

ILLINOIS POLLUTION CONTROL BOARD  
September 17, 2009

IN THE MATTER OF: )  
)  
NITROGEN OXIDE (NO<sub>x</sub>) TRADING ) R 09-20  
PROGRAM SUNSET PROVISIONS FOR ) (Rulemaking - Air)  
ELECTRIC GENERATING UNITS (EGUs): )  
NEW 35 ILL. ADM. CODE 217.751 )

Proposed Rule. Second Notice.

OPINION AND ORDER OF THE BOARD (by S.D. Lin):

On April 21, 2009, the Illinois Environmental Protection (Agency) filed this proposal for rulemaking under Sections 10, 27, and 28 of the Environmental Protection Act (Act), 415 ILCS 5/10, 27, 28 (2008). The proposal would add a single new section, 35 Ill. Adm. Code 217.751, to 35 Ill. Adm. Code 217.Subpart W. Beginning with any control period in 2009, the new section would “sunset”, or render inapplicable, the provisions of the Nitrogen Oxides (NO<sub>x</sub>) Trading Program for electrical generating units (EGUs) found at 35 Ill. Adm. Code 217.Subpart W. But, the provisions of 35 Ill. Adm. Code 217.Subpart W will remain in effect for violations that occurred in control periods prior to 2009.

By order of May 7, 2009, the Board denied the Agency’s motion for expedited consideration. But, as the Agency had also requested, the Board ordered immediate publication of the rules for first notice in the *Illinois Register* under the Illinois Administrative Procedure Act (APA), 5 ILCS 100/1-1 *et seq* (2008). *See*, respectively, 35 Ill. Adm. Code Sections 102.202(g) and 101.512. The proposal was published at 33 Ill. Reg. 8880 (June 26, 2009). The Board held hearings on the proposal on June 18, 2009 and July 23, 2009, and received three public comments on or before August 25, 2009.

By today’s action, the Board adopts this second-notice order, and directs that the proposed rule be submitted to the Joint Committee on Administrative Rules (JCAR) for its review under the APA. The Board finds that this record demonstrates that the proposed rule if adopted is technically feasible, economically reasonable, and, in the words of Section 27 (b) of the Act, will have no “adverse economic impact on the people of the state of Illinois.” 415 ILCS 5/27(b) (2008). The proposal contains no substantive changes from the first notice proposal. However, the table of contents of Part 217 has been revised to include Subparts D through M, due to the recent completion of other air rulemakings. *See*, Section 27 Proposed Rules for Nitrogen Oxide (NO<sub>x</sub>) Emissions From Stationary Reciprocating Internal Combustion Engines and Turbines: Amendments to 35 Ill. Adm. Code Parts 211 and 217, R07-19 (July 23, 2009) and Nitrogen Oxides Emissions From Various Source Categories, Amendments to 35 Ill. Adm. Code Parts 211 and 217, R08-19 (Aug. 20, 2009). Adoption of second notice today puts the Board on schedule for adoption of a final rule by the end of November 2009 as requested by the Agency.

This second notice opinion will set out the proposal and its background, and discuss the evidence presented and public comments made concerning the economic reasonableness and technical feasibility of the rule.

### **THE PROPOSAL**

In the proposal's six-page statement of reasons (SR), the Agency states that the Board adopted the Part 217 NO<sub>x</sub> Trading Program rules in Proposed New 35 Ill. Adm. Code 217. Subpart W, The NO<sub>x</sub> Trading Program for Electrical Generating Units, and Amendments to 35 Ill. Adm. Code 211 and 217, R 01-9 (Dec. 21, 2000). SR. at 1. Part 217.Subpart W regulates NO<sub>x</sub> emissions from utility boilers or EGUs. Part 217.Subpart W received approval by the United States Environmental Protection Agency (US EPA) as part of the Illinois State Implementation Plan (SIP) for ozone on November 8, 2001. *See* 66 *Fed. Reg.* 56449 (Nov. 8, 2001). Illinois was required to regulate these sources pursuant to USEPA's NO<sub>x</sub> SIP Call for EGUs pursuant to Sections 110(a) (2) and 126 of the federal Clean Air Act (CAA) and 40 CFR 51.121. *See also* 63 *Fed. Reg.* 57356 (Oct. 27, 1998). SR at 1-2. IEPA reports that the emissions reductions helped the two Illinois ozone nonattainment areas in Illinois to attain the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS). In addition, the continued implementation of the federal NO<sub>x</sub>, Trading Program was required under Phase I of the 8-hour ozone implementation rule. *See* 40 CFR 51.905(f). *Id.* at 2.

On May 12, 2005, USEPA adopted the federal Clean Air Interstate Rule (CAIR) to replace the NO<sub>x</sub> SIP Call Trading Program beginning with the 2009 control period and to add two new trading programs addressing annual emissions of NO<sub>x</sub> and sulfur dioxide. *See Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone; Revisions to Acid Rain Program; Revisions to the NO<sub>x</sub> SIP Call*, 70 *Fed. Reg.* 25162 (May 12, 2005). SR at 2. While the IEPA states that the Board adopted the CAIR rules in the still-pending R06-22 proceeding, in fact the CAIR rules were adopted by the Board in Proposed New Clean Air Interstate Rule (CAIR) SO<sub>2</sub>, NO<sub>x</sub> Annual and NO<sub>x</sub> Ozone Season Trading Programs, 35 Ill. Adm. Code 225, Subparts A, C, D, E and F, R 06-26 (Aug.23, 2007). The CAIR rules, by their terms, were to replace the NO<sub>x</sub> Trading rules in 2009. The Illinois CAIR rules were approved by USEPA on October 16, 2007. *See* 72 *Fed. Reg.* 58528(Oct. 16, 2007). *Id.*

The CAIR provisions as set forth in 35 Ill. Code Part 225.Subpart E include a trading program for control of NO<sub>x</sub> emissions during the ozone season that replaces the provisions in Part 217.Subpart W for EGUs beginning with the 2009 control period (May 1 through September 30) and thereafter. Part 225.Subpart E incorporated in large part applicable provisions from the federal CAIR rule as required for federal approval. SR at 2.

After the adoption of Illinois CAIR, the United States Court of Appeals reached a decision on a number of petitions for review it had received concerning the federal CAIR rule. On July 11, 2008, the Court of Appeals vacated the federal CAIR rule in its entirety and remanded the rule to USEPA for revision. *North Carolina v. USEPA*, 531 F.3d 896 (C.A.D.C. Cir. 2008). The court's July 2008 opinion stated that pending the remand of the CAIR program to USEPA, the provisions of the federal NO<sub>x</sub> SIP Call Trading Program would remain in place. But, the parties petitioned the court for rehearing on the decision to vacate and requested that the

federal CAIR rule be reinstated during the remand. On December 23, 2008, the court granted the rehearing and “unvacated” federal CAIR rule with implementation to begin with the original control period in 2009. *North Carolina v. USEPA*, 550 F.3d 1176 (C.A.D.C. Cir. 2008). SR at 2-3.<sup>1</sup>

The Board's Part 217 NO<sub>x</sub> Trading Program rules have continued to be in full force and effect. The Agency states that, with the reinstatement of the federal CAIR program, Illinois' EGUs must now comply with two sets of duplicative administrative requirements (*e.g.*, permitting, reporting) for the 2009 ozone season and beyond: namely, the Illinois CAIR rule requirements at Part 225 and the Illinois NO<sub>x</sub> Trading Program at Part 217.

In 40 CFR 51.123(bb)(1)(i), USEPA has provided that states such as Illinois with approved CAIR programs may revise their applicable SIP so that the provisions of the NO<sub>x</sub> SIP Call Trading Program do not apply to affected EGUs. IEPA's proposal requesting the Board to amend the Illinois rules is the first step to revision of the SIP. Upon completion of this rulemaking, IEPA may then submit rules to USEPA for formal approval and SIP inclusion.

To address and remove this duplication, the proposal would “sunset” the provisions of the NO<sub>x</sub> Trading Program, by adding a new Part 217.751. The full text of the proposed rule is:

#### Section 217.751 Sunset Provisions

The provisions of this Subpart W shall not apply for any control period in 2009 or thereafter. Noncompliance with the provisions of this Subpart that occurred prior to 2009 is subject to the applicable provisions of this Subpart.

(Source: Added at 33 Ill. Reg. \_\_\_ effective \_\_\_\_\_ )

The Agency states that this proposal is consistent with the provisions of 40 CFR 51.123(bb)(1)(i), which provide that states with approved CAIR programs may revise their applicable SIP so that the provisions of the NO<sub>x</sub>, SIP Call Trading Program do not apply to affected EGUs. SR at 3.

As to the scope of the rule, the Agency states that the entire State of Illinois was subject to the NO<sub>x</sub>, SIP Call and is now subject to CAIR. The proposed regulations will affect existing EGUs. There are approximately 229 existing EGUs that are currently subject to the NO<sub>x</sub> SIP Call Trading Program. For the NO<sub>x</sub> SIP Call Trading Program, existing units are those that commenced operation before May 1, 2006. Of these units, 170 are gas and oil fired boilers, 59 are coal-fired boilers, and the remainder are gas and oil-fired combustion turbines. SR at 3.

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<sup>1</sup> There has been no final action by USEPA on its CAIR rules. The Board has never been asked to construe what effect, if any, the status of the federal CAIR rules has on the Board's Part 225 CAIR NO<sub>x</sub> rules.

The statement of reasons indicates that the Agency did an electronic e-mail outreach to the 229 existing EGUs that are subject to the Part 217 NO<sub>x</sub> Trading Program rules, and has identified no significant issues. SR. at 4-5.

The Agency accordingly concludes that

the rule is being proposed to prevent a burden and replaces a rule that is no longer being implemented by USEPA. The adoption of the proposal will not result in injury or substantial prejudice, nor an abrupt departure from a well established practice. Hence, adoption of this proposal is appropriate to prevent a burden on affected EGUs.

The amendments to Part 217.Subpart W are being proposed to ensure consistency with the CAIR ozone season program and prevent EGUs from being subject to duplicative monitoring, reporting, permitting and recordkeeping requirements. USEPA has stopped allocating NO<sub>x</sub> allowances for the NO<sub>x</sub> SIP Call Trading Program. As this proposal sunsets regulatory provisions, it would impose no new requirements or costs on affected sources. Hence, the proposal is both technically and economically feasible. SR at 5.

### **PROCEDURAL HISTORY**

As previously stated, the Agency filed this proposal on April 21, 2009. The Agency also filed a motion (Mot.) requesting the Board to expedite consideration of the proposal. *See* 415 ILCS 5/28 (2008); 35 Ill. Adm. Code 102.202(g) and 101.512. The motion to expedite requested that the Board cause immediate first notice publication of the proposal under the APA, 5 ILCS 100 *et seq.* (2008), without Board comment on the merits and schedule public hearings as soon as possible. Mot. at 2-3.

In support of this request, the Agency laid out the sequence of events as described above concerning the adoption of the state and federal CAIR and NO<sub>x</sub> Trading Program rules, and the actions of the federal court of appeals. The Agency then stated that

With the reinstatement of the CAIR program, Illinois' EGUs must now comply with duplicative administrative requirements (e.g., permitting, reporting) for the 2009 ozone season and beyond until the provisions of the NO<sub>x</sub> Trading Program are sunsetted; namely, the duplicative requirements that appear in Part 217.Subpart W.

For the reasons stated above, and due to the impending 2009 ozone season control period (May 1, 2009, through September 30, 2009), the regulations need to be adopted in an expedited manner.

In light of the foregoing, it is necessary to expedite review in this matter. Mot. at. 2.

By order of May 7, 2009, the Board denied the Agency's motion for expedited consideration, but did authorize first-notice publication of the proposal in the *Illinois Register*

without comment on the proposal's merits, and directed the hearing officer to promptly schedule hearings. Nitrogen Oxide (NO<sub>x</sub>) Trading Program Sunset Provisions for Electric Generating Units (EGU's): New 35 Ill. Adm. Code 217.751, R09-20 (May 7, 2009). The Board stated that it did not dispute the fact that the 229 regulated EGUs are subject to two sets of rules, and that the problem must be addressed. *Id.*, slip op. at 5. But, the Board noted that it simply could not expedite its consideration of rulemakings in every rule, and found that the situation did not present the "dire circumstances" presented in other then-pending rulemakings in which Agency requests had been granted. *Id.* at 4-5 (citing Section 27 Proposed Rules for Nitrogen Oxide (NO<sub>x</sub>) Emissions From Stationary Reciprocating Internal Combustion Engines and Turbines: Amendments to 35 Ill. Adm. Code Parts 211 and 217, R07-19, slip op. at 4 (Apr. 2, 2009) and In the Matter of: Nitrogen Oxides Emissions from Various Source Categories, Amendments to 35 Ill. Adm. Code Parts 211 and 217, R08-19, slip op. at 4 (Apr. 2, 2009)) and 6 (citing Amendments to 35 Ill. Adm. Code 225: Control of Emissions From Large Combustion Sources (Mercury Monitoring), R09-10 (Nov. 5, 2008)).

By hearing officer order of May 13, 2009, hearings were set for June 18, 2009 in Chicago and July 23, 2009 in Springfield.<sup>2</sup> The hearing officer order also set deadlines for the pre-filing of testimony. On the same day, by letter of October 18, 2008, the Board requested the Director of the Department of Commerce and Economic Opportunity (DCEO) to request an economic impact study (EclS) concerning this rulemaking as required by Section 27 (b) of the Act. 415 ILCS 5/27(b) (2008). The Board explained the circumstances of the rule, and its hearing schedule, and its intent not to hold a third hearing. The Board asked that DCEO respond to the request no later than June 30, 2009, so that prior to the July 23, 2009 hearing the public would have the 20-day notice of the results of DCEO's decision making required by Section 27(b) of the Act. DCEO has not responded to the Board's request at any time.

The first hearing was held in Chicago on June 18, 2009, conducted by Hearing Officer Kathleen M. Crowley. At the first hearing, the Agency presented testimony timely pre-filed on June 1, 2009 by Mr. Yoginder Mahajan. Mr. Mahajan has been employed by the Agency since March 1992 as an Environmental Protection Engineer in the Air Quality Planning Section in the Bureau of Air. This testimony was also entered into the record as Exhibit 1. 6/18/09 Tr. at 8.

Counsel for Midwest Generation, Kathleen Bassi of SchiffHardin, LLP, posed questions concerning enforcement and distribution of unused allowances that Mr. Mahajan was not prepared to answer. 6/18/09 Tr. 8-15. Counsel for the Agency, Rachel Doctors, stated that another witness would be provided at the second hearing: David Bloomberg. 6/18/09 Tr. 9. Ms. Bassi represented that she might file additional questions for the Agency to answer at the next hearing.

Due to the need to expedite other air rulemakings, first notice publication of these rules did not occur until June 26, 2009. *See* 33 Ill. Reg. 8880 (June 26, 2009). This publication started the 45-day public comment period under the APA, requiring the Board to accept all comments filed through August 10, 2009.

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<sup>2</sup> The transcripts for these hearings are not sequentially numbered. The transcript for the first hearing will be cited as "6/18/09 Tr." and the second as "7/23/09 Tr."

By e-mail of July 8, 2009, Ms. Bassi informed Ms. Crowley that she would not be filing any additional questions, and that Ms. Bassi might not be in attendance at hearing. On July 10, 2009, the Agency pre-filed the testimony of another witness, Mr. David E. Bloomberg. No other pre-filed testimony was received.

The second hearing was held on July 23, 2009 in Springfield, conducted by Hearing Officer Webb.<sup>3</sup> At the first hearing, the Agency presented testimony timely pre-filed by Mr. Bloomberg. Mr. Bloomberg, an Agency employee for nearly 18 years, for the last five years has been the Compliance Unit Manager in the Compliance Section within the Agency's Division of Air Pollution Control. The Bloomberg testimony was also entered into the record as Exhibit 2. 7/23/09 Tr. at 8. No questions were asked of Mr. Bloomberg.

The hearing officer noted that DCEO had not responded to the Board's May 13, 2009 EcIs letter. The hearing officer relayed that Section 27(b) requires the Board to hold a hearing on the economic impact of the rules, any EcIS submitted, and on any explanation DCEO provides for not conducting an EcIS. The hearing officer also explained that Section 27(b) allows the Board to dovetail the economic impact hearing with any other hearing. 7/23/09 Tr. at 5-6. The hearing officer asked whether any person wished to address EcIS issues, and no one responded. 7/23/09 Tr. at 8-9.

Section 102.108 (b) of the Board's procedural rules also provides that the Board will accept comments for 14 days after the receipt of the hearing transcript, or at any other date set by the hearing officer. Based on the expected August 18, 2009 date for transcript receipt and the Board's meeting schedule, the close of the comment period was set for Friday, August 21, 2009. 7/23/09 Tr. at 14.

The first post hearing comment (PC 1) was timely filed by Southern Illinois Power Cooperative (SIPC) on August 21, 2009. SIPC suggested changes to the proposal that would have required the Agency to disburse allowances. The Agency filed a comment and response in opposition to the SIPC comment on August 25, 2009 (PC 2); this was accompanied by a motion for leave to file, which is here granted. Also on August 25, 2009, SIPC responded by e-mail to the Agency's query as to whether it would accept e-mail service. SIPC agreed that it would, but disagreed with the Agency's statement of facts; this e-mail was docketed as PC 3 to allow for consideration of SIPC's substantive remark.

## **HEARING TESTIMONY**

### **Mahajan Testimony**

As previously stated, the only witness at the first hearing was the Agency's Yoginder Mahajan. Mr. Mahajan has been employed since March 1992 as an Environmental Protection Engineer in the Air Quality Planning Section in the Bureau of Air. He worked for various metal fabrication companies for nine (9) years. Mr. Mahajan's educational background includes a Bachelor of Engineering Degree in Mechanical Engineering from Bhopal University at Bhopal,

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<sup>3</sup> Hearing Officer Crowley explained that the second hearing might be conducted by Springfield-based Hearing Officer Carol Webb, to economize on Board travel expenses. 6/18/09 Tr. at 23.

India. Prior to his employment by the Agency, Mr. Mahajan worked for various metal fabrication companies for nine years. Exh. 1 at 1.

As part of his regular duties in the Air Quality Planning Section, Mr. Mahajan has been involved with preparing emissions estimates for various source categories used in the development of the 1990 ozone season weekday emissions inventories; evaluating control technologies applicable to VOM emissions sources utilized in the preparation of the Rate-of-Progress plans for the Chicago and St. Louis ozone nonattainment areas; and assisting in the development of regulations for the control of VOM emissions from the source categories included in the Rate-of-Progress plans. Regarding the R09-20 proposal, Mr. Mahajan testified that he has been involved in the development of the regulations to control nitrogen oxides (NO<sub>x</sub>) emissions from electrical generating units. Exh. 1 at 1.

Mr. Mahajan related that the rules adopted in Proposed New 35 Ill. Adm. Code 217, Subpart W, The NO<sub>x</sub> Trading Program for Electrical Generating Units, and Amendments to 35 Ill. Adm. Code 211 and 217, R 01-9 (Dec. 21, 2000) were intended to comply with the NO<sub>x</sub> SIP Call promulgated by USEPA in October 1998. *See* 63 FR 57356 (October 27, 1998). The NO<sub>x</sub> SIP Call Trading Program was an ozone season trading program administered by USEPA.

USEPA adopted the federal CAIR rules in 2005. *See* 70 FR 25162, May 12, 2005. The Board adopted Illinois CAIR rules in Proposed New Clean Air Interstate Rule (CAIR) SO<sub>2</sub>, NO<sub>x</sub> Annual and NO<sub>x</sub> Ozone Season Trading Programs, 35 Ill. Adm. Code 225, Subparts A, C, D, E and F, R 06-26 (Aug. 23, 2007). The sources affected by CAIR are the same electrical generating units that were affected by the NO<sub>x</sub> SIP Call rules in Subpart W of 35 Ill. Adm. Code 217. The NO<sub>x</sub> SIP Call rules and CAIR are cap and trade programs that require affected sources to hold NO<sub>x</sub> allowances equal to their NO<sub>x</sub> emissions. The monitoring and reporting of NO<sub>x</sub> emissions in both programs are substantially identical.

Mr. Mahajan testified that, for Illinois, USEPA allocated 30,701 NO<sub>x</sub> allowances in Phase I of the CAIR ozone season NO<sub>x</sub> trading budget. This is the same number of NO<sub>x</sub> allowances allocated in the NO<sub>x</sub> SIP Call trading budget. After deducting 30% of the allowances for the new unit set-aside and clean air set-aside, the Agency allocated 21,491 NO<sub>x</sub> allowances for each ozone season in 2009 through 2011 to the 249 affected units pursuant to procedures set forth at Part 225, Subpart E. The estimated NO<sub>x</sub> emissions reductions from NO<sub>x</sub> SIP Call were 85,777 per year from 2007 base year NO<sub>x</sub> emissions. In Phase II of CAIR, starting with the 2015 ozone season, USEPA allocated 28,981 NO<sub>x</sub> allowances per ozone season. Mr. Mahajan stated that the Agency believes that the CAIR NO<sub>x</sub> ozone trading will provide reductions in NO<sub>x</sub> emissions equal to or greater than the estimated reductions in NO<sub>x</sub> emissions achieved from the NO<sub>x</sub> SIP Call rules.

In the preamble to the CAIR rule published at 70 FR 25162 (May 12, 2005), USEPA stated that it would not administer the NO<sub>x</sub> SIP Call Ozone Season Trading Program after September 30, 2008. CAIR provided for the NO<sub>x</sub> SIP Call Trading Program to be replaced by the CAIR Ozone Season NO<sub>x</sub> Trading Program.

As to the specifics of the R09-20 proposal, Mr. Mahajan noted that the proposed Sunset Provisions, Section 217.751 of 35 Ill. Adm. Code would require that the provisions of Subpart W not apply for any control period in 2009 or thereafter. Noncompliance with the provisions that occurred prior to 2009 would remain subject to the applicable provisions of Subpart W. Adoption of this proposal will eliminate duplicate requirements for the affected sources. Mr. Mahajan stated that the Agency that this proposal is consistent with U.S. EPA's requirements and it will not adversely impact the affected sources or the air quality in Illinois.

Counsel for Midwest Generation, Kathleen Bassi of SchiffHardin, LLP, posed questions concerning enforcement and distribution of unused allowances that Mr. Mahajan was not prepared to answer. 6/18/09 Tr. 8-15. Counsel for the Agency, Rachel Doctors, stated that another witness would be provided at the second hearing: David Bloomberg. 6/18/09 Tr. 9.

Mr. Mahajan clarified units of measurement in his testimony in response to questions from the Board. After the close of questioning, counsel for the Agency stated that the Agency "hoped" that the rule could be "fully adopted" no later than November 30, 2009. Tr. at 20. Counsel for Midwest Generation stated the client

does support this sunset rule proposal. And we appreciate the Agency's concern with the double -- the duplicative requirements that would apply otherwise. And so, November 30th is a really good target date, so there's not double recordkeeping to be done. Tr. at 21.

### **Bloomberg Testimony**

Mr. David E. Bloomberg appeared at the second hearing to provide testimony regarding questions that arose during the first hearing on this matter. Mr. Bloomberg remarked that, while the issue of distribution of allowances goes beyond the intended scope of this rulemaking, he was providing background testimony at the request of the Board. Mr. Bloomberg has served for the last 5 years as the Compliance Unit Manager in the Compliance Section within the Agency's Division of Air Pollution Control. He was previously an Environmental Protection Engineer in the Air Quality Planning Section for twelve and a half years. Mr. Bloomberg's academic credentials include a Bachelor of Science degree in ceramic engineering from the University of Illinois at Champaign-Urbana, as well as completion of all graduate coursework required for a Master's degree in the same field. Exh. 2. at 1.

Mr. Bloomberg stated that, among other duties, he supervised Illinois' portion of the now-defunct NO<sub>x</sub> trading program run under the NO<sub>x</sub> SIP Call, as well as supervising Illinois' portion of the current CAIR NO<sub>x</sub> trading program. Both of these programs involved determining or approving the determination of which sources are eligible to receive certain types of allowances, such as early reduction credits and new source set-asides; determining or approving the determination of apportionment of allowances given to such sources or to other sources eligible to receive allowances; collecting or overseeing the collection of monies for sales of certain NO<sub>x</sub> allowances; informing USEPA how to distribute NO<sub>x</sub> allowances to Illinois sources; serving as the designated account representative for the State of Illinois; answering questions concerning the Illinois NO<sub>x</sub> rules; and related tasks. Exh. 2. at 1.

Mr. Bloomberg relayed that, in addition, as manager of the Compliance Unit, he approves Agency reviews of emissions and monitors testing conducted for sources subject to NO<sub>x</sub> regulations, participates in decisions regarding enforcement of the Board's air pollution regulations, interfaces with USEPA regarding federal enforcement cases in Illinois, and oversees the process of sending out Violation Notices and related activities. During his tenure at the Agency, Mr. Bloomberg has been involved in designing, writing, implementing, and enforcing a wide variety of air pollution regulations, including those for NO<sub>x</sub> trading, CAIR, mercury, the Emissions Reduction Market System (ERMS), and several industry-specific rules. Exh. 2. at 1.

Mr. Bloomberg first addressed whether the last truly applicable provisions of 35 Ill. Adm. Code.Subpart W occurred at the end of the 2008 ozone season. Mr. Bloomberg stated that "The answer to this is yes, if this rulemaking goes through." With CAIR replacing the NO<sub>x</sub> SIP Call trading program, there are no more NO<sub>x</sub> SIP Call allowances and thus no requirements relating to such. However, Mr. Bloomberg clarified that there are recordkeeping and reporting requirements which would be duplicative and potentially contradictory with CAIR requirements for affected sources, which is a major reason the Agency has proposed this sunset rulemaking. Exh. 2. at 1.

Mr. Bloomberg next addressed the question of whether the Agency presently knows, or would know within a short time period whether or not there have been violations under 35 Ill. Adm. Code.Subpart W. Mr. Bloomberg in the negative, stating there is no guarantee the Agency would know in a short time period whether or not there were violations. Sometimes, it may take several years to determine that such a violation took place. For example, in one case, an emissions test had been completed incorrectly but the problems were not determined for two or three years. Once they were, the source's NO<sub>x</sub> emissions for the past several years had to be recalculated, causing the source to be in noncompliance with the NO<sub>x</sub> SIP Call trading program for those previous years. At least one other case similarly involved noncompliance that was discovered two or more years after the NO<sub>x</sub> allowances should have been provided. For this reason, Mr. Bloomberg believes it is necessary to retain the Subpart W regulations in order to preserve the Agency's ability to enforce these regulations, should situations arise where it becomes necessary. Mr. Bloomberg believes this is a fairly standard practice when revising air pollution regulations, and stated that he has been involved in several rulemakings where regulations were changed but older versions of the regulations were maintained on the books for precisely this enforcement purpose. Exh. 2. at 2.

Mr. Bloomberg then testified as to whether all allowances that have been provided by USEPA to Illinois under the NO<sub>x</sub> SIP Call program been distributed to EGUs. Mr. Bloomberg said that the answer to that is no, because the current regulations do not provide for such distribution. The correct number of allowances greater than three percent (3% ) of the New Source Set-Aside (NSSA) is in the process of being distributed to EGUs, pursuant to 35 Ill. Adm. Code 217.764 and 217.768. Mr. Bloomberg stated that this is the only pertinent distribution provided for under these regulations. Mr. Bloomberg gave the same answer to the related question, of when the other allowances will be distributed: Mr. Bloomberg stated that they will not be until and unless the Agency makes a decision to do so and a new regulation is passed by the Board to so provide. However, Mr. Bloomberg stated that the Agency is not

seeking authority to distribute such allowances at this time and, as noted previously, such allowance distribution falls outside the scope of this rulemaking. Exh. 2. at 2.

Mr. Bloomberg stated that there are other allowances falling outside the umbrella of those already described. There are some other allowances that reside in Illinois' account for which no distribution is currently planned. Some of these are from the non-EGU trading budget under 35 Ill. Adm. Code 217.Subpart U , and some are for allowances that were part of some other distribution but were left over due to rounding when allocating on a pro-rata basis. Mr. Bloomberg states that these allowances would presumably be addressed in the same manner as described earlier. Exh. 2. at 2.

Finally, Mr. Bloomberg gave verification that NO<sub>x</sub> SIP Call allowances indeed became CAIR allowances. Exh. 2. at 2.

## **PUBLIC COMMENTS**

### **PC1: SIPC**

In its public comment, signed by Leonard F. Hopkins, P.E., Southern Illinois Power Cooperative (SIPC) stated that SIPC is an entity affected by the proposed rulemaking which participated in the Agency's pre-proposal outreach program. SIPC operates a coal-fired power plant located near Marion, Illinois, and is subject to the NO<sub>x</sub> Trading Program rules at 35 Ill. Adm. Code Part 217.Subpart W as well as the Illinois CAIR rules at 35 Ill. Adm. Code Part 225, Subparts D and E, and the Illinois mercury rule, 35 Ill. Adm. Code Part 225.Subpart B. PC 1 at 1.

SIPC generally supports the Agency's proposal to sunset the provisions of Part 217. Subpart W, and agrees that the duplicative recordkeeping and reporting created by the NO<sub>x</sub> Seasonal CAIR are unnecessary and burdensome. PC 1 at 1. However, as SIPC told the Agency during outreach, SIPC believes that

if the Board is going to sunset Subpart W, it should do it completely. That is, the Board should, in this rulemaking, address the distribution of NO<sub>x</sub> Budget allowances remaining in the Agency's account. . . .Since the authority to distribute allowances lies in the Board's rule, then the Board can alter that authority in this sunset rulemaking by providing that the Agency distribute all remaining NO<sub>x</sub> allowances. To accomplish this, SIPC suggests the following language:

The provisions of this Subpart W shall not apply for any control period in 2009 or thereafter. All allowances remaining in the Agency's accounts shall be distributed pursuant to the provisions of Section 217.764(b)(4)(A) and (B) of this Subpart. Noncompliance with the provisions of this Subpart that occurred prior to 2009 is subject to the applicable provisions of this Subpart. PC 1 at 1-2 (underlining of new proposed language in original).

SIPC contends that if the Board does not address distribution of the remaining NO<sub>x</sub> allowances in this rulemaking, then either the Board will have to hold a second rulemaking to address this deficiency in this proposed rule or the allowances will, effectively through neglect, be subject to the retirement provisions of the CAIR rules, citing 35 Ill. Adm. Code 225.545(i) and 225.575(b)(4). PC 2 at 2. SIPC suggests that Subpart W generally provided for distribution of excess allowances to existing electric generating units, while CAIR focuses on the retirement of excess allowances. *Id.* SIPC states that

These are diametrically opposed means of addressing excess allowances. The Agency's direction in Subpart W should continue to apply to the remaining NO<sub>x</sub> Budget allowances rather than allowing the Agency to apply the direction of the CAIR by not addressing disposition of the remaining allowances at this time. This issue is properly before the Board at this time, as the question of the unallocated allowances was raised at the first hearing and addressed in testimony at the second hearing (citations omitted). There are a total of at least 1,212 New Source Set-Aside ("NSSA") allowances remaining plus a number of allowances from the general pool not distributed due to rounding. *See* Agency Trading website: <[www.epa.state.il.us/air/nox/](http://www.epa.state.il.us/air/nox/)> and <[www.epa.state.il.us/air/nox/allowances.html](http://www.epa.state.il.us/air/nox/allowances.html)>. In 2007 and 2008, the Agency set aside 614 allowances into the NSSA<sup>4</sup>. 35 Ill. Adm. Code § 217.760(a)(2). Only 16 allowances were distributed from the NSSA in 2007, and none were distributed in 2008, leaving 1,212 undistributed allowances in the NSSA. PC 1 at 3.

SIPC concludes that it is timely and appropriate for the Board to address the issue of the undistributed NO<sub>x</sub> Budget allowances remaining in the Agency's account, and SIPC requests that the Board amend the proposed rulemaking with the addition of direction to the Agency to distribute the remaining NO<sub>x</sub> Budget allowances. PC1 at 3.

### **PC2: the Agency**

In PC 2, the Agency responds to SIPC's assertions in PC 1 (referring to the commenter as SIPCo). In summary, the Agency requests that the Board adopt the rule as proposed at first notice. The Agency states that

SIPCo is requesting that Board address the distribution of NO<sub>x</sub> Budget allowances remaining in the Illinois EPA's account. SIPCo raises the specter that if the allowances are not distributed pursuant to this rulemaking they will be retired under 35 Ill. Adm. Code Section 225.545(i) or 225.575(b)(4). This is false

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<sup>4</sup> PC 1 contains a footnote 1 at this point in the text which reads original reads "This information was on the Agency's website shortly after the June 18 hearing, but has since apparently been removed." PC 1 at 3.

because the transfer of the NO<sub>x</sub> SIP Call allowances from the Illinois EPA's NO<sub>x</sub> budget account to its Clean Air Interstate Rule ("CAIR") NO<sub>x</sub> Ozone Season account by the United States Environmental Protection Agency ("USEPA") does not confer any additional authority on the Illinois EPA to distribute or retire these allowances beyond the authority originally given by the Board under Subpart W.

In addition, the Board has not given the Illinois EPA the authority under either Section 225.545(i) or 225.575(b)(4) to retire NO<sub>x</sub> SIP Call allowances. Section 225.545(i) applies to allowances from the CAIR New Unit Set-Aside ("NUSA"). As the NO<sub>x</sub> SIP Call allowances are not part of the CAIR NO<sub>x</sub> Ozone Season Budget as set forth in Section 225.525, these allowances are not part of the portion of the budget that has been set-aside for new-units in 2009, hence, these allowances are not subject to the retirement provisions of subsection (i) of Section 225.545(i). Similarly, Section 225.575(b)(4) refers to allowances that have been portioned from the CAIR NO<sub>x</sub> Ozone Season Budget for the Clean Air-Set Aside ("CASA"). As the NO<sub>x</sub> SIP Call allowances are not part of the CAIR budget, they cannot be distributed under the CASA provisions and are not subject to the provisions of that Section. Just because the allowances in question were New Source Set-Aside allowances under the NO<sub>x</sub> SIP Call does not make them allowances in the NUSA under Illinois' CAIR program. There is no provision for such allowances to be transferred into the NUSA category, because there is no provision for how these allowances will be treated under the CAIR program. PC 2 at 1-2.

The Agency does not believe that a second rulemaking will be needed if the allowances that were not allocated under the NO<sub>x</sub> SIP Call trading program are not addressed in this docket. The Agency states that it will be reopening Part 225 after USEPA addresses the vacatur and remand of the CAIR rule under the *North Carolina v. EPA*, No. 05-1244 (D.C. Cir. 2008) decision. PC 2 at 2.

The Agency strongly disagrees with SIPC's contention that this rulemaking provides an appropriate vehicle for considering the issue of the unallocated allowances. The Agency reminds that it has repeatedly stated that the unallocated allowances are outside the scope of its proposal here. The Agency argues that SIPC has never put forth a proper justification for this proposal at the appropriate point in this rulemaking, and has failed to make any assertion that it would be prejudiced by waiting for the Agency to address this issue in a later proposal. The Agency suggests that interested persons have had no opportunity to address the merits of SIPC's proposal, suggesting the proposal is faulty:

Further, it should be noted that SIPCo's proposed amendment that provides "All allowances remaining in the Agency's accounts shall be distributed pursuant to the provisions of Section 217.764(b)(4)(A) and (B)," does not address the issue as it applies only to the fourth year of the program (2007) which has passed. Hence, the adoption of such amendment would result in no distributions whatsoever as the fourth year of the program has come and gone. PC 2 at 3.

The Agency urges that no changes to the proposal are necessary at this time and that no prejudice will result from bundling an amendment to distribute these allowances (should such an amendment be deemed appropriate at that time) with a future Agency proposal for amendments to Part 225. The Agency continues to believe that SIPC's proposed amendment falls beyond the scope of the current rulemaking. The Agency requests that the Board adopt the proposed rules to address substantive and duplicative requirements that face both the Agency and affected EGUs. PC 2 at 3.

### **PC3: SIPC**

When filing PC2, the Agency addressed electronic copies to persons on the service list, stating that it would supply hard copies to anyone who objected to such service. SIPC replied to the Agency and the Board; the reply was docketed as PC 3 due to the nature of the reply. PC3 states in its entirety:

The electronic service is fine.

While I disagree with your opinion of the facts, there is no need to waste paper with a hard copy for the sake of service. Also, there certainly was no intent on the part of SIPC to wait until the last minute with these comments, but there have been a large number of environmental issues this summer that has absorbed the time of our VERY small staff (2). PC3

### **DISCUSSION AND CONCLUSION**

The facts presented here are clear. The entire State of Illinois was subject to the NO<sub>x</sub>, SIP Call and is now subject to CAIR. The proposed amendment to 35 Ill. Adm. Code 217.Subpart W will affect existing EGUs. There are approximately 229 existing EGUs that are currently subject to the NO<sub>x</sub> SIP Call Trading Program. For the NO<sub>x</sub> SIP Call Trading Program, existing units are those that commenced operation before May 1, 2006. Of these units, 170 are gas and oil fired boilers, 59 are coal-fired boilers, and the remainder are gas and oil-fired combustion turbines. SR at 3.

Only two of the 229 EGUs affected have commented in this rulemaking: Midwest Generation and SIPC. Both support the language of the Agency proposal, although SIPC argues that it does not go far enough. While economic benefits have not been quantified in this record, the Agency and commenters agree that removal of duplicative requirements will present an economic benefit in the form of reduced recordkeeping and reporting.

The Board finds that the facts presented in support of the Agency's proposal are uncontroverted. USEPA has stopped allocating NO<sub>x</sub> allowances for the NO<sub>x</sub> SIP Call Trading Program. The amendments to Part 217.Subpart W are being proposed to ensure consistency with the CAIR ozone season program and prevent EGUs from being subject to duplicative monitoring, reporting, permitting and recordkeeping requirements. As this proposal sunsets regulatory provisions, it would impose no new requirements or costs on affected sources. The Board accordingly finds that this record demonstrates that the

proposed rule if adopted is technically feasible, economically reasonable, and, in the words of Section 27 (b) of the Act, will have no “adverse economic impact on the people of the state of Illinois.” 415 ILCS 5/27(b) (2008).

The 2009 ozone season control period (May 1, 2009, through September 30, 2009) is over. But, the record is also clear that it would be beneficial if the proposed rules are adopted and effective on or before November 30, 2009. The Board finds that it would be impossible to conclude this rulemaking under that timetable if the Board were to consider the issue of unallocated allowances now. The Board declines to add the language proposed by SIPC.

As the Agency points out, the regulated community and members of the public have had no meaningful opportunity to comment on whether the issue of unallocated allowances should be addressed in Part 217 at all, let alone by insertion of the language as proposed by SIPC. SIPC has failed to support its proposed additional language with convincing evidence and argument. If SIPC believes that it cannot wait for the Agency to address this issue in some future rulemaking to amend 35 Ill. Adm. Code Part 225, SIPC is free to file a regulatory proposal that complies with the requirements of Section 27 of the Act and the Board’s procedural rules at 35 Ill. Adm. Code 102.

For all of the foregoing reasons, the Board adopts the proposed Section 217.751 set forth below for second notice review by JCAR under the APA. The rule text itself is unchanged since first notice publication. But, the table of contents of Part 217 now lists Subparts D through M, added in rulemakings completed during the pendency of this R09-20 proceeding. *See, Section 27 Proposed Rules for Nitrogen Oxide (NO<sub>x</sub>) Emissions From Stationary Reciprocating Internal Combustion Engines and Turbines: Amendments to 35 Ill. Adm. Code Parts 211 and 217, R07-19 (July 23, 2009) and Nitrogen Oxides Emissions From Various Source Categories, Amendments to 35 Ill. Adm. Code Parts 211 and 217, R08-19 (Aug. 20, 2009).*

## **ORDER**

The Board directs the Clerk to submit the following proposed rules to the Joint Committee on Administrative Rules for its second notice review under the APA.

TITLE 35: ENVIRONMENTAL PROTECTION  
 SUBTITLE B: AIR POLLUTION  
 CHAPTER I: POLLUTION CONTROL BOARD  
 SUBCHAPTER c: EMISSION STANDARDS AND LIMITATIONS  
 FOR STATIONARY SOURCES

PART 217  
 NITROGEN OXIDES EMISSIONS

SUBPART A: GENERAL PROVISIONS

Section	
217.100	Scope and Organization
217.101	Measurement Methods
217.102	Abbreviations and Units
217.103	Definitions
217.104	Incorporations by Reference

#### SUBPART B: NEW FUEL COMBUSTION EMISSION SOURCES

Section	
217.121	New Emission Sources (Repealed)

#### SUBPART C: EXISTING FUEL COMBUSTION EMISSION UNITS

Section	
217.141	Existing Emission Sources in Major Metropolitan Areas

#### SUBPART D: NO<sub>x</sub> GENERAL REQUIREMENTS

Section	
217.150	Applicability
217.152	Compliance Date
217.154	Performance Testing
217.155	Initial Compliance Certification
217.156	Recordkeeping and Reporting
217.157	Testing and Monitoring
217.158	Emissions Averaging Plans

#### SUBPART E: INDUSTRIAL BOILERS

Section	
217.160	Applicability
217.162	Exemptions
217.164	Emissions Limitations
217.165	Combination of Fuels
217.166	Methods and Procedures for Combustion Tuning

#### SUBPART F: PROCESS HEATERS

Section	
217.180	Applicability
217.182	Exemptions
217.184	Emissions Limitations
217.185	Combination of Fuels
217.186	Methods and Procedures for Combustion Tuning

## SUBPART G: GLASS MELTING FURNANCES

Section	
217.200	Applicability
217.202	Exemptions
217.204	Emissions Limitations

## SUBPART H: CEMENT AND LIME KILNS

Section	
217.220	Applicability
217.222	Exemptions
217.224	Emissions Limitations

## SUBPART I: IRON AND STEEL AND ALUMINUM MANUFACTURING

Section	
217.240	Applicability
217.242	Exemptions
217.244	Emissions Limitations

## SUBPART K: PROCESS EMISSION SOURCES

Section	
217.301	Industrial Processes

## SUBPART M: ELECTRICAL GENERATING UNITS

Section	
217.340	Applicability
217.342	Exemptions
217.344	Emissions Limitations
217.345	Combination of Fuels

## SUBPART O: CHEMICAL MANUFACTURE

Section	
217.381	Nitric Acid Manufacturing Processes

SUBPART Q: STATIONARY RECIPROCATING  
INTERNAL COMBUSTION ENGINES AND TURBINES

Section	
217.386	Applicability
217.388	Control and Maintenance Requirements

217.390	Emissions Averaging Plans
217.392	Compliance
217.394	Testing and Monitoring
217.396	Recordkeeping and Reporting

#### SUBPART T: CEMENT KILNS

Section	
217.400	Applicability
217.402	Control Requirements
217.404	Testing
217.406	Monitoring
217.408	Reporting
217.410	Recordkeeping

#### SUBPART U: NO<sub>x</sub> CONTROL AND TRADING PROGRAM FOR SPECIFIED NO<sub>x</sub> GENERATING UNITS

Section	
217.450	Purpose
217.452	Severability
217.454	Applicability
217.456	Compliance Requirements
217.458	Permitting Requirements
217.460	Subpart U NO <sub>x</sub> Trading Budget
217.462	Methodology for Obtaining NO <sub>x</sub> Allocations
217.464	Methodology for Determining NO <sub>x</sub> Allowances from the New Source Set-Aside
217.466	NO <sub>x</sub> Allocations Procedure for Subpart U Budget Units
217.468	New Source Set-Asides for "New" Budget Units
217.470	Early Reduction Credits (ERCs) for Budget Units
217.472	Low-Emitter Requirements
217.474	Opt-In Units
217.476	Opt-In Process
217.478	Opt-In Budget Units: Withdrawal from NO <sub>x</sub> Trading Program
217.480	Opt-In Units: Change in Regulatory Status
217.482	Allowance Allocations to Opt-In Budget Units

#### SUBPART V: ELECTRIC POWER GENERATION

Section	
217.521	Lake of Egypt Power Plant
217.700	Purpose
217.702	Severability
217.704	Applicability
217.706	Emission Limitations
217.708	NO <sub>x</sub> Averaging
217.710	Monitoring

## 217.712 Reporting and Recordkeeping

SUBPART W: NO<sub>x</sub> TRADING PROGRAM FOR  
ELECTRICAL GENERATING UNITS

Section	Purpose
217.750	Purpose
<u>217.751</u>	<u>Sunset Provisions</u>
217.752	Severability
217.754	Applicability
217.756	Compliance Requirements
217.758	Permitting Requirements
217.760	NO <sub>x</sub> Trading Budget
217.762	Methodology for Calculating NO <sub>x</sub> Allocations for Budget Electrical Generating Units (EGUs)
217.764	NO <sub>x</sub> Allocations for Budget EGUs
217.768	New Source Set-Asides for "New" Budget EGUs
217.770	Early Reduction Credits for Budget EGUs
217.774	Opt-In Units
217.776	Opt-In Process
217.778	Budget Opt-In Units: Withdrawal from NO <sub>x</sub> Trading Program
217.780	Opt-In Units: Change in Regulatory Status
217.782	Allowance Allocations to Budget Opt-In Units

SUBPART X: VOLUNTARY NO<sub>x</sub> EMISSIONS REDUCTION PROGRAM

Section	Purpose
217.800	Purpose
217.805	Emission Unit Eligibility
217.810	Participation Requirements
217.815	NO <sub>x</sub> Emission Reductions and the Subpart X NO <sub>x</sub> Trading Budget
217.820	Baseline Emissions Determination
217.825	Calculation of Creditable NO <sub>x</sub> Emission Reductions
217.830	Limitations on NO <sub>x</sub> Emission Reductions
217.835	NO <sub>x</sub> Emission Reduction Proposal
217.840	Agency Action
217.845	Emissions Determination Methods
217.850	Emissions Monitoring
217.855	Reporting
217.860	Recordkeeping
217.865	Enforcement
217.APPENDIX A	Rule into Section Table
217.APPENDIX B	Section into Rule Table
217.APPENDIX C	Compliance Dates
217.APPENDIX D	Non-Electrical Generating Units

- 217.APPENDIX E Large Non-Electrical Generating Units  
 217.APPENDIX F Allowances for Electrical Generating Units  
 217.APPENDIX G Existing Reciprocating Internal Combustion Engines Affected by the NO<sub>x</sub> SIP Call  
 217.APPENDIX H Compliance Dates for Certain Emissions Units at Petroleum Refineries

AUTHORITY: Implementing Sections 9.9 and 10 and authorized by Sections 27 and 28.5 of the Environmental Protection Act [415 ILCS 5/9.9, 10, 27 and 28.5 (2004)].

SOURCE: Adopted as Chapter 2: Air Pollution, Rule 207: Nitrogen Oxides Emissions, R71-23, 4 PCB 191, April 13, 1972, filed and effective April 14, 1972; amended at 2 Ill. Reg. 17, p. 101, effective April 13, 1978; codified at 7 Ill. Reg. 13609; amended in R01-9 at 25 Ill. Reg. 128, effective December 26, 2000; amended in R01-11 at 25 Ill. Reg. 4597, effective March 15, 2001; amended in R01-16 and R01-17 at 25 Ill. Reg. 5914, effective April 17, 2001; amended in R07-18 at 31 Ill. Reg. 14271, effective September 25, 2007; amended in R07-19 at 33 Ill. Reg. 11999, effective August 6, 2009; amended in R08-19 at 33 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_; amended in R09-20 at 33 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_.

SUBPART W: NO<sub>x</sub> TRADING PROGRAM FOR ELECTRICAL  
GENERATING UNITS

Section 217.751 Sunset Provisions

The provisions of this Subpart W shall not apply for any control period in 2009 or thereafter. Noncompliance with the provisions of this Subpart that occurred prior to 2009 is subject to the applicable provisions of this Subpart.

(Source: Added at 33 Ill. Reg. \_\_\_\_, effective \_\_\_\_\_ )

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on September 17, 2009, by a vote of 5-0.




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John T. Therriault, Assistant Clerk  
Illinois Pollution Control Board