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: Mr. John T. Therriault
Assistant Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
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(VIA ELECTRONIC MAIL)

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(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 **REPLY OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP TO THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO MOTION FOR EMERGENCY RULE AND MOTION FOR EXPEDITED ACTION ON THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP'S ALTERNATIVE PROPOSAL**, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

Dated: August 17, 2009

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

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NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP ("IERG"), by and through its attorneys, Alec M. Davis and HODGE DWYER & DRIVER, and pursuant to 35 Ill. Admin. Code § 101.500 and the Illinois Pollution Control Board's ("Board") August 6, 2009 Order, hereby moves the Board to grant the Motion for Emergency Rule and Motion for Expedited Action on IERG's Alternative Proposal (collectively "Motions") filed with the Board on August 3, 2009. In support of this Reply to the Illinois Environmental Protection Agency's ("Illinois EPA") Response to IERG's Motions, IERG states as follows:

I. INTRODUCTION

On August 3, 2009, IERG filed the above-referenced Motions with the Board requesting that the Board adopt an emergency rule in order to provide a mechanism by which 2009 NOx allowances could be issued to budget units subject to 35 Ill. Admin. Code Part 217 Subpart U and adopt an alternative proposal to bring budget units into the Clean Air Interstate Rule ("CAIR") NOx Ozone Season Trading Program for the 2010 control period and beyond. *See* Motion for Emergency Rule and Motion for Expedited Action on IERG's Alternative Proposal, *In the Matter of: NOx Trading Program:*

Amendments to 35 Ill Adm. Code Part 217, R06-22 (Ill.Pol.Control.Bd. Aug. 3, 2009) (rulemaking hereafter cited as "R06-22").[1] The Illinois EPA filed a Response to IERG's Motions on August 13, 2009, and pursuant to the Board's August 6, 2009 Order, IERG files this Reply to the Illinois EPA's Response. *See* Illinois EPA's Response to Motion for Emergency Rule and Motion for Expedited Action, R06-22 (Ill.Pol.Control.Bd. Aug. 13, 2009) (hereafter cited as "Response"); Board Order, R06-22 (Ill.Pol.Control.Bd. Aug. 6, 2009).

This Reply addresses the statements made in the Illinois EPA's Response and further reiterates the basis for IERG's Motions and urges the Board to grant IERG's Motions. IERG continues to assert that its Motions, as filed, provide sufficient justification and support for the Board to grant both Motions, due to the legislative mandate at Section 9.9 of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/9.9, and the Illinois EPA's failure to see that such mandate is implemented. IERG urges the Board, at this time, to take immediate action on IERG's Motion for Emergency Rule. As set forth subsequently in this Reply, should the Board request additional information in support of IERG's Motion for Expedited Action, IERG will provide such information for the Board's consideration. IERG will also work with the Illinois EPA to develop a "permanent rule" that is mutually acceptable. However, to ensure the allocation of allowances for the 2009 ozone season, IERG requests that the Board not delay in granting the Motion for Emergency Rule.

[1] Motion for Emergency Rule cited hereafter as "IERG MER." Motion for Expedited Action cited hereafter as "IERG MEA."

II. NOx TRADING PROGRAM

Section 9.9 of the Act requires a NOx trading program. 415 ILCS 5/ 9.9. NOx SIP Call obligations for both electrical generating units ("EGUs") and non-EGUs are discussed under Section 9.9 of the Act, which is clearly entitled "Nitrogen oxides trading system." *Id.* (Emphasis added.) Section 9.9(b) requires the Agency to propose and the Board to adopt regulations to implement an interstate NOx trading program. 415 ILCS 5/9.9(b). It is noteworthy that Section 9.9(a)(1) references the need to reduce NOx emissions pursuant the October 27, 1998 Federal Register on regional transport (overtly labeled by the General Assembly as the NOx SIP Call), which the United States Environmental Protection Agency ("USEPA"), in the CAIR proceeding, has clearly stated is still applicable.

Part 225 of the Board's rules currently resolve the NOx trading requirement for the EGUs through the CAIR trading program. However, no such resolution has been put forward by the Illinois EPA for non-EGUs. The Agency tries to declare as obsolete Section 9.9's NOx trading requirements for non-EGUs by stating that the Section 9.9 obligations for non-EGUs were met when the Board adopted Subpart U. Response at ¶ 24. Apparently, the Illinois EPA is stating that since USEPA, a federal administrative agency, decided to move to trading under CAIR, the non-EGU emission trading laws passed in Illinois are now usurped. The Illinois EPA has provided no legal authority for the proposition that a federal administrative agency can void legislation passed by the General Assembly. Assuming no such authority exists, Section 9.9's mandate for non-EGU NOx trading stands, especially since the NOx SIP Call obligation for affected sources remains in full force and effect.

The Illinois EPA next attempts to circumvent Section 9.9's trading requirements for non-EGUs by stating that the "General Assembly could not have foreseen the sunset to the NOx SIP Call Trading Program and the adoption of the CAIR program." *Id.* While IERG does not disagree with this statement, it is obvious that the General Assembly has not seen fit to pass any legislation, nor, to IERG's knowledge, has the Illinois EPA suggested the same, that would amend Section 9.9 to do away with the requirement for NOx trading for non-EGUs. As such, the legislative mandate for NOx trading for non-EGUs stands as applicable law in Illinois that must be fulfilled by the Board.

Section 9.9(b) refers to the requirement to adopt and implement trading regulations and refers to 40 C.F.R. Part 96 generally and then to some specific provisions (40 C.F.R. 96.4(b) and 96.55(c), Subpart E and Subpart I). 415 ILCS 5/9.9(b). Although some of these specific provisions might be superseded by provisions brought in under CAIR, it is clear that the legislature required Illinois facilities, including non-EGUs, to participate in NOx emissions trading. The simple legal reality is that Section 9.9 requires a NOx trading system for non-EGUs. And indeed, CAIR provides for just such a system that can include non-EGUs. As IERG discussed in its Motion for Expedited Action, USEPA clearly explained that because it would "no longer administer the trading program for the NOx SIP Call, States that wish to continue to meet their NOx SIP Call obligations through a [USEPA]-administered cap and trade program will also adopt the CAIR ozone-season model rule." 70 Fed. Reg. 25275 (May 12, 2005). (Emphasis added.)

The Illinois EPA states that it has had discussions with USEPA on "how the outstanding NOx SIP Call budget for 2009 ozone control period can be met." Response at ¶ 21. The conclusion that is alleged to have been derived from such discussions is that an emission report showing that the NOx budget is met "would suffice in lieu of having adopted measures." *Id.* However, the Illinois EPA has failed to provide any documentation regarding this agreement.

Further, it is our understanding that such an agreement would be in violation of the requirements of 40 C.F.R. § 51.121(r)(2), which requires a State Implementation Plan ("SIP") revision that shows enforceable control measures have been adopted that will produce emission reductions that meet the NOx budget. 40 C.F.R. § 51.121(r)(2). The Illinois EPA, however, has failed to propose such control measures. The Illinois EPA claims that its obligations under 40 C.F.R. § 51.121(r)(2) were met with the various NOx RACT rules that specify specific control measures. Response at ¶ 24. IERG questions how the Illinois EPA can show that it has enforceable limits in place for the 2009 season when some of the NOx RACT rules have not yet been adopted by the Board and have compliance dates that start in 2012. Further, the provisions of 40 C.F.R. § 51.123(e) and (bb) allow a state to adopt the CAIR ozone season emissions trading program for non-EGUs in lieu of having to adopt specific emission control measures under Section 51.121. 40 C.F.R. § 51.123(e), (bb).

In addition, the Illinois EPA states that it has not received notification from the USEPA that it is deficient in demonstrating that the NOx SIP Call budget will be met, but rather, the Illinois EPA states, without proof, that it has received "every indication" that it can meet the requirements of 40 C.F.R. § 51.121(r)(2) by submitting a "demonstration

using reported emissions from the applicable sources" to show that "the budget has been met." Response at ¶ 23. Again, the Illinois EPA provides no documentation from USEPA substantiating the "indications" that it is meeting the requirements of 40 C.F.R. § 51.121(r)(2). In fact, USEPA did provide notice to the Illinois EPA that the State's CAIR submittal to USEPA did not address non-EGUs. 72 Fed. Reg. 58528, 58531 (Oct. 16, 2007) (stating that "Illinois' CAIR submittal does not fully address the replacement of the NOx SIP Call. Illinois' CAIR NOx ozone season trading program addresses the emissions from EGUs and do [sic] not address emissions from non-EGUs that are covered by the NOx SIP Call trading program").

The Illinois EPA next claims that the burden to propose a trading program lies with the Illinois EPA. Response at ¶ 24. As late as March 9, 2009, the Illinois EPA, in its status report to the Board, stated that it was "planning to replace Subpart U with a new rule" by integrating "the Non-EGUs into the CAIR rule." Illinois EPA Status Report, R06-22 (Ill.Pol.Control.Bd. Mar. 9, 2009). The Illinois EPA further stated that the "timetable for addressing that requirement is expected to be the Spring of 2009." *Id.*; *see also* Post-Hearing Comments of the Illinois EPA, *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. Mar. 23, 2009) (hereafter "R08-19") (stating that the Illinois EPA intended to "make a regulatory proposal soon to address" its "deficiency" in not amending its rules for non-EGUs to ensure compliance with the non-EGU NOx budget). The Illinois EPA stated its intent to propose a trading program, and as late as March 2009, gave every indication it would do so. IERG and its member sources waited patiently for the Illinois EPA to act on its stated intentions. When the

Illinois EPA failed to do so, IERG was compelled to step in on behalf of the owners and operators subject to obligations under Subpart U.

Now that IERG has taken steps to move the Board to act to fulfill the requirements of Section 9.9, the Illinois EPA has reversed its course at the last possible moment. The Illinois EPA has provided purported alternative language at Section III and Attachment A of its Response that would attempt to eliminate the requirement for non-EGUs to hold NOx allowances. This is a position that the Board cannot sanction.

The Illinois EPA supports its proposal by stating that CAIR is "still in flux" and that there are several new air quality standards which "tighten existing air quality criteria for ozone, PM2.5 and NOx." Response at ¶ 46. Illinois EPA's position on CAIR is interesting, as just two paragraphs earlier, it suggests that IERG's proposal should be handled in Part 225, which implements CAIR in Illinois for EGUs. Further, Section 9.9(a)(2) of the Act clearly states that the "General Assembly finds" that reducing NOx emissions helps Illinois to meet the national ambient air quality standard for ozone ("NAAQS"). 415 ILCS 5/9.9(a)(2). Section 9.9(a)(3) states the "General Assembly finds" that emissions trading is a cost effective means of meeting the NAAQS. 415 ILCS 5/9.9(a)(3). Thus, no matter what the future may hold with respect to changing air quality standards, the current law in Illinois requires that non-EGU NOx trading be used as a way to meet those obligations.

It has become obvious that the Illinois EPA's intentions were actually to effectively "repeal" the State's legislatively mandated trading program for non-EGUs. IERG believes strongly that if the Board follows the Illinois EPA's path in this regard, it will be doing so in direct contravention of Section 9.9 of the Act. IERG urges the Board

to reject such an inappropriate and arguably illegal approach. The Board must follow the requirements of Section 9.9 and continue non-EGU NOx trading in Illinois.

III. MOTION FOR EMERGENCY RULE

A. Emergency Circumstances - Threat to the Public Interest

Illinois EPA states there is no emergency warranting the adoption of an emergency rule because individual sources cannot be sued for lack of compliance with the NOx SIP Call Trading Program because such program no longer exists. IERG believes that this, however, is not the issue to be resolved. Rather, individual sources subject to Subpart U are required by existing Subpart U to hold sufficient NOx SIP Call allowances to cover NOx emissions for the 2009 ozone season and beyond. Further, provisions contained in the Clean Air Act Permit Program ("CAAPP") permits of several of the facilities subject to Subpart U require that, by November 30th of each year, the sources hold allowances available for compliance that are not less than the budget units' total NOx emissions for the preceding control period. IERG MEA at 14. Finally, while it is true that there is no longer a NOx SIP Call Trading Program, the requirement that non-EGUs comply with the provisions of the NOx SIP Call remains fully intact. IERG MEA at 11-12; *see also* 35 Ill. Admin. Code Part 217. Absent adoption of IERG's alternative proposal, there will be no mechanism by which the sources subject to Subpart U can achieve compliance.

The Illinois EPA also states in its Response that "IERG has provided no evidence that any of its members have been subject to a lawsuit . . ." Response at ¶ 25. Such issue is not yet ripe since the potential for noncompliance will not occur until November 30, 2009, the date on which budget units must hold NOx allowances. In fact, the purpose of

IERG's filing is to avoid potential litigation. The costs associated with litigation do not constitute the best use of anyone's – be it individual companies, state or federal governments, or private parties – limited resources. Further, impacted sources could face penalties as provided in Section 42 of the Act, which states that persons violating the Act, Board regulations, or permit conditions "shall be liable for a civil penalty of not to exceed $50,000 for the violation and additional civil penalty of not to exceed $10,000 for each day during which the violation continues . . ." 415 ILCS 5/42. Each ton of NOx for which an allowance is not held, as required under both Subpart U and the sources' CAAPP permits, on November 30th, could potentially be deemed to be a separate violation. IERG contends that the threat of economic harm is not only real, but also substantial.

IERG reiterates that the obligation to otherwise satisfy the NOx SIP Call remains in place. Additionally, IERG is uncertain that the discontinuation of the USEPA implementation of the program renders the requirements of Illinois regulations and CAAPP permit conditions as moot. Absent some binding indication that such is the case, thereby absolving all sources subject to the current Subpart U from potential liability stemming from the requirements of Subpart U and their CAAPP permits, adoption of the emergency rule and alternative proposal are necessary in order to shield impacted facilities from liability and fulfill statutory requirements requiring a NOx trading program.

The Illinois EPA states that "no emergency exists under the circumstances present." Response at ¶ 28. As described in detail in the Motion for Emergency Rule, an emergency satisfying the criteria required by the Administrative Procedure Act ("APA"),

5 ILCS 100/5-45, currently exists since impacted facilities face potential liability of applicable regulations and/or their CAAPP permits should they not hold NOx allowances by the regulatory deadline. Impacted facilities also face significant economic hardship should impacted facilities be required to purchase NOx allowances. IERG MER at 10-16. As IERG expressed in its Motion, industry in Illinois faces the very real threat of enforcement actions by federal, state, or third parties. *Id.* at 3. Further, as described below, the Securities and Exchange Commission ("SEC") reporting obligation is not one to be taken lightly.

The Illinois EPA states that the threat to the public as described in IERG's Motions is "[a]rguably analogous to an administrative need" and "does not constitute an 'emergency.'" Response at ¶ 30 (citing *Citizens for Better Environment v. Illinois Pollution Control Board,* 152 Ill. App 3d 105, 504 N.E.2d 166 (1st. 1987) (hereafter "*CBE*"). In *CBE*, the Court determined that an emergency situation did not exist under the APA because the basis for the adoption of the emergency rule was administrative in nature. *CBE* at 109-110. The Board argued that the emergency rulemaking was proper because the emergency rule clarified the statute at issue, would reduce the "number of appeals to the Board" regarding waste stream authorizations, would ease the "transition period when final rules [were] adopted," and gave effect to the statute since the "argument [could] be made that [the] section [of the statute was] not self-executing." *Id.* at 109. The Court concluded that the emergency rule was invalid and noted that in *CBE* there was an "administrative problem that was self created and an attempt to remedy the situation was made at the eleventh hour." *Id.* at 110.

In this matter, the threat to the public interest, as described in the Motion for Emergency Rule, is in no way "administrative," as the Illinois EPA would argue. In fact, the threat of liability for noncompliance with applicable regulations and CAAPP permits is real. Further, impacted sources face financial hardship should the purchase of NOx allowances be necessary since they have, in the past, relied on the allocation of allowances to meet their compliance requirements.

As the Court in *CBE* stated, the administrative situation was self created and a solution was attempted at the "eleventh hour." Similarly, the Illinois EPA created the problem that is addressed in IERG's Motions by failing to take action to establish a rule that provides for the allocation of allowances to budget units for the 2009 control period and to bring budget units into the CAIR NOx Ozone Season Trading Program for the 2010 control period and beyond. In addition, the Illinois EPA admitted in another rulemaking currently pending before the Board its deficiency in not amending its rules for non-EGUs to ensure compliance with the non-EGU NOx budget and even stated that it intended to "make a regulatory proposal soon to address this deficiency . . ." Post-Hearing Comments of the Illinois EPA, *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. Mar. 23, 2009) (hereafter "R08-19"). However, unlike in *CBE,* in this case, the Illinois EPA did not even attempt a solution at the "eleventh hour" to address its admitted deficiency. It was IERG that was compelled to take action because of the real threat of liability that faces sources subject to Subpart U.

The Illinois EPA also states that it agrees with the dissenting opinion to the Board's final opinion issued in *In the Matter of: Emergency Rule Amending 7.2 psi Reid Vapor Pressure Requirement in the Metro-East Area, 35 Ill. Adm. Code 219.585(a),* R95-10 (Ill.Pol.Control.Bd. Feb. 23, 1995)(hereafter cited as "R95-10"). In the R95-10 rulemaking, the Board adopted an emergency rule to address inconsistency between federal and state annual compliance dates for supplying lower RVP gasoline and alleviated the hardships to refiners, distributors, and bulk gasoline terminals resulting from the inconsistency in compliance dates. *Id.* at *3-5. However, Board Member J. Theodore Meyer dissented from the adoption of the emergency rule because, in his opinion, "R95-10 does not merit emergency status." Dissenting Opinion, R95-10. Board Member Meyer's dissenting opinion is a mere two paragraphs, and is just that – a dissenting opinion. All other Board Members determined that circumstances warranted the adoption of an emergency rule. Further, not only did the Board determine that economic hardship constituted a threat to the public interest warranting an emergency rule in the R95-10 rulemaking, but it also made the same determination in *In the Matter of: Emergency Rule Amending the Stage II Gasoline Vapor Recovery Rule in the Metro-East Area, 35 Ill. Adm. Code 219.586(d),* where the Board found that uncertainty as to the USEPA's position regarding the promulgation of court-mandated onboard vapor recovery rules resulted in a situation where gas stations in the Metro-East were forced to make significant capital outlays to meet a compliance deadline to install Stage II vapor recovery equipment, which outlays would be unnecessary if the USEPA promulgated onboard vapor recovery rules. *In the Matter of: Emergency Rule Amending the Stage II Gasoline Vapor Recovery Rule in the Metro-East Area, 35 Ill. Adm. Code 219.586(d),*

R93-12 at *5 (Ill.Pol.Control.Bd. May 20, 1993) (hereafter cited as "R93-12").

Significantly, the Board stated:

> Emergency rulemaking by the Board is justified when there is a threat to the public interest. The record in this case demonstrates that facilities in the Metro-East area that should have complied with Stage II vapor recovery requirements by May 1, 1993, would **suffer extreme economic hardship** if forced to comply at this time. The court mandate for USEPA to promulgate onboard controls, which potentially may eliminate the need for Metro-East facilities to comply with Stage II requirements, creates intolerable uncertainty until the USEPA provides guidance. **Moreover, the affected facilities have been placed in a position where they are subject to legal action by the Agency, or any citizen, if they fail to comply with the Stage II requirements which should have taken effect on May 1, 1993.**

Id. at *8. (Emphasis added.)

As in the R93-12 and R95-10 proceedings, in this matter, impacted facilities face potential economic hardship should NOx allowances not be allocated as required by applicable regulations, and thus, like the sources in the 93-12 proceeding, they "have been placed in a position where they are subject to legal action by the Agency, or any citizen" if they fail to comply with Subpart U requirements and their CAAPP permit conditions. *Id.* As explained in the Motions, impacted sources have not planned for an expenditure of capital to purchase NOx allowances that previously have been issued without imposition of a fee. In both the rulemakings referenced above, the Board did find that economic hardship constitutes a threat to pubic interest and justifies the adoption of an emergency rule. The impending economic hardship coupled with the potential liability for violation of Board regulations and CAAPP permit conditions, as well as SEC disclosure issues, amounts to a real and serious threat to the public interest, as discussed in further detail below.

The R93-12 and R95-10 proceedings also provide additional insight regarding the Board's considerations when adopting emergency rules. In R93-12, the Board deemed the Illinois EPA's initial Motion for Emergency Rule defective because "essential information was missing." R93-12 at *1. In response to the Board's order requesting additional information, the Illinois EPA submitted a revised Motion providing the information requested from the Board. Response to Board Order of May 5, 1993, R93-12 (Ill.Pol.Control.Bd. May 17, 1993)(hereafter "Response to Board Order"). In addition, several additional comments were filed in support of the emergency rule, including comments from U.S. Representative Jerry F. Costello, Clinton County Oil Company, Illinois Petroleum Marketers Association, and Thomeczek Oil Company, explaining how the current requirements would substantially impact industry should the emergency rule not be adopted. R93-12 at *7-8. Similarly, in R95-10, the Illinois EPA, as proponent of the emergency rule, offered as proof of the hardship facing impacted facilities, such as Shell Oil Company and Amoco, "letters to it from various members of the regulated community who have requested or who support the change" proposed by the emergency rule. R95-10 at *4.

In this matter, IERG's Motion for Emergency Rule, which incorporated the Motion for Expedited Action, described in detail the history of this proceeding, the events causing this emergency situation, why these circumstances are an emergency, and why such circumstances warrant the adoption of an emergency rule. Moreover, this Reply provides additional information that supports the adoption of the emergency rule. The Board, in R93-12, adopted an emergency rule based on the Illinois EPA's initial motion, which the Board deemed incomplete, and a brief follow-up Motion that relied on a call

from the Illinois Petroleum Association, comments filed by impacted sources, and a single paragraph citing *CBE,* and a statement that "emergency rules are being proposed to alleviate a clear and present threat to the public interest, not merely administrative ease." Response to Board Order at ¶ 8; R93-12 at *1. If the Board made a determination based on the limited support for the emergency rule provided by the Illinois EPA in the R93-12 proceeding, surely the detailed information explaining the emergency circumstances in this matter and the impact on non-EGUs justifies and warrants the adoption of the emergency rule, as described in Exhibit 1 to the Motion for Emergency Rule.

Also note that, in this proceeding, like in R93-12 and R95-10, several companies, as well as trade associations, filed comments explaining why the emergency rule and adoption of the alternative proposal are necessary. *See* Response of Corn Products International, Inc. to Motions Submitted by IERG, R6-22 (Ill.Pol.Control.Bd. Aug. 11, 2009); Response of Chemical Industry Council of Illinois to Motions Submitted by IERG, R6-22 (Ill.Pol.Control.Bd. Aug. 11, 2009); Response of Illinois Chamber of Commerce to Motions Submitted by IERG, R6-22 (Ill.Pol.Control.Bd. Aug. 11, 2009); Response of Flint Hills Resources, LP to Motions Submitted by IERG, R6-22 (Ill.Pol.Control.Bd. Aug. 12, 2009); Response of Illinois Manufacturers' Association to Motions Submitted by IERG, R6-22 (Ill.Pol.Control.Bd. Aug. 12, 2009); Response of Bunge North America to Motions Submitted by IERG, R6-22 (Ill.Pol.Control.Bd. Aug. 13, 2009); Response of Citgo Petroleum Corporation to Motions Submitted by IERG, R6-22 (Ill.Pol.Control.Bd. Aug. 13, 2009); Response of Archer Daniels Midland Company to Motions Submitted by IERG, R6-22 (Ill.Pol.Control.Bd. Aug. 13, 2009); Response of Illinois Petroleum Council to Motions Submitted by IERG, R6-22

(Ill.Pol.Control.Bd. Aug. 13, 2009); and Response of Marathon Petroleum Company to Motions Submitted by IERG, R6-22 (Ill.Pol.Control.Bd. Aug. 13, 2009). In the past, as evidenced by the rulemaking discussed above, the Board has considered comments from impacted parties and related entities that represent such parties. Here, all the submittals, excluding the Illinois EPA's Response, filed in response to IERG's Motions support the adoption of the emergency rule and alternative proposal and explain that impacted sources face potential liability and possibility of litigation initiated by USEPA, the Illinois EPA, the Attorney General's Office, or citizen groups. As the Board gave consideration to public comments submitted in R93-12 and the Illinois EPA itself relied on the hardship expressed by industry in its proposed emergency rule in R95-10, IERG requests that the Board give due consideration to the comments submitted in this proceeding in support of the emergency rule and alternative proposal.

In addition, in the R93-12 proceeding, the Board took note of what prompted the imposition of an emergency rule stating that "the extreme action of an emergency rulemaking might have been avoided if the Agency had acted in a more timely fashion." R93-12 at *8. The Board further noted:

> [T]he Agency was aware of the pending Stage II problem almost two months ago and more than a month before the May 1, 1993 compliance deadline. The Agency did not notify this Board until May 3, 1993, after the compliance deadline had already passed. Compounding the matter, the Agency's May 3 notification was defective, forcing additional delay.
>
> The Agency's untimely actions have reduced the opportunity for this Board to weigh alternative, and perhaps more appropriate, measures in place of the drastic emergency rulemaking action.

Id. at *9. As in R93-12, it is the Illinois EPA's "untimely actions," i.e. inaction, of failing to take steps to adopt a rule to bring budget units into the CAIR NOx Ozone Season

Trading Program in a timely manner that has caused the emergency situation that exists. As discussed in detail in the Motions, the Illinois EPA has been aware for months of the need to establish a trading program for non-EGUs. This is evidenced by the Status Reports filed in this rulemaking, as well as the Illinois EPA's statement in the NOx RACT proceeding that it intended to "make a regulatory proposal soon to address this deficiency . . ." in not amending its rules for non-EGUs to ensure compliance with the non-EGU NOx budget. Post-Hearing Comments of the Illinois EPA, R08-19 (Ill.Pol.Control.Bd. Mar. 23, 2009). As the Board has considered the timeliness of the Illinois EPA's actions in a past rulemaking and whether such timeliness played a part in why an emergency rule was necessary, IERG requests that the Board duly consider the Illinois EPA's inaction in this matter.

Finally, in the R93-12 proceeding, an emergency rule with a new compliance date was adopted to "replace" the prior compliance date in order to relieve the hardship on industry. R93-12 at *9. The Board stated that when the emergency rule expires after 150 days, the prior "compliance deadline will again become the law, unless a permanent amendment to Section 219.586 is made." *Id.* (Emphasis in original.) In this proceeding, IERG's emergency rule offers a replacement of the current version of Subpart U with the CAIR NOx Ozone Season Trading Program in order to provide a mechanism by which 2009 NOx allowances can be issued. Similarly, the alternative proposal is intended only to bring budget units into the CAIR NOx Ozone Season Trading Program for the 2010 control period and beyond. Such an alternative proposal or "permanent rule" is necessary since the emergency rule will expire after only 150 days. The Board in R93-12 recognized the need for a permanent rule to achieve a permanent solution, and thus,

IERG requests that the Board adopt the emergency rule and alternative proposal as described in IERG's Motions.

B. CAAPP Permit Liability

The Motions reference, as does this Reply, that impacted sources face potential liability in terms of violations of CAAPP permit conditions should facilities not hold the requisite NOx allowances as required by their CAAPP permits, as well as Subpart U. The Illinois EPA, however, does not address this issue in its Response. It simply ignores the threat of liability posed by potential noncompliance with CAAPP permit conditions. Further, the suggested sunset provision in Attachment A of the Illinois EPA's Response may relieve impacted facilities from compliance with the regulatory requirement to hold NOx allowances, but it does not address the CAAPP permit conditions requiring that facilities hold NOx allowances. In order to revise such conditions, CAAPP permits may have to undergo significant modifications. Such significant modifications must first comply with public notice requirements, pursuant to 415 ILCS 5/39.5(14)(c)(iii). Therefore, these permit revisions would not be completed prior to the November 30, 2009 deadline to hold NOx allowances.

The Illinois EPA also has misinterpreted IERG's concern regarding the liability faced by sources, as evidenced by the Illinois EPA's statement that "USEPA does not prosecute individual companies when a state has failed to adopt an applicable program." Response at ¶ 22. As explained in IERG's Motions, impacted facilities face potential liability stemming from both an existing regulatory program and permitting standpoint, which could prompt enforcement from USEPA or the Illinois EPA or litigation by citizen groups or the Illinois Attorney General's Office.

Although the Illinois EPA states that "USEPA has indicated that a demonstration using reported emissions from the applicable sources demonstrating that the budget has been met would suffice in lieu of having adopted measures," documentation of such an indication is neither included with the Illinois EPA's Response nor part of the record in this rulemaking. *Id.* at ¶ 22. Impacted facilities cannot rely on the Illinois EPA's recitation of discussions with USEPA regarding how to meet the NOx SIP Call budget requirement without additional evidence of USEPA's position.

C. SEC Disclosure Requirement

As noted in IERG's Motion for Emergency Rule, publicly held companies must disclose potential liability in SEC filings. IERG MER at 5. IERG disputes that the Illinois EPA, as a state governmental agency charged with protecting environmental quality, has the ability to determine what are "minimally impacting and arguably immaterial uncertainties" for purposes of the requirement of a publicly held corporation to report to the SEC, as it claims in its Response. Response at ¶ 27.

D. Conclusion

IERG incorporates the discussion below in regards to the Motion for Expedited Action, as applicable, to the discussion above regarding IERG's Motion for Emergency Rule. IERG has demonstrated that an emergency exists, and accordingly, based on IERG's Motions and this Reply, IERG requests that the Board grant the Motion for Emergency Rule in order to provide a mechanism by which impacted facilities can be issued NOx allowances for the 2009 control period and avoid potential liability for not holding the required NOx allowances on November 30, 2009.

IV. MOTION FOR EXPEDITED ACTION ON ALTERNATIVE PROPOSAL

A. General Comments

IERG incorporates the discussion above, as applicable, to the discussion below regarding IERG's Motion for Expedited Action.

IERG asks that the Board grant the Motion for Expedited Action, as the Agency has not presented any indication of material prejudice that would result from the Motion being granted. IERG's alternative proposal is intended "to allow the continued trading of NOx emissions allowances as seamlessly as possible so that operations of industry throughout Illinois can continue to comply with the federal NOx SIP Call requirements for Non-EGUs." IERG MEA at 13.

The Illinois EPA also raises issues with IERG's proposed allocations, as contained in Appendix E of Subpart U. Response at ¶ 39. However, the Illinois EPA's argument fails to recognize the fundamental economics of a trading program. The prospect of excess, saleable allowances is intended to motivate sources to reduce their emissions beyond an established threshold, as is evident by the current total emission levels of budget sources. The Illinois EPA states that the alternative proposal "allocates significantly more allowances than are needed by existing sources for compliance." *Id.* The Illinois EPA, however, fails to recognize that this is the direct result of sources taking steps to reduce their emissions, be that through investment in pollution control technology or adopting operating practices to minimize emissions of NOx, in expectation of being able to realize a return on their investment. As stated above, IERG's alternative proposal is merely intended to extend the current trading program by amending Subpart U with the necessary changes to comport with the federal CAIR trading system. IERG

disagrees with the Illinois EPA's conclusion that the budget and allocation methodology "do not comport with public policy and protection of the environment." *Id.* IERG contends that, as it only intends to continue the existing trading program, it is seeking the same aims of public policy and protection of the environment as that previously approved program.

IERG also disagrees with the Illinois EPA's desired limitations of a budget no greater than actual emissions, and a limited duration, such as no longer than the 2011 control period. *Id.* As discussed above, the Illinois EPA's desire to reduce the number of allowances allocated is contrary to the public policy associated with the NOx trading program and the General Assembly's mandate in Section 9.9 of the Act. Moreover, the Illinois EPA's position effectively nullifies any economic benefit for units subject to the rule that have taken action to reduce their emissions, and further, is not called for by the NOx SIP Call. With regard to a limited duration, IERG cannot support such a provision. IERG is concerned that such a provision could result in the expiration of a rule prior to the adoption of its replacement, resulting in the same situation currently facing impacted sources. Further, IERG is uncertain whether the USEPA would approve a SIP containing a sunset date, with no provision for the future. Finally, IERG believes that the Board's rulemaking process for Regulations of General Applicability provides an adequate mechanism for replacing a NOx trading rule at some time in the future, if the Illinois EPA desires, or future USEPA rulemakings necessitate. The Illinois EPA has not provided information showing otherwise.

B. Federal Approvability

The Illinois EPA repeatedly states that the alternative proposal "is not federally approvable." Response at ¶¶ 8-9 and 36-37. IERG questions the basis for the Illinois EPA's conclusive determination. As discussed in IERG's Motion for Expedited Action, the alternative proposal meets the requirements, as specified by USEPA, for bringing budget units into the CAIR NOx Ozone Season Trading Program because the alternative proposal adopts the CAIR model rule at 40 C.F.R. Part 96 Subparts AAAA through IIII. IERG MEA at 9-11. The alternative proposal not only incorporates the federal CAIR model rule, but it also follows the same structure and uses the same terminology, where appropriate, as the CAIR NOx Ozone Season rule for EGUs at 35 Ill. Admin. Code Part 225 Subpart E, which was federally approved as a SIP revision. 72 Fed. Reg. 58528 (Oct. 16, 2007).

In addition, the Illinois EPA admits that "due to the press of time" it has not provided "a copy of the draft rule to USEPA for review to ensure the approvability of the proposal." Response at ¶ 33. IERG questions how the Illinois EPA can unequivocally state that the alternative proposal is not federally approvable, and at the same time, state that it has not provided a copy of the draft to USEPA to determine approvability. It would seem these statements are incongruous, at best. Other inconsistencies are evident in the Illinois EPA's statement "if the rule being suggested by IERG was not federally approved" which seems to indicate that whether the rule is federally approvable remains unknown, not a foregone conclusion. *Id.* at ¶ 35.

In the same regard, it appears that the Illinois EPA has no basis to state that an "emergency amendment beyond what the Illinois EPA has proposed in Attachment A"

would not be approved by USEPA. *Id.* at ¶ 34. To make such an unequivocal statement would have required the Illinois EPA to have been informed by USEPA that IERG's alternative proposal was not federally approvable. In order for USEPA to have made such a determination, it would have had to have reviewed IERG's alternative proposal. Yet, the Illinois EPA admits that it did not provide a copy of the draft rule to USEPA for review with regard to approvability. *Id.* at ¶ 33.

Based on the Illinois EPA's admission that it has not provided IERG's alternative proposal to USEPA, it would appear that the Illinois EPA would not be in the position to state whether the proposal was or was not federally approvable. Absent USEPA's determination of the approvability of the alternative proposal, IERG offers that there appears to be no basis for the Illinois EPA's statement that the alternative proposal is not federally approvable. Again, IERG's alternative proposal follows the direction of USEPA by adopting the federal model CAIR ozone season rule. 70 Fed. Reg. at 25274, 25290; IERG MEA at 9-11, 13.

Further, if the Illinois EPA did not have time "in the six days provided by the Board" to do a line by line analysis of the proposed rule or submit a draft to USEPA, IERG questions if the Illinois EPA had time to submit the regulatory language proposed in its Attachment A for USEPA's review "to ensure the approvability of the proposal"? Response at ¶ 33. If Illinois EPA did so, why did it not similarly have time to forward IERG's alternative proposal to USEPA for review?

The Illinois EPA also offers that if the Board proceeds with a short term solution, it should do so using the regulatory language submitted by the Illinois EPA in Attachment A to its Response, "which does not have the aforementioned problems

associated with" IERG's alternative proposal. *Id.* at ¶ 12. This would seem to imply that the Illinois EPA's proposed regulatory language is federally approvable. However, as referenced above, IERG questions whether the Illinois EPA has provided a draft of Attachment A to USEPA for approval, and if so, why was IERG's alternative proposal not provided to USEPA?

The Illinois EPA also offers that non-EGUs can be included in the CAIR program only if the rule is "substantially identically [sic] to 40 C.F.R. Subparts AAAA through IIII." *Id.* at ¶ 32. Yet, the Illinois EPA states that it has not completed a line by line analysis of the proposed rule. *Id.* at ¶ 33. Absent having completed such analysis, it would seem difficult, at best, for the Illinois EPA to apparently conclude that IERG's alternative proposal is or is not substantially identical to 40 C.F.R. Subparts AAAA through IIII.

In summary, IERG believes that its alternative proposal, the sole purpose of which is to bring the NOx SIP Call budget units into the CAIR NOx Ozone Season Trading Program is not only federally approvable, but may even be automatically approvable. IERG bases its belief on Section 51.123 of the federal requirements for submissions and revisions of SIPs relating to NOx emissions under CAIR. 40 C.F.R. § 51.123. Specifically, Section 51.123(aa) outlines the requirements for an emissions trading program in a State's SIP revision to be automatically approved:

> [I]f a State adopts regulations substantively identical to subparts AAAA through IIII of part 96 of this chapter (CAIR Ozone Season NOX Trading Program), incorporates such subparts by reference into its regulations, or adopts regulations that differ substantively from such subparts only as set forth in paragraph (aa)(2) of this section, then such emissions trading program in the State's SIP revision is automatically approved as meeting

> the requirements of paragraph (q) of this section, provided that the State has the legal authority to take such action and to implement its responsibilities under such regulations.

40 C.F.R. § 51.123(aa)(1). (Emphasis added.)

C. Procedural Issues

The Illinois EPA states that IERG's alternative proposal "is more correctly a separate proposal from the subject matter and scope of the present rulemaking." Response at ¶10. IERG disagrees with the Illinois EPA's assertion. As described in detail in the Motion for Expedited Action, the Status Reports filed by the Illinois EPA in this rulemaking acknowledge that this rulemaking proposal would likely need to be amended to address the requirements of CAIR's replacement of the NOx SIP Call Trading Program. IERG MEA at 5-8. As late as March 2009, the Illinois EPA acknowledged the "obligation for meeting interstate NOx reductions for industrial boilers" and planned on replacing Subpart U with a rule to "integrate the Non-EGUs into the CAIR rule." Illinois EPA Status Report, R06-22 at *1 (Ill.Pol.Control.Bd. Mar. 9, 2009). As IERG has stated, it does not intend "to establish a new federal program," but rather, as described in the Motions, to effectuate an extension of a State program that has been ongoing. Response at ¶16; IERG MEA at 13.

In addition, in paragraph 11 of the Response, the Illinois EPA alleges that the Motion for Expedited Action does not include several requirements that the Illinois EPA implies are necessary for proposing the alternative language. Response at ¶ 11. IERG notes that the requirements that the Illinois EPA references are for new rulemakings, and such requirements are not applicable to the Motion for Emergency Rule, and it is doubtful that the information is necessary for the alternative proposal. IERG's Motions

contain sufficient information and justification as the Board requires to consider adoption of both the emergency rule and the alternative proposal. The Board has discretion to waive any non-statutory requirements for several reasons, including where the information has already been provided. 35 Ill. Admin. Code § 102.110. However, if the Board does determine that it needs additional information, IERG will provide the Board with the requested information.

As discussed in the Motion for Emergency Rule, the APA grants the Board authority to adopt an emergency rule that will be effective for 150 days. IERG MER at 10. The Illinois EPA states in its Response that "[t]here is no provision for any regulatory amendment that would be in place following the expiration of the 150 days." Response at ¶ 11. As discussed in the Motion for Emergency Rule, budget units subject to Subpart U are required to hold NOx allowances on November 30, 2009, which is less than 150 days from today. The adoption of the emergency rule will provide the necessary regulatory regime through the time period in which impacted sources must comply. The emergency rule will no longer be necessary after November 30, 2009 since compliance requirements will have past. Thus, IERG filed the Motion for Expedited Action in order to bring budget units into the CAIR NOx Ozone Season Trading Program for the 2010 control period and beyond. The "permanent rule" as described in the Motion for Expedited Action should be in place and provide the requirements for compliance when the emergency rule expires.[2]

[2] If a permanent rule is not adopted prior to the expiration of the emergency rule, the rule existing prior to the adoption of the emergency rule will once again become effective. *See* R93-12 at *9 (stating that the Board observed "that when the instant emergency rule expires, the May 1, 1993 compliance deadline will again become the law, unless a permanent amendment to Section 219.526 is made"). (Emphasis in original.)

In regards to the Illinois EPA's statement that IERG's alternative proposal "should seek to amend Part 225," IERG does not deny that a proposal *could* be placed in Part 225: *Control of Emissions from Large Combustion Sources.* *See* 35 Ill. Admin. Code Part 225. However, as IERG intends to continue the existing trading program, it is appropriate to retain the regulatory structure in which that program existed. Also, it appears that Part 225 applies only to EGUs, and since all the units regulated by the current version of Subpart U, as well as the alternative proposal, are non-EGUs, amending Part 217 is appropriate.

As stated above, should the Board request additional information in support of IERG's Motion for Expedited Action, IERG will provide such information for the Board's consideration. IERG will also work with the Illinois EPA to develop a mutually acceptable proposal for the "permanent rule," but to ensure the allocation of allowances for the 2009 ozone season, IERG requests that the Board not delay in granting the Motion for Emergency Rule.

V. ILLINOIS EPA'S PROPOSED LANGUAGE

In the Illinois EPA's Response, it proposes the addition of a sunset provision to Subpart U. Response at ¶ 8 and Attachment A. The proposed sunset provision does not adequately address IERG's concerns regarding potential liability that impacted facilities face should they not hold sufficient NOx allowances on November 30, 2009. Although the sunset provision is intended to eliminate the regulatory requirement to hold NOx allowances, it has no impact on CAAPP permit requirements. In addition, as stated previously, IERG is uncertain that the Illinois EPA's approach satisfies the requirement to "adopt control measures that satisfy the same portion of the State's NOx emission

reduction requirements under this section as the State projected such emissions trading program would satisfy," if the State chooses to not meet the NOx SIP Call budget obligation through the use of a trading program. 40 C.F.R. § 51.121(r)(2). (Emphasis added.) The Illinois EPA's proposed language provides an incomplete solution as substantial risk and uncertainty for affected sources would remain. Again, as IERG has maintained, the best approach is to continue the existing NOx trading program.

VI. APPENDIX E TO IERG'S ALTERNATIVE PROPOSAL

The Illinois EPA states that IERG's alternative proposal includes a NOx budget that is different than the budget provided to Illinois by USEPA. Response at ¶ 32. As described in detail in the Motion for Expedited Action and its Exhibits, Bunge Milling, Inc.'s ("Bunge") CFB Boiler at its Danville, Illinois facility was inadvertently excluded from Subpart U Appendix E, and thus, Bunge has never received an allocation of allowances for the CFB Boiler. IERG MEA at 20-22, Exhibits 4-10. In accordance with the correspondence exchanged between Bunge and the Illinois EPA, IERG revised Appendix E to the alternative proposal to include an allocation of allowances for Bunge. *Id.* And, the Illinois EPA's request to USEPA regarding an allocation of allowances to Bunge has been pending since August 2006. IERG MEA at Exhibit 8. Moreover, the adjustment to the Illinois budget (based upon the Illinois EPA's pending request) is fully consistent with action taken by USEPA to adjust the Illinois budget during its approval of the existing Subpart U as satisfying Illinois NOx SIP Call requirements in 2001. *See* 66 Fed. Reg. 56449 (Nov. 8, 2001), attached to IERG's MEA as Exhibit 2. As IERG has maintained, both the emergency rule and alternative proposal described in the Motions are federally approvable, and the Board should, thus, adopt the emergency rule and

alternative proposal as submitted by IERG, including the revisions to Appendix E. Should USEPA disapprove of the adjusted budget for Illinois, USEPA can easily sever the portion of the alternative proposal, i.e. the allocation of allowances to Bunge, from the rule it approves. Such a decision, however, should be left to USEPA since it establishes the NOx budget for the State.

In the alternative, should the Board choose not to leave the decision on whether Bunge receives an allocation to USEPA, the Board should adopt the emergency rule and alternative proposal as described in the Motions, absent the adjusted budget for Bunge by subtracting 101 allowances from the total allowances in Appendix E to the alternative proposal. However, in doing so, IERG requests that the Board exempt Bunge from compliance with the requirement to hold NOx allowances on November 30, 2009.

VII. ADDITIONAL COMMENTS

IERG also makes the following comments regarding certain statements made in the Illinois EPA's Response:

The Illinois EPA implies, in its Response, that IERG was deficient in notifying stakeholders of its alternative proposal. Response at ¶ 38. IERG acknowledges that its membership does not include all of the sources impacted by Subpart U, members of the general public, or environmental groups. IERG does not question whether or not the Agency *would have* consulted stakeholders if it had proposed and developed a rule. However, the Agency did not propose or develop a rule, and thus IERG was forced to do so. Again, as IERG has stated above, the alternative proposal is a continuation of the existing trading program, and thus, any interests expressed by stakeholders regarding the

current trading program are reflected in the alternative proposal, as it is merely an extension of the existing program.

The Illinois EPA states that "allowance allocations do not establish a property right." *Id.* at ¶ 40. IERG has never asserted that the need for a NOx trading program is based on allowances as property. In addition, although allowance allocations may not be considered as a property right, IERG interprets Section 9.9 of the Act to indicate the General Assembly's preference for a trading program to satisfy the NOx SIP Call budget obligation. While true that a continued trading program creates an incentive for sources to install and operate control equipment that will produce excess emission reductions, sell allowances not needed for compliance, and offers some degree of stability to market participants, the issue of allowances as property is not a central tenet of the trading program.

VIII. CONCLUSION

The Illinois EPA's failure to replace Subpart U and establish a new regulatory mechanism for issuing NOx allowances for the 2009 ozone season to industries subject to Subpart U has placed the State's owners/operators of affected non-EGUs in a critical bind and exposed them to risk of liability. Since the USEPA ceased to operate the federal NOx SIP Call trading program after the 2008 ozone season and replaced it with the CAIR NOx Ozone Season Trading Program, and since facilities subject to Subpart U are required by existing Subpart U and their CAAPP permits to hold sufficient allowances to cover NOx emissions for the 2009 ozone season, it is imperative that an emergency rule be adopted in order to provide a mechanism by which NOx allowances for the 2009 control period may be allocated to non-EGUs. Further, in regards to IERG's alternative

proposal, a permanent rule is necessary in order to require the Illinois EPA to bring NOx SIP Call budget units into the CAIR NOx Ozone Season Trading Program and distribute allowances for the 2010 control period and beyond.

WHEREFORE, the ILLINOIS ENVIRONMENTAL REGULATORY GROUP requests that the Board to grant the Motions filed with the Board on August 3, 2009 and take the comments provided above under consideration.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP

Dated: August 15, 2009

By: /s/ Katherine D. Hodge
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IERG:001/Fil/Reply to IEPA Response to IERG Motions

CERTIFICATE OF SERVICE

I, Katherine D. Hodge, the undersigned, hereby certify that I have served the attached REPLY OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP TO THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO MOTION FOR EMERGENCY RULE AND MOTION FOR EXPEDITED ACTION ON THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP'S ALTERNATIVE PROPOSAL upon:

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IERG:001/R Dockets/Fil/NOF COS – Reply to IEPA Response to IERG Motions