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January 21, 2014

Mr. John Therriault
Clerk, Illinois Pollution Control Board
100 W. Randolph St., Suite 11-500
Chicago, Illinois 60601

RE: Response to Illinois Environmental Protection Agency's Motion for Emergency Rulemaking on Coke/Coal Bulk Terminals (R14-20)

Dear Board Members:

We urge the Board to reject Illinois Environmental Protection Agency's attempted circumvention of normal notice and comment rulemaking procedures in connection with EPA's proposed emergency rule directed at coke and coal bulk terminals. ArcelorMittal USA is the largest integrated iron and steel company in the world, with operations in the State of Illinois and elsewhere that will be adversely affected by EPA's proposed rule as currently drafted. ArcelorMittal is both a supplier and customer of coal and coke – coal being the critical raw material in the production of coke, and coke being one of the three principle raw materials in blast furnace operations at its integrated steelmaking facilities.

We concur in the comments submitted by others, including the Illinois Chamber of Commerce and Indiana Manufacturers' Association. In order to supplement, rather than repeat, the comments of others, we submit this response in order to provide the Board with additional guidance on the meaning of "emergency" in the context of emergency rulemaking.

Notwithstanding the significant implications of EPA's proposed rule upon the iron and steel industry in Illinois, there has been virtually no dialogue with the regulated community and absolutely no analysis of the economic impact of the proposed rule. Instead, EPA asks the Board to issue the rule immediately pursuant to the emergency rulemaking provisions of Section 5-45 of the Illinois Administrative Procedures Act (IAPAct). The result of this extraordinary request is that affected businesses have had one business day to evaluate the proposed rule and develop comments by today's noon deadline. Contrast this with the normal notice-and-comment rulemaking procedures under Section 5-40 of the IAPAct, which provides for a 45-day public comment period during a first notice period, a public hearing and, importantly, an obligation on the part of the Board to seek an economic impact analysis.

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ArcelorMittal fully supports a meaningful dialogue among interested parties regarding the issues described by IEPA in the Motion, which appear to be focused on "petcoke" although the proposed emergency rule would apply to all forms of coke as well as coal. The stated objective behind this very detailed proposed rule is no different than every other environmental regulation, and its development should be fully vetted through the normal rulemaking procedures to ensure that all considerations are appropriately evaluated and addressed.

EPA asserts that the proposed rule is justified as an "emergency rule," yet EPA has failed to explain the "emergency." The reason for this failure is clear – there is no "emergency." It is worth noting that, in December when the Mayor of Chicago announced draft rules intended to address exactly the same concerns as raised by EPA in its proposed emergency rule, the Mayor saw no need to bypass normal rulemaking procedures and the dialogue among stakeholders regarding the City's draft rules is ongoing. In fact, the City just extended the comment period by 2 weeks until February 7, 2014.

Section 27(c) of the Illinois Environmental Protection Act (IEPAct) specifies that the emergency rulemaking procedures can only be used upon a showing "that a situation exists which reasonably constitutes a threat to the public interest, safety or welfare." 415 ILCS 5/27(c). The Illinois Administrative Procedure Act (IAPAct) defines an "emergency" in the context of rulemaking as "the existence of any situation that any agency finds reasonably constitutes a threat to the public interest, safety, or welfare." 5 ILCS 100/5-45(a). Importantly, however, the Board is not "conclusively bound" by an agency's finding that such a situation exists. *Citizens for a Better Environment*, 152 Ill. App. 3d 105, 109 (1st Dist. 1987), *citing Senn Park Nursing Center v. Miller*, 118 Ill. App.3d 733, 744 (1983).

There is a paucity of case law addressing when it is appropriate to bypass the normal notice-and-comment procedures; this fact alone is instructive on the high bar that should be set in connection with emergency rulemaking. In both *Citizens* (involving an environmental rule issued by the Board) and *Senn Park* (involving Medicaid rules issued by the Department of Public Aid), the appellate court rejected use of emergency rulemaking procedures. *Citizens* appears to be the only reported decision by the civil courts in the last two decades regarding an emergency rule issued by the Board.

The Board itself has only relied upon its emergency rulemaking authority a handful of times over the last 20 years (based upon a review of Orders of the Board identified through an on-line search of the Board's docket).

- The most recent review of a motion for emergency rulemaking appears to have been 3 years ago, in 2011, on a motion filed by the Illinois Environmental Regulatory Group. *See In the Matter of Nitrogen Oxides Emissions*, R11-026. In that case, the Board denied the motion based on a finding that the uncertainty caused by inconsistencies between state and federal compliance dates, and the resulting threat of economic hardship and potential liabilities to affected facilities, did not constitute an "emergency." While two earlier Board decisions in 1993 and 1995 relating to regulatory uncertainties and certain air program compliance deadlines concluded that an "emergency" did exist [*see* R93-12 and R95-10], the situation in 2011 was different. As stated by the Board, citing *Citizens*, the need for "clarification" of a statutory provision is not adequate to establish the actual existence of a threat.

- Seven years earlier, in 2004, the Board again examined the appropriateness of emergency rulemaking and rejected the emergency rule proposed by EPA. *See In the Matter of Proposed*

Amendments to Regulation of Petroleum leaking Underground Storage Tanks, R04-22 and R04-23 (consolidated). In that case, the Board was unpersuaded by EPA's assertion that, without the emergency rule, remediation of leaking UST sites would not proceed and such an outcome was a threat to public interest, safety, or welfare. In essence, EPA was unable to explain why reliance upon existing regulations and procedures (in that case, the methodology for determining reasonable costs for purposes of reimbursement from the UST Fund) was not adequate. Stated another way, EPA could not explain why the normal notice-and-comment rulemaking procedures were not adequate, relying on existing regulation in the meantime.

- One has to go back another seven years to find the next examination by the Board of a proposed emergency rulemaking, this time one proposed by the Department of Agriculture. *See In the Matter of Livestock Waste Regulations*, R97-14. At first blush, this emergency rule might seem analogous to the present bulk terminal proposal given the detail of the new requirements sought to be imposed (rather than, for example, simple changes to an administrative detail or compliance date). But livestock waste emergency rule is readily distinguished. First, the Board rejected the Department's request that the new rule be applied to current operators, finding that there was no showing of an "emergency" with regard to the current operators. The Board found only that emergency rules were needed with regard to new or modified operations, and it rejected a number of proposed provisions as not being sufficiently tailored to the stated emergency. Second, the Board gave considerable weight to the fact that the emergency regulation was needed in order to give effect to the newly enacted Livestock Management Facilities Act. In that Act, the General Assembly specifically concluded that existing rules were inadequate. The Board found that the legislative intent could not be given effect unless and until implementing rules were adopted. This is not the case with regard to EPA's proposed rulemaking regarding bulk terminals.

- The Board issued two emergency rules in 1993, both in response to indisputable emergencies resulting from that year's flood disaster. *See In the Matter of Landfill Rules for On-Site Burial of Dead Animals in Flood-Disaster Counties*, R93-25, and *In the Matter of Emergency Amendments to the Open-Burning Rules*, R93-15. By definition, these two rules were short-lived and intended to address very specific emergency situations. Similarly, an emergency rule issued in 1994 addressed the need to extend a deadline for the acceptance of flood-related waste and refuse at municipal solid waste facilities, after the legislature had enacted an extension but the implementing regulation had not been made consistent. *See* R94-013. Clearly, EPA's proposed rulemaking does not present the same "emergency" as occurred in 1993.

It is clear from the foregoing that reliance upon the emergency rulemaking procedures should be rarely used. The presence of an actual threat – not merely a potential threat – must be clear. And it is EPA's responsibility to provide facts – not anecdotes and conclusory statements – that support a finding of an actual threat. Use of the emergency rulemaking must be preserved for truly extraordinary circumstances

In its Motion, EPA refers several times to existing regulatory programs without any explanation as to why those existing programs are not adequate to address the concerns described.

For example, EPA asserts that fugitive emissions from "[s]everal bulk terminals located in Cook County" "cause or threaten to cause a public nuisance as well as violations of the Act and Board regulations." EPA then concludes that, therefore, "t]hese emissions reasonably constitute a threat to the public interest, safety, or welfare, necessitating adoption of the emergency amendments ..." Mot. at ¶1. Of course

violations of environmental regulations are contrary to the public interest, safety or welfare. If they were not, the regulations would not have been issued in the first place. The test for determining whether an "emergency" exists cannot simply be that rules are not being followed. Moreover, the specific concerns and incidents reference in EPA's Motion are apparently already being addressed through permitting and enforcement measures pursuant to existing regulations.

EPA must explain why the existing rules are inadequate, in the same manner that the Board called upon EPA to do in 2004 in connection with its requested emergency UST rules. EPA cannot make that showing here, as every one of the facilities targeted by EPA's proposal is subject to fugitive dust regulation (indeed, emissions of all visible emissions are prohibited by all persons throughout the State) and stormwater discharge regulation. EPA even acknowledges that the proposed rules merely provide details for a particular group of facilities within the context of existing air and water regulatory programs. See Mot. at ¶ 16. Filling in detail, where there has been absolutely no showing that existing regulations and enforcement authorities cannot address the perceived concern, is not the purpose behind the emergency rulemaking provisions. If EPA believes further detail is warranted, then the normal notice-and-comment rulemaking procedures are more than adequate to allow all stakeholders input.

Two other statements by EPA in its Motion underscore the fallacies of the proposed emergency rule. In paragraph 14, EPA notes that total enclosures can take a year or more to design and construct, and thus that option cannot provide "immediate protection against the threats posed." Yet the proposed rule centers around requiring facilities to achieve total enclosure within two years; if a compliance date is two years out, by definition the proposed rule is not tailored to meet the supposed emergency. In paragraph 15, EPA explains that the proposed rule must apply statewide because other terminals outside of Cook County "could" encounter problems and operations might simply relocate to other parts of the State. Neither of these "justifications" constitutes an emergency. They are purely speculative and are not an actual, present-day "threat" warranting an emergency rule.

We urge the Board to consider carefully EPA's reliance on the "emergency rulemaking" authority of Section 27(c) of the Illinois Environmental Protection Act. When examined objectively, we are confident that the Board will conclude no "emergency" exists that justifies hasty promulgation of a very detailed and complex rule with wide-ranging impacts on the Illinois economy generally and the iron and steel industry specifically.

Thank you for your consideration of these comments.

Sincerely,

Squire Sanders (US) LLP

Wendlene M. Lavey

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Jessica E. DeMonte

cc: Keith Nagel

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	R14-20
EMERGENCY RULEMAKING	)	(Rulemaking-Air/Land/Water)
REGARDING REGULATIONS OF	)	
COKE/BULK TERMINALS: NEW 35 ILL.	)	
ADM. CODE 213	)	

AMENDED CERTIFICATE OF SERVICE

I, the undersigned state that I have served copies of the foregoing comments filed with the Illinois Pollution Control Board upon the following, by first class mail:

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Dated: January 21, 2014