BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
EMERGENCY RULEMAKING REGARDING	)	**R14-020**
REGULATON OF COKE/COAL BULK TERMINALS	)	**(Rulemaking – Air)**
35 ILL. ADM. CODE PART 213	)	

NOTICE OF FILING

TO: John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

Attached Service List

PLEASE TAKE NOTICE that I have today filed with the Illinois Pollution Control Board Horsehead Corporation's Response to Illinois EPA's Proposal and Motion for Emergency Rulemaking and Entries of Appearance, copies of which are herewith served upon you.

Dated: January 21, 2014

HORSEHEAD CORPORATION.

By: /s/ Susan M. Franzetti
One of Its Attorneys

Susan M. Franzetti
Kristen Laughridge Gale
NIJMAN FRANZETTI LLP
10 S. LaSalle St., Suite 3600
Chicago, IL 60603
(312) 251-5590 (phone)
(312)251-4610 (fax)

SERVICE LIST R14-20

Marie Tipsord, Hearing Officer
Illinois Pollution Control Board
100 West Randolph St.
Suite 11-500
Chicago, IL 60601

Matthew J. Dunn
Office of the Illinois Attorney General
69 West Washington St.
Suite 1800
Chicago, IL 60602

David W. Hacker
General Attorney
United States Steel Corporation
Law Department
600 Grant Street, Room 1500
Pittsburgh, PA 15219

Mark A. Biel
Executive Director
Chemical Industry Council of Illinois
1400 E. Touhy Avenue
Suite 110
Des Plaines, IL 60018

Dana Vetterhoffer
Illinois EPA
1021 North Grand Ave.
P.O. Box 19276
Springfield, IL 62794-9276

Virginia Yang
Illinois Department of Natural Resources
One Natural Resources Way
Springfield, IL 62702-1271

Tom Wolf
Executive Director
Energy Council
Illinois Chamber of Commerce
300 S. Wacker Drive, Suite 1600
Chicago, IL 60606

Charles Drevna
President
American Fuel & Petrochemical Manufacturers
1667 K Street NW
Suite 700
Washington, D.C. 20006

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
EMERGENCY RULEMAKING REGARDING	)	**R14-020**
REGULATON OF COKE/COAL BULK TERMINALS	)	**(Rulemaking – Air)**
35 ILL. ADM. CODE PART 213	)	

HORSEHEAD CORPORATION'S RESPONSE TO
ILLINOIS EPA'S PROPOSAL AND MOTION FOR EMERGENCY RULEMAKING

INTRODUCTION

Horsehead Corporation ("Horsehead"), by its counsel, Nijman Franzetti LLP, submits this response to the Illinois Environmental Protection Agency's ("Illinois EPA" or "Agency") Proposal and Motion for Emergency Rulemaking (the "Agency Motion"). There is simply no "emergency" here under the Illinois Administrative Procedures Act (the "IAPA") and the Illinois Pollution Control Board ("Board") regulations that authorizes the Board to forego normal rulemaking procedures that allow for public comment and participation of all affected parties. The Agency has clearly failed to demonstrate, because it is not able to, that the operations and activities which its rulemaking proposal seeks to regulate present a true "emergency" under the applicable law and regulations. Moreover, the Agency has failed to make the requisite demonstration pursuant to Section 27(c) of the Illinois Protection Act (the "Act") that one or more of the following emergency rulemaking conditions exist: (i) the Governor has declared a disaster emergency; (ii) a severe public health emergency; or (iii) a situation which reasonably constitutes a threat to the public interest, safety or welfare.

Further, Horsehead specifically objects to the Board's adoption of these emergency rules at its January 23 meeting when the Agency has not presented for public review its "statement of the specific reasons for the finding" that an emergency which threatens the public interest, safety

and welfare exists, as required both by Section 5-45 of the IAPA and Sections 102.106(b) and 102.612(a) of Part 102 of the Board's regulations. In particular, because of the absence of any statement of specific reasons for these emergency rules, combined with the vagueness of the proposed scope and applicability of the proposed language of the Agency's hastily prepared rules, Horsehead is not even certain whether its long-standing Illinois operations are intended to be regulated by these rules. Horsehead's operations are not accurately described as a "coke or coal bulk terminal." However, because the proposed definition of that term in the emergency rules is unclear, if the proposed rules were to apply to Horsehead's operations, there would be significant adverse effects on its Illinois operations. Given this uncertainty, Horsehead is compelled to protect its interests by objecting to the Agency's request for emergency rulemaking. Horsehead requests that the Board require the Agency to clarify the intended scope of these proposed rules prior to their adoption.

Alternatively, if the Board should find that there is any legal basis for proceeding with emergency rulemaking here, which Horsehead maintains it properly should not, then Horsehead requests that the Board apply a "scalpel" to the Agency's vague and sweeping "emergency rules" to eliminate the threat of imposing unjust and unnecessary burdens upon non-bulk terminal operations like Horsehead's - - which has not and is not causing any threat to the public interest, safety or welfare and is not the cause of the Agency's emergency rulemaking motion.

The Agency's proposed "Purpose and Applicability" in Section 213.110 of the emergency rules is to "apply to coke or coal bulk terminals." (Agency Motion, Exhibit A at p. 3) However, the Agency's proposed definition of "coke or coal bulk terminals" in proposed Section 213.115 is unclear and confusing. It first broadly defines such terminals as "any source, site, or facility where coke or coal is stored, handled, blended, processed, transported, or otherwise

managed, other than the source, site, or facility that produces or consumes the coke or coal." (Id.) Horsehead reasonably believes that because it only stores and handles a limited amount of petroleum coke ("petcoke") or metallurgical coke ("metcoke") for use as a carbon source in its manufacturing process, it "consumes" the coke in that process and therefore, its operations are intended to be excluded from the proposed emergency rules. Horsehead's interpretation of the "coke or coal bulk terminals" definition is supported by the remainder of the proposed definition's language which provides: "A coke or coal bulk terminal typically receives coke or coal from one type of vehicle - such as a truck, railcar, barge or lake vessel – transfers the coke or coal to another type of vehicle, often while temporarily storing the coke or coal between receipt and transfer." (*Id.*) This language does not describe Horsehead's operations. The limited amount of coke materials used by Horsehead are added to feedstock materials and heated in high-temperature metal recovery kilns as an ingredient to create a reducing environment in the kiln to produce products used primarily for zinc production and by asphalt and cement manufacturing plants. Accordingly, Horsehead requests that the Board clarify the proposed definition of "coke or coal bulk terminal" in Section 213.115 of the emergency rules by revising the first sentence to read as follows:

> "Coke or coal bulk terminal" means a source, site, or facility where coke or coal is stored, handled, blended, processed, transported, or otherwise managed, other than the source, site, or facility that produces or consumes the coke or coal **or uses coke or coal as a carbon source in a manufacturing process**.

In the alternative, the Board should give careful consideration to excluding smaller operations who would otherwise be subjected to these proposed emergency rules, even though the Agency's Motion focuses on "large" bulk terminals. The risk of adverse prejudice is significant for smaller operations. The economic impact upon smaller operations is more likely to be economically unreasonable and to raise technical feasibility issues as well due, for

example, to the different nature of their operations versus large bulk terminal operations. Because the Agency's primary focus has been on large bulk terminals, the issues unique to smaller operations, particularly those that are not accurately characterized as "bulk terminals," have not been adequately considered, if they were considered at all, in the drafting of these rules. This problem is yet another reason supporting a proper notice and comment period for these proposed rules. However, in the interim, the Board should include a *de minimis* exception in the definition of "coke or coal bulk terminal" which limits its applicability "to sources, sites or facilities is stored, handled, blended or processed, transported, or otherwise managed **in an amount in excess of 10,000 cu.yds.**" Given that the Agency provides no information showing that such smaller sources present a threat to the public interest, safety or welfare, such a revision is warranted to reduce the irreparable harm associated with adopting these emergency rules.

Horsehead regrets that the Board has been placed in this difficult situation. However, because the Agency's Motion threatens to cause significant prejudice to innocent business operations like Horsehead's, and to the jobs those operations provide to Illinois residents, the Board needs to exercise its lawful authority to protect the fundamental due process rights guaranteed to all Illinois citizens, and more specifically, the continued operations at Horsehead's Illinois facility, by denying the Agency's motion.

I. The Agency's Motion does not Present Valid Grounds for an Emergency Rulemaking.

Under the relevant facts and circumstances presented by the Agency's Motion, if the Board were to grant emergency relief, which it clearly should not, it would be setting a very dangerous legal precedent. Granting this emergency motion will open the "flood gates" to allow future petitions for emergency rules in virtually any area of environmental regulation. All a petitioner will need to allege is that the proposed rules are necessary to address "a threat to the

public interest, safety or welfare." It will essentially eliminate the meaning of "emergency" under the IAPA and Board regulations. It also will eliminate the requirement that there must be a reasonable conclusion made that an emergency situation presenting such a threat exists. Adopting these emergency rules now would also eviscerate the fundamental due process protections built into its notice and comment rulemaking procedures for affected parties. Virtually any future "emergency" environmental rulemaking petitioner will be able to claim that some "threat" to the public interest, safety or welfare will be addressed by its rulemaking proposal, as most if not all Illinois environmental regulations afford some protection against "threats to the public interest, safety or welfare." This is not the outcome the Illinois legislature intended when it enacted the IAPA emergency rulemaking provisions on which the Board's regulations are based.

A. Illinois Emergency Rulemaking Authority is to be Used Sparingly and only in True Emergencies.

As the Board is well aware, general rulemaking pursuant to Section 5-40 of the IAPA, 5 ILCS 100/5-40, is subject to the detailed procedures set forth in Part 102 of the Board regulations. The notice, hearing and comment procedure reflects our state's preference for public participation in rulemaking. The non-emergency rulemaking procedures prescribed by Board regulations are not mere formalism; they serve important purposes. The opportunity for the public to present testimony and to comment on proposed rules helps create better quality rules, by virtue of the input of all interested members of the public in the decision-making process.[1] In *County of Du Page v. Illinois Labor Relations Board*, 358 Ill.App.3d 174, 183-184 (2nd Dist., 2005), the Illinois Appellate Court rejected the Illinois Labor Relations Board's attempt to use

[1] *County of Du Page v. Illinois Labor Relations Board*, 358 Ill.App.3d 174 (2nd Dist., 2005). See also, *United States v. Utesch*, 596 F.3d 302, 308-09 (6th Cir. 2010) (quoting *Dismas Charities, Inc. v. U.S. Dept. of Justice*, 401 F.3d 666, 678, 680 (6th Cir. 2005)).

the emergency rulemaking provisions of the IAPA because it "was as much a threat to the public interest, safety, and welfare as was the situation the Board was addressing, because the public interest embodied in the [IAPA] was frustrated by the Board's bypassing the public notice and comment requirements." See also, *Champaign-Urbana Public Health Dist. V. ILRB*, 354 Ill.App.3d 482 (4th Dist. 2004).

Allowing parties potentially affected by such rules to participate in the rulemaking process is important to fundamental fairness. It ensures the fair treatment of persons affected by the rule, because all parties potentially affected have a chance to participate.[2] As a nonelected political body, the Board's very legitimacy is dependent upon its openness and amenability to the needs and ideas of affected parties. For all these reasons, the Board should not exempt the Illinois EPA from the notice and comment procedures where, as here, the matter presented is not predicated on a true emergency.[3]

The IAPA's emergency rulemaking provisions and the Board's emergency rulemaking regulations are intended only for those exigent circumstances that truly call for prompt action in the absence of notice and comment procedures in promulgating a rule. They must be read narrowly, in order to effectuate their purpose and to preserve the beneficial aspects of emergency rulemaking. The Illinois Joint Committee on Administrative Rules ("JCAR"), which is charged under the Illinois Administrative Procedure Act with review authority over all rules adopted by the Board, including emergency rules, has set forth in its own regulations a "basic policy" regarding preemptory rulemaking which endorses these important principles, stating in 35 Ill. Adm. Code Section 240.100(a) that, "the Joint Committee believes that public notice and

---

[2] *Utesch*, 596 F.3d at 308-09 (quoting *Dismas Charities*, 401 F.3d at 678, 680).

[3] *See, e.g., Citizens for a Better Environment v. Pollution Control Board,* 152 Ill App.3d 105, 504 N.E.2d 166 (1st Dist. 1987) *See also,* N.J. Dept. of Envt. Prot. v. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980) (Interpreting the emergency rulemaking provisions of the federal Administrative Procedure Act, stating "[I]t should be clear beyond contradiction or cavil that Congress expected, and the courts have held, that the various exceptions to the notice-and-comment provisions of section 553 will be narrowly construed and only reluctantly countenanced.").

comment is an essential part of the rulemaking process, which should only be by-passed for very serious reasons." 35 Ill.Adm.Code § 240.100(a). "One of the main reasons the [IAPA] was enacted was to give the public input into the rulemaking process." (*2012 Annual Report - Joint Committee on Administrative Rules, Illinois General Assembly*, at p. 8; available at: http://www.ilga.gov/commission/jcar/12AnnualReport.pdf). In explaining the requirements of the emergency rulemaking provisions of section 5-45 of the IAPA, JCAR has repeatedly stated the following in each of its Annual Reports for the past several years:

> Section 5-45 of the Illinois Administrative Procedure Act specifies that agencies may use this short form rulemaking procedure, in which a rule is adopted without prior opportunity for public and JCAR comment, only if the agency finds that an emergency exists that requires adoption of a rule within fewer days than normally required. The agency must state the emergency situation in writing and make an effort to notify the affected public.

2012 Annual Report - Joint Committee on Administrative Rules, Illinois General Assembly, at p. 19; *see also, 2009 Annual Report - Joint Committee on Administrative Rules, Illinois General Assembly*, at p. 19, https://archive.org/stream/2009annualreport00illi#page/18/mode/2up.[4]

In sum, the emergency rulemaking rules are intended to be limited to those circumstances where the benefits gained from public participation are outweighed by emergency circumstances. Unless the Agency has a compelling emergency public interest, demonstrable through concrete evidence, that clearly outweighs the need for public participation, it should be required to comply with the normal rulemaking notice and comment procedures. The Agency has not made that showing here.

---

[4] JCAR has repeatedly objected to and suspended attempts by Illinois agencies to utilize emergency rulemaking in situations where a true emergency does not exist, even where the proposed emergency rules would clearly benefit and protect members of the public. See, *e.g.*, objection and suspension of emergency rules to help cover health insurance costs of qualifying homemaker agencies (2009 Annual Report at p. 19). Even when a proposed emergency rule that sought to protect students with disabilities from the use of "pain as an intentional method of control," JCAR objected and suspended the rule because the State Board of Education "had not shown the existence of any emergency situation." 2008 Annual Report – Joint Committee on Administrative Rules, Illinois General Assembly, at p. 21, available at: http://archive.org/stream/2008annualreport00illi/2008annualreport00illi_djvu.txt

B. There is no "Emergency" within the Meaning of Applicable Illinois Law and Regulations.

The Illinois EPA's proposed "emergency" rules are primarily for the purpose of regulating the bulk storage and handling of petcoke, coal and related materials. It is undisputable that these materials have been handled and stored in Illinois for many years. As stated in the public comment filed in this proceeding by the American Fuel and Petrochemical Manufacturers (Public Comment #2 at p. 1), petcoke has been around since the 1930's. Certainly, neither petcoke nor coal materials only recently appeared in Illinois.

The operations which the Illinois EPA is seeking to regulate on an emergency basis are not new, nor does the Agency make any such claim. Nor does the Agency pretend to have only just become aware of these activities. In fact, in its motion, the Agency carefully avoids any mention of the fact that it has been aware of and has regulated these operations for years, without ever before "reasonably" concluding, as the legislative "emergency" definition in Section 5-45 of the IAPA requires, that these operations constitute a threat to the public interest, safety and welfare that warrants emergency relief. The Agency conveniently neglects to inform the Board that operations like those conducted at Horsehead's facility have had air and waste management operating permits issued through existing Illinois air and land management regulatory programs for years. Under these existing programs, Horsehead's operations have been regularly inspected by the Agency to monitor compliance with existing air, land and water requirements that already adequately protect the environment and the public welfare.

As discussed further below, because of the vagueness of the Agency's proposed emergency rules, the lack of any Agency statement of reasons to provide further explanation of their scope and applicability, and the limited time allowed for the preparation of this response, Horsehead is not even certain that the proposed emergency rules are intended to regulate its

Illinois operations. But in order to protect its fundamental due process right to find out the answer to this critical question through general rulemaking notice and comment procedures, Horsehead is compelled to bring to the Board's attention the legal deficiencies in the Agency's filing.

C. Horsehead's Operations should not be Regulated by the Proposed Emergency Rules because they present no Risk to the Public Interest, Safety or Welfare.

It is particularly prejudicial here that a potentially affected party, like Horsehead, is being required to respond to the Agency's motion for emergency rulemaking without the Agency first having complied with the important requirement under Section 5-45 of the IAPA to file a formal statement of the reasons for its finding that "emergency" rules are warranted here. In the absence of such a statement, Horsehead is uncertain whether or not the proposed "emergency" rules will or will not adversely affect its operations because it cannot clearly determine from the Agency's cursory filing whether its operations will be impacted. The Agency has not presented any explanation of the intended scope and applicability of its proposed "emergency" rules. Its limited description of the alleged threats it seeks to address do not apply to Horsehead's operations. To clarify the basis for Horsehead's uncertainty, and its significant concern that the Agency's "rush to judgment" here will unreasonably ensnare Horsehead's operations under these hastily prepared "emergency rules," it presents for the Board's consideration an overview of the operations it conducts at its Chicago facility and how those operations differ from those described in the Agency's Motion and proposed emergency rules.

The Board has previously had occasion to review the operations conducted at Horsehead's facility, located at 2701 E. 114th St. in Chicago. In February 2000, the Board granted the facility's Adjusted Standard Petition to find that the zinc oxide product manufactured at Horsehead's facility was excepted from the definition of solid waste. (See, *In the Matter of*

Petition of Horsehead Resource and Development Company, Inc. for an Adjusted Standards Under 35 Ill. Adm. Code 720.131(c), AS 00-2 (February 17, 2000)). The production process in question for what was then called "crude zinc oxide" ("CZO"), now simply referred to as "Waelz Oxide," is described in greater detail in the Board's February 17, 2000 Opinion and Order. (*Id.* at pp. 4-6). Briefly stated, the Board found that the CZO was produced "by recycling a mixture which is about 90 % EAF [Electric Arc Furnace] dust and about 10% hazardous and non-hazardous zinc-bearing feedstocks." (*Id.* at p. 4) None of these feedstocks are "coke or coal materials."

However, as the Board also correctly described, "[j]ust before the feedstocks enter the Waelz kilns, a carbon source (such as coke) is added." (*Id.* at p. 5, citations omitted) The carbon source used today is either petcoke or metcoke. Horsehead maintains less than 10,000 cu. yds of such coke materials outdoors at its facility for use in its manufacturing process. The Waelz kilns heat the combined feedstocks and coke source materials mixture "to 1200 degrees Celsius in order to chemically reduce nonferrous metals." (*Id.*) The process "results in no waste nor water discharges." (*Id.*) In other words, there is no coke-containing solid waste or wastewater generated from this process. Therefore, Horsehead submits that its use of coke materials in its production process meets the intended meaning of "consuming" the coke materials under the Agency's proposed exclusion from the definition of "coke or coal bulk terminal."

The resulting zinc materials produced from the Waelz kiln are the Waelz Oxide and "Iron-Rich Material" or "IRM." (*Id.* at pp.5-6). The Waelz Oxide is sold directly, or after further purification at another Horsehead facility, for use either as feedstock in zinc production or as an ingredient in the production of micronutrients, such as for animal feed. (*Id.* at pp. 7-8,

12) The IRM is sold for use in asphalt aggregate, cement production, or construction aggregate. (*Id.* at p. 6) As the Board found, "Horsehead changes EAF dust, a product with negative value [because "generators of EAF dust pay for it to be either disposed or recycled"], into Waelz Oxide and IRM, products with substantial positive values. (*Id.;* see also p. 12)[5] Horsehead's "recycling of EAF dust conserves natural resources by decreasing the need to mine non-renewable zinc ores. In addition, Horsehead's recycling process means that less EAF dust is sent to landfills." (*Id* at p. 15).

The Board already has scrutinized in detail the Horsehead operations at issue here. In the course of that close scrutiny, supported by sworn testimony and the rigors of an evidentiary hearing with the opportunity for cross-examination, in which the Agency directly participated, there were no concerns whatsoever raised by Horsehead's limited handling and storage of coke materials at its facility and its use of those materials as a carbon source in its production process. Nothing has significantly changed since both the Agency and the Board closely reviewed Horsehead's operations. Accordingly, Horsehead requests that the Board deny the Agency's motion for emergency rulemaking. In the alternative, Horsehead requests that the Board revise the definition of "coke or coal bulk terminal" in Section 213.155 of the Agency's rules to clarify that Horsehead's operation is not subject to the rules or otherwise enter a finding that Horsehead is not subject to the emergency rules, as the Board deems appropriate.

[5] As was the case in the Board's findings in 2000, and is still the case today, Horsehead does not store or stockpile Waelz Oxide at its facility. (*Id.* at p. 6) "All transfer points in Horsehead's Chicago facility have collection equipment and baghouses which allow Horsehead to collect released material and return it to the CZO manufacturing process. Exh. 1 at 7, 8, 26; Exh. 2 at 4; Exh. 3 at 3. Immediately after CZO is produced, Horsehead conveys it from product collectors via a pipe that extends into closed pressure differential rail cars for off-site shipment. These railcars are in an enclosed building. Tr. at 25; Exh. 1 at 18, 26. Horsehead has 24-hour opacity monitors to measure if any gases escape from the product collectors. Alarms alert plant personnel if there is a release, and the affected part of the product collector can be shut down for repairs to minimize further losses. Exh. 3 at 4. (Id. at p. 13) As the sworn testimony stated, "CZO never sees the light of day." (*Id.* at p. 9)

D. No Health Risks Support this Proposed Emergency Rulemaking.

The coke materials used by Horsehead do not present a health risk, let alone an imminent health risk that would warrant emergency rulemaking. In its Motion, the Agency provides no medical or scientific data whatsoever to support its position that it has "reasonably" concluded that there is a threat to the public interest, safety or welfare presented by operations of the type conducted by Horsehead. The truth is that it cannot. Studies conducted on petcoke, including by the United States Environmental Protection Agency ("EPA"), have shown that such materials are non-carcinogenic, not toxic, not hazardous and are not likely respirable (so as to contribute to increased respiratory symptoms associated with other fugitive PM emissions). Recently, the Congressional Research Service ("CRS") published an extensive report, entitled "Petroleum Coke: Industry and Environmental Issues," by Anthony Andrews & Richard K. Lattanzio., CRS Report R43263, October 29, 2013.[6] It found that "petcoke has a low health hazard potential in humans." (Id. at p. 9) Regarding human health effects, there are no specific effects or potential harm from petcoke dust particles as compared to dust particles generally. (Id at 10.) As the CRA report states:

> According to studies referenced by the U.S.EPA in its analysis of petcoke, it has no observed carcinogenic reproductive or developmental effects. The only possible health effects are from chronic inhalation which showed non-specific effects of dust particles, rather than the specific effects of petcoke. In other words, the potential harm is not specifically from the petcoke, but from the dust. (*Id* at 9-10.)

Other key findings in the CRS Report include:

- Petcoke may be a source of particulate matter in the air, depending on its size, size of the petcoke pies, and the method of storage. However, most forms of coke are comprised of granules orders of magnitude larger than $PM_{2.5}$, and are not likely respirable. (*Id.* at p. 15);

[6] A copy of the report is available on the internet at: https://www.hsdl.org/?view&did=746955.

- Due to the extreme conditions under which it is created, petcoke is a very stable and inert substance. Its melting point, boiling point, vapor pressure and water solubility are far outside the range of ambient conditions. Petcoke will not vaporize into the atmosphere and does not react chemically in the presence of water or light. It is not biodegradable and will not bio-accumulate substances into its structure. If released into the environment, petcoke will incorporate into the soil or sediment, or be transported via the wind or water depending upon the particle size and density. (*Id.* at p. 8);

- Petcoke has been evaluated for its toxicity to plants and animals in studies conducted in accordance with U.S.EPA recommended methods. The studies found that petcoke is non-toxic to terrestrial plants and animals and aquatic animals, both vertebrates and invertebrates; and had only a small effect on aquatic plants. (*Id.* at p. 9)

The studies that have been conducted show that there is nothing unique or specific to petcoke fugitive emissions which warrants emergency rulemaking. There is no evidence here showing that taking the additional time prescribed by the Board regulations for non-emergency rulemaking will put the public health or the environment at greater risk. More is needed than mere assertions of a threat to public health; specific evidence is necessary. The Agency's Motion does not present any such evidence. More particularly, with respect to the Agency's apparent request that the Board make these emergency rules effective immediately pursuant to Section 102.612 of the Board regulation, the CRS Report demonstrates there is absolutely no basis to support the required finding by the Board "that a severe public health emergency exists."

II. "Emergency Rules" are Unnecessary because the Agency already has Existing Legal Authority to Address the Alleged Risks.

The Agency's allegations that an "emergency" exists are not "reasonable" as required by Section 5-45 of the IAPA. The Agency seeks to have the Board utilize its emergency rulemaking authority because it contends that emissions of fugitive particulate matter (PM) and runoff "from large, uncovered coke piles" are inadequately controlled such that they cause or threaten to cause a public nuisance and violations of the Act and Board regulations. (Agency Proposal and Motion for Emergency Rulemaking, dated January 16, 2014, at pp. 1-2).

If these allegations are true, as the Agency claims, then the Agency already has well-established legal authority to address them through appropriate enforcement actions against the alleged violators to enjoin these noncompliant air emissions and runoff discharges without the need for "emergency" relief. Section 9(a) of the Act prohibits causing air pollution, including air pollution caused by fugitive PM emissions of the type described by the Agency. More specifically, Section 201.141 of the Illinois Air Pollution Regulations prohibits causing, threatening or allowing the discharge of PM into the atmosphere generated during material handling and storage operations causing or tending to cause air pollution alone or in combination with contaminants from other sources. (35 Ill.Adm.Code §201.141). The Illinois Air Pollution Regulations, consistent with the federal Clean Air Act ("CAA") PM-specific provisions of subpart 4 of Part D of the CAA, also contain specific PM-10 National Ambient Air Quality Standards (NAAQS) which provide the standard for determining whether these alleged fugitive PM emissions are causing air pollution. (See 35 Ill.Adm.Code § 243.120).[7] More specifically, Section 212.309(a) of the Illinois Air Pollution Regulations expressly requires an operating program that "shall be designed to significantly reduce fugitive particulate matter emissions." (35 Ill.Adm.Code § 212.309(a)). Section 212.310 further sets forth the minimum requirements for these operating programs, including *inter alia*, a "detailed description of the best management practices utilized to achieve compliance with this Subpart, including an engineering specification of particulate collection equipment, application systems for water, oil, chemicals and dust suppressants utilized and equivalent methods utilized" and the "[e]stimated frequency of application of dust suppressants by location of materials." Moreover, more specific and

[7] To the extent that the scope of the Agency's proposed emergency rules may extend to emissions from "emissions units," as defined in the Illinois Air Pollution Regulations, Section 212.123 of the Subchapter C Emission Standards and Limitations For Stationary Sources, 35 Ill.Adm.Code § 212.123, contains a specific prohibition against visible emissions of PM above a specified opacity level into the atmosphere.

detailed requirements for controlling fugitive emissions are contained in the CAA Title V Permits for any major sources of PM-10, including requirements to have operating programs designed to significantly reduce fugitive particulate emissions at the source.

With regard to runoff discharges, the same extensive legal framework for regulating such discharges already exists. Section 12(a) of the Act prohibits actions which "cause or tend to cause water pollution." (415 ILCS 5/12(a)(2010)). Section 12(d) of the Act prohibits causing or threatening to cause "a water pollution hazard."[8] (415 ILCS 5/12(f)(2010)). The Illinois Water Pollution Regulations specifically prohibit, "[e]xcept as in compliance with the provisions of the Act, Board regulations, and the [Clean Water Act], the discharge of any contaminant or pollutant by any person into the waters of the State from a point source..." (35 Ill.Adm.Code § 309.102(a)). As the Board is aware, both general and individual NPDES stormwater permits issued to industrial dischargers in Illinois include a requirements that the discharger maintain and implement a Storm Water Pollution Prevention Plan (SWPPP) to prevent noncompliant runoff discharges.

The Agency completely fails to acknowledge the existence of the extensive legislative and regulatory framework already in place under Illinois law or to explain why the many existing legal prohibitions on the activities it describes in its Motion are inadequate to address its claimed "emergency" situation. Based on these existing legal requirements, enforcement actions already have been filed by the Illinois Attorney General to pursue the relief and protections afforded by these existing laws and regulations against operations which it contends are contributing to the need for these emergency rules and reportedly has already reached a settlement in one of those cases. (See November 4, 2013 Illinois Attorney General Press Release, available at:

[8] "A water pollution hazard is [a] condition that may become water pollution in the future." *People of the State of Illinois v. John Prior d/b/a Prior Oil Company, et al.*, PCB 02-177, slip op. at p. 22 (May 6, 2004), citing *Bliss v. Illinois EPA*, 138 Ill.App.3d 699, 704 (5th Dist. 1985) .

http://www.illinoisattorneygeneral.gov/pressroom/2013_11/20131104.html; December 19, 2013, "Deal requires removal of Chicago 'petcoke' piles, Daily Herald, available at http://www.dailyherald.com/article/20131219/news/712199809/print/. An "emergency rulemaking" is clearly not justified under Illinois law when the rules necessary to address and enforce against the conduct complained of obviously already exist and are being used by the State of Illinois to enforce against alleged noncompliance.

It is particularly in a situation like this where an agency should not be allowed to evade using the existing regulatory requirements, adopted after the opportunity for notice and comment by affected parties and the general public, by instead pursuing emergency rules. When emergency rules are adopted, because they do not benefit from the scrutiny of general rulemaking notice and comment, there is a substantial risk that the scope of the emergency rules is far broader and the requirements more costly and burdensome than what is necessary to address the alleged risks the agency is seeking to address.

The Agency's bald assertions of the threat posed here are insufficient to invoke emergency rulemaking. The Agency has failed to produce any new facts or any new situation showing that emergency rulemaking is justified. The required evidence of a threat to the public interest, safety or welfare warranting emergency rulemaking simply does not exist.

III. The Proposed Emergency Rules Require Immediate Compliance that will Adversely Affect Horsehead's Operations Before any Opportunity is Afforded for Notice and Comment Rulemaking Procedures.

There will be immediate burdens and costs imposed by the Agency's proposed emergency rules. This is not a situation where the emergency rules may be adopted without causing significant adverse effects to affected parties. The Agency's proposed emergency rules include many substantial requirements that become effective either immediately upon the adoption of the rule or within only a number of days thereafter. Hence, although the emergency

rulemaking provisions of the IAPA will limit the duration of these rules to 150 days unless an earlier date is specified or the emergency rule is replaced by permanent rulemaking, affected parties will in the interim have to change their operations and incur substantial costs without having been afforded the opportunity to present evidence to the Board showing that these requirements should not be applicable to their operations or are technically infeasible or economically unreasonable, as provided under Section 27(c) of the Act.

Among its many requirements, the proposed rules require regulated facilities to expend funds almost immediately to:

- Within five days, install equipment to monitor wind speed. (Proposed Section 213.240);
- Within 30 days, install dust suppression systems along conveyor systems and any coke or coal piles that are not totally enclosed. (Proposed Section 213.265); and
- Within 45 days, submit permit applications for wastewater and stormwater runoff controls and plans for total enclosure of all coke and coal piles, transfer points, loading and unloading areas, screening areas, etc., as well as plans to minimize truck traffic around the facility and to address fugitive emissions. (Proposed Sections 213.220, 213.225, 213.275(b)).

If the Board proceeds to immediately adopt the proposed emergency rules, which it should not, it will materially prejudice parties whose operations will be regulated and potentially seriously curtailed by these rules. Because Horsehead's operations should not reasonably be included in the regulatory scheme which the Agency is seeking to have enacted here, Horsehead urges the Board to provide the necessary clarification of the scope and intent of these proposed rules before their adoption. Otherwise, Horsehead will suffer material prejudice by either risking the threat of the rules' enforcement should it not attempt to comply or by expending significant but unnecessary funds to try to comply with new rules that should be deemed inapplicable to its operations.

Under Section 27 of the Act, when promulgating a rule, the Board must take into account several matters, including the technical feasibility and economic reasonableness of reducing the alleged pollution that the proposed rules seek to regulate. The proposed emergency rules raise significant issues regarding both technical feasibility and economic reasonableness. The Agency has not provided any information to the Board showing that the emergency rules satisfy the requirements for rulemaking under Section 27 of the Act. The IAPA's emergency rulemaking provisions do not exclude emergency rules from the requirements of Section 27 of the Act. Accordingly, unless and until the Agency demonstrates to the Board that the Section 27 rulemaking criteria is satisfied by its proposed emergency rules, the Board should not proceed to adopt them.

IV. No "Undue Delay or Material Prejudice" will be caused by allowing a 14-Day Response Period for the Proposed Emergency Rules.

On a more basic level, it is apparent that the winter snow-covered land conditions in Illinois right now prevent the kind of fugitive dust emissions and discharge runoff conditions that these proposed emergency rules seek to address, particularly in the Cook County area in which the Agency contends many of the coke or coal bulk terminals are located. There is no imminent threat. Hence, given these conditions, there is no reason why at least the minimum 14-day response period allowed under the Board regulations should be eliminated. Maintaining the status quo for another few weeks to allow addition time for more comment on the proposed emergency rules and hopefully to allow the Agency to clarify their intended scope and applicability may help reduce the material prejudice to affected parties threatened by these emergency rules.

V. CONCLUSION

For all of the above reasons, we urge the Board to comply with the IAPA, as incorporated into its own regulations, and deny the Agency's Motion for Emergency Rulemaking. If any such rules are required here, they should be promulgated through normal rulemaking procedures that allow for public comment and participation of all affected parties. Certainly, no "severe public health emergency" exists to support a Board finding that these rules should be immediately effective, as required by Section 102.612(b) of the Board regulations. At a minimum, affected parties should be afforded the minimum 14-day comment period allowed under Board regulations for responding to any motions filed with the Board.

In the alternative, before taking any emergency rulemaking action, Horsehead requests that the Board clarify the provisions of any emergency rules it may adopt to provide that an operation such as the one conducted by Horsehead is not subject to the rules because it does not "consume" coke or coal materials pursuant to the definition of "coke or coal bulk terminal" in Section 213.115 of the proposed rules. Horsehead submits that this can be accomplished by revising the language in the first sentence of Section 213.115's definition of "coke or coal bulk terminal" to as set forth below, or as otherwise appropriately determined by the Board:

> "Coke or coal bulk terminal" means a source, site, or facility where coke or coal is stored, handled, blended, processed, transported, or otherwise managed, other than the source, site, or facility that produces or consumes the coke or coal **or uses it as a carbon source in a manufacturing process**.

The Board alternatively should consider excluding from these emergency rules smaller operations for which compliance would be economically unreasonable and/or technically infeasible due to the different nature of their operations versus large bulk terminal operations. The Agency has provided no information showing that such smaller operations present a threat to the public interest, safety or welfare. The definition of "coke or coal bulk terminal" should be

revised to include a *de minimis* exception which limits its applicability "to sources, sites or facilities is stored, handled, blended or processed, transported, or otherwise managed in an amount in excess of 10,000 cu.yds."

Horsehead appreciates the opportunity, albeit very limited, to provide this response to the Agency's Motion.

Respectfully submitted,

HORSEHEAD CORPORATION

By: /s/ Susan M. Franzetti

Dated: January 21, 2014

Susan M. Franzetti
Kristen Laughridge Gale
NIJMAN FRANZETTI LLP
10 S. LaSalle St., Suite 3600
Chicago, IL 60603
(312) 251-5590 (phone)
(312) 251- 4610 (fax)

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
EMERGENCY RULEMAKING REGARDING	)	**R14-020**
REGULATON OF COKE/COAL BULK TERMINALS	)	**(Rulemaking – Air)**
35 ILL. ADM. CODE PART 213	)	

APPEARANCE

The undersigned, as one of its attorneys, hereby enters her appearance on behalf of Horsehead Corporation.

Horsehead Corporation

By: /s/ Susan M. Franzetti
Susan M. Franzetti

Dated: January 21, 2014

Susan M. Franzetti
NIJMAN FRANZETTI LLP
10 South LaSalle Street
Suite 3600
Chicago, IL 60603
(312) 251-5250 (phone)
(312) 251-4610 (fax)

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
EMERGENCY RULEMAKING REGARDING	)	**R14-020**
REGULATON OF COKE/COAL BULK TERMINALS	)	**(Rulemaking – Air)**
35 ILL. ADM. CODE PART 213	)	

APPEARANCE

The undersigned, as one of its attorneys, hereby enters her appearance on behalf of Horsehead Corporation.

Horsehead Corporation

By: /s/ Kristen L. Gale
Kristen Laughridge Gale

Dated: January 21, 2014

Kristen Laughridge Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street
Suite 3600
Chicago, IL 60603
(312) 251-5250 (phone)
(312) 251-4610 (fax)

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, Horsehead Corporation's Response to Illinois EPA's Proposal and Motion for Emergency Rulemaking and Entries of Appearance were filed electronically on January 21, 2014 with the following:

John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

and that true copies were mailed by First Class Mail, postage prepaid, on January 21, 2014 to the parties listed on the foregoing Service List.

/s/ Susan M. Franzetti