

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF: )  
)  
NOx TRADING PROGRAM: ) R06-22  
AMENDMENTS TO 35 ILL. ) (Rulemaking - Air)  
ADM. CODE PART 217 )

**NOTICE OF FILING**

TO: Ms. Dorothy M. Gunn John C. Knittle, Esq.  
Clerk of the Board Hearing Officer  
Illinois Pollution Control Board Illinois Pollution Control Board  
100 West Randolph Street 2125 South First Street  
Suite 11-500 Champaign, Illinois 61820  
Chicago, Illinois 60601 (VIA FIRST CLASS MAIL)  
(VIA ELECTRONIC MAIL)

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board a **MOTION FOR EXPEDITED REVIEW and INITIAL COMMENTS OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP**, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
REGULATORY GROUP,

By: /s/ Katherine D. Hodge  
One of Its Attorneys

Dated: March 10, 2006

Katherine D. Hodge  
N. LaDonna Driver  
HODGE DWYER ZEMAN  
3150 Roland Avenue  
Post Office Box 5776  
Springfield, Illinois 62705-5776  
(217) 523-4900

**CERTIFICATE OF SERVICE**

I, Katherine D. Hodge, the undersigned, hereby certify that I have served the attached **MOTION FOR EXPEDITED REVIEW and INITIAL COMMENTS OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP** upon:

Ms. Dorothy M. Gunn  
Clerk of the Board  
Illinois Pollution Control Board  
100 West Randolph Street  
Suite 11-500  
Chicago, Illinois 60601

via electronic mail on March 10, 2006; and upon:

John C. Knittle, Esq.  
Hearing Officer  
Illinois Pollution Control Board  
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Champaign, Illinois 61820

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by depositing said documents in the United States Mail, postage prepaid, in Springfield,  
Illinois, on March 10, 2006.

/s/Katherine D. Hodge  
Katherine D. Hodge

IERG:001/R Dockets/Fil/COS – COMMENTS



5. Further, the Agency filed the proposed amendments on January 19, 2006. The proposed amendments were posted on the Board's website on or soon after that date. Certain provisions of the proposed amendments provide that the Agency may confiscate and redistribute certain NOx Allowances from shutdown or transferred units unless such NOx Allowances are transferred "to another source or budget unit subject to the requirements of Subpart U." See Agency's Proposed Amendments to 35 Ill. Adm. Code 217, Subpart U, Section 217.462(d)(2)(D) and Section 217.462(d)(3). Only Illinois sources and budget units are subject to Subpart U. Since the Agency's proposed amendments have been officially filed with the Board and published on the Board's site, prospective out-of-state buyers have access to the Agency's proposed amendments and may not be as likely to purchase NOx Allowances from Illinois units for fear that the Agency's proposed amendments may become the rule in Illinois and that if an Illinois unit may someday be shutdown or sold, the Agency would confiscate the NOx Allowances. Further, out-of-state buyers that may be willing to accept the additional risk associated with the Agency's proposed amendments would likely determine that NOx Allowances from Illinois units would have a lower value than NOx Allowances from units located in other states. Thus, sources that may wish to sell NOx Allowances during the period that the Agency's proposed amendments could possibly become the rule in Illinois would be materially prejudiced as a result of the denial of this motion.

6. In addition, since the proposed amendments include allocations of NOx Allowances that are different for some sources than the current rule, it is unclear if the Agency will, or could properly, issue NOx Allowances for the 2007, 2008 and 2009 seasons before this rulemaking is complete. If the Agency allocates the NOx Allowances

for 2007, 2008 and 2009 under the current rule, it may have to make an adjustment to the allocation to redistribute certain NOx Allowances. Such a redistribution would materially prejudice the owners of the units involved since they would not be certain of the number of NOx Allowances that they could rely upon until some future date after the allocation.

7. On the other hand, if this rulemaking is not expedited and the Agency does not allocate the NOx Allowances for 2007, 2008 and 2009 until after this rulemaking is complete, Illinois owners of units subject to Part 217 would be at a disadvantage with regard to sources in other states. NOx Allowances are transferable between entities in approximately 20 states. Approximately 16 states in the NOx trading program have already made allocations for year 2007. Some states have made allocations through the year 2009. Sources in those states currently have the opportunity to sell the future year NOx Allowances, use them and sell older NOx Allowances or to engage in trades intended to maximize the value of their NOx Allowances. In Illinois, owners of units subject to Part 217, would be denied this opportunity until this rule is finalized. Further, since the value of NOx Allowances tends to decline over time, the value of the 2007, 2008 and 2009 NOx Allowances that Illinois owners of units subject to Part 217 receive will likely be lower if this rule is not expedited. The lack of flexibility and lower NOx Allowance value that would be associated with a delay in this rulemaking would put Illinois owners of units subject to Part 217 at a competitive disadvantage when compared with other states in the program. Therefore, Illinois owners of units subject to Part 217 would be materially prejudiced as a result of the denial of this motion. Thus, for the

reasons stated in paragraphs 5, 6 and 7 above, IERG urges the Board to move forward with this rulemaking as expeditiously as possible.

8. On October 19, 2000, the Board, pursuant to Section 28.5 of the Illinois Environmental Protection Act (“Act”), accepted In the Matter of: Proposed New 35 Ill. Adm. Code 217.Subpart U, NO<sub>x</sub> Control and Trading Program for Specified NO<sub>x</sub> Generating Units, Subpart X, Voluntary NO<sub>x</sub> Emissions Reduction Program, and Amendments to 35 Ill. Adm. Code 211, R01-17 (Oct. 19, 2000) for fast track rulemaking. At that time, the Board, without commenting on the merits of the proposal, adopted the proposed amendments for first notice publication.

9. Since the initial proposal of Part 217 was required to meet the State’s federal obligations under the Clean Air Act, 42 U.S.C. § 7401, *et seq.*, the Board’s review of the proposed amendments, which clarify and update Part 217 regulations, should also be expedited.

10. IERG also requests that the requisite hearing be scheduled as soon as possible in accordance with Section 28(a) of the Act, 415 ILCS 5/28(a).

11. IERG is filing its Initial Comments on the Agency’s proposed amendments to Part 217 simultaneously with this motion.

12. IERG believes that the information necessary for the Board to schedule a public hearing is contained in the Agency’s Statement of Reasons and in IERG’s Initial Comments. If more information is needed, IERG will cooperate fully to expeditiously provide the same to the Board and its hearing officer.

13. As required by 35 Ill. Admin. Code § 101.512, this Motion is accompanied by an affirmation attesting that the facts cited herein are true.

WHEREFORE, for the above and foregoing reasons, the ILLINOIS ENVIRONMENTAL REGULATORY GROUP hereby respectfully requests the Illinois Pollution Control Board to expedite review in this matter.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
REGULATORY GROUP

By: /s/ Katherine D. Hodge  
One of Its Attorneys

Date: March 10, 2006

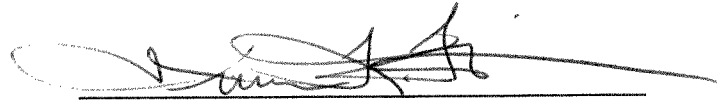
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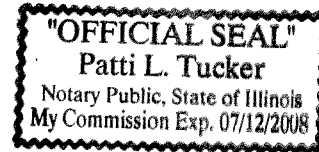
STATE OF ILLINOIS            )  
  ) SS  
COUNTY OF SANGAMON )

Deirdre K. Hirner, being first duly sworn on oath, affirms that the facts set forth in the Motion for Expedited Review are true and correct.



Deirdre K. Hirner, Executive Director  
Illinois Environmental Regulatory Group  
3150 Roland Avenue  
Springfield, Illinois 62703

Subscribed and sworn to before me  
this 10<sup>th</sup> day of March, 2006.

  
\_\_\_\_\_  
Notary Public

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF: )  
 )  
NOx TRADING PROGRAM: ) R06-22  
AMENDMENTS TO 35 ILL. ) (Rulemaking - Air)  
ADM. CODE PART 217 )

**INITIAL COMMENTS OF THE  
ILLINOIS ENVIRONMENTAL REGULATORY GROUP**

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP (“IERG”), by one of its attorneys, Katherine D. Hodge of HODGE DWYER ZEMAN, and submits its Initial Comments in the above-captioned matter to the Illinois Pollution Control Board (“Board”), stating as follows.

**I. INTRODUCTION**

IERG is an Illinois not-for-profit corporation affiliated with the Illinois State Chamber of Commerce. IERG is composed of 59 member companies regulated by governmental agencies that promulgate, administer or enforce environmental laws, regulations, rules or other policies. A number of IERG’s member companies conduct activities governed by the regulations set forth in 35 Ill. Admin. Code Part 217.

On January 19, 2006, the Illinois Environmental Protection Agency (the “Illinois EPA”) submitted a Proposal of Amendment (the “Proposal”) to 35 Ill. Admin. Code Part 217 (“Part 217”). The Board issued an order on February 2, 2006, accepting the Proposal for hearing, granting the Illinois EPA’s motion for waiver with regard to certain filing requirements and requesting copies of certain other documents from the Illinois EPA. IERG submits the following Initial Comments on the Proposal.

**II. DISCUSSION**

**A. General Comments**

Generally, IERG appreciates and supports the Illinois EPA's efforts to provide clarity to Part 217. The Illinois NO<sub>x</sub> Trading Program (the "Program") became effective in 2001. Two IERG member companies own and operate units that were not included in the Program. Other member companies own boilers that are used as emissions control devices (referred to herein as "CO Boilers"), which should have been more clearly exempted from the Program. Further, several of IERG's member companies are relying upon newly established federal emissions calculations methodologies for low mass emissions ("LME") units in order to demonstrate compliance with the State requirements. The LME methodologies were revised by the United States Environmental Protection Agency (the "USEPA") in June 2002 and again in August 2002, after the promulgation of Part 217. Further, there were several inconsistencies and other outdated references in Part 217 that needed to be addressed. IERG contacted the Illinois EPA soon after the rule became effective to discuss the need for amendments to Part 217.

It is important to IERG and its member companies that any clarifications to the rule: (1) specifically exclude CO Boilers located at refineries from the requirements of the rule; (2) include certain units owned by member companies into the rule and provide for an allocation to such units; (3) clarify the sections of the rule that apply to units for which low-emitter status may be requested; and, (4) maintain the economic and constitutional integrity of Part 217.

While IERG agrees that the Proposal accomplishes some of these goals, most notably the exclusion of CO Boilers, IERG believes that the Proposal does not address some issues in an appropriate manner. Further, IERG supports the corrections made by

the Illinois EPA to Subparts A, T, W and the sections of Subpart U that are not specifically addressed herein. In particular, as written, the Confiscation Provisions (as defined below) of the Proposal would likely have a deleterious effect on the economic underpinnings of the Program and would violate the commerce clause of the United States Constitution. IERG proposes to replace the Confiscation Provisions with constitutional and economically sound provisions that will specify the actions that the Illinois EPA must take should they be unable to issue certain NO<sub>x</sub> Allowances. IERG will discuss the specific issues below.

**B. CO Boilers**

The Proposal includes language at amended Section 217.454(e) that will exclude existing CO Boilers at Illinois refineries. IERG believes that the language in the Proposal is sufficient to ensure CO Boilers at refineries will be exempt from the Program. IERG appreciates the Illinois EPA's efforts to resolve this problem with Part 217.

**C. Inclusion of Units**

The Proposal includes Boiler CB-706 located at Flint Hills Resources, LP ("Flint Hills") and provisionally includes the CFB Boiler located at Bunge Milling, Inc. ("Bunge") in the Program by including the boilers on Appendices D and E of Part 217.<sup>1</sup> IERG agrees that this is an appropriate means by which to include the boilers. However, the Statement of Reasons submitted by the Illinois EPA contains several errors with regard to Flint Hills. On page 9, the Statement of Reasons includes two parentheticals indicating that Flint Hills had formerly been doing business as BP Amoco. These parentheticals are not correct and should be stricken. Furthermore, in the next to last

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<sup>1</sup> Flint Hills Boiler CB-706 was covered by the Program but did not receive an allocation of NO<sub>x</sub> Allowances. The Bunge CFB Boiler was inadvertently not covered by Part 217 and did not receive an allocation of NO<sub>x</sub> Allowances.

sentence on page 9, the Statement of Reasons incorrectly lists the sources that have units that will receive a reduction in Allowances in order to provide the NOx Allowances to the boiler at Flint Hills. The list should read as follows: A. E. Staley Manufacturing Company, Archer Daniels Midland Company (Decatur Complex), Corn Products International, Inc. (Argo Manufacturing Facility), Aventine Renewable Energy, Inc., Morris Cogeneration, LLC and Trigen-Cinergy Solutions of Tuscola, LLC.

In addition to the problems with the Statement of Reasons addressed above, Appendices D and E contain several errors as submitted in the Proposal. Appendix D incorrectly lists the company names of ConocoPhillips Company, Marathon Ashland Petroleum LLC and Chicago Coke Co., Inc. Appendix E incorrectly lists the company name of Marathon Ashland Petroleum LLC and Chicago Coke Co., Inc. and misspells the name of Morris Cogeneration, LLC. Further, the unit designation numbers for the first two units listed for ConocoPhillips Company are not correct. Finally, Appendix E, as presented in the Proposal, does not specifically state that the CFB Boiler located at Bunge will not be subject to Subpart U until the boiler has received an allocation of Allowances. Attached hereto as Exhibit A are proposed alternative versions of Appendices D and E, showing changes from the currently enacted Appendices D and E. IERG requests that Appendices D and E of the Proposal be stricken and replaced in their entirety with IERG's proposed Appendices D and E, as presented here in Exhibit A.

**D. Low-emitter Provisions**

As written, the Proposal is unclear as to which units may elect low-emitter status. Section 217.454(c) states that "the owner or operator of a source listed in Appendix E of the Part may elect low-emitter status for a budget unit subject to subsection (a) of this section." Under this language, the owner of a source listed in Appendix E which also

owned other sources not listed on Appendix E with units that may be subject to the Program, would be able to bring the units at the non-Appendix E source into the Program as low-emitters. However, Section 217.472(d) states that “[o]nly a unit located at a source to which the Agency has ever allocated Allowances under Appendix E of this Part may elect low-emitter status.” Under the language of Section 217.472(d), the owner of sources listed on Appendix E and other sources not listed on Appendix E (as described above) would not be able to elect low-emitter status for any unit not listed on Appendix E. The Statement of Reasons adds to the confusion in its discussion of Section 217.454 by stating that “[t]o be eligible, the source must be listed in Appendix E.” SOR p. 13. As can be seen, this language in the Statement of Reasons does not conform to the language in the Proposal. The statement of Reasons further adds to the confusion in its discussion of Section 217.472. On page 18, the Statement of Reasons states that “only a source listed in Appendix E may elect low-emitter status,” while the section it is describing would allow any source to which the Illinois EPA had ever allocated Allowances to elect low-emitter status regardless of whether the source was currently listed on Appendix E. Again, this language in the Statement of Reasons does not conform to the language in the Proposal. Taken together, the conflicting provisions coupled with the conflicting explanations make the low-emitter provisions vague and overly complicated.

IERG proposes to simplify the low-emitter provisions by extending the availability of low-emitter status to all units, not merely those owned by sources listed in Appendix E. IERG believes that flexibility for units that are currently subject to Part 217, and units that could become subject to Part 217, is an important consideration with regard to the low-emitter status provisions. IERG believes that the low-emitter provisions in Part 217 serve an important purpose by allowing units that are truly low

emitters to take federally enforceable permit limits, retire a stream of Allowances large enough to cover their emissions, and thereafter not be subject to the bulk of the provisions of Part 217.

While it could be argued that extending the low-emitter provisions to sources not currently listed on Appendix E would require more effort by the Illinois EPA to make occasional amendments to Appendix E, IERG believes that extending the availability of low-emitter status to units that are not owned by owners and operators listed on Appendix E would not be overly complicated. IERG notes that when Subpart U was initially promulgated, Appendix E included fifteen separate facilities as owners or operators. The Proposal would add two new facilities as owners or operators, delete one facility as an owner or operator, correct the names of four of the original facilities and completely change the names of eight of the original facilities listed on Appendix E to reflect a change in the ownership of the unit. Only two of the original fifteen facilities listed as owners or operators on Appendix E will not be changed by the Proposal. Since the Illinois EPA has been able to make the appropriate changes to Appendix E that were required by the Proposal, it would seem that a few additional changes to Appendix E, due to the inclusion of low-emitters during a future amendment to Appendix E, would not add an onerous additional burden on the Illinois EPA. IERG would recommend that the low-emitter provisions be extended to all appropriate units, whether or not the owner or operator is currently listed on Appendix E.

Attached hereto as Exhibit B are proposed alternative versions of Sections 217.454 and 217.472 of Part 217, regarding low-emitter status and low-emitter requirements, showing changes from the currently enacted Sections 217.454 and 217.472. IERG requests that Sections 217.454 and 217.472 of the Proposal be stricken and

replaced in their entirety with IERG's proposed Sections 217.454 and 217.472, as presented here in Exhibit B.

**E. Economic and Constitutional Integrity of Part 217**

IERG recognizes that there may be situations where the Illinois EPA could be unable to allocate certain NOx Allowances. However, IERG has several concerns with the confiscation provisions included as Section 217.462(d) and (e) (the "Confiscation Provisions") of the Proposal. These problems include: (1) the placement of the Confiscation Provisions; (2) the potential economic impact of the provisions; (3) the inclusion of a specific provision regarding bankruptcy; and (4) the constitutionality of the Confiscation Provisions. IERG will discuss each of its concerns below under separate headings.

**1. Placement**

The Illinois EPA has placed the Confiscation Provisions in Section 217.462, which is entitled "Methodology for Obtaining NOx Allocations." As proposed, the Confiscation Provisions envision a reallocation of certain Allowances and do not discuss any methodology for any unit to obtain Allowances. Since the Confiscation Provisions and IERG's proposed amendments address reallocation of certain Allowances, the provisions would be better placed in Section 217.466 regarding NOx Allocations Procedure for Subpart U Budget Units, or in a new odd-numbered section, such as a new Section 217.467.

**2. Economic Impact**

The Confiscation Provisions are intended to address situations where the Illinois EPA, for one reason or another, is unable to allocate NOx Allowances to the units listed in Appendix E. The Confiscation Provisions provide that if a unit subject to Subpart U



does not have an account officer or an account within two years after the Illinois EPA is required to make an allocation to the unit, the Illinois EPA may confiscate the NOx Allowances and allocate them to new sources. Similarly, if a unit is permanently shutdown and does not permanently transfer its NOx Allowances to a unit subject to Subpart U within two years, the Illinois EPA may confiscate the allocation to the unit and allocate the Allowances to new sources. Further, if a unit is sold and the seller fails to notify the Illinois EPA that the NOx Allowances have been transferred to the new owner or to another source or unit subject to Subpart U, the Illinois EPA will allocate the NOx Allowances to the new owner. It must be noted that only Illinois sources and units may be subject to Subpart U. Therefore, if a unit is shutdown or sold and its allocation is sold to any person who is not an Illinois source or unit subject to Subpart U, the Illinois EPA may confiscate the Allowances.

According to the USEPA, there are five overarching principles that should guide all environmental cap and trade programs – simplicity, accountability, transparency, predictability and consistency. See Tools of the Trade: A Guide to Designing and Operating a Cap and Trade Program for Pollution Control at 3-1, EPA430-B-03-002, June 2003.

Simplicity is important because “markets perform better when the rules are simple and easily understood by all participants.” Id. The Confiscation Provisions add considerable complexity to the Program. For example, as Subpart U currently stands, there are effectively two classes of Allowances: Allowances allocated to Appendix E units which may be traded to any party, and Allowances initially allocated to the NSSA, which will be returned to the Appendix E units if not used in one year. Under the Confiscation Provisions, the number of effective classes of Allowances is expanded

considerably. In addition to (1) Allowances allocated to Appendix E units which may be traded to any party and (2) Allowances initially allocated to the NSSA which will be returned to the Appendix E units if not used in one year, the new classes of Allowances would include: (3) Allowances confiscated from shutdown sources that will be issued to new sources; (4) Allowances transferred from a shutdown source to an out-of-state source; and (5) Allowances that may be claimed to be part of a bankruptcy estate. Each of these new classes of Allowances would have a different value. Further, under the Confiscation Provisions, the very future availability of NOx Allowances could be called to question.

Currently, a broker or out-of-state party may buy a continuous stream of NOx Allowances from an Illinois source or unit for a specified period of years. If the Illinois source shuts down, the party is contractually entitled to retain the NOx Allowances. If the proposed automatic Confiscation Provisions on shutdown were adopted, purchasers of NOx Allowances would be required to address the future economic viability of the seller's business, which is beyond the purview of what these rules should impose. This extensive up-front evaluation would add considerable complexity to the Program and certainly increase transaction costs. The additional complexities and increased transaction costs added to the Program by the Confiscation Provisions would have a chilling effect on the Allowance market in general and, in particular, the price and salability of Illinois Allowances. Finally, the added complexities would not result in any increased benefit to the environment.

In addition, the Confiscation Provisions undermine the predictability and consistency of the Program. Under the Program as it stands, once an entity has purchased Allowances from an Appendix E unit, the purchasing entity can be assured that it will

have the ability to bank or trade the Allowances, just as if it were an entity listed on Appendix E. If the Confiscation Provisions are added to the Program, the future value of NOx Allowances is dependent upon the actions of the source that owns the unit listed on Appendix E, (i.e. whether the unit will be shutdown or sold to another source) even though the Allowances may have been sold years before. Brokers and out-of-state parties could not predict the future value of any stream of Allowances they may purchase.

It should be noted that the on-going success of the Program requires that participants be allowed to continue to trade, regardless of where either party is located. In fact, as of the date of this writing, Illinois NOx SIP Call units have been involved in trades involving 72,928 Allowances. Less than half of these traded Allowances, or 31,195 Allowances, were traded from one Illinois unit to another Illinois unit. Since the majority of trades are not made from one Illinois unit to another, the Confiscation Provisions would have a profound negative effect on the Program.

### **3. Bankruptcy Provision**

The Proposal includes, as the second sentence of Section 217.462(d), the following sentence: “This authority does not apply to Allowances at a source or emission unit subject to or at issue in a pending bankruptcy action, or where an order for relief has been entered in an involuntary bankruptcy case, such that the debtor, trustee, or other parties in interest may assert that the owner or operator’s interest in the Allowances may be considered property of the estate pursuant to Section 541(a) of the Bankruptcy Code (11 U.S.C. § 541(a)).” IERG fails to understand inserting this sentence into the Proposal.

With regard to bankruptcy law, the United States Supreme Court has repeatedly affirmed the position that “[p]roperty interests are created and defined by state law.” Butner v. United States, 440 U.S. 48, 55 (1979). According to Lexis, Butner has been

cited for this specific principle over 700 times. These cases make it clear that before an item can be “property of the estate” for the purposes of bankruptcy, the item must first be “property” under state law. Section 217.456(d)(6) of Part 217 states that “[a]n allowance allocated by the Agency or USEPA under the NOx Trading Program or pursuant to this Subpart does not constitute a property right.” The new bankruptcy related sentence in Section 217.462(d) is irreconcilable with the statement in Section 217.456(d)(6) that Allowances are not a property right. An item is either property under state law or it is not. In fact, “a bankruptcy trustee can acquire no greater rights in property than the debtor.” In re Thompson, 253 B.R. 823, 825 (Bankr. D. Ohio 2000).

When two enactments of the same body are irreconcilable, under the doctrine of repeal by implication “the one which was enacted later should prevail . . .” State v. Mikusch, 138 Ill. 2d 242, 254 (1990). In the present matter, adoption of the new sentence in Section 217.462(d), could result in NOx Allowances constituting a property right through the repeal by implication of Section 217.456(d)(6). Thereafter, Allowances could be considered property for any purpose, including the takings and interference with contracts provisions of the United States Constitution. If Allowances are property, the application of the other provisions of Section 217.462(d) and (e) would certainly seem to be a state action resulting in a taking of property without just compensation and, therefore, constitute an unconstitutional taking.

The bankruptcy provision introduces added uncertainty into the Program. While it seems clear that under the bankruptcy provision the Illinois EPA would not be allowed to confiscate NOx Allowances that may be claimed as property of a bankruptcy estate, the rule does not provide any guidance regarding the actions the Illinois EPA’s must take in that circumstance. It cannot be determined whether the Illinois EPA must allocate the

Allowances to the original unit, allocate the Allowances to some other unit or whether the Illinois EPA would be allowed to withhold the NO<sub>x</sub> Allowances indefinitely.

Furthermore, the current Section 217.456(d)(6) provision (Allowances are not property) could be relied upon by the Illinois EPA, should it determine that it must reduce allocations to meet future emission reduction requirements. However, if this were to occur at some future date, it would seem to promote disparate treatment of Allowances for units at sources that had ever been involved in a bankruptcy as opposed to those that had not. For example, if a party in a bankruptcy case asserts that the continuous perpetual stream of Allowances are the property of a bankruptcy estate, it would seem that the new sentence would indicate that the Illinois EPA would concede that such Allowances were property of the bankrupt, and untouchable by the Illinois EPA. Should such a situation occur, the Illinois EPA could require reductions of allocations of Allowances to non-bankrupt units, but could not interrupt allocations of Allowances to bankrupt units. Since the bankruptcy provision is not specific to units subject to Appendix E, it would seem that, should the Illinois EPA determine that future reductions of Allowances were needed, a broker could purchase continuous streams of Allowances from several Appendix E units, declare bankruptcy, claim the Allowances were part of the bankruptcy estate and, therefore, protect those Allowances from reduction.

Finally, no other market-based cap and trade program in Illinois provides for specialized treatment in the instance of bankruptcy. It should be noted that the Emission Reduction Market Program (35 Ill. Adm. Code 205 et. seq.) (“ERMS”) is a cap and trade market-based emissions reduction program with provisions that address the same emissions market issues that are addressed by the Program. The ERMS program does not have any bankruptcy provision. Subpart W of Part 217 (25 Ill. Adm. Code Subpart W),

the federal SO<sub>2</sub> trading program (40 CFR 73), the federal NO<sub>x</sub> SIP Call trading program (40 CFR 96), the federal NO<sub>x</sub> budget trading program (40 CFR 97) all comprise market-based cap and trade emission reduction programs. None of these programs contains a provision regarding differing property rights in a bankruptcy situation or a concept limiting interstate trading with regard to Allowances held by shutdown units.

Generally, IERG believes that the bankruptcy provision adds considerable complexity which would result in a negative effect on the Program. Further, the added complexity and negative effect would not be balanced by any benefit to the Illinois EPA, affected sources or the environment. IERG would recommend that the second sentence of Section 217.462(d) be removed from the Proposal.

#### **4. Constitutionality of Confiscation Provisions**

Sections 217.462(e)(1) and (2), of the Illinois EPA's Proposal, provide that in most circumstances where the Illinois EPA confiscates Allowances, the Allowances will be reallocated to new sources in Illinois. Sections 217.462(d)(2) and (d)(3) provide that Allowances from a shutdown unit or a unit sold to another entity will be confiscated unless the shutdown unit transfers its Allowances to another Illinois source. IERG requests that if there must be Confiscation Provisions, the owners or operators of shutdown or sold units should be allowed to keep their Allowances and transfer such Allowances to any party that can legally purchase such Allowances. IERG also requests that any confiscated Allowances be redistributed to budget units already listed in Appendix E. While the Illinois EPA does not state its reasons for requiring transfers to in-state units and making redistributions to new in-state units, the only rational assumption is that the rule is intended to facilitate business, and particularly new business, in Illinois. IERG, as an organization representing Illinois businesses, finds this

rationale to be laudable. However, IERG believes that the provisions discussed above would constitute an unconstitutional interference with interstate commerce.

There do not appear to be any federal regulations that address the situation as described in the preceding paragraph. Therefore “[i]n the absence of federal legislation, these subjects are open to control by the States so long as they act within the restraints imposed by the Commerce Clause itself.” Philadelphia v. New Jersey, 437 U.S. 617, 623 (1978). Furthermore, “State laws enacted for a legitimate public purpose with only an incidental effect on interstate commerce are constitutional ‘unless the burden imposed is clearly excessive in relation to the putative local benefits.’” Clean Air Mkts. Group v. Pataki, 194 F. Supp. 2d 147, 159 (D.N.Y. 2002). The new source set aside (“NSSA”) provisions of the current version of Part 217 are an excellent example of a state law with a legitimate purpose (providing a fund of Allowances for new Illinois sources) and an incidental and limited effect on interstate commerce (only 3% of the total NOx budget for non-EGUs is reserved for the NSSA, with the rest of the Illinois Allowances available for interstate commerce).

The Proposal would provide that all Allowances confiscated from budget units without accounts or account officers, and all Allowances confiscated from shutdown units, would be allocated to new Illinois budget units. Furthermore, under Subsections 217.462(d)(2) and (d)(3), sources contemplating a shutdown or sale of a unit would be forced to sell their Allowances to another Illinois unit or lose them. The Proposal does not limit the number of Allowances that may be affected by the Confiscation Provisions. As stated before, although IERG finds the Illinois EPA’s interest in Illinois business laudable, “regardless of the ultimate legislative purpose, even if laudable, a statute that discriminates against commerce is protectionist and violates the Constitution. If the

legislative means result in ‘isolating the State from the national economy,’ then the statute is unconstitutional despite a legitimate legislative goal. Further, a state cannot validly legislate to ‘its own inhabitants a preferred right of access over consumers in other States to its natural resources or to privately owned articles of trade. In other words, a state cannot block imports from other states, nor exports from within its boundaries, without offending the Constitution.” Id. at 160.

IERG maintains its position that the confiscation aspects of the Confiscation Provisions, as written, are unconstitutional. However, if certain Allowances are to be confiscated, it would seem that there are three possible alternatives. First, the Illinois EPA could redistribute the confiscated Allowances to new sources, but as described above, that option would seem to be unconstitutional. Second, they could retire the confiscated Allowances, which option would be antithetical to the market-based nature of Part 217 and would also violate section 9.9(d)(4) of the Illinois Environmental Protection Act (providing “that the Agency allocate to non-EGUs Allowances that are designated in the rule, unless the Agency has been directed to transfer the allocations to another unit subject to the requirements of the NOx Trading Program, and that upon shutdown of a non-EGU, the unit may transfer or sell the Allowances that are allocated to such unit”). Third, the Illinois EPA could redistribute the confiscated Allowances to the units listed in Appendix E in order for such Allowances to remain available for interstate commerce. IERG would recommend the third approach listed above.

## **5. Scenarios**

The full impact of the Confiscation Provisions may best be understood by the presentation of actual scenarios that show the effects of the Confiscation Provisions when applied to potential business situations. Below are four scenarios that discuss the Illinois



EPA's actions that would be required based on Section 217.462(d)(1)-(3) of the Proposal and the disposition of the confiscated Allowances, as would be required by Section 217.462(e)(1)-(3).

Scenario 1

Section 217.462 (d)(1) - Through a contract, company A transfers to company B 100 Allowances per year for 15 years to be delivered once every three years. The first three-year transfer is carried out without problem. A's account representative dies within 24 months after the Agency is required to make the next 3-year NOx allocation and A does not certify a new representative for a considerable time. It is unclear what the Illinois EPA would be required to do in such a situation. Company A failed to have an account representative for a period within two years of the time that the Agency was required to make its next allocation. The rule is silent regarding how long a source can be without an account representative within the 2-year timeframe before (d)(1) is triggered. The Agency sends a certified letter to A. A responds in 10 days with evidence that it has continuously held a NOx Budget Account, but has not yet appointed a new account representative. The Agency may consider the Allowances "forfeited" under (e) because the Agency did **not** receive a response from the source indicating that it "has appointed an account representative." Since the Agency can consider the Allowances forfeited, it can redistribute the Allowances to new sources under (e)(1). When the next installment under the contract is due, B contacts A to receive transfer of the Allowances. A informs B that it cannot perform. B cannot sue A for specific performance of the contract because A does not have any Allowances. B probably cannot sue the Agency because the Agency is not a party to the contract. B will have taken all appropriate steps to assure its future compliance and may still be left without Allowances.

Scenario 2

Section 217.462 (d)(2) - Company C had a single NOx budget unit that received 100 NOx Allowances per year. C permanently ceased operation of the unit and withdrew its permit. The current price for NOx Allowances is \$1,500 per allowance. The source has good reason to believe that in a few years the price for Allowances will be \$5,500 or more per allowance. C makes occasional spot sales but generally holds its Allowances and does not permanently transfer them to another source within two years of the date that the Agency is required to make a NOx allocation. The Agency sends C a certified letter. C responds in 10 days that it intends to keep its Allowances and sell them when the price increases. C's Allowances will be considered forfeited by the Agency under (d)(2) because C did not permanently transfer its Allowances to another source subject to Subpart U before the Agency sent the certified letter. C's Allowances will be reallocated to new sources under (e)(1). The only way C can avoid this result is to permanently transfer all of its Allowances at a time when the price for Allowances may be extraordinarily low. The rule drives C's behavior rather than the market forces that the rule was originally intended to harness for environmental purposes.

Scenario 3

Section 217.462 (d)(2) – This scenario is the same as scenario 2 above, except that company C transferred all of its current and future NOx Allowances some time ago to an out-of-state broker who is not subject to Subpart U. Since C did not permanently transfer its Allowances to another Illinois source subject to Subpart U before the Illinois EPA sent the certified letter. C's Allowances will be reallocated to new sources under

(e)(1). The broker, through no fault of his own, will not receive the NO<sub>x</sub> Allowances that he bargained and paid for.

#### Scenario 4

Section 217.462 (d)(3) - Company D sells all of its assets (except its Allowances) to company E before the Agency's next allocation date. Company E is a large operation that already has an allocation and, for tax purposes, does not want to acquire company D's Allowances. Company D sells all of its NO<sub>x</sub> Allowances to company F which is an Ohio company that is not subject to Subpart U. The Agency sends a certified letter to the former owner. The former owner responds that it sold its NO<sub>x</sub> Allowances to company F. The Agency must confiscate the Allowances under (d)(3) because company F is an Ohio company that is not subject to Subpart U. The Agency would then be required to redistribute the Allowances to company E under (e)(3). The rule thwarts the intended outcome of a perfectly legitimate market transaction. D will have no Allowances to provide to F and will be forced to breach its contract with F. F will not acquire the Allowances that it bargained for in good faith. E will be stuck with Allowances that it specifically did not want.

### **6. IERG's Proposed Amendments**

Attached hereto as Exhibit C, please find suggested language that would address the same situations that the Illinois EPA has attempted to address with the Confiscation Provisions. The language is marked to show changes versus the current section of Part 217. Please note that the suggested language: (1) does not classify certain Allowances as "property" while claiming that others are not property; (2) provides specific, well defined steps that the Illinois EPA and the owners/operators of budget units must take in

situations where some units do not receive an allocation; and (3) avoids the commerce clause constitutional problems that would be created by the Confiscation Provisions.

IERG's proposed amendments provide the Illinois EPA and sources with clear, definite procedures that must be followed in a situation where the allocation of certain NOx Allowances to a unit listed in Appendix E is in question. In IERG's proposal, a new subsection (1) has been added under Subsection 217.466(a) that will require the Illinois EPA to send a certified letter to the owner or operator or account representative of any budget unit that has not received a NOx Allocation. A new subsection (2) has been added to specify the actions that the Illinois EPA must take if the owner, operator or account representative has performed all of the activities needed for the budget unit to receive an allocation. A new subsection (3) has been added to specify what action the Illinois EPA must take when an owner, operator or account representative has not yet taken the required actions for a budget unit to receive a NOx Allocation, but the owner or operator nevertheless indicates that it does intend to fulfill such requirements. A new subsection (4) has been added to specify the actions the Illinois EPA must take if the owner, operator or account representative indicates that it has transferred some or all of its NOx Allowances to another budget unit. A new subsection (5) has been inserted to specify the actions the Illinois EPA must take if it does not receive a response from the owner, operator or account representative within 45 days or if the owner, operator or account representative indicates that it does not intend to obtain the necessary requirements to receive a NOx Allocation.

IERG requests that Confiscation Provisions in the Proposal be stricken in their entirety. IERG further requests that IERG's proposed changes to Section 217.466, as provided in Exhibit C, be included in Part 217.

**III. CONCLUSION**

IERG requests that the rulemaking in this proceeding be amended consistent with the above comments. IERG appreciates this opportunity to participate in this rulemaking.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
REGULATORY GROUP,

By: /s/ Katherine D. Hodge  
One of Its Attorneys

Dated: March 10, 2006

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GWN/Misc./217 Changes/Comments to Agency Proposal v03

**Exhibit A**

## Section 217.Appendix D Non-Electrical Generating Units

COMPANY ID # / NAME	UNIT DESIGNATION	UNIT DESCRIPTION
1	2	3
<u>A. E. STALEY MANUFACTURING COMPANY</u>		
115015ABX	<del>850700612999</del> 6020099	COAL-FIRED BOILER 1
	<u>299</u>	
115015ABX	<del>850700612999</del> 6020099	COAL-FIRED BOILER 2
	<u>299</u>	
115015ABX	<del>730200841299</del> 6020099	BOILER #25
	<u>129</u>	
<u>ARCHER DANIELS MIDLAND CO EAST PLANT COMPANY (DECATUR COMPLEX)</u>		
115015AAE	85060030081	COAL-FIRED BOILER 1
115015AAE	85060030081	COAL-FIRED BOILER 2
115015AAE	85060030081	COAL-FIRED BOILER 3
115015AAE	85060030082	COAL-FIRED BOILER 4
115015AAE	85060030082	COAL-FIRED BOILER 5
115015AAE	85060030082	COAL-FIRED BOILER 6
115015AAE	85060030083	GAS-FIRED BOILER 7
115015AAE	85060030083	GAS-FIRED BOILER 8
<u>FLINT HILLS RESOURCES, LP (JOLIET FACILITY)</u>		
<u>197800ABZ</u>	<u>960100250119</u>	<u>CB-706</u>
<u>CPC INTERNATIONAL INC.</u>		
<u>CORN PRODUCTS INTERNATIONAL, INC. (ARGO MANUFACTURING FACILITY)</u>		
031012ABI	<del>91020069160</del> 96010009	COAL-GAS-FIRED BOILER 6
	<u>160</u>	
031012ABI	<del>73020146041</del> 96010009	BOILER SERIAL 15813 # 1
	<u>041</u>	COAL-FIRED
031012ABI	<del>73020146042</del> 96010009	BOILER SERIAL 15812 # 2
	<u>042</u>	COAL-FIRED
031012ABI	<del>73020146043</del> 96010009	GAS FIRED BOILER NO 4
	<u>043</u>	<u>WEST STACK BLRS</u>
031012ABI	<del>73020147045</del> 96010009	BOILER SERIAL 18345 # 3
	<u>045</u>	COAL-FIRED
031012ABI	<del>73020147046</del> 96010009	GAS FIRED BOILER NO 5
	<u>046</u>	<u>EAST STACK BOILER</u>

GREAT LAKES NAVAL STATION  
NAVAL TRAINING CENTER/GREAT LAKES

097811AAC	<u>7808007101195120330</u>	BOILER #5
	<u>011</u>	
097811AAC	<u>7808007101195120330</u>	BOILER #6
	<u>011</u>	

INDIAN REFINING LIMITED PARTNERSHIP

<del>101805AAC</del>	<del>72110297015</del>	<del>BOILER 18601</del>
<del>101805AAC</del>	<del>72110297016</del>	<del>BOILER 18602</del>
<del>101805AAC</del>	<del>72110297017</del>	<del>BOILER 18603</del>

JEFFERSON SMURFIT CORPORATION

119010AAL	72120426001	BLR 7-COAL FIRED
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CHICAGO COKE CO., INC.

<u>031600AMC</u>	<u>96030032091</u>	<u>BOILER 4B</u>
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MARATHON OIL CO ILLINOIS REFINING DIVISION  
MARATHON ASHLAND PETROLEUM LLC

033808AAB	<u>7211129105596010007</u>	BOILER #3 OIL,REF GAS
	<u>055</u>	FIRED
033808AAB	<u>7211129105696010007</u>	BOILER #4 REF GAS,
	<u>056</u>	OIL FIRED

MOBIL JOLIET REFINING CORP

EXXONMOBIL OIL CORPORATION (JOLIET FACILITY)

197800AAA	<u>7211056700295120304</u>	AUX BOILER-REFINERY
	<u>002</u>	GAS FULL FIRE IF COGEN
		DOWN
197800AAA	<u>8601000904395120304</u>	STATIONARY GAS
	<u>043</u>	TURBINE

PEKIN ENERGY COMPANY

AVENTINE RENEWABLE ENERGY, INC.

179060ACR	<u>7302008701996030001</u>	<u>BOILER C – PULVERIZED</u>
	<u>019</u>	<u>WET BOTTON, WALL</u>
		<u>FIRED</u>

QUANTUM – USI DIVISION

MORRIS COGENERATION, LLC

<u>063800AAC063800AAJ</u>	<u>7210001601399110011</u>	BOILER #1
	<u>001</u>	
<u>063800AAC063800AAJ</u>	<u>7210001601399110011</u>	BOILER #2
	<u>002</u>	
<u>063800AAC063800AAJ</u>	<u>7210001601499110011</u>	#3 GAS FIRED BOILER
	<u>003</u>	

<u>063800AAC063800AAJ</u>	<u>7210001601699110011</u>	#5 GAS FIRED BOILER
	<u>004</u>	
<u>063800AAC063800AAJ</u>	<u>7210001601799110011</u>	#6 BOILER
	<u>005</u>	

~~QUANTUM—USI DIVISION~~~~TRIGEN-CINERGY SOLUTIONS OF TUSCOLA, LLC~~

<u>041804AAB041030ABG</u>	<u>7212120710801010038</u>	BOILER NO 1
	<u>01</u>	
<u>041804AAB041030ABG</u>	<u>7212120710901010038</u>	BOILER NO 2
	<u>06</u>	
<u>041804AAB041030ABG</u>	<u>7212120711001010038</u>	BOILER NO 3
	<u>07</u>	
<u>041804AAB041030ABG</u>	<u>7212120711101010038</u>	BOILER NO 4
	<u>08</u>	
<u>041804AAB</u>	<u>72121207112</u>	BOILER NO 5

~~SHELL OIL CO WOOD RIVER MFG COMPLEX~~~~CONOCOPHILLIPS COMPANY (WOOD RIVER REFINERY)~~

<u>119090AAA</u>	<u>7211063308095120306</u>	BOILER NO 15
	<u>080</u>	
<u>119090AAA</u>	<u>7211063308195120306</u>	BOILER NO 16
	<u>081</u>	
<u>119090AAA</u>	<u>7211063308295120306</u>	BOILER NO 17
	<u>082</u>	

~~U-UNITED STATES STEEL —CORPORATION (SOUTH WORKS)~~

<u>031600ALZ</u>	<u>8201004401396030055</u>	NO. 6 BOILER, #5 POWER
	<u>013</u>	STATION (FUEL-NAT.GAS)
<u>031600ALZ</u>	<u>8201004401496030055</u>	NO 1 BLR NG
	<u>014</u>	

~~UNIV OF ILL—ABBOTT POWER PLANT~~

<u>019010ADA</u>	<u>82090027006</u>	<del>BOILER #7 (265 MBTU)</del>
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~~UNO VEN COMPANY~~~~CITGO PETROLEUM CORPORATION~~

<u>197090AAI</u>	<u>7211025303796030079</u>	BOILER 430-B-1
	<u>037</u>	

~~BUNGE MILLING, INC.~~

<u>183020ABT</u>	<u>72121262091</u>	<u>CFB BOILER</u>
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(Source: ~~Added/Amended~~ at 25 \_\_\_\_ Ill. Reg. 128 \_\_\_\_\_, effective ~~December 26, 2000~~  
)



## Section 217.Appendix E Large Non-Electrical Generating Units

COMPANY ID # / NAME	UNIT DESIGNATION	UNIT DESCRIPTION	BUDGET ALLOCATION	BUDGET ALLOCATION LESS 3% NSSA
1	2	3	4	5

## A. E. STALEY MANUFACTURING COMPANY

115015ABX	<del>85070061299960</del> 20099299	COAL-FIRED BOILER 1	<del>176175</del>	<del>171170</del>
115015ABX	<del>85070061299960</del> 20099299	COAL-FIRED BOILER 2	175	170
115015ABX	<del>73020084129960</del> 20099129	BOILER #25	125	121
A. E. STALEY MANUFACTURING COMPANY (Total Allocation)			476475	462461

## ARCHER DANIELS MIDLAND CO EAST PLANT — COMPANY (DECATUR COMPLEX)

115015AAE	85060030081	COAL-FIRED BOILER 1	<del>238237</del>	<del>231230</del>
115015AAE	85060030081	COAL-FIRED BOILER 2	261	253
115015AAE	85060030081	COAL-FIRED BOILER 3	267	259
115015AAE	85060030082	COAL-FIRED BOILER 4	276	268
115015AAE	85060030082	COAL-FIRED BOILER 5	275	267
115015AAE	85060030082	COAL-FIRED BOILER 6	311	302
115015AAE	85060030083	GAS-FIRED BOILER 7	19	18
115015AAE	85060030083	GAS-FIRED BOILER 8	19	18
ARCHER DANIELS MIDLAND CO EAST PLANT COMPANY (DECATUR COMPLEX) (Total Allocation)			1,6661,665	1,6161,615

## FLINT HILLS RESOURCES, LP (JOLIET FACILITY)

197800ABZ	960100250119	CB-706	6	6
FLINT HILLS RESOURCES, LP (JOLIET FACILITY) (Total Allocation)			6	6

## CORN PRODUCTS INTERNATIONAL, INC. (ARGO MANUFACTURING FACILITY)

031012ABI	<del>91020069160</del> <u>960</u> <u>10009160</u>	GAS-FIRED BOILER 6	55	53
031012ABI	<del>73020146041</del> <u>960</u> <u>10009041</u>	BOILER # 1 COAL-FIRED	<del>209</del> <u>210</u>	<del>203</del> <u>204</u>
031012ABI	<del>73020146042</del> <u>960</u> <u>10009042</u>	BOILER # 2 COAL-FIRED	210	203
031012ABI	<del>73020146043</del> <u>960</u> <u>10009043</u>	GAS FIRED BOILER NO 4 WEST STACK BLRS	81	79
031012ABI	<del>73020147045</del> <u>960</u> <u>10009045</u>	BOILER # 3 COAL-FIRED	211	205
031012ABI	<del>73020147046</del> <u>960</u> <u>10009046</u>	GAS FIRED BOILER NO 5 EAST STACK BOILER	81	79
CORN PRODUCTS INTERNATIONAL, INC. (ARGO MANUFACTURING FACILITY) (Total Allocation)			<u>848847</u>	<u>823822</u>

## GREAT LAKES NTC

## NAVAL TRAINING CENTER/GREAT LAKES

097811AAC	<del>78080071011</del> <u>951</u> 20330011	BOILER # 5	26	25
097811AAC	<del>78080071011</del> <u>951</u> 20330011	BOILER # 6	26	25
GREAT LAKES NTC NAVAL TRAINING CENTER/GREAT LAKES (Total Allocation)			52	50

## JEFFERSON SMURFIT CORPORATION

119010AAL	72120426001	BLR 7-COAL FIRED	39	38
JEFFERSON SMURFIT CORPORATION (Total Allocation)			39	38

MARATHON ~~OIL CO ILLINOIS REFINING DIV~~ ASHLAND PETROLEUM LLC

033808AAB	<del>72111291055</del> <u>960</u> <u>10007055</u>	BOILER #3 OIL, REF GAS FIRED	53	51
033808AAB	<del>72111291056</del> <u>960</u> <u>10007056</u>	BOILER #4 REF GAS, OIL FIRED	53	52
MARATHON <del>OIL CO ILLINOIS REFINING</del> <del>DIV</del> <u>ASHLAND PETROLEUM LLC</u> (Total Allocation)			106	103

EXXON MOBIL  
EXXONMOBIL OIL CORPORATION (JOILET REFINERY)

197800AAA	<u>72110567002951</u> <u>20304002</u>	AUX BOILER- REFINERY GAS	101	98
197800AAA	<u>86010009043951</u> <u>20304043</u>	STATIONARY GAS TURBINE	85	82
<u>EXXON MOBILEXONMOBIL OIL CORPORATION (JOLIET REFINERY)</u> (Total Allocation)			186	180

WILLIAMS  
AVENTINE RENEWABLE ENERGY, INC.

179060ACR	73020087019	BOILER C - PULVERIZED DRY BOTTOM	<u>377376</u>	<u>366365</u>
<u>WILLIAMS AVENTINE RENEWABLE ENERGY, INC.</u> (Total Allocation)			<u>377376</u>	<u>366365</u>

EQUISTAR  
MORRIS COGENERATION, LLC

<u>063800AAC</u>	<u>72100016013991</u>	BOILER #-1	40	39
<u>063800AAJ</u>	<u>10011001</u>			
<u>063800AAC</u>	<u>72100016013991</u>	BOILER #-2	40	39
<u>063800AAJ</u>	<u>10011002</u>			
<u>063800AAC</u>	<u>72100016014991</u>	#3 GAS FIRED BOILER	40	39
<u>063800AAJ</u>	<u>10011003</u>			
<u>063800AAC</u>	<u>72100016016991</u>	#5 GAS FIRED BOILER	40	39
<u>063800AAJ</u>	<u>10011004</u>			
<u>063800AAC</u>	<u>72100016017991</u>	#6 BOILER	<u>4039</u>	<u>3837</u>
<u>063800AAJ</u>	<u>10011005</u>			
<u>EQUISTAR MORRIS COGENERATION, LLC</u> (Total Allocation)			<u>200199</u>	<u>194193</u>

EQUISTAR  
TRIGEN-CINERGY SOLUTIONS OF TUSCOLA, LLC

<u>041804AAB</u>	<u>72121207108960</u>	BOILER NO 1	<u>121120</u>	<u>118117</u>
<u>041030ABG</u>	<u>20121108</u>			
<u>041804AAB</u>	<u>72121207109960</u>	BOILER NO 2	121	118
<u>041030ABG</u>	<u>20121109</u>			
<u>041804AAB</u>	<u>72121207110960</u>	BOILER NO 3	121	117
<u>041030ABG</u>	<u>20121110</u>			
<u>041804AAB</u>	<u>72121207111960</u>	BOILER NO 4	120	116
<u>041030ABG</u>	<u>20121111</u>			
<u>041804AAB</u>	<u>72121207112</u>	BOILER NO 5	0	0
<u>EQUISTAR TRIGEN-CINERGY SOLUTIONS OF TUSCOLA, LLC</u> (Total Allocation)			<u>483482</u>	<u>469468</u>

~~TOSCO~~

CONOCOPHILLIPS COMPANY (WOOD RIVER REFINERY)

119090AAA	<del>72110633080</del> 951 20306080	BOILER NO 15	40	38
119090AAA	<del>72110633081</del> 951 20306081	BOILER NO 16	40	39
119090AAA	<del>72110633082</del> 951 20306082	BOILER NO 17	80	78
<del>TOSCO</del> CONOCOPHILLIPS COMPANY (WOOD RIVER REFINERY) (Total Allocation)			160	155

~~U-UNITED STATES STEEL -CORPORATION (SOUTH WORKS)~~

031600ALZ	82010044013	NO. 6 BOILER, #5 POWER STATION (FUEL- NAT.GAS)	90	88
031600ALZ	82010044014	NO 1 BLR NG	90	87
<del>U-UNITED STATES STEEL -CORPORATION (SOUTH WORKS) (Total Allocation)</del>			180	175

~~UNIV OF ILL - ABBOTT POWER PLANT~~

<del>019010ADA</del>	<del>82090027006</del>	<del>BOILER #7</del>	<del>86</del>	<del>83</del>
<del>UNIV OF ILL - ABBOTT POWER PLANT (Total Allocation)</del>			<del>86</del>	<del>83</del>

CITGO PETROLEUM CORPORATION

197090AAI	72110253037	BOILER 430-B-1	23	22
CITGO PETROLEUM CORPORATION (Total Allocation)			23	22

~~LTV STEEL COMPANY CHICAGO COKE CO., INC.~~

<del>301600AMC</del>	<del>{UNIT</del>	<del>BOILER NO 4B</del>	<del>*60</del>	<del>*58</del>
<del>031600AMC</del>	<del>DESIGNATION]</del>			
	<del>96030032091</del>			
<del>LTV STEEL COMPANY CHICAGO COKE CO., INC. (Total Allocation)</del>			<del>*60</del>	<del>*58</del>

\* Pursuant to Section 217.460(f), Column 2, Column 4 and Column 5 will be adjusted at such time as USEPA makes an allocation for LTV Steel's Boiler No. 4B.

~~BUNGE MILLING, INC.~~

<del>183020ABT</del>	<del>72121262091</del>	<del>CFB BOILER</del>	<del>*</del>	<del>*</del>
<del>BUNGE MILLING, INC. (Total Allocation)</del>			<del>*</del>	<del>*</del>

\*Columns 4 and 5 will be adjusted when USEPA makes an allocation for Bunge's CFB Boiler. Bunge's CFB Boiler will not be subject to any of the provisions of Subpart U of this Part until such time as the CFB Boiler receives an allocation of NOx Allowances.

GRAND TOTAL	4,8824,856	4,7364,711
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(Source: ~~Added~~Amended at ~~25~~ Ill. Reg. ~~5914~~, effective ~~April 17, 2001~~  
)

## Exhibit B

Section 217.454      Applicability

- a) ~~This~~ Except as provided in subsection (e) of this Section, this Subpart applies to any fossil fuel-fired stationary boiler, combustion turbine, or combined cycle system, with a maximum design heat input greater than 250 mmbtu/hr and that is:
1. A unit listed in Appendix E of this ~~Subpart~~Part, irrespective of any subsequent changes in ownership, unit designation, or name of the unit; or
  2. A unit not listed in Appendix E of this ~~Subpart~~Part that:
    - A. At no time serves a generator producing electricity for sale;
    - B. At any time serves a generator producing electricity for sale, if such generator has a nameplate capacity of 25 MWe or less and has the potential to use no more than 50% of the potential electrical output capacity of the unit. Fifty percent of a unit's potential electrical output capacity shall be determined by multiplying the unit's maximum design heat input by 0.0488 MWe/mmbtu. If the size of the generator is smaller than this calculated number, the unit is subject to the provisions of this Subpart, but if the size of the generator is greater than this calculated number, the unit is subject to the provisions of Subpart W of this Part;
    - C. Is part of any source, as that term is defined in 35 Ill. Adm. Code Section 211.6130, listed in Appendix E of this Part; or
    - D. Is a unit subject to Subpart W of this Part (excluding any unit listed in Appendix F of this Part, regardless of any change in ownership or any change of operator), and the owner or operator makes a permanent election, at the time of applying for a budget permit pursuant to this Part, to subject the unit to the requirements of this Subpart rather than Subpart W of this Part. Any unit for which such an election is made will not receive an allocation from the Subpart U or Subpart W NO<sub>x</sub> Trading Budget.
- b) Those units that meet the above criteria and are subject to the NO<sub>x</sub> Trading Program emissions limitations contained in this Subpart are budget units.
- c) Low-emitter status: Notwithstanding subsection (a) of this Section, the owner or operator of a budget unit subject to the requirements of

subsection (a) of this Section and which such unit is listed in Appendix E of this Part or which such unit meets the requirements of subsections (c)(1) and (c)(2) of this Subpart may elect low-emitter status by obtaining a permit with federally enforceable conditions that meet the requirements of Section 217.472(a). Starting with the effective date of such permit, the unit shall be subject only to the requirements of Section 217.472. A unit not listed in Appendix E is not eligible to elect low-emitter status pursuant to Section 217.472 unless the owner or operator of such unit meets the following requirements:

- 1) The owner or operator of the unit not listed in Appendix E shall obtain a permanent transfer of allowances from a unit listed in Appendix E to the unit not listed in Appendix E. Such permanent transfer will not be effective until, the owner or operator has complied with Section 217.462 of this Subpart and the change in allocation is reflected in the applicable federally enforceable permits.
- 2) The Agency shall initiate a rulemaking to amend Appendices D, E and G of this Part every three years to reflect any changes to the listed NO<sub>x</sub> allocations, if such changes have occurred.

d) The owner or operator of any budget unit not listed in Appendix E of this Part but subject to this Subpart shall not receive an allocation of NO<sub>x</sub> allowances from the Subpart U or Subpart W NO<sub>x</sub> Trading Budget, except for any allowance from the ~~new source set-aside-NSSA~~ NSSA in accordance with Section 217.468 of this Subpart. Such unit must acquire NO<sub>x</sub> allowances in an amount not less than the NO<sub>x</sub> emissions from such budget unit during the control period (rounded to the nearest whole ton) in accordance with the federal NO<sub>x</sub> Trading Program, Subpart X of this Part or pursuant to a permanent transfer of NO<sub>x</sub> allocations pursuant to Section 217.462(b) of this Subpart.

~~e) — Notwithstanding any other provisions of this Subpart, a source and units at the source subject to the provisions of subsection (a) of this Section will become subject to this Subpart on the first day of the control season subsequent to the calendar year in which all of the other states subject to the provisions of the NO<sub>x</sub> SIP Call (63 Fed. Reg. 57355 (October 27, 1998)) that are located in USEPA Region V or are that contiguous to Illinois have adopted regulations to implement NO<sub>x</sub> trading programs and other required reductions of NO<sub>x</sub> emissions pursuant to the NO<sub>x</sub> SIP Call, and such regulations have received final approval by USEPA as part of the respective states' SIPs for ozone, or a final FIP for ozone promulgated by USEPA is effective. [415 ILCS 5/9.9(f)]~~

e) This Subpart does not apply to the following boilers used to combust and thereby control CO emissions from a fluidized catalytic cracking unit (FCCU), specifically the Boiler 112B-2 at the refinery located at Lemont, Illinois; Boilers 14B-3 and 14B-4 at the refinery located in

Channahon/Joliet, Illinois; the waste heat boiler 60F-1 at the refinery located in Robinson, Illinois; and CO Heaters/Boilers CCU No. 1 and CCU No. 2 at the refinery located in Roxana, Illinois.

(Source: ~~Added at 25 Ill. Reg. 5914, effective April 17, 2001~~)

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

\* \* \*

Section 217.472 Low-Emitter Requirements

Starting with the effective date of the permit referred to in Section 217.454(c), ~~the~~ budget unit electing low-emitter status ~~shall be subject only pursuant~~ to the requirements of ~~this~~ Section: 217.454(c) shall be subject only to the following requirements:

- a) For each control period the owner or operator elects low-emitter status, the federally enforceable permit conditions must:
  - 1) Restrict the unit to burning only natural gas, fuel oil, or natural gas and fuel oil;
  - 2) Limit the unit's potential NO<sub>x</sub> mass emissions for the control period to the lesser of 25 tons or less the number of allowances allocated to the unit in Appendix E of this Part or, if the unit is not yet listed in Appendix E, the number of NO<sub>x</sub> allowances that have been permanently transferred to that unit from another unit listed in Appendix E;
  - 3) Restrict the unit's operating hours to the number calculated by dividing 25 tons of the allowable potential NO<sub>x</sub> mass emissions provided in subsection (a)(2) of this Section by the unit's maximum potential hourly NO<sub>x</sub> mass emissions;
  - 4) Require that the unit's potential NO<sub>x</sub> mass emissions shall be calculated by using the monitoring provisions of 40 CFR 75, or if the unit does not rely on these monitoring provisions, as follows:
    - A. Select the applicable default NO<sub>x</sub> emission rate:  
0.7 lbs/mmbtu for combustion turbines burning natural gas exclusively during the control period; 1.2 lbs/mmbtu for combustion turbines burning any fuel oil during the control period; 1.5 lbs/mmbtu for boilers burning natural gas exclusively during the control period; or 2 lbs/mmbtu for boilers burning any fuel oil during the control period.
    - B. Multiply the default NO<sub>x</sub> emission rate under subsection (a)(4)(A) of this Section by the unit's maximum rated



hourly heat input which is the higher of the manufacturer's maximum rated hourly heat input or the highest observed hourly heat input. The owner or operator of the unit may request in the permit application required by this subsection that the Agency use a lower value for the unit's maximum rated hourly heat input. The Agency may approve such lower value if the owner or operator demonstrates that the maximum hourly heat input specified by the manufacturer or the highest observed hourly heat input, or both, are not representative. The owner or operator must demonstrate that such lower value is representative of the unit's current capabilities because modifications have been made to the unit that permanently limit the unit's capacity;

- 5) Require that for 5 years at the source that includes the unit, records demonstrating that the operating hours restriction, the fuel use restriction and the other requirements of the permit related to these restrictions were met; and
  - 6) Require that the owner or operator of the unit report to the Agency for each control period the unit's hours of operation (treating any partial hour of operation as a whole hour of operation), heat input and fuel use by type. This report shall be submitted by November ~~1~~<sup>1</sup><sup>st</sup> of each year the unit elects low-emitter status.
- b) The Agency will notify the USEPA in writing of each unit electing low-emitter status pursuant to the requirements of subsection (a) of this Section and when any of the following occurs:
- 1) The permit with federally enforceable conditions that includes the restrictions in subsection (a) of this Section is issued by the Agency;
  - 2) Such permit is revised to remove any such restriction;
  - 3) Such permit includes any such restriction that is no longer applicable; or
  - 4) The unit does not comply with any such restriction.
- c) The unit shall become subject to the requirements of this Subpart if, for any control period under this Section, the fuel use restriction or the operating hours restriction under subsection (a) of this Section is removed from the unit's permit or otherwise is no longer applicable, or the unit does not comply with the fuel use restriction or the operating hours restriction under subsection (a) of this Section. Such unit shall be treated as commencing operation on September 30 of the control period for which the fuel use restriction or the operating hours restriction is no longer

applicable or during which the unit does not comply with the fuel use restriction or the operating hours restriction.

- d) ~~The~~An owner or operator of a unit to which ~~the Agency has ever allocated allowances under Appendix E of this Part~~ meets the requirements set forth in Section 217.454(c) may elect low-emitter status. ~~In that case, the~~The Agency will reduce the Subpart U NO<sub>x</sub> budget by the number of allowances equal to the amount of NO<sub>x</sub> emissions the unit is permitted to emit during the control period, pursuant to a federally enforceable condition in the unit's permit. ~~The, but in no case will the Agency deduct more allowances than the number of allowances that the unit was allocated in Appendix E of this Part or, if the unit is not yet listed in Appendix E, the number of NO<sub>x</sub> allowances that have been permanently transferred to that unit from another unit listed in Appendix E. If the owner or operator of~~ has requested a permit emission limit greater than its allocation for the budget unit as set forth in Appendix E of the Part, the owner or operator of such a unit electing low-emitter status may demonstrate that it holds sufficient allowances to cover the unit's NO<sub>x</sub> emissions by offsetting the emissions from such unit, not to exceed its permitted emission limit as included in its federally enforceable permit, with allowances issued for voluntary NO<sub>x</sub> reductions meeting the requirements of Subpart X of this Part or that there has been a permanent transfer of allowances from another unit listed in Appendix E. The Agency will not reduce the Subpart U NO<sub>x</sub> budget by the allowances issued for NO<sub>x</sub> reductions obtained in accordance with Subpart X of this Part.

(Source: ~~Added~~Amended at 25 \_\_\_\_\_ Ill. Reg. 5914-\_\_\_\_\_, effective ~~April 17,~~  
2001

## Exhibit C

### Section 217.466 NO<sub>x</sub> Allocations Procedure for Subpart U Budget Units

For each control period, the Agency will allocate the total number of NO<sub>x</sub> allowances in the Subpart U NO<sub>x</sub> Trading Budget apportioned to budget units under Section 217.460 of this Subpart, subject to adjustment as provided in this Subpart. These allocations will be issued as provided in subsections (a) and (b) of this Section, as follows:

- a) The Agency will allocate to each budget unit that is listed in Appendix E of this Part the number of allowances listed in Column 5 of Appendix E of this Part for that budget unit for each 3-year period of the program, except as provided in Section 217.462(b) of this Subpart. The Agency will report these allocations to USEPA by March 1 of 2004, and on April 1 triennially thereafter.
  - 1) After the Agency makes an allocation to budget units listed in Appendix E of this Part, for any control period including the initial control period, if any of the NO<sub>x</sub> allowances listed in Column 5 of Appendix E of this Part are not allocated by the Agency to the corresponding budget unit listed in Appendix E of this Part, the Agency will send a certified letter to the holder of the NO<sub>x</sub> budget permit applicable to such unit or the account representative or, if there is no NO<sub>x</sub> budget permit issued for such unit, to the last owner or operator of the budget unit, as listed on the source's most recent operating permit. The certified letter will state that the recipient may be entitled to an allocation of NO<sub>x</sub> allowances and include a contact telephone number and a copy of this Section 217.466. The owner or operator or account representative will have 45 days to respond in writing to the Agency.
  - 2) If the owner or operator or account representative indicates in its response that the unit has a NO<sub>x</sub> budget permit, a NO<sub>x</sub> budget account and a NO<sub>x</sub> account representative and provides the NO<sub>x</sub> budget account number and NO<sub>x</sub> budget permit number in its response, the Agency will verify that the NO<sub>x</sub> budget account number and NO<sub>x</sub> budget permit number correspond with the budget unit listed in Appendix E of this Part, for which an allocation has not yet been made, and issue the NO<sub>x</sub> allowances for the budget unit within 10 days of receipt of the response.
  - 3) If the owner or operator or account representative indicates in its response that it does not have a NO<sub>x</sub> budget permit, a NO<sub>x</sub> budget account and a NO<sub>x</sub> account representative, but that it is in the process of obtaining a NO<sub>x</sub> budget permit, a NO<sub>x</sub> budget account and a NO<sub>x</sub> account representative, the Agency will hold the NO<sub>x</sub>

allowances that are associated with such a budget unit until the owner or operator or account representative provides the Agency with a NO<sub>x</sub> budget account number and NO<sub>x</sub> budget permit number. The Agency will verify that the NO<sub>x</sub> budget account number and NO<sub>x</sub> budget permit number correspond with the budget unit listed in Appendix E of this Part, for which an allocation has not yet been made, and issue the NO<sub>x</sub> allowances for the budget unit within 10 days of receipt of the NO<sub>x</sub> budget account number and NO<sub>x</sub> budget permit number.

4) If the owner or operator or account representative indicates in its response that some portion or all of the NO<sub>x</sub> allowances associated with the budget unit listed in Appendix E of this Part have been transferred to another budget unit subject to this Subpart, a budget unit subject to Subpart W of this Part, or to any person who could legally purchase the NO<sub>x</sub> Allowances, and provides the signature of the account representative and the account numbers for both the transferring budget unit and the recipient, the Agency will allocate the NO<sub>x</sub> allowances in the manner described in the response within 10 days of receipt of the response, or if the signature of the account representative and the account numbers for both the transferring budget unit and the recipient are sent by a separate correspondence, within 10 days of the receipt of the signature of the account representative and the account numbers for both the transferring budget unit and the recipient.

5) If the Agency does not receive a response within 45 days, or if the owner or operator states in its response that it has permanently shut down the unit listed in Appendix E of this Part, and does not intend to obtain a NO<sub>x</sub> budget permit for the unit listed in Appendix E of this Part, the Agency will deem the allowances forfeited and allocate the allowances pro-rata to the owners or operators of the budget units listed in Appendix E of this Part. If there are insufficient allowances to allocate whole allowances, such fractional allowances shall be retained by the Agency and allowed to accumulate until the accumulated fractional allowances are equal to a whole allowance. The Agency will then allocate such accumulated whole allowances. Within two years after making an allocation under this Subsection, the Agency will propose a rulemaking to the Board to amend Appendix E of this Part to reflect these allocations.

b) The Agency will allocate allowances from the ~~new source set-aside~~ NSSA to "new" budget units as set forth in Section 217.468 of this Subpart.

- c) The Agency will report allocations from the ~~new source set aside~~NSSA to USEPA by April 1 of each year for the following year.
- d) To the extent that allowances remain in the ~~new source set aside~~NSSA after any allocation pursuant to subsection (b) of this Section, the Agency shall allocate any such remaining allowances pro-rata to the owner or operator of the budget units listed in Appendix E of this Part to the extent a whole allowance may be allocated to any such owner or operator. ~~The Agency will make such allocation by April 15 of each year. If there are insufficient allowances to allocate a whole allowance to any such owner or operator of a budget unit listed in Appendix E of this Part, such allowances shall be retained by the Agency in the ~~new source set aside~~NSSA. Any such allowances retained in the ~~new source set aside~~NSSA shall be accumulated in the ~~new source set aside~~NSSA and may either:~~
- 1) Be available for allocation to new budget units for future control periods, subject to the provisions of Section 217.468 of this Subpart; or
  - 2) If, after any annual allocation to new budget units, there are sufficient allowances accumulated in the new source set-aside to allocate one or more whole allowances to the owner or operator of existing budget units listed in Appendix E of this Part on a pro-rata basis, such accumulated whole allowances shall be allocated pro-rata to such owner or operators.

(Source: ~~Added~~Amended at 25 \_\_\_ Ill. Reg. ~~5914~~\_\_\_\_\_, effective ~~April 17, 2001~~  
)