Used Tires. *Public Act 96-737 (Effective August 25, 2009)*

Amends the Environmental Protection Act.⁸⁹ Authorizes the Illinois EPA to issue administrative citations for the following violations under the Agency’s Used Tire Program: 1) causing or allowing water to accumulate in used or waste tires, other than used or waste tires located at a residential household with 12 or fewer used or waste tires on site, 2) failure of a tire retailer to collect the Tire User Fee or file a return with the Illinois Department of Revenue, and 3) transporting used or waste tires in violation of registration or vehicle placarding requirements.⁹⁰ Makes the penalties in such administrative citation actions \$1,500 for the first violation and \$3,000 for

83. 225 ILL. COMP. STAT. ANN. 225/7(c) (West 2010); 415 ILL. COMP. STAT. ANN. 5/12(I) (West 2010).

84. 415 ILL. COMP. STAT. ANN. 100 (West 2010).

85. 415 ILL. COMP. STAT. ANN. 100/5(f) (West 2010).

86. 105 ILL. COMP. STAT. ANN. 105/6(c)(3) (West 2010) (repealed).

87. 35 ILL. COMP. STAT. ANN. 505/2a (West 2010).

88. 415 ILL. COMP. STAT. ANN. 125/390 (West 2010).

89. 415 ILL. COMP. STAT. ANN. 5 (West 2010).

90. 415 ILL. COMP. STAT. ANN. 5/31.1(a) (West 2010); 415 ILL. COMP. STAT. ANN. 5/55(k) (West 2010).

second or subsequent violations, plus hearing costs.⁹¹ Excludes not-for-profit corporations, the State, and units of local governments from registration and vehicle placarding violations under certain circumstances.⁹²

R. Vehicle Idling. *Public Act 96-576 (Effective August 18, 2009)*

This Act increases the fine for excessive idling of a diesel fuel motor vehicle from \$50 to \$90 for the first conviction, and from \$150 to \$500 for a second or subsequent conviction within a 12 month period.⁹³ Specifies the distribution of collected fines and penalties between the General Revenue Fund, the law enforcement agency that issued the citation, and the Trucking Environmental and Education Fund.⁹⁴ Creates the Trucking Environmental and Education Fund as a special fund in the State Treasury.⁹⁵ Provides that money deposited into the Trucking Environmental and Education Fund, subject to appropriation, shall be paid to the Illinois EPA for education of the trucking industry on air pollution and preventative measures specifically related to idling.⁹⁶

S. Waste Beneficial Use. *Public Act 96-489 (Effective August 14, 2009)*

Amends the Environmental Protection Act.⁹⁷ Authorizes the Illinois EPA to issue determinations allowing certain materials that would otherwise be managed as waste to be considered non-waste if they are beneficially reused in a manner that protects human health and the environment.⁹⁸ Sets forth the demonstration applicants must make in order to obtain a beneficial use determination.⁹⁹

91. 415 ILL. COMP. STAT. ANN. 5/42(b)(4-5) (West 2010).

92. 415 ILL. COMP. STAT. ANN. 5/55.1(b-c) (West 2010).

93. 625 ILL. COMP. STAT. ANN. 5/11-1429(g) (West 2010).

94. 625 ILL. COMP. STAT. ANN. 5/11-1429(h) (West 2010).

95. 625 ILL. COMP. STAT. ANN. 5/11-1429(l) (West 2010).

96. *Id.*

97. 415 ILL. COMP. STAT. ANN. 5 (West 2010).

98. 415 ILL. COMP. STAT. ANN. 5/22.54 (West 2010).

99. 415 ILL. COMP. STAT. ANN. 5/22.54(a) (West 2010).

T. Water Infrastructure Financial Assistance

1. *Public Act 96-4 (Effective April 3, 2009)*

Makes Fiscal Year 2009 supplemental appropriations to various state agencies, including appropriations to authorize the expenditure of funds from the American Recovery and Reinvestment Act of 2009 (“ARRA”). *Inter alia*, appropriates up to \$180 million from the Water Revolving Fund to the Illinois EPA for financial assistance to units of local government, pursuant to the ARRA, for sewer systems and wastewater treatment facilities.¹⁰⁰ Appropriates up to \$80.2 million from the Water Revolving Fund to the Illinois EPA for financial assistance to units of local government and privately owned public water supplies, pursuant to the ARRA, for drinking water infrastructure projects.¹⁰¹

2. *Public Act 96-8 (Effective April 28, 2009)*

Makes changes necessary to authorize expenditure of the State’s share of the ARRA. *Inter alia*, amends the Environmental Protection Act to authorize the Illinois EPA to provide financial assistance, consistent with the ARRA, to units of local government and privately owned community water supplies under the Illinois EPA’s Water Pollution Control Loan Program and Public Water Supply Loan Program.¹⁰² The financial assistance includes loans at or below market rates, forgiveness of principal, negative interest rates, and grants.¹⁰³ Authorizes the Illinois EPA to adopt rules, including emergency rules, to allow the timely administration of funds provided under the ARRA.¹⁰⁴

3. *Public Act 96-503 (Effective August 14, 2009)*

Amends the Build Illinois Bond Act.¹⁰⁵ Allows certain bonds currently used for loans or grants to units of local government for the financing and construction of wastewater facilities to also be used for grants to serve

100. Public Act 96-4, Art. 5, Sec. 65 (adding new Section 260 to Article 15 of Public Act 95-731).

101. *Id.* (adding new Section 265 to Article 15 of Public Act 95-731).

102. 415 ILL. COMP. STAT. ANN. 5/19.3(b)(2.5) and (d)(2.5) (West 2010).

103. *Id.*

104. 415 ILL. COMP. STAT. ANN. 5/19.4(d) (West 2010).

105. 30 ILL. COMP. STAT. ANN. 425 (West 2010).

unincorporated areas.¹⁰⁶ Amends the Environmental Protection Act.¹⁰⁷ Authorizes the Illinois EPA to distribute grants to units of local government for financing and construction of wastewater facilities (instead of “municipal wastewater facilities”) in both incorporated and unincorporated areas.¹⁰⁸

U. Water Use. *Public Act 96-222 (Effective January 1, 2010)*

Amends the Water Use Act of 1983.¹⁰⁹ Requires any person interested in developing a “high-capacity well” to notify the Soil and Water Conservation District (“SWCD”) before constructing the well.¹¹⁰ Requires existing and proposed high-capacity wells to be registered with the SWCD.¹¹¹ Authorizes the SWCD, under certain circumstances, to recommend that the Department of Agriculture restrict the quantity of water that may be extracted from a high-capacity well.¹¹² Requires persons responsible for a high-capacity well, high-capacity intake, or public water supply to participate in the Illinois Water Inventory Program, but exempts high-capacity intakes used for agricultural irrigation and high-capacity wells used for agricultural irrigation from this requirement for 5 years.¹¹³ Also exempts persons responsible for high capacity wells or intakes used for irrigation if they lie within the boundaries of a water authority or local government that already estimates and reports such water withdrawals through a method deemed acceptable by the Illinois State Water Survey.¹¹⁴

III. 2009 REGULATORY DEVELOPMENTS

Some of the most closely watched environmental rulemaking proceedings underway in the state in 2009 and 2010 were the proposed vapor intrusion regulations, Illinois Pollution Control Board (“IPCB”) R09-9, and the Chicago Water Way and Lower Des Plaines River water quality standards, IPCB R08-9.

The Chicago Area Waterway System (“CAWS”) and Lower Des Plaines River consist of portions of the Chicago, Calumet, and Lower Des Plaines

106. 30 ILL. COMP. STAT. ANN. 425/4(a) (West 2010).

107. 415 ILL. COMP. STAT. ANN. 5 (West 2010).

108. 415 ILL. COMP. STAT. ANN. 5/4(t) (West 2010).

109. 525 ILL. COMP. STAT. ANN. 45 (West 2010).

110. 525 ILL. COMP. STAT. ANN. 45/5 (West 2010).

111. 525 ILL. COMP. STAT. ANN. 45/5.1(a) (West 2010).

112. 525 ILL. COMP. STAT. ANN. 45/5.1(c), (d) (West 2010).

113. 525 ILL. COMP. STAT. ANN. 45/5.3 (West 2010).

114. *Id.*

River drainages, which were altered in various stages during the mid 1800s through the mid 1900s to promote commercial navigation and to eliminate untreated sewage from flowing into Lake Michigan.¹¹⁵ A pilot Use Attainability Analysis (“UAA”) for the Lower Des Plaines River began in March 2000 by the convening of a stakeholders advisory group. This group, comprised of a cross-section of the community likely to be impacted by potential rule changes, includes environmental groups, local governments, specific industries, industry trade associations, and regulatory agencies.¹¹⁶ The stakeholder model developed in the Lower Des Plaines UAA was expanded for the CAWS UAA which was one of the most extensive stakeholder involvement efforts ever undertaken by the Illinois EPA.¹¹⁷

The Illinois EPA combined the results of the Lower Des Plaines River Pilot UAA and the CAWS UAA into a single regulatory proposal intended to incorporate the policy conclusions the Illinois EPA made as a result of its years of study. The result is an exhaustive and detailed rulemaking proposal.¹¹⁸ The stakeholders continue to be extremely active in the rulemaking proceeding itself. The Board has held over 35 days of hearings on the proposal in 2008 and 2009, and additional hearings have been scheduled for 2010.¹¹⁹

PCB R09-9 concerns amendments to the Tiered Approach to Corrective Action Objectives (“TACO”), 35 Ill. Admin. Code 742, with the desired effect of protecting building occupants from volatile chemicals that have the potential to migrate from the soil and groundwater to indoor air. This migration process has been referred to as “vapor intrusion.”¹²⁰

In its “Statement of Reasons” for the proposed amendment, Illinois EPA states that there is no legislative or regulatory requirement to propose the amendments. With this proposal, the Illinois EPA wants to broaden the exposure routes evaluated so as to more fully protect public health from contaminated sites and to add more certainty to the release of liability provided by the agency’s “No Further Remediation” determination.¹²¹ The U.S. EPA recommends screening all sites that have the potential to cause indoor

115. *In the Matter of: Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and the Lower Des Plaines River: Proposed Amendments to 35 Ill. Admin. Code Parts 301, 302, 303 and 308*, PCB R08-09, Initial Filing, Oct. 26, 2007, Statement of Reasons and Attachments, page 14.

116. *Id.* at 21.

117. *Id.* at 21–22.

118. *Id.* at 23.

119. Illinois Register Vol. 34, Issue 1, page 391, Jan. 4, 2010

120. *In the Matter of: Proposed Amendments to Tiered Approach to Corrective Action Objectives (35 Ill. Adm. Code 742) R09-9*, Initial Filing, Statement of Reasons, page 3, Sept. 3, 2008.

121. *Id.*

inhalation health risks. Other states have experienced public health crises and ensuing legal and financial challenges caused by vapor intrusion exposures at sites where the indoor inhalation pathway was not evaluated as part of the regulatory cleanup. In March 2008, ASTM International issued its *Standard Practice for Assessment for Vapor Intrusion into Structures on Property Involved in Real Estate Transactions*.¹²²

In development of the proposed amendments, Illinois EPA convened an internal workgroup to create a methodology for evaluating indoor inhalation pathways that would be compatible with and integrated into the existing TACO regulations. The workgroup reviewed the draft vapor intrusion guidance prepared by the United States EPA and state specific guidance prepared by New Jersey, New York, Pennsylvania, Missouri and Colorado, among others. Illinois EPA also retained the services of a private consultant with expert knowledge in contaminant fate and transport.¹²³

In October 2009, the Board granted the Illinois EPA's Motion to Stay the rulemaking proceedings. As the basis for the motion, Illinois EPA states that the Illinois EPA had been contacted by representatives of the United States EPA Region V, who expressed serious concerns regarding part of the Illinois EPA's proposal. The United States EPA indicated that it was Region V's belief that the proposal was inconsistent with national policy and with the way the model relied upon in the proposal (the Johnson and Ettinger model) is supposed to operate. The Illinois EPA requested the 12-month stay to further evaluate the United States EPA's concerns.¹²⁴

Also in 2009, the Board adopted two emergency and permanent procedural rulemakings proposed by the Illinois EPA. This was done so that the State of Illinois might be eligible for funds made available through the federal American Recovery and Reinvestment Act of 2009 for public water supply and water pollution control projects, as well as projects qualifying under the state's clean diesel program.

Additionally, there were adoptions of regulations that were the subject of IPCB R09-10. *In the Matter of: Proposed Amendments to 35 Ill. Admin. Code 225 Control of Emissions from Large Combustion Sources (Mercury Monitoring)*, effective June 18, 2009, allowed the Illinois EPA to recreate certain monitoring provisions of the federal Clean Air Mercury Rule ("CAMR"), and add them to the Illinois Mercury Rule. These amendments

122. *Id.*

123. *Id.* at 4.

124. *In the Matter of: Proposed Amendments to Tiered Approach to Corrective Action Objectives (35 Ill. Admin. Code 742) R09-9*, Motion to Stay Proceedings, page 3, Oct. 5, 2009.

were proposed to compensate for the United States Court of Appeals for the District of Columbia's *vacatur* of the CAMR on March 13, 2008.¹²⁵

Two rulemakings concerned updates for the control of NO_x emissions in the state's non-attainment areas. IPCB R08-9 went into effect August 31, 2009. The adopted rules amend Parts 211 and 217 of the Board's air pollution regulations to control NO_x emissions from major stationary sources in the non-attainment areas and from emission units including industrial boilers, process heaters, glass melting furnaces, cement kilns, lime kilns, furnaces used in steelmaking and aluminum melting, and fossil fuel-fired boilers at such sources. In 1997, USEPA adjusted its standards for NO_x and PM_{2.5}. This rulemaking was an adjustment in the Illinois SIP to accommodate the changes for the non-attainment areas. IPCB R07-19, which went into effect August 6, 2009, concerns amendments to further control NO_x emissions from engines and turbines located at 100 ton per year sources in the state's two non-attainment areas.

IPCB R08-18, *Proposed Amendments to Groundwater Quality Standards*, 35 Ill. Admin. Code 620, an update of the state's groundwater quality standards to account for new scientific data, federal updates, updated technical references, and the discovery of additional groundwater parameters, remains as a pending rulemaking before the Board. Originally filed in February of 2008, the Board held two hearings on the proposal in 2008.

On July 27, 2009, the Illinois EPA filed a rulemaking proposal with the Board requesting a number of changes in the landfill financial assurance provisions. The Board has assigned docket number R10-9 for consideration of this proposal. The Illinois EPA's proposal states that the current State requirements date back to 1985 and 1990. The Illinois EPA is looking to update the financial assurance regulations to account for changes that have occurred over the years—primarily with regard to comparable provisions in federally derived hazardous waste regulations. The Illinois EPA proposal seeks to update certain documents incorporated by reference to the latest version of the document that are available. The Illinois EPA seeks to “shorten the minimum required terms of bond and letters of credit used to provide financial assurance from the current four or five years to one year.”¹²⁶ The proposal adds “evergreen renewal language to bonds and letters of credit, in order to shift the burden of maintaining continuous financial assurance to

125. *New Jersey v. Env'tl. Prot. Agency*, 517 F.3d 574 (D.C. Cir. 2008); *In the Matter of: Proposed Amendments to 35 Ill. Admin. Code 225 Control of Emissions from Large Combustion Sources (Mercury Monitoring)*, IPCB R09-10, Initial Filing, Statement of Reasons, page 1, Oct. 03, 2008.

126. Illinois Register, Vol. 34, Issue 1, page 437, January 4, 2010.

regulated entities.”¹²⁷ The Illinois EPA asserts that the current lack of such renewal provisions has imposed the burden of ensuring continuous coverage on the Illinois EPA.¹²⁸

Looking towards 2010, the Illinois EPA is preparing a rulemaking proposal regarding the land application of sewage sludge.¹²⁹ The rules would establish pollutant limits, pathogen reduction requirements, and vector control measures applicable to sludge applied to land.¹³⁰ The Illinois EPA is also preparing to submit a rulemaking proposal regarding state implementation of the USEPA’s Concentrated Animal Feeding Operation (“CAFO”) National Pollutant Discharge Elimination System (“NPDES”) regulations adopted December 22, 2008.¹³¹

IV. CASELAW DEVELOPMENTS

A. Removal Actions

In September 2008, the State filed a two count complaint against defendants Tarkowski and Ward seeking cost recovery for cleanup costs pursuant to §§ 22.2(f) and 55.3(h) of the Illinois Environmental Protection Act.¹³² Tarkowski filed a Petition for Removal seeking to remove the action from state court to the United States District Court for the Northern District of Illinois.¹³³ The State opposed removal and filed a motion seeking to remand the case to state court on jurisdictional grounds.¹³⁴

In granting the State’s motion, the Federal District Court held that both of the State’s counts were based on state law and that no federal issue was raised by the State or cited by the defendants.¹³⁵ While the district court acknowledged that the defendants made certain vague allegations as to civil and constitutional rights violations, it held that nothing in the original pleadings endowed the district court with jurisdiction pursuant to 28 U.S.C.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 398.

131. *Id.* at 400.

132. *People v. Tarkowski*, No. 08 CV 5955, 2009 WL 77671 at *1 (N.D. Ill. Jan. 9, 2009).

133. *Id.*

134. *Id.*

135. *Id.* at *2.

§1441.¹³⁶ The district court also held that since no federal officer or agency had been sued, jurisdiction was not available pursuant to 28 U.S.C. §1442. Finally, the court stated that removal under 28 U.S.C. §1443 was not available in this case.¹³⁷

In another case, the plaintiffs lived and worked near a company that cleaned and reconditioned used industrial containers that had contained hazardous or toxic chemicals.¹³⁸ Plaintiffs alleged that the defendant company operated an unlicensed hazardous waste disposal facility in violation of local, state and federal environmental laws and that the plaintiffs suffered harm from the resulting contamination.¹³⁹ The case was originally filed in state court, but was removed to federal court after the plaintiffs filed their sixth amended complaint, which alleged claims of civil conspiracy.¹⁴⁰ Plaintiffs opposed removal and filed a motion seeking to remand the case to state court.¹⁴¹

In general, plaintiffs alleged that defendants conspired to unlawfully process hazardous waste in violation of the Resource Conservation and Recovery Act and the Illinois Environmental Protection Act. Defendants removed the case to federal court contending that a federal question had arisen because the complaint presented a federal conspiracy claim. The district court granted the plaintiff's motion to remand the case to the Circuit Court of Cook County, holding that based on precedent, the federal interest was minimal. According to the district court, "while RCRA grants a private right of action to enforce its provisions, it does not contain a private right to recover damages for personal injuries."¹⁴² Furthermore, the court reasoned that "[C]ongress's decision to grant a private right of enforcement and its silence with respect to any other private cause of action allows for the inference that it intended to keep RCRA-based state law claims for conspiracy and negligence out of federal court."¹⁴³

B. Response Costs

In *Arrow Gear Co. v. Downers Grove Sanitary District*, the plaintiff sought "to recover from Defendants [for] 'response costs'" incurred or to be incurred under two settlement agreements with the United States

136. *Id.*

137. *Id.* at *3.

138. *Giles v. Chi. Drum Inc.*, 631 F. Supp. 2d 981, 982 (N.D. Ill. 2009).

139. *Id.* at 982-83.

140. *Id.* at 983.

141. *Id.*

142. *Id.* at 990.

143. *Id.*

Environmental Protection Agency.¹⁴⁴ Plaintiff had previously sought to recover its response costs by cross and third-party actions in a prior suit that was dismissed with prejudice pursuant to the settlement agreements.¹⁴⁵ On summary judgment, the district court concluded that the plaintiff's claims were barred by the doctrine of *res judicata* and could not form the basis of a new action even though the settlement agreements purported to allow future litigation of claims arising out of "administrative proceedings."¹⁴⁶

In 2007, the City of Waukegan sued various businesses pursuant to § 107 of the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA") 42 U.S.C. § 9607(a), for damages relating to the cleanup of polychlorinated biphenyls that contaminated its harbor.¹⁴⁷ The defendants in turn filed third-party actions against numerous entities for contribution pursuant to § 113(f) of CERCLA, 42 U.S.C. § 9613(f).¹⁴⁸ Certain third-party defendants then moved to dismiss, but the district court postponed ruling on their motion.¹⁴⁹ Notwithstanding that federal courts continue to adhere to a notice pleading standard, the district court held that more information was required regarding the city's claims for past response costs and deemed it reasonable to require the city to specifically identify whether such costs were voluntary costs or were paid as a result of consent decrees under § 113(f) of CERCLA, or both.¹⁵⁰ The court reasoned, that because the nature of a party's incurred response costs (e.g., voluntary, reimbursement, etc.) determines whether or not it may seek or recoup the same under § 107 or § 113, it was necessary for the city to provide further information before the court could rule on the merits of pending motion to dismiss.¹⁵¹ The district court also required the city to submit additional information regarding its anticipated future costs.¹⁵²

144. Arrow Gear Co. V. Downers Grove Sanitary Dist., No. 08 CV 4895, 2009 WL 275442, at *1 (N.D. Ill. Jan. 29, 2009).

145. *Id.*

146. *Id.* at *8.

147. City of Waukegan v. Nat'l Gypsum Co. No. 07 C 5008, 2009 WL 3053725, at *1 (N.D. Ill. Sept. 2, 2009).

148. *Id.*

149. *Id.*

150. *Id.* at *2.

151. *Id.* at *2-*5.

152. *Id.* at *5.

C. No Further Remediation Letters

In August 2005, a developer purchased real property on which a dry cleaning business had previously operated.¹⁵³ Prior to purchasing the site, the developer sought and obtained a No Further Remediation Letter (“NFR Letter”) from the Illinois Environmental Protection Agency.¹⁵⁴ Under Illinois law, an NFR Letter releases the recipient from “further responsibilities” under the Illinois Environmental Protection Act and constitutes prima facie evidence that the property no longer poses a threat to human health or the environment.¹⁵⁵

In January 2007, the plaintiff discovered contamination at a site adjacent to the developer’s property.¹⁵⁶ The plaintiff contended that the contamination migrated from the developer’s property.¹⁵⁷ In July 2008, the plaintiff filed suit against the developer in the state court and in December 2008, the plaintiff filed a separate action in the Northern District of Illinois seeking relief under the Citizen Suit Provisions of the Resource Conservation and Recovery Act, 42 USC 6972(a).¹⁵⁸ The developer moved to dismiss the citizen suit action claiming that the NFR Letter resolved the case.¹⁵⁹ The court found that the NFR Letter did not control since it only released the developer from liability under State law, and did not release the developer under the RCRA, and was only prima facie, not conclusive, proof that the developer’s property was contaminant free.¹⁶⁰ The district court also refused to apply the doctrine of abstention, holding that abstention is appropriate only where there are parallel suits pending in state and federal court and after balancing 10 recognized factors.¹⁶¹ In this case, the court noted that while the State suit might be parallel, the factors militated against abstention.¹⁶²

The developer also argued that the NFR Letter resolved the controversy under *St. Charles Mfg. Ltd. P’ship v. Whirlpool Corp.*,¹⁶³ which held that when the parties agree to let the Illinois Environmental Protection Agency decide

153. *Snellback Properties, L.L.C. v. Aetna Dev. Corp.*, No. 08 C 7326 2009 WL 1606945, *1 (N.D. Ill. June 9, 2009).

154. *Id.*

155. *Id.* (citing 415 ILL. COMP. STAT. ANN. 5/58.10(a) (West 2010)).

156. *Snellback*, 2009 WL 1606945 at *1.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at *1-*2.

162. *Id.* at *2.

163. *St. Charles Mfg. P’ship v. Whirlpool Corp.*, 398 F.3d 593 (7th Cir. 2005).

whether or not remediation is complete, those contractual provisions control.¹⁶⁴ In the absence of a contract between the plaintiff and the developer, the district court found that the Seventh Circuit's decision in *St. Charles Mfg. Ltd.* did not support dismissal.¹⁶⁵

D. Home Rule Environmental Regulation

The Village of DePue, an Illinois home rule village, brought a State Court action against a property owner and lessee alleging violations of recently enacted hazardous substances ordinances, common law nuisance, and trespass related to a superfund site.¹⁶⁶ The defendants removed the case to federal court and then filed a motion to dismiss.¹⁶⁷ This case decided the second of two actions filed by the Village.¹⁶⁸

This case involved contamination at the DePue/New Jersey Zink/Mobile Chemical Corporation Superfund Site located within the Village of DePue, Bureau County, Illinois.¹⁶⁹ In earlier litigation, the Illinois Attorney General filed a lawsuit against the defendants' corporate predecessors pursuant to the Illinois Environmental Protection Act, in which the defendants entered into an interim consent order requiring them to perform a phased investigation of the site and implement certain interim remedies.¹⁷⁰ The defendants were also required to propose final remedies before completing a final remedial action at the site.¹⁷¹ The defendants were in the process of conducting remedial investigations and feasibility studies and had implemented certain limited environmental remedies when the Village, which was not satisfied with the defendants' progress, brought its first action under a local nuisance ordinance seeking fines, penalties, and an injunction requiring the defendants to immediately complete a total cleanup of the site.¹⁷² The Village's first case was dismissed based upon preemption—specifically, as a non-home rule unit of local government, the Village ordinance was preempted by the Illinois Environmental Protection Act.¹⁷³ The dismissal of the first action was affirmed on appeal to the Seventh Circuit and the instant action followed.¹⁷⁴

164. *Snellback*, at *2.

165. *Id.* at *3.

166. *Vill. of DePue, Ill. v. Viacom Int'l. Inc.*, 632 F. Supp. 2d 854, 856 (C.D. Ill. 2009).

167. *Id.* at 858.

168. *Id.* at 859.

169. *Id.*

170. *Id.* at 857.

171. *Id.*

172. *Id.* at 858.

173. *Id.*

174. *Id.* at 859.

Prior to filing its second action, the Village sought, and received, approval as a home rule unit of local government with greater autonomy in governing its local affairs.¹⁷⁵ The Village passed a new ordinance prohibiting any person, entity, or corporation from owning, controlling, or possessing “real property by lease, trust or deed which contains hazardous waste or hazardous substances.”¹⁷⁶ The new ordinance increased the penalties to a one time fine of up to \$50,000 and reoccurring daily fines of up to \$10,000 per day.¹⁷⁷ In granting the defendants’ motion to dismiss, the District Court found “the hazardous substances ordinance, as applied in this action, is aimed at altering Defendants’ conduct in a way that cannot be reconciled with Defendants’ performance obligations under the Consent Order.”¹⁷⁸ According to the District Court, the Village’s attempt to enforce its amended ordinance was an invalid exercise of home rule authority under the Illinois Constitution.¹⁷⁹ In addition, the District Court held that the Village had failed to adequately state a claim for either nuisance or trespass, and therefore dismissed those pending claims.¹⁸⁰

E. Accepting Waste, Modifying Permits

Generators and transporters of waste brought an action against the director of Illinois Environmental Protection Agency (“IEPA”) for alleged violations of the Dormant Commerce Clause based, in part, on IEPA’s denial of a waste collection business operator’s application to modify its operating permit to allow it to accept waste that was generated outside of the Village of Bradley, Illinois.¹⁸¹ At issue in this case was the United States Supreme Court’s conclusion that the Commerce Clause in the United States Constitution contains a negative command, known as the “Dormant Commerce Clause,” which prohibits states from “advancing their own commercial interest by curtailing the movement of articles of commerce, either into or out of the state.”¹⁸² According to the Seventh Circuit, “the Dormant Commerce Clause

175. *Id.*

176. *Id.* at 859–60.

177. *Id.* at 860.

178. *Id.* at 864.

179. *Id.*

180. *Id.* at 864–65.

181. *Liberty Disposal Inc. v. Scott*, 648 F. Supp. 2d 1047, 1050 (N.D. Ill. 2009).

182. *Id.* at 1051 (citing *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Natural Res.*, 504 U.S. 353, 359 (1992)).

applies with full force to state regulation of the collection, transportation, processing, and disposal of solid waste.”¹⁸³

In this case, plaintiff alleged that the defendant violated the Dormant Commerce Clause because there was no “legitimate, non-discriminatory justification” for prohibiting the transfer of waste from outside the boundaries of the Village of Bradley to a disposal facility within the Village.¹⁸⁴ The court found that the prohibition was discriminatory on its face and could only “be saved by a showing that it ‘advances a legitimate local purpose that cannot adequately be served by reasonable nondiscriminatory alternatives.’”¹⁸⁵ In partially denying the defendant’s motion to dismiss, the court held that certain plaintiffs had pleaded a claim under the Dormant Commerce Clause, to the extent that the alleged conduct was discriminatory on its face, even though such plaintiffs had access to other transfer stations and could have potentially obtained the necessary sighting approval to access the Bradley facility.¹⁸⁶

F. Fines, Attorneys’ Fees and Costs

In a prior action, the Sierra Club filed a claim under the Clean Air Act seeking to enjoin the power company from building a coal fired power plant.¹⁸⁷ The Sierra Club alleged that the company’s prevention of significant deterioration permit had expired and/or was invalid.¹⁸⁸ The court granted summary judgment to the Sierra Club and that decision was affirmed on appeal.¹⁸⁹ In this case, the Sierra Club sought imposition of a fine and an award of its attorneys’ fees and costs.¹⁹⁰ The District Court for the Southern District of Illinois found that the imposition of a \$100,000 fine (0.2 percent of the potential penalty) was reasonable.¹⁹¹ The court also noted that the company did not act in good faith by proceeding with construction of the power plant after the PSD permit had automatically expired and awarded

183. *Liberty Disposal*, 648 F. Supp. 2d at 1051–52. (citing Nat’l Solid Waste Mgmt. Ass’n v. Meyer, 63 F.3d 652, 657 (7th Cir. 1995)).

184. *Liberty Disposal*, 648 F. Supp. 2d at 1052.

185. *Id.* at 1054.

186. *Id.* at 1055–56.

187. *Sierra Club v. Franklin Cnty. Power of Ill., L.L.C.*, No. 05 CV 4095, 2009 WL 3816816 at *1 (S.D. Ill. Nov. 12, 2009).

188. *Id.*

189. *Id.* at *4 (citing *Sierra Club v. Franklin Cnty. Power of Ill., L.L.C.*, 546 F.3d 918, 934–35 (7th Cir. 2008)).

190. *Sierra Club*, 2009 WL 3816816 at *1.

191. *Id.* at *2.

attorneys' fees and costs to the Sierra Club's counsel at the rate of \$425/hr for lead counsel.¹⁹²

G. Cleanup Obligations Under RCRA Non-Dischargeable in Bankruptcy

In this case, the United States brought an action under the Resource Conservation and Recovery Act ("RCRA") seeking injunctive relief and requiring the owner of an oil refinery site to clean up contamination.¹⁹³ The Seventh Circuit Court of Appeals held: (1) that the government's claim to injunctive relief was not discharged in bankruptcy; and (2) that the injunction was not invalid under the rule requiring an injunction to state its terms specifically and describe in reasonable detail the acts required.¹⁹⁴ The court analyzed the conflicting policy considerations associated with bankruptcy (fresh start) and environmental clean up policy (prevent a substantial danger to human health or the environment).¹⁹⁵ The court found that a discharge in bankruptcy is limited to claims that give rise to a right to payment.¹⁹⁶ Under the RCRA, the government was merely entitled to require the defendant to clean up the contamination and had no right to payment.¹⁹⁷ The government's claim was, therefore, non-dischargeable in bankruptcy.¹⁹⁸

With regard to the specificity required, the Seventh Circuit found that "a degree of ambiguity is unavoidable in a decree ordering a complicated environmental clean up."¹⁹⁹ Accordingly, the court reasoned that the injunction was valid since a defendant can always seek clarification or modification of a decree from the court, and has some protection if the decree remains ambiguous after seeking clarification or after being modified.²⁰⁰ In which case, the defendant cannot be held in contempt for violating the decree.²⁰¹

192. *Id.* at *9.

193. *United States v. Apex Oil Co.*, 579 F.3d 734, 735 (7th Cir. 2009).

194. *See id.*

195. *Apex Oil*, 579 F.3d at 738.

196. *Id.* at 739.

197. *Id.*

198. *Id.*

199. *Id.* at 740.

200. *Id.*

201. *Id.*

H. Sovereign Immunity

The State brought an action against the Defendants alleging that they were illegally operating a dump site.²⁰² One defendant filed a third-party complaint and counterclaim against the Illinois Department of Transportation and its Secretary, as well as against several other defendants, alleging that they violated the Illinois Environmental Protection Act (Act).²⁰³ The State moved to dismiss on the basis of sovereign immunity and that Section 45(d) of the Act did not waive sovereign immunity.²⁰⁴ The trial court granted the State's motion and the Appellate Court affirmed.²⁰⁵

The Appellate Court's decision discussed the history of sovereign immunity before affirming the trial court's findings.²⁰⁶ Noting that a waiver of sovereign immunity must be "clear and unequivocal," the court found that the Act had no such clear statements waiving sovereign immunity for claims arising under its provisions.²⁰⁷

The defendant argued that the State was subject to suit because the General Assembly's findings stated that "environmental damage does not respect political boundaries;"²⁰⁸ "that it is the obligation of the State Government to manage its own activities so as to minimize environmental damage;"²⁰⁹ and, "that the adverse effects upon the environment are fully considered and borne by those who cause them."²¹⁰ Thus, the defendant argued, the Act's grant of jurisdiction to the court to "include any of the parties which it determines to have, with actual knowledge, allowed, caused or contributed to the illegal open dumping or open burning" in any order to remove the waste or to apportion the costs for such removal,²¹¹ must include the State.²¹²

The court noted that the term "person" included "state agenc[ies]," and that the State's "obligations under the . . . Act . . . [require it] 'and all its agencies, institutions, officers and subdivisions [to] comply with all

202. *People v. Excavating and Lowboy Serv., Inc.*, 388 Ill. App. 3d 554, 555, 902 N.E.2d 1218, 1222 (1st Dist. 2009).

203. *Id.* at 556–57, 902 N.E.2d at 1222.

204. *Id.* at 557, 902 N.E.2d at 1223.

205. *Id.* at 566, 902 N.E.2d at 1230.

206. *Id.* at 557–60, 902 N.E.2d at 1223–25.

207. *Id.* at 563–64, 902 N.E.2d at 1228.

208. 415 ILL. COMP. STAT. 5/2(a)(ii) (2004).

209. 415 ILL. COMP. STAT. 5/2(a)(vi) (2004).

210. *Excavating*, 388 Ill. App. 3d at 560, 902 N.E.2d at 1225 (citing 415 ILL. COMP. STAT. 5/2(b) (2004)).

211. 415 ILL. COMP. STAT. 5/2(a)(ii) (West 2004).

212. *Excavating*, 388 Ill. App. 3d at 561, 902 N.E.2d at 1225.

requirements, prohibitions, and other provisions of the Act and of regulations adopted thereunder.”²¹³

The court, in order to determine if the Act abrogated sovereign immunity, then examined the “interplay between the legislation,” and its analysis turned on the rule that the role of the court is to determine the true intent and meaning of the legislature and that the language be given its plain and ordinary meaning, while reading the statutes as a whole.²¹⁴ The court found that neither statute was ambiguous and, while conceding the language which would hold the State a “person” within the meaning of the Act, its decision turned on what language was missing. Specifically, the court found that “there is nothing about the terms of the [Act] that would countermand the specific and unequivocal language of either the Immunity Act or the Claims Act.”²¹⁵ Thus, the grant of the right to sue “is not the same as conferring jurisdiction on any designated forum.”²¹⁶

The impact of the holding then, would appear to be that while the State may be sued under the Act, such suits may only be filed in the Court of Claims. Left for another day is the question of how questions of liability will be resolved when the State is but only one party to the litigation, such as was present here, and is not present at trials which would allocate environmental liability.

I. Injunctions

Residents of Bensenville, Illinois sued the City of Chicago to block the expansion of O’Hare International Airport because the City had failed to comply with Bensenville’s Demolition Ordinance.²¹⁷ The allegation germane to this discussion is that the demolition would constitute a public nuisance because it would expose residents to hazardous substances and chemicals released during the demolition. The procedural history of the case is extensive. Various injunctions were issued and the complaint was subject to a number of amendments. Ultimately the trial court issued an order dismissing the complaint and allowed the City to proceed.²¹⁸

The issue relevant to this discussion was whether the Plaintiffs were entitled to the injunction which effectively prohibited the City from

213. *Id.* at 562, 902 N.E.2d at 1226. (examining 415 ILL. COMP. STAT. 5/47(a) (2004)).

214. *Id.*

215. *Id.* at 563, 902 N.E.2d at 1227.

216. *Id.*

217. *The Vill. of Bensenville v. City of Chi.*, 389 Ill. App. 3d 446, 449, 906 N.E.2d 556, 560 (2d Dist. 2009).

218. *Id.* at 477, 906 N.E.2d at 581.

demolishing the structures. In dismissing the suit, the trial court relied heavily on the regulatory oversight which was available from both the State and Federal Environmental Protection Agencies.

On appeal, the court affirmed the dismissal of all claims except those related to the nuisance issue.²¹⁹ That issue turned on applications of general principles of law related to injunctions. More particularly, the issue was whether the Plaintiffs had “an adequate remedy at law.”²²⁰

The court rejected the trial court’s reliance on the oversight responsibilities of the regulatory agencies.²²¹ Rather, the court held that the trial court was under an obligation to make separate findings, considering “all relevant factors, and, without regard to the concurrent jurisdiction of administrative agencies, [to determine] whether the demolition would constitute a public nuisance.”²²² The court found that the trial court failed to reach the issue of whether there was an adequate remedy at law, but instead, by finding that the agencies could enforce against any violations, explained why it was not reaching a decision on the issue.²²³

The existence of regulatory oversight did not change the fact that the enforcement of environmental matters is not “exclusively in the hands of administrative agencies,” but rather is a “dual system of enforcement and civil relief.”²²⁴ Thus, the matter was remanded so that the trial court could make findings on the issue.²²⁵

J. Landfill Siting

This case involved the siting of a landfill.²²⁶ A first request was made and approved by the City of Kankakee.²²⁷ After appeal by objectors, the Pollution Control Board (“PBC”) reversed and denied the request.²²⁸ That PBC decision was reversed by the Appellate Court, which was in turn reversed by the Supreme Court of Illinois.²²⁹ Ultimately, the Supreme Court of Illinois

219. *Id.* at 499, 906 N.E.2d at 598.

220. *Id.* at 493, 906 N.E.2d at 594.

221. *Id.* at 496, 906 N.E.2d at 596.

222. *Id.*

223. *Id.* at 497, 906 N.E.2d at 597.

224. *Id.* at 495, 906 N.E.2d at 595.

225. *Id.* at 499, 906 N.E.2d at 599.

226. *Cnty. of Kankakee v. Pollution Control Bd.*, Nos. 3-04-0271, 3-04-0285, 3-04-0289, 2009 WL 4723290, *1 (Ill. App. Ct. December 4, 2009).

227. *Id.* at *2.

228. *Id.*

229. *Id.*

upheld the PBC's denial.²³⁰

Thereafter, a second request was filed.²³¹ This siting was approved by the City and parties objecting to the siting appealed.²³² The Pollution Control Board affirmed and an appeal was made to the Appellate Court.²³³ The threshold issue to be decided was whether the request was properly re-filed in accordance with the requirements of Section 39 of the Illinois Environmental Protection Act.²³⁴ The court ruled that the request was not in accordance with Section 39.

Subsection 39.2 of the Act states that a request for local siting approval may not be filed if it is "substantially the same as a request which was disapproved pursuant to a finding against the applicant . . ."²³⁵ The question then is whether the prior application was disapproved, for the purpose of Subsection 39.2, when the PBC reversed the City's decision. In rendering a decision, the court, as the court in *People v. Excavating and Lowboy Services*²³⁶ was required to do, had to engage in statutory construction.²³⁷

The court decided that the second application did not comply with Subsection 39.2. Despite the fact that the only reference to "disapproval" in Subsection 39.2 makes no reference to the PBC, the court held the application was disapproved when applying the rule that "each provision should be construed in connection with every other section."²³⁸ The court reasoned that because Subsection 40.1 provides for a "resolution of any statutorily prescribed 'contest [of] the decision of the county board or the governing body of the municipality,'" rights of appeal are established. Because the PBC is empowered to deny the approval of the local board, the "Act signals the legislature's intent to vest approval and disapproval authority at both the local level and at the review level."²³⁹ Thus, the "local siting review process" referenced in Subsection 39.2 is not limited to approval or disapproval at the local level.

The court then proceeded to resolve additional issues on appeal, including whether notice was adequate, whether there was bias in the procedures employed at the local level, and whether the PBC could adjudicate

230. *Id.*

231. *Id.* at *3.

232. *Id.*

233. *Id.*

234. *Id.* at *3-*5.

235. 415 ILL. COMP. STAT. 5/39.2(m) (2004).

236. *Id.*

237. *Kankakee*, 2009 WL 4723290 at *4.

238. *Id.*

239. *Id.*

claims about amendments to a county's waste management plan.²⁴⁰ Regarding notice, the court found that notice in siting proceedings is a jurisdictional requirement and that the local authority can only be vested with the authority to hear a request if there is notice to neighboring property owners.²⁴¹ The issue in the instant case was whether there was proper notice given to all co-owners of a neighboring property when all the co-owners received notice at the address of the neighboring property.²⁴² The court ruled that such notice is effective if "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and their opportunity to present objections."²⁴³

On the issue of fairness, the burden of establishing bias is high and the "complaining party must show that a disinterested observer might conclude that the local siting authority adjudged both the facts and law before hearing the case."²⁴⁴ Finally, the court ruled that the PBC had no authority to consider an amendment to a county's solid waste management plan.²⁴⁵

V. CONCLUSION

The calendar year of 2009 presented some major changes in the area of environmental law. There were numerous legislative and regulatory developments and it is expected that there will be more with the ever-growing consciousness of the state of our environment in Illinois. This is a growing and evolving area of law that can continue to expect major changes as the State of Illinois and the Federal government focus on the environment.

240. *Id.* at *4-*13.

241. *Id.* at *6.

242. *Id.*

243. *Id.* at *9.

244. *Id.* at *11.

245. *Id.* at *14.

