BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	R08-19
NITROGEN OXIDES EMISSIONS FROM	)	(Rulemaking - Air)
VARIOUS SOURCE CATEGORIES:	)	
AMENDMENTS TO 35 ILL. ADM. CODE	)	
PARTS 211 and 217	)	

NOTICE OF FILING

TO: Mr. John T. Therriault
Assistant Clerk of the Board
Illinois Pollution Control Board
100 W. Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA ELECTRONIC MAIL)

Timothy Fox, Esq.
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA U.S. 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 **FIRST-NOTICE COMMENTS OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP**, copies of which are herewith served upon you.

Respectfully submitted,

By: /s/ Alec M. Davis
Alec M. Davis

Dated: July 6, 2009

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CERTIFICATE OF SERVICE

I, Alec M. Davis, the undersigned, hereby certify that I have served the attached **FIRST-NOTICE COMMENTS OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP** upon:

Mr. John T. Therriault
Assistant Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
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via electronic mail on July 6, 2009; and upon:

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by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on July 6, 2009.

/s/ Alec M. Davis
Alec M. Davis

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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NITROGEN OXIDES EMISSIONS FROM	)	R08-19
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FIRST-NOTICE COMMENTS OF
THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP ("IERG"), by and through its attorneys, Alec M. Davis of IERG, and HODGE DWYER & DRIVER, and submits the following FIRST-NOTICE COMMENTS OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP for consideration in the above-referenced matter.

I. INTRODUCTION

The Illinois Environmental Regulatory Group would like to thank the Illinois Pollution Control Board ("Board") for providing the opportunity to participate in this rulemaking, and submit these comments in response to the first-notice publication of the proposed amendments to Parts 211 and 217 of Title 35 of the Illinois Administrative Code. 33 Ill. Reg. 6896 and 6921 (May 22, 2009). IERG appreciates that Illinois EPA ("Agency") has continued to work with affected parties throughout this rulemaking to address unresolved issues, and that these negotiations have resulted in positive amendments to various provisions of the original proposal. IERG acknowledges that while many of its concerns have been addressed during the process, there are a few remaining that we will address in these comments. IERG will further point out, as we are sure the Board is aware, that the proposal as published in the Illinois Register, 33 Ill. Reg.

6896 and 6921, differs from the Opinion and Order of the Board by A.S. Moore: Proposed Rule, First Notice dated May 7, 2009, as posted on the Board's website. Opinion and Order of the Board, *In the Matter of: Nitrogen Oxides Emissions From Various Source Categories: Amendments to 35 Ill. Adm. Code Parts 211 and 217*, R08-19 (Ill.Pol.Control.Bd. May 7, 2009) (rulemaking hereafter cited as *"NOx RACT Rule,"* opinion and order hereafter cited as "1st Notice Opinion and Order"). Therefore, IERG notes that these comments have been prepared in response to the proposal as included in the Illinois Register.

As noted in the Board's May 7 First Notice Opinion and Order, IERG raised the following in its March 23, 2009 Post-Hearing Comments, Post-Hearing Comments of the Illinois Environmental Regulatory Group, *NOx RACT Rule*, R08-19 (Ill.Pol.Control.Bd. March 23, 2009) (hereafter cited as "PC 13"). First, with reference to its proposed alternative emissions limits relative to its position "that the proposal went beyond what is required to satisfy the RACT obligation," IERG expressed its understanding that the Agency's proposal would not only help to satisfy current RACT requirements, but would also serve to help meet the new federal standards for ozone and PM2.5 and satisfy their corresponding new RACT requirements, as informed by the Agency's testimony during the course of the rulemaking. PC 13 at 3 - 4.

Second, IERG stated its preferred compliance date of January 1, 2014, to allow affected entities sufficient time to plan and secure financing for projects. PC 13 at 7. Third, IERG offered its support for the concept of demonstrating compliance through emissions averaging plans. However, in doing so, IERG raised the importance of ensuring that the averaging language of proposed Subpart Q, *Section 27 Proposed Rules*

for Nitrogen Oxide (NOx) Emissions from Stationary Internal Combustion Engines and Turbines: Amendments to Ill. Adm. Code Parts 211 and 217, R07-19, comport with the averaging language in this proceeding. IERG offered language in that regard. PC 13 at 5-7.

And finally, IERG argued that the proposal should not include the types of emission units that are not now located in the nonattainment areas. Rather, IERG offered that these units be removed from the present rulemaking and addressed in a future proposal in the event that additional regulation becomes necessary. PC 13 at 8. IERG also offered that such new units, should they come to be operated in the nonattainment areas, would be subject to much more stringent new source standards. *Id*.

IERG will take this opportunity to address the above stated concerns. In addition, IERG will seek clarification of certain provisions based on discussions held with its Members following issuance of the First Notice Opinion and Order. Finally, IERG would like to draw the Board's attention to what it believes may be substantive differences between the version of the amendments contained in the Board's First-Notice Opinion and Order, and the version of the amendments published in the Illinois Register.

II. EMISSIONS LIMITS

IERG concurs with the Board's opinion that the Agency has provided a detailed explanation as to why the Agency's proposal, as amended by the Agency's two motions to amend in this proceeding, is RACT for NOx. 1st Notice Opinion and Order at 20. IERG acknowledges and appreciates that the Illinois EPA has worked with affected sources to establish emission limits that are economically reasonable and technically

achievable, and to reach resolution on the limits for sources located in the nonattainment areas, as established in this rulemaking.

The Illinois EPA has indicated that it intends the NOx RACT rule to "provide a floor," i.e. a minimum emission limit, that a new unit in the nonattainment areas can expect to be required to meet. Post-Hearing Comments of the Illinois Environmental Protection Agency, *NOx RACT Rule*, R08-19 at 19-20 (Ill.Pol.Control.Bd. March 23, 2009) (hereafter cited as "PC 11"). IERG notes that the Board has affirmed that the proposed emission standards may "serve as benchmark for future emissions sources that may be located in the nonattainment areas. 1st Notice Opinion and Order at 18-19. IERG recognizes the value of benchmarks, but is concerned that, when used as a RACT "floor", this approach could potentially create issues for new source permitting.

As pointed out by the Agency in its comments, new source permitting should, in theory, result in more strict requirements than a RACT rule. PC 11 at 20. It is possible, however, that a new source permit applicant, upon performing a site-specific analysis to determine what level of NOx control technology constitutes BACT or LAER, could result in an emission limitation that is less stringent than the RACT "floor" established by this rulemaking. In such a situation, it is unclear how the Agency intends the "floor" to function. IERG raises this issue so that the Board may be aware of the likelihood that some sources may require the Board's consideration of site-specific relief at a future date.

III. COMPLIANCE DATE

Selection of a January 1, 2014 compliance date would indeed afford optimum opportunity for planning and financing any necessary modifications to facilities. However, IERG acknowledges the validity of the Agency's arguments for adoption of the

2012 date, particularly in regard to the impact these rules are intended to have on the newest ozone standard and the PM2.5 daily standard. IERG appreciates the Agency's stated willingness to work with impacted facilities to achieve compliance in an appropriate and timely manner.

IV. AVERAGING PROVISIONS

IERG is substantially in agreement with the Board's determination to revise the language of Section 217.158(a)(1)(C), regarding the inclusion of "replacements units" in emissions averaging plans, as suggested by both IERG and the Agency. 1st Notice Opinion and Order at 41-42. However, for the purpose of clarity, IERG would recommend an additional minor revision, the insertion of a comma between "capacity" and "or" as shown on the fifth line below:

> C) Units that commence operation after January 1, 2002, if the unit replaces a unit that commenced operation on or before January 1, 2002, or it replaces a unit that replaced a unit that commenced operation on or before January 1, 2002. The new unit must be used for the same purpose and have substantially equivalent or less process capacity, or be permitted for less NOx emissions on an annual basis than the actual NOx emissions of the unit or units that are replaced. Within 90 days after permanently shutting down a unit that is replaced, the owner or operator of such unit must submit a written request to withdraw or amend the applicable permit to reflect that the unit is no longer in service before the replacement unit may be included in an emissions averaging plan.

Based upon 33 Ill. Reg. at 6955.

IERG proposes changes to the proposed Section 217.158(d), regarding updates to emissions averaging plans.

Section 217.158(d) of the first-notice version states:

1) If a unit that is listed in an emissions averaging plan is taken out of service, the owner or operator must submit to the Agency, within 30 days of such occurrence, an updated emissions averaging plan; or

2) If a unit that was exempt from the requirements of Subpart E, F, G, H, I, or M of this Part pursuant to Section 217.162, 217.182, 217.202, 217.222. 217.242, or 217.342, of this Part, as applicable, no longer qualifies for an exemption, the owner or operator may amend its existing averaging plan to include such unit within 30 days after the unit no longer qualifies for the exemption.

33 Ill. Reg. at 6956.

IERG suggests that 217.158(d)(1) be deleted as being unnecessary or, in the alternative amended as follows:

1) If a unit that is listed in an emissions averaging plan is permanently shut down~~taken out of service~~, the owner or operator must submit to the Agency, within ~~3~~90 days of such occurrence, an updated emissions averaging plan; or

The term "taken out of service" proposed in the Illinois Register is not defined. Consequently, taking a unit out of service for a brief period of time for routine maintenance and repair could require modifying an emissions averaging plan. In addition, the emissions averaging equations contained in the proposed Section 217.158(f) account for periods of time when a unit is not operating or out of service, regardless of whether for routine maintenance or repair, or due to operational requirements. Similarly, a unit that is "permanently shut down" would be accounted for by the emission averaging computation. Therefore, IERG believes that provision 217.158(d)(1) is unnecessary.

In the event that the Board deems it necessary to retain subsection (d)(1) for recordkeeping purposes, IERG would urge the Board to consider the above suggested

language, wherein the requirement to update an emission averaging plan would apply only to units that are "permanently shut down."

Provision 217.158(d)(2) allows units that were previously exempt to be included in an averaging plan by amending the plan "within 30 days after the unit no longer qualifies for the exemption." The language is unclear as to whether the owner or operator loses the ability to include the unit if the averaging plan is not updated within 30 days. It is further unclear as to the need for a time limit for including formerly exempt units in an averaging plan. Once a unit is no longer exempt, it is subject to all of the applicable provisions of the proposed rule, and there should be no need for a time limit for including such units in an emission averaging plan. IERG believes it is in concurrence with the Agency's intent, that this language is to describe exceptions to the once-per-year limit to amending emission averaging plans contained in the proposed 217.158(c). Therefore, IERG suggests the following changes to 217.158(d)(2):

> 2) If a unit that was exempt from the requirements of Subpart E, F, G, H, I, or M of this Part pursuant to Section 217.162, 217.182, 217.202, 217.222. 217.242, or 217.342, of this Part, as applicable, no longer qualifies for an exemption, the owner or operator may amend its existing averaging plan <u>at any time</u> to include such unit ~~within 30 days after the unit no longer qualifies for the exemption~~.

Finally, proposed section 217.158(h) would allow exclusion from the "calculation demonstrating compliance" certain time periods when a unit is shut down for a maintenance turnaround. In order to rely upon the proposed exemption, an owner/operator would have to notify the Agency in writing in advance, <u>and</u> the shut down must not exceed 45 days per ozone season or calendar year. IERG asks the Board to clarify and to revise this provision so that it is clear the rule does not restrict that a shut

down of a covered unit during an actual maintenance turnaround be limited to 45 days, but that, instead, the exemption from the calculation demonstrating compliance would be limited to 45 days. This clarification is important because the shut down of a covered unit during a planned maintenance turnaround at a large facility, such as a petroleum refinery, may be extended beyond a planned duration due to various reasons, including delays associated with weather, manpower and equipment availability, as well as unplanned or unforeseen mechanical setbacks. In that regard, IERG suggests the following revision to proposed section 217.158(h):

> h) The owner or operator of an emission unit located at a petroleum refinery who is demonstrating compliance with an applicable Subpart through an emissions averaging plan under this Section may exclude from the calculation demonstrating compliance those time periods when an emission unit included in the emissions averaging plan is shut down for a maintenance turnaround, provided that such owner or operator notify the Agency in writing at least 30 days in advance of the shutdown of the emission unit for the maintenance turnaround and the shutdown of the emission unit does not exceed 45 days per ozone season or calendar year and NOx pollution control equipment, if any, continues to operate on all other emission units operating during the maintenance turnaround. <u>This provision is in no way intended to restrict to 45 days or less the shutdown of a covered unit during a maintenance turnaround.</u>

Based upon 33 Ill. Reg. at 6959.

V. <u>THE IMPACT ON UNITS NOT IN THE NONATTAINMENT AREAS</u>

As repeatedly raised throughout this procedure, IERG's primary concern remains that this rulemaking establishes emissions limits for units that are not present in the nonattainment areas subject to this proposal. *See* PC 13 at 8, *citing* Pre-Filed Questions for IEPA Submitted by IERG, *NOx RACT Rule*, R08-19, at Question 11 (Ill.Poll.Control.Bd. Sept. 16, 2008); and Hearing Transcript, *NOx RACT Rule*, R08-19 at 57-64 (Ill.Poll.Control.Bd. Oct. 14, 2008) (hereafter cited as "Tr. 1"). *See also* Pre-Filed

Testimony of David J. Kolaz on Behalf of the Illinois Environmental Regulatory Group, *NOx RACT Rule*, R08-19 at 19-24 (Ill.Poll.Control.Bd. Nov. 25, 2008). IERG acknowledges Illinois EPA's lack of concurrence in our request to omit emission standards for units, which are not currently operated in the nonattainment areas. PC 11 at 19-20. However, IERG maintains that proposing emissions limits for such units is inappropriate and, even perhaps, troublesome precedence. The owners and operators of units potentially impacted under this proposal have not had the opportunity to participate in this rulemaking. Lack of notice and opportunity to participate seems contrary to the notion of a full and fair hearing, a notion to which we have steadily adhered.

The Illinois EPA has stated that it did not perform analyses on existing units subject to the rule to determine whether emission limits contained in the proposal were RACT. Tr. 1 at 15-16. Indeed, as the record shows, the initially proposed rule has been amended to reflect what is "reasonably available, considering technological and economic feasibility" when unit-specific factors are taken into consideration, in compliance with federal guidance. 44 Fed. Reg. 53762 (September 17, 1979).

Considering unit-specific factors, a detailed case-by-case analysis for a particular unit could show that, for that unit, the proposed emission limit does not reflect the application of "reasonably available control technology." In the case of "future" units located in nonattainment areas, the opportunity to perform such an analysis clearly will have passed upon the finalization of this rulemaking. Of even greater concern is the emissions limits contained in the proposal may be viewed as the "RACT floor" for those units located outside of the nonattainment areas, whose owners and operators have not had opportunity for unit-specific discussions with Illinois EPA during the course of this

proceeding. Such owners and operators have expressed concern to IERG that, if the emission limits contained in the proposal were applicable to certain of their units, they likely could not be met. Again, IERG believes it is necessary to note that these individual companies have not had cause to engage in the discussion during the course of this proceeding.

IERG maintains it strong position that the emissions limits contained in the proposal should not be interpreted to represent what is "reasonably available control technology" with regard to any unit not currently present in the nonattainment areas subject to the proposed amendments. Any future imposition of RACT limits proposed in this proceeding, if applied to units outside of the nonattainment areas covered by the proposed rule, may raise implications for what constitutes "reasonably available control technology." Such implications may not have been addressed in this proceeding, and may call for establishing different emissions limits. We would respectfully request the Board to give serious consideration to IERG's position.

VI. REPORTING REQUIREMENTS

Sections 217.156 (j)(1) and (j)(2) of the first-notice version require the following:

1) Information identifying and explaining the times and dates when continuous emissions monitoring for NOx was not in operation, other than for purposes of calibrating or performing quality assurance or quality control activities for the monitoring equipment; and

2) An excess emissions and monitoring systems performance report in accordance with the requirements of 40 CFR 60.7(c) and (d) and 60.13, or 40 CFR 75, or an alternate procedure approved by the Agency and USEPA.

33 Ill. Reg. at 6948.

IERG proposes that subsection (j)(1) be deleted, and that subsection (j)(2) be amended as follows:

> 2) An excess emissions and monitoring systems performance report and/or summary report in accordance with the requirements of 40 CFR 60.7(c) and (d) ~~and 60.13~~, or 40 CFR 75.73(f), or an alternate procedure approved by the Agency and USEPA.

The fundamental requirements of subsection (j)(1) are embodied in the provisions of the Code of Federal Regulations ("CFR") cited in subsection (j)(2). These CFR references provide, among other things, the criteria and reporting detail for reporting continuous emissions monitoring down time, which are not included in subsection (j)(1). IERG offers that excluding subsection (j)(1) would avoid the potential for confusion resulting from the CFR reference included in (j)(2).

IERG suggests revisions to subsection (j)(2) for the purposes of clarity and correctness. The reference to 40 CFR 60.13 pertains to *Monitoring Requirements*, and not recordkeeping and reporting, and thus should be excluded. The references to 40 CFR 60.7(c) and (d) deal specifically with the excess emissions and monitoring systems performance report that is the topic of subsection (j)(2). The reference to 40 CFR 75.73(f) refers specifically to the quarterly reporting requirements within the recordkeeping and reporting provisions of 40 CFR 75.73, which is the topic of the proposed Section 217.156(j). The general requirements for continuous emissions monitoring pursuant to 40 CFR Part 75 are already referenced in the proposed rule in Section 217.157 (Testing and Monitoring).

VII. SUBSTANTIVE INCONSISTENCIES IN PUBLISHED VERSIONS

Comparison of the first-notice version of the proposed amendments contained in the Board's opinion and order, *see* 1st Notice Opinion and Order at 58-107, to those in the published Illinois Register, *see* 33 Ill. Reg. 6896 and 6921, revealed differences between the two versions. IERG includes the following listing of what it believes may be substantive differences for the Board's consideration.

- The Board's version repeals Subpart B, and designates as the new Subpart B "Existing Fuel Combustion Emission Units." The Illinois Register version does not repeal Subpart B, and resultantly, the lettering of the subsequent Subparts (B through H in the Board's version) are shifted one letter forward (becoming C through I in the Illinois Register version).
- The title of the Board's Section 217.141 in the table of contents reads as follows:

  217.141 Existing Emission Units ~~Sources~~ in Major Metropolitan Areas

  The Illinois Register version does not reflect the change in the section's title, *see* 1st Notice Opinion and Order at 72; 33 Ill. Reg. at 6931, but does reflect the correct title elsewhere. *See* 33 Ill. Reg. at 6939.
- The Board's Section 217.141(c) contains the following language, which is absent from the Illinois Register version: "and, where A, B, C and appropriate metric and English units are determined from the following table:" *See* 1st Notice Opinion and Order at 79; 33 Ill. Reg. at 6940.

- The Illinois Register incorrectly titles its Subpart D (equivalent to Subpart C in the Board's version) as: "SUBPART D: INDUSTRIAL BOILERS" *See* 1st Notice Opinion and Order at 80; 33 Ill. Reg. at 6941.
- Section 217.141(d)(1) differs in the two versions. In the Board's version, the language is changed from "sources" to "units," while the Illinois Register does not. *See* 1st Notice Opinion and Order at 80; 33 Ill. Reg. at 6941.
- The board's Section 217.154(d) reads:

  > d) The owner or operator of an emission unit subject to subsection (a) or (b) of this Section must notify the Agency of the scheduled date for the performance testing ***at least 30 days in writing*** before such date and five days before such date.

  1st Notice Opinion and Order, at 82 (emphasis added).

  The Illinois Register version reads:

  > d) The owner or operator of an emission unit subject to subsection (a) or (b) of this Section must notify the Agency of the scheduled date for the performance testing ***in writing at least 30 days*** before such date and five days before such date.

  33 Ill. Reg. at 6944 (emphasis added). IERG feels that the difference in language could lead to potential confusion in interpretation, i.e. the 30-day notice has to be in writing, but must the 5-day notice also?
- The equation contained in Section 217.164(e) in the Illinois Register version is incomplete. Comparing to the Board's version, the Illinois Register is missing the subscript "BFG" and closing parenthesis. *See* 1st Notice Opinion and Order at 98; 33 Ill. Reg. at 6962.
- The emissions limitations contained in the table in Section 217.244(b) differ between the two versions. In the Board's version, for "Reverberatory furnace"

the limitation is 0.08 lb/mmBtu, in the Illinois Register, the limitation is 5.1 lb/mmBtu. Similarly, for "Crucible furnace" the Board's value is 0.16 lb/mmBtu, and the Illinois Register is 5.1 lb/mmBtu. *See* 1st Notice Opinion and Order at 105; 33 Ill. Reg. at 6970.

- In Appendix H, the Board's version has the table of Emission Units divided by facility, while the Illinois Register version does not. *See* 1st Notice Opinion and Order at 106-107; 33 Ill. Reg. at 6972-73.
- Also in Appendix H, the Illinois Register version contains a duplicate unit designated "BEU HM-1" as the last entry in the table. *See* 33 Ill. Reg. at 6973.

VIII. CONCLUSION

IERG appreciates the efforts and attention afforded this proposal. Illinois EPA's willingness to work with affected sources, and the Board's in-depth consideration of the issues raised by regulated entities, has strengthened the quality of the proposal. Beyond those issues described above, IERG can offer its support for the amendments as proposed at first-notice. IERG respectfully asks, and encourages, the Board to consider these comments, in revising the proposal for second-notice.

Both the State of Illinois and those facilities operating in the nonattainment areas of the state share the goal to avoid federal sanctions for not having a NOx RACT rule in place for the nonattainment areas. IERG would certainly encourage the proposed amendments be finalized before the September 24, 2009 sanctions deadline, *see* Motion for Expedited Review, *NOx RACT Rule,* R08-19 at 5-6 (Ill.Pol.Control.Bd. March 19, 2009). However, IERG believes the goal can be met while giving due deliberation to the above-raised matters of concern. Again, we thank the Board for the opportunity to

participate in this rulemaking, and to the consideration it has given to the issues raised thus far.

IERG reserves the right to supplement these First Notice Comments.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP

Dated: July 6, 2009

By: /s/Alec M. Davis
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