ILLINOIS POLLUTION CONTROL BOARD
January 23, 2014

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

OPINION AND ORDER OF THE BOARD (by D. Glosser):

On January 16, 2014, the Illinois Environmental Protection Agency (IEPA) filed a motion and proposal for emergency rulemaking (Mot.) pursuant to Section 27(c) of the Environmental Protection Act (Act) (415 ILCS 5/27(c) (2012)), Section 5-45 of the Illinois Administrative Procedure Act (IAPA) (5 ILCS 100/5-45 (2012)), and Section 102.612 of the Board's rules (35 Ill. Adm. Code 102.612). IEPA proposes an emergency rule applicable statewide to govern the handling of coal and coke, including petroleum coke (or "petcoke"), at bulk terminals and other specified facilities. The proposed emergency rules would require immediate measures that include road paving, use of dust suppression systems, setback requirements, containment of stormwater, and disposal of coke and coal that have been on site for more than one year.

The IEPA motion requested that the Board take action "immediately" at today's scheduled meeting. After allowing for an abbreviated public comment period, the Board received 34 responses (including 3 late ones filed today) to IEPA's motion and proposal as well as a reply from IEPA.

IEPA sought an emergency rule proposal to address fugitive emissions of PM from petcoke and coal bulk terminals. The Board allowed for responses to the proposal and allowed IEPA the opportunity to reply. The Board has received 34 comments on this rulemaking and after careful consideration of all of these, the Board declines to propose an emergency rule. The Board finds that IEPA has failed to demonstrate "that a situation exists which reasonably constitutes a threat to the public interest, safety or welfare" (415 ILCS 5/27(c) (2012)). Therefore, the Board cannot proceed with an emergency rule.

While the Board is not convinced an "emergency" exists, the Board does have regulations addressing these facilities and the Board believes that the rules governing bulk terminal operations for petcoke and coal could be improved. Also, the Board believes that the proposal will benefit by proceeding through the regular rulemaking process. Therefore, in order to examine this issue more closely, the Board will proceed with IEPA's proposal under Section 27 of the Act (415 ILCS 5/27 (2012)) as general rulemaking to address the public health and environmental concerns raised by IEPA and the commenters. The Board directs the hearing officer to enter an order asking IEPA to amend its proposal to include the information required in 35 Ill. Adm. Code 102.

The Board first outlines the procedural history and then the statutory background. Next, the Board summarizes IEPA's motion and statement of reasons and all of the responses and comments. The Board then summarizes IEPA's reply. The Board provides a description of emergency rulemaking before the Board discusses its findings.

PROCEDURAL BACKGROUND

On January 16, 2014, IEPA filed its motion for emergency rulemaking and proposed rule text. IEPA asked that the Board rule on the motion on January 23, 2014, before the expiration of the 14-day response time included in the Board's procedural rules at Section 101.500(d) (35 Ill. Adm. Code 101.500(d)). On January 17, 2014, the hearing officer entered an order setting abbreviated response and reply times, consistent with the IEPA's proposed timetable. The order was designed to allow the Board to better consider the legal and technical aspects of the proposal and motion filed by IEPA, based on a more complete record for Board decision.

The hearing officer order directed that any responses to IEPA's motion were to be filed with the Board by Tuesday, January 21, 2014, at noon. IEPA was allowed to reply to the responses by Wednesday, January 22, 2014, at 1:00 p.m.

The Board received 31 timely public comments, 30 of which are in response to IEPA's motion and proposal. IEPA's statement of reasons and reply was docketed as PC 31. Two additional comments were received on January 22, 2014, and one on January 23, 2014. The Board has considered the late-filed public comments.

Additionally, the Board notes that three persons presented public remarks at the Board's meeting today. The Board has also considered these public remarks, which the Board will have transcribed and entered into the record in this docket.

STATUTORY AND REGULATORY BACKGROUND

When adopting emergency rules, the Board must follow the dictates of both the Environmental Protection Act (Act), 415 ILCS 5 *et seq.* (2012) and the Illinois Administrative Procedure Act (IAPA), 5 ILCS 5/100 *et seq.* (2012).

Section 27 (a) and (c) of the Act provides in part:

> The Board may adopt substantive regulations as described in this Act. * * * In promulgating regulations under this Act, the Board shall take into account the existing physical conditions, the character of the area involved, including the character of surrounding land uses, zoning classifications, the nature of the existing air quality, or receiving body of water, as the case may be, and the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution.

On proclamation by the Governor, pursuant to Section 8 of the Illinois Emergency Services and Disaster Act of 1975, that a disaster emergency exists, or when the Board finds that a severe public health emergency exists, the Board may, in relation to any proposed regulation, order that such regulation shall take effect without delay and the Board shall proceed with the hearings and studies required by this Section while the regulation continues in effect.

When the Board finds that a situation exists that reasonably constitutes a threat to the public interest, safety or welfare, the Board may adopt regulations pursuant to and in accordance with Section 5-45 of the Illinois Administrative Procedure Act. 415 ILCS 5/27(a) and (c) (2012).

Section 5-45 of the IAPA provides in part:

> (a) "Emergency" means the existence of any situation that any agency finds reasonably constitutes a threat to the public interest, safety, or welfare.
>
> (b) If any agency finds that an emergency exists that requires adoption of a rule upon fewer days than is required by Section 5-40 and states in writing its reasons for that finding, the agency may adopt an emergency rule without prior notice or hearing upon filing a notice of emergency rulemaking with the Secretary of State under Section 5-70. The notice shall include the text of the emergency rule and shall be published in the Illinois Register. Consent orders or other court orders adopting settlements negotiated by an agency may be adopted under this Section. Subject to applicable constitutional or statutory provisions, an emergency rule becomes effective immediately upon filing under Section 5-65 or at a stated date less than 10 days thereafter. The agency's finding and a statement of the specific reasons for the finding shall be filed with the rule. The agency shall take reasonable and appropriate measures to make emergency rules known to the persons who may be affected by them.
>
> (c) An emergency rule may be effective for a period of not longer than 150 days, but the agency's authority to adopt an identical rule under Section 5-40 is not precluded.

* * *

The IAPA goes on to provide that, after filing, emergency rules will be reviewed by the Joint Committee on Administrative Rules (JCAR). Under Section 100/5-120, JCAR examines an emergency rule "to determine whether the rule is within the statutory authority on which it is based and whether the rule is in proper form." 5 ILCS 100/5-120(a). If JCAR determines a rule is non-compliant, JCAR may file an objection, to which the adopting agency can respond. If JCAR is not satisfied with the response, it can take various actions, including suspension of the rule. 5 ILCS 100/5-120 and 125.

IEPA'S MOTION AND PROPOSAL
Background

IEPA asks that the Board grant the motion for emergency rulemaking "immediately", without waiting the for the 14-day response time set forth in Section 101.500(d) (35 Ill. Adm. Code 101.500(d)), "in order to prevent undue delay or material prejudice". Mot. at 1. IEPA argues that several bulk terminals located in Cook County process, transport, and handle large quantities of coke or coal while storing the materials in large outdoor storage areas. *Id*.; PC 31 at 1. IEPA argues that the emissions of fugitive particulate matter and the discharge of runoff from the materials into waters of the State constitute a threat to the public interest, safety or welfare, necessitating the adoption of emergency rules. *Id*.

IEPA explains that "coke" refers to "solid, carbonaceous material derived from the distillation of coal (including metallurgical coke or 'metcoke')." Mot. at 2; PC 31 at 2. The term is also used to refer to materials derived from "oil refinery coker units or other cracking processes (including petroleum coke or 'petcoke')." Coke can contain high amounts of carbon and petcoke contains sulfur and may also contain a variety of metals that include vanadium, nickel, chromium, and lead. *Id*. Coke and metcoke are used as alternative fuel in coal-fired power plants and cement kilns, and metcoke may be used as a reducing agent in smelting iron ore. *Id*.

IEPA states that dust from both coke and coal is a type of fugitive particulate matter (PM) that is subject to the National Ambient Air Quality Standards (NAAQS) and exposure to PM can have "serious health consequences" including cardiovascular and respiratory effects. Mot. at 2. IEPA offers that specific adverse effects include "aggravated asthma, decreased lung function, increased respiratory symptoms such as difficulty breathing, irregular heartbeat, and nonfatal heart attacks." *Id*. IEPA opines that at-risk populations, including as children and the elderly may be at an increased risk. *Id*.

Emissions from coke and coal dust can be released during loading, unloading, transferring, handling, and transport. Mot. at 2. IEPA details that when the wind "acts upon open storage piles" of coke and coal, the fugitive PM can be carried into surrounding areas. *Id*. at 2-3. The coke and coal dust can then be inhaled or deposited on persons, property and in the water. *Id*. at 3. IEPA also expresses concern that runoff from the storage piles could discharge into surface waters and groundwater posing a threat to aquatic life and groundwater contamination. *Id*.

IEPA explains that there are several bulk storage terminals located in Cook County, which include outdoor storage piles of coke in varying sizes. Mot. at 3. The facilities:

> unload coal and coke from trucks, barges, and/or railcars, convey the materials to storage piles (where the materials remain for varying lengths of time), transfer the materials on site, convey the materials to loading operations, and load the materials for transport to end users. Outdoor storage piles of coke and coal vary

> in size by facility, but can be 75 or more feet high and several hundreds of feet long and wide. *Id*.

IEPA states that there "may be" similar coke and coal terminals operating throughout the State. *Id*.

Emergency Regulation

IEPA argues that the Board can rule on its motion without waiting the 14-day response time as the failure to do so could result in undue delay or material prejudice. Mot. at 7. Further, IEPA argues that:

> Inadequately controlled fugitive PM emissions, along with inadequately controlled discharges of stormwater and wastewater to waters of the State, from handling, processing, transport, and storage operations at coke or coal bulk terminals reasonably constitute a threat to the public interest, safety, or welfare, necessitating immediate adoption of emergency regulations. Mot. at 5

As support for its position, IEPA states that it has become aware of or observed: 1) large clouds of black dust traveling beyond the boundaries of the facilities into nearby neighborhoods and school yards; 2) coke and coal dust deposited upon and accumulating on lawns, pools, vehicles, building siding, and furniture; 3) coke and coal dust blown into residences, schools and businesses on a daily basis forcing residents to avoid opening windows or engaging in outdoor activities. Mot. at 5-6. IEPA further observes that large uncovered piles of coke and coal are stored directly adjacent to water bodies and inadequate berms and unlined sedimentation ponds are used resulting in runoff being inadequately controlled. *Id*. IEPA notes that coke and coal dust have also been deposited into off-site storm sewers that discharge to waters of the State. *Id*. at 6.

IEPA argues that enclosures take a year or more to be designed and constructed and cannot provide protection against the immediate threat imposed by these piles. Mot. at 6. Because emissions are inadequately controlled and cannot be controlled unless certain activities at the facilities are enclosed, the emergency rules are necessary, in IEPA's opinion. *Id*. The emergency rules require immediate measures that include road paving, use of dust suppression systems, setback requirements, containment of stormwater, and disposal of coke and coal that have been on site for more than one year. *Id*. IEPA concedes that the Board's current regulations address fugitive PM, stormwater and wastewater runoff; however IEPA is seeking emergency regulations necessary to establish more detailed control requirements specific to emissions from coke and coal bulk terminals. *Id*. at 6-7.

Technical Feasibility and Economic Reasonableness

IEPA believes that the control measures in the proposed emergency rules are technically feasible and economically reasonable. PC 31 at 7. IEPA believes this to be particularly true in light of the threat to the public interest, safety or welfare posed by the uncontrolled fugitive emissions. *Id*. IEPA explains that total enclosure of certain operations is necessary and while it

may take time, the immediate measures in the proposed rules can be technically and economically accomplished within the timeframes provided. *Id*.

IEPA notes that facilities must move toward total enclosure and have a plan in place within 45 days to complete enclosure as quickly as possible. PC 31 at 7. IEPA states that the creation of such a plan is reasonable from both a technical and economic standpoint and will ensure sources are timely evaluating the technical steps necessary to achieve total enclosure. *Id*. at 7-8.

IEPA argues that other control measures including road paving, truck cleaning, street sweeping, use of dust suppression systems, and maintenance of railways are technically feasible and are already in place "in some fashion at different facilities" in the State. PC 31 at 8. IEPA states, "the only provision that may require technology that is not necessarily commonplace is the requirement that sources implement measures ensuring that dust suppression continues when temperatures fall below freezing; however, the IEPA is aware of at least one source, through discussion with that source, that such measures are available and can be technically accomplished. *Id*.

IEPA argues that nothing in the rule "pushes the boundaries of technical feasibility" and the measures are economically reasonable. PC 31 at 8. IEPA claims that while some of the proposed measures may pose a limited cost to regulated entities, most measures would not "exceed the cost threshold of economic reasonableness". *Id*. at 8-9.

Regarding setbacks for water pollution controls, IEPA states the piles "can be easily moved to prescribed distances within 60 days" after the effective date of the rule. PC 31 at 9. Further IEPA maintains that construction of impermeable bases or pads and location of piles on such bases or pads can be accomplished within the 60-day timeframe. Also, the controls proposed for protection of the waters of the State "consist of typical housekeeping or sediment control measures" used at construction sites in Illinois. *Id*.

Additionally, IEPA opines that filing applications for permits within 45 days of the effective date of the rules is reasonable. PC 31 at 10. IEPA contends that the required use of 100-year, 24-hour precipitation event for the design of sedimentation ponds is also appropriate. *Id*. IEPA argues that written documentation of compliance with wastewater and stormwater runoff controls will add only nominal costs. *Id*.

Finally, IEPA asserts that the requirement for a hazardous waste determination is necessary to minimize threats to the public health, safety, and welfare. PC 31 at 10. IEPA is requiring these determinations to "ensure that coke stored onsite for more than one year (and therefore considered speculatively accumulated and abandoned/discarded and a waste) would not be a hazardous waste." *Id*. at 11.

RESPONSIVE PUBLIC COMMENTS

As previously stated, the Board received 31 timely public comments responsive to the IEPA filing, as well as three more late-filed comments. These are summarized below.

Chemical Industry Council of Illinois (CICI) (PC 1)

CICI urges that the Board reject the emergency designation for the proposed rules involving petcoke and coal bulk terminals. PC 1. Section 27(c) of the Act Act (415 ILCS 5/27(c) (2012)) states that the Board may only adopt emergency rulemakings when at least one of the conditions listed in Section 27 (c) exist. *Id.* CICI maintains the proposed rules at issue here do not rise to the level of an "emergency." *Id.* CICI asserts that the companies that CICI represents have not contributed to or created any health or disaster-related emergencies in regards to petcoke or related materials, and none of the conditions listed in Section 27(c) exist that warrant an emergency rulemaking. *Id.*

CICI wants the Board to understand that petcoke is "non-toxic, non-hazardous and certainly is not an imminent health threat." PC1. CICI suggests that the IEPA is using the emergency procedures to circumvent the correct rulemaking process. *Id.* CICI says that, due to the widespread and significant impacts that the proposed rule can have, the regular, comprehensive rulemaking process should be used. *Id.* CICI claims the IEPA proposal will have a large impact on Illinois commerce. *Id.* Because of the significant impacts, CICI requests the Board to carefully examine all available data. *Id.*

American Fuel and Petroleum Manufacturers Association (AFPM) (PC 2)

Many members of the AFPM use crude oil to produce petcoke, a "non-toxic, non-hazardous, and highly-valued source of cost-effective energy." PC 2. The AFPM is disturbed that some state and local officials have shown contempt for the lawful regulatory process by trying to convict petcoke without merit. *Id.* AFPM suggests that, even though the comment period is not yet complete, Governor Quinn has "circumvented the unbiased rulemaking process by directing the IEPA to reclassify the proposed rules as emergency rules and to submit to the [Board] for final approval." *Id.*

AFPM believes this situation could set a dangerous precedent of using administrative emergency rules to impose regulations for non-emergency environmental issues. *Id.* Section 27(c) of the Act (415 ILCS 5/27 (2012)) sets strict criteria for permitting administrative emergency rulemaking. *Id.* AFPM says none of these apply to petcoke, because extensive testing has proved that petcoke poses no health risks to humans. *Id.* The AFPM supports a deliberate, fact-based analysis of petcoke before rules are finalized. *Id.*

Illinois Chamber of Commerce (Chamber) (PC 3)

The Chamber opposes the emergency regulations, stating that no emergency exists. PC 3 at 1. The Chamber states that it is unaware of any member of the Chamber or any company in Illinois "that is currently contributing to, or creating, any public health or disaster related emergencies as defined in the Act" in the handling and storage of petcoke, coal or related materials. *Id.*

The Chamber continues that petcoke is non-toxic, non-hazardous and certainly is not an imminent health threat. PC 3 at 2. The Chamber also notes that, while the Governor "made it clear that [petcoke] storage and transportation is the major impetus for this request," the proposed emergency rules do not apply only to petcoke. *Id.* The Chamber believes that the emergency rules will "cause widespread economic harm" because the value of the regulations and the unintended consequences has not been reviewed, and it is doubtful that the proposed deadlines could be met at all or without great cost to industry. *Id.* The Chamber therefore asks that the Board request IEPA to "work within the rulemaking process to resolve a very solvable issue with the benefit of perspective, time, reason, research and the opportunity for public input." *Id.* at 3.

Illinois Manufacturers' Association (IMA) (PC 4)

The IMA is a statewide trade organization representing nearly 4,000 companies and facilities that employ 580,000 workers. PC 4 at 1. The IMA opposes both the content of the proposed emergency rulemaking and the designation of the rules as an emergency. *Id.* The IMA argues that the emergency rulemaking is improper on three bases.

First, the IMA states that the United States Environmental Protection Agency (USEPA) does not classify petcoke as a hazardous material and the Chicago Department of Public Health agrees with that classification, therefore IMA believes "[t]here is no threat to public interest, safety or welfare." PC 4 at 1-2. Second, the IMA argues that companies affected by the rule will be forced to expend "significant financial resources" pursuant to a proposed "very tight timeline that may not be physically possible to comply with." *Id.* at 2. Therefore, IMA says the rule requires unreasonable or unnecessary economic costs. *Id.* Third, the IMA labels the petcoke issue "political," suggests that it is being addressed through other avenues, and argues that this isolated incident does not constitute an emergency.

Beelman River Terminals, Inc. (BRT) (PC 5)

BRT expresses concern about the "inequity" of the proposed emergency regulations. PC 5 at 1. BRT states that it works with IEPA and USEPA to protect public health and the environment, and that its terminal in Venice, Illinois is committed to compliance with all federal, state, and local regulations, as well as permit conditions on the processing and handling of coke and coal. *Id.* BRT adds that its Venice facility has operated for 14 years without an environmental violation or citation. *Id.*

BRT further states that the Venice terminal's 34-person workforce is 47% minority, and that Beelman Truck Company has 45 employees, 24% who are minority. PC 5 at 1. BRT and its affiliates pay over $150,000 annually in Madison County taxes, BRT continues, and otherwise support the local economy. *Id.* at 2. BRT explains that barge-transported coal is unloaded at its terminal and delivered by truck to U.S. Steel in Granite City, Illinois, and that petcoke produced by Phillips 66's Wood River Refinery arrives by truck to the terminal and is then loaded onto barges. *Id.* BRT asserts that petcoke is not stored long-term at its terminal; rather, storage lasts only until a shipment is accumulated, after which it is loaded onto barges. *Id.* at 3.

BRT questions the IEPA's statement in the introduction to the emergency rules that fugitive emissions from coal and coke storage are inadequately controlled, claiming it has "numerous safety precautions" in place to control and eliminate fugitive dust emissions. PC 5 at 2. According to BRT, these include the facility itself, whose "state of the art" conveyor system, stackers, and truck and barge "load out systems" are designed to meet current regulations. *Id.* In addition, BRT has a fugitive dust control plan, which prescribes use of water cannons, spray nozzles on conveyor systems and water trucks/sweepers for paved roadways. *Id.* Moreover, BRT continues, BRT's outbound barge loading system uses truck dump hoppers, stackers, reclaim tunnels, and conveyors with extendable chutes to transfer or reclaim "product" when it is transferred to barges. *Id.* According to BRT, this "virtually eliminates" any fugitive dust emissions during "load out." *Id.* BRT unloads coal for U.S. Steel using covered conveyors and an enclosed hopper with a spray bar. *Id.* at 3.

BRT further states that it has "all required" operating permits, including a lifetime permit issued by the IEPA to operate emission units and pollution control equipment. PC 5 at 3. Another of its permits addresses coal handling and water pollution control. *Id.* BRT adds that it has "all required construction permits" from the IEPA and the United States Army Corps of Engineers. *Id.*

BRT maintains that the proposed emergency rules unfairly discriminate against bulk storage terminals in Illinois, subjecting them to more restrictive standards that would put them at a competitive disadvantage as compared to out-of-state operators. PC 5 at 3. Customers of Illinois terminals could simply switch to operations not subject to such restrictive regulations in other states, such as Missouri, where massive stockpiles in St. Louis "dwarf" BRT's stockpiles. *Id.*

Next, BRT argues there is "absolutely no evidence of an emergency sufficient to deny interested parties their rights under the normal procedures." PC 5 at 3. First, BRT continues, there is no emergency at all. Petcoke has been produced for over 70 years, and BRT has handled at its terminals for over 25 years. *Id.* at 4. According to BRT, the transportation, storage, and handling of petcoke is not a new industry, and any associated environmental and public health impact has only decreased over the years. *Id.* BRT asserts that operators like it have already invested "significant resources" in the safe handling of petcoke. *Id.*

Second, according to BRT, petcoke does not present a "severe threat" to public health. PC 5 at 4. BRT maintains that USEPA, based on a June 2011 study, does not classify petcoke as a hazardous material, does not find that it presents an imminent threat to human health, and "has found that it has a low potential to cause adverse effects on aquatic and plant life." *Id.*

Third, BRT continues, it is BRTs understanding that the public complaints referenced in the proposed emergency rule were all related to "an isolated incident" in August 2013 at a single Cook County facility. PC 5 at 4. BRT adds that it further understands that "extenuating environmental factors," including high winds and excessive heat, contributed to that situation, and that measures have already been implemented to prevent future such incidents. *Id.* Nor is BRT aware of any "similar complaints or incidents" from any facility outside of Cook County. *Id.*

In addition, BRT asserts that the proposed emergency rules would have a "severe negative impact on Illinois businesses and citizens; are arbitrary and capricious; and would require procedures "not necessary or merited in the petcoke industry." PC 5 at 5. The timeframe for implementation of the new standards is "far too short," according to BRT, because of the "large scope of construction" for most, if not all, of the affected facilities. *Id.* BRT adds that the design and construction of enclosures, relocation of existing storage piles, and the paving of roads are all labor intensive, expensive, and time consuming activities. *Id.* BRT further asserts that the emergency rules, if adopted, would require facility owners to undertake these activities in poor weather conditions, and without advance notice or warning to prepare for the associated labor and financial impacts. *Id.* BRT concludes there is "no rational basis to implement such financially devastating procedures" with no evidence of violations or issues beyond a "single isolated incident in Cook County over six months ago, which has since been corrected." *Id.*

BRT concludes that petcoke, while constantly monitored, has "never been classified as a hazardous material and has never required specific permitting." PC 5 at 5. BRT adds that the proposed emergency rules are arbitrary and unnecessary, as regulations already in place "are more than sufficient to protect public health. *Id.* The proposed rules would cause "extreme hardship" for BRT as well as other operators and their employees and customers. *Id.* The same would be true for Illinois as a whole, as well as local communities and businesses, according to BRT. *Id.* at 5-6.

If new regulations are to be considered, BRT continues, they should be subject to a non-emergency, orderly process. PC 5 at 6. In such a process, according to BRT, the Board would discover that BRT and similar facilities already have the necessary controls and safety precautions in place. *Id.* BRT asserts that reasonable regulations would extend no further than these existing "processes and precautions." *Id.* BRT requests "fair consideration and observation" of its terminal before its facility is "inaccurately and unfairly" included in the proposed rulemaking. *Id.* According to BRT, the proposed rules would have a "significant detrimental impact" on BRT's employees and customers, and would cost the State and BRT business, employment, and economic opportunity, which would shift to St. Louis and Missouri. *Id.*

Wood River Refinery (Refinery) (PC 6)

The Refinery, located in Roxana, Illinois, is a petroleum process facility, responsible for 1,200 area jobs, that creates many products including petcoke. PC 6 at 1. The Refinery is concerned that if the emergency rulemaking is allowed it will create a storage facility shortage, which will in effect, trigger the Refinery to reduce their production of crude. *Id.* This would result in less production of gasoline, diesel, and other refining products. *Id.*

The Refinery argues there is no justification for distinguishing this as an emergency rulemaking scenario. PC 6 at 1-2. The Refinery states that, according to the IAPA and Act, an emergency rulemaking process is only acceptable when there is an emergency or a threat to the public interests, safety or welfare. *Id.* at 2. The Refinery argues that the IEPA merely lists certain issues in the Chicago area, without demonstrating why it is an emergency outside of the

Chicago area. *Id.* The Refinery also states that it is their understanding that the problem refineries in the Chicago area were not in compliance with the existing rules. *Id.* The Refinery acknowledges the concern that implementing these rules solely in the Chicago area will result in storage facilities moving outside of the limits, and argues that this is not feasible because the facilities will still be regulated and must file for an air permit. *Id.*

The Refinery is concerned with the precedent that will be set if the emergency rulemaking is allowed to continue. PC 6 at 2. Claiming that allowing emergency rulemaking, without fully justifying the actions within the Motion, negates the open transparent nature the Act brings to rulemaking. *Id.* Refinery asks that the rulemaking to be completed in the normal format, instead of in the emergency format. *Id.*

BP Products North America Inc. (BP) (PC 7)

BP opposes the IEPA's proposed emergency rules. BP states that it has contracted with KCBX in Chicago for terminal services and handling of petcoke fuel produced at BP's northwest Indiana Whiting Refinery, the sixth largest refinery in the United States. PC 7 at 1. According to BP, the IEPA's proposal would impose "onerous and unnecessary" regulations on bulk storage terminals that have been doing business in Illinois for decades and are already adequately regulated at the federal and State levels. *Id*.

BP argues that under Illinois law, there is no emergency related to petcoke transport and handling. PC 7 at 2. BP expresses its understanding that the "localized and sporadic complaints of fugitive emissions" of 2013 in Cook County have already been addressed. *Id*. BP further claims that "[r]equiring additional water pollution controls when there has been no notice of a water pollution emergency is without basis." PC 7 at 4.

BP cites USEPA and City of Chicago reports in maintaining that petcoke is not hazardous to health or the environment. PC 7 at 2. BP asserts that allowing IEPA to use emergency rulemaking to "circumvent the correct rulemaking process" would set a "dangerous precedent." PC 7 at 2-3. BP also has many concerns with the language of the proposed rules, claiming, for example, that the proposed definitions of "moist" and "transfer point" are flawed and that various timing requirements are too aggressive. PC 7 at 3-4.

BP requests that the Board reject the IEPA's proposed emergency rules and instead conduct "a deliberate, fact-based analysis that allows for thoughtful and complete industry and community involvement to properly develop additional regulatory controls, if needed, that are protective of human health and the environment and fair to Illinois business." PC 7 at 4-5.

KCBX Terminals Company (KCBX) (PC 8)

Overview of KCBX's Position

KCBX argues that there is no emergency, and because there is no emergency, regulated entities should be allowed a "full and fair opportunity" to provide responses to the proposed rule. PC 8 at 1. In support of its argument that there is no emergency, KCBX states that:

> Although the supposed emergency emanates from Cook County, the officials on site there have not given any indication that the issue needs to be addressed in an emergency fashion. To the contrary, the City of Chicago is considering its own on-point regulations without seeking to accelerate the prescribed timetable, and recently extended the deadline for comments on its proposed ordinance.
>
> The United States Environmental Protection Agency (USEPA) does not perceive any such emergency. To the contrary, the USEPA has specifically approved the air monitoring that KCBX is putting in place to monitor any fugitive dust emissions from KCBX's facilities in order to collect data to determine whether future action is necessary.
>
> The City of Chicago and the USEPA have good reason not to be raising false alarms about an emergency. They well recognize that KCBX has a new $10 million state-of-the-art dust suppression system in place at its South facility to safeguard against fugitive dust, and a similar system at its North facility. These safeguards include an array of dust control best management practices including water cannon sprays, water trucks, weather monitoring, pile management and grooming, surfactant and encrusting agent addition, water spray bars on fixed conveyor transfer points, truck wheel washes, and protocols to suspend operations, if necessary. PC 8 at 1-2

KCBX further argues that the scientific evidence confirms that no emergency exists because petcoke has been in use as a fuel for decades without significant impacts. PC 8 at 2. Scientific literature and studies identify low risk to human health posed by petcoke and test results provided by KCBX of soil and surface sampling in the neighborhoods around KCBX's facilities show no evidence of key chemical indicators of petcoke or coal on surfaces or in soils. *Id*.

KCBX opines that the event that precipitated this regulatory push was a dust cloud in August of 2013, before KCBX had commissioned dust suppression systems at the facility. PC 8 at 2. KCBX says it placed a state-of-the-art system in place in November of 2013. *Id*. KCBX argues that "no fair-minded observer would think that such an occurrence presents an emergency" requiring rushing forward with regulations. *Id*.

KCBX claims that in light of the foregoing, the claim of "emergency" cannot withstand judicial scrutiny; however, KCBX will support its evidence if the Board believes that additional information is necessary to conclude that there is no emergency. PC 8 at 2-3.

KCBX opines that undue delay or material prejudice will not result if KCBX and other entities are allowed the "protections of the normal rulemaking process". PC 8 at 3. KCBX notes that IEPA's claim of undue delay or material prejudice relates to "inadequately controlled emissions and discharges"; however, KCBX has installed a dust suppression system and is controlling emissions. *Id*. KCBX states that during the severe wind storm on November 17, 2013, when several tornados were reported statewide and the Chicago Bears game was delayed

by two hours due to weather, no dust emissions were observed. *Id*. This is proof that the dust suppression system is working. *Id*.

Without the "normal time" to respond fully to IEPA's proposal and motion, KCBX claims that it will be prejudiced and suffer irreparable harm. PC 8 at 3. KCBX asserts that the proposed emergency rules have a profound negative impact on KCBX and other businesses in Illinois. *Id*. KCBX will incur significant costs in construction and planning to comply with the emergency rules and compliance is technically infeasible. *Id*. KCBX asserts that the proposed timeframe had denied it the ability to build a full record by expanding on points in KCBX's comment. *Id*. at 4.

KCBX also takes issue with IEPA's preparation of the emergency rule without input from regulated entities. PC 8 at 4. KCBX alleges that IEPA did accept comments from a group, not regulated by the rule. *Id*. KCBX argues that an unregulated entity should not have been given an opportunity to comment on IEPA's proposal if the regulated community was not given the opportunity to comment on IEPA's proposal. *Id*.

KCBX offers that if regular rulemaking were initiated, KCBX would utilize the time to provide IEPA with data, views, arguments, and comments. PC 8 at 4. KCBX would include detailed discussion and explanation of the evidence summarized above, including testimony from toxicologists and environmental health scientists. *Id*. KCBX could also provide discussion on how it could comply and suggestions for improvements to the rule. *Id*.

KCBX's Operations

KCBX operates two bulk material transfer facilities in Chicago along the Calumet River. PC 8 at 5. The North facility has been operated by KCBX for 20 years and KCBX acquired the South facility in December 2012. IEPA has issued air permits to both facilities, North on April 5, 2012, and South on April 18, 2013. *Id*. KCBX's North facility also has a National Pollutant Discharge Elimination System (NPDES) permit, while the South facility operates under a Subtitle D non-discharge water permit issued on July 2, 2013. *Id*. Also, KCBX reports, construction at the South facility is covered by the IEPA's general NPDES permit for stormwater discharge. *Id*.

KCBX transfers its bulk products petcoke and coal from one mode of transportation to another. PC 8 at 6. Transferring the bulk products includes staging the materials for a period of time and KCBX is thus directly affected by the IEPA's proposed emergency rule. *Id*.

Legal Standard For Emergency Rules

KCBX notes that the Board's rulemaking proceedings are governed by the Act and IAPA, which require agencies to allow a minimum 45-day comment period on proposed rules unless an emergency exists or the rulemaking is peremptory. KCBX argues that IEPA's request for emergency rulemaking should not be granted, as the legal basis for emergency rulemaking does not exist. KCBX notes that IEPA has not claimed that the Governor proclaimed a disaster emergency, as required by Section 27(c) of the Act (415 ILCS 5/27(c) (2012)); nor has IEPA

provided evidence that a severe public health emergency exists, as required by Section 27(c) of the Act (415 ILCS 5/27(c) (2012)). PC 8 at 7.

KCBX quotes a Board opinion that stated, "'[i]n analyzing any request for emergency rulemaking, the Board must determine first whether an emergency within the meaning of the [I]APA exists, and only second what the content of the emergency rule should be.' Proposed Amendments To: Regulation Of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732 and 734), PCB R04-22, R04-23 (cons.) slip op. at 7 (June 3, 2004)." PC 8 at 7. Further, KCBX notes that courts are not conclusively bound by the Board's determination that an emergency exists. *Id*., citing Citizen's for Better Environment v. IPCB, 152 Ill. App. 3d 105, 504 N.E.2d 166 (1st Dist. 1987). Lastly, KCBX points out that the failure to comply with the IAPA requirements for public notice and comment, the rule is not valid or effective. PC 8 at 8, citing Cnty. of Du Page v. Illinois Labor Relations Bd., 358 Ill. App. 3d at 181, 183, 830 N.E.2d 709 (2nd Dist. 2005).

KCBX notes that the Board has sparingly used its authority to promulgate emergency rules with most emergency rules dealing with true public health emergencies. PC 8 at 18. KCBX opines that the Board's prior decisions and judicial precedent demonstrate that the Board should deny the request for emergency rules. *Id*. KCBX points to four cases where the Board adopted emergency rules: Hazardous Hospital Wastes, Section 3(jj) and 21(h) of the EPA, R80-19 (Dec. 18, 1980); Emergency Rulemaking: Livestock Waste Regulations, 35 Ill. Adm. Code 505, R97-14 (Oct. 29, 1996) (R97-14); Emergency Rulemaking: Amendments to the Open-Burning Permit Rules, 35 Ill. Adm. Code 237, R93-15 (Aug. 20, 1993); and Emergency Amendments to the Landfill Rules for On-Site Burial of Dead Animals in Flood-Disaster Counties: 35 Ill. Adm. Code 8-7.106, R93-25 (Sept. 23, 1993). KCBX notes that in R80-19 the Board was faced with confusion that existed over a newly defined term "hazardous hospital waste"; while in R97-14, the Board adopted livestock management waste rules where none previously existed. PC 8 at 18-19. With R93-15 and R93-25, the Board adopted rules to allow for disposal of dead animals after 20 counties had been impacted by massive flooding. *Id*. at 19.

Illinois courts have invalidated emergency rules where an actual emergency does not exist. PC 8 at 19-20, citing as examples Senn Park Nursing Ctr .. a Div. of Mid-States Health Centers. Inc. v. Miller, 118 Ill. App. 3d 733,744,455 N.E.2d 162, (1st Dist. 1983), aff'd. 104 Ill. 2d 169, 184-86 (1984) (invalidating emergency rule regarding reimbursable costs under Medicaid where the only emergency was due to agency's own failures and there was no real threat to the public); Champaign-Urbana Pub. Health Dist. v. Illinois Labor Relations Bd., 354 Ill. App. 3d 482,821 N.E.2d 691 (4th Dist. 2004) (invalidating emergency rules when only alleged emergency was one of administrative interest and convenience); s*ee also* Citizens for a Better Environment (overturning an emergency rule in part because "a public body cannot create an urgent situation and then claim an emergency"); Cnty. of Du Page v. Illinois Labor Relations Bd., 358 Ill. App. 3d at 181, 183, 830 N.E.2d 709 (invalidating emergency rules of the Labor Relations Board because no emergency existed).

KCBX argues that in this case there is no confusion of law, no proliferation of unregulated facilities, and no natural disaster. PC 8 at 20. IEPA instead points to "unsupported

conclusions and hearsay" and to facilities that do not create an emergency. KCBX asserts that the Board should deny the motion for emergency rulemaking.

KCBX Asserts No Emergency Exists

Human Health Effects. KCBX asserts that petcoke and coal pose no threat to the public interest, safety, or welfare as potential emissions of airborne PM from petcoke dust poses a low risk to human health. PC 8 at 8. KCBX supports this position, providing reports from the USEPA (Exh. 2) and the Congressional Research Service (CRS) (Exh. 3), both of which "conclude that petcoke has not been associated with any inhalation-related mortalities or any reproductive or developmental effects." *Id*. These reports reviewed studies that found that petcoke is not carcinogenic via inhalation and found that petcoke is not an identified mutagenic or prone to inducing chromosomal aberration during *in vivo* toxicity testing. *Id*.

KCBX offers that with few exceptions, petcoke is typically stored in open-air piles, similar to other non-hazardous industrial and agricultural bulk material, not impacted by rain, are stored. PC 8 at 9. KCBX argues that IEPA had not identified any discernible risk to health or the environment to warrant "special regulation of piles of petcoke as distinct from any other piles." *Id*. Furthermore, KCBX argues that the data indicate that petcoke is not associated with a high level of hazard based on toxicological testing and most toxicological date indicate a low level of hazard following inhalation and dermal exposure to animals. *Id*.

As to coal, KCBX notes that the mineral content of dust depends on the particle size of the dust, the coal seam, and how the coal was mined. PC 8 at 10. KCBX points to studies that indicate that coal dust cannot be classified as carcinogenic to humans, and that coal handlers are no more likely to have bronchitis, wheezing or asthma, or elevated blood pressure from other groups of employees. *Id*.

KCBX argues that these studies and reports refute IEPA's claim that fugitive PM from petcoke and coal poses a danger or threat to human health, safety or welfare. PC 8 at 11. Thus, KCBX opines and emergency rule is not warranted based on human health effects. *Id*.

Operation of KCBX's Facility Does Not Create an Emergency. KCBX claims that its facilities have extensive safeguards to protect against fugitive emissions. PC 8 at 11. These safeguards were tested during the severe windstorm on November 17, 2013, and employees at work did not observe dust leaving the KCBX facility during the storm. *Id*. KCBX operates its facilities pursuant to permits issued by IEPA and those permits contain requirements to control and regulate PM fugitive emissions. KCBX opines that no emergency exists with regard to the facilities that warrants bypassing the regular rulemaking process. *Id*.

In further support, KCBX notes that the August 2013 emissions occurred less than a year after KCBX took control of the facility and before the new dust suppression system was in place. PC 8 at 12. KCBX notes that the results of comprehensive soil and surfaces sampling in the neighborhoods surrounding the KCBX facilities establish no significant amount of petcoke or coal from the KCBX facilities was deposited in the sample area. *Id*. at 12-13. Furthermore, none of the soil or surface dust show elevated levels of substances in ratios associated with petcoke or coal. *Id*.

KCBX employs an array of dust control best management practices. PC 8 at 13. Those practices include water cannon sprays, water trucks, weather monitoring, pile management and grooming, application of surfactant and encrusting agents, water spray bars on conveyor transfer points, and truck wheel washes, as well as the suspension of operations. *Id*. KCBX has also agreed to implement air monitoring at both facilities. *Id*. at 15.

Ambient Air Conditions Do Not Support an Emergency. KCBX notes that USEPA has designated the areas where KCBX's facilities are located as attainment for both PM_{10} and $PM_{2.5}$. PC 8 at 15. The attainment designation for $PM_{2.5}$ was made ion October 2, 2013. *Id*. at 16.

Sufficiency of Existing Regulations

KCBX argues that the existing regulations support a finding that no emergency exists. PC 8 at 16. KCBX notes that bulk material handling facilities must obtain air permits from IEPA and an applicant must submit proof to IEPA that the emission source will not cause a violation of the Act. *Id*., citing 35 Ill. Adm. Code 201. Bulk material facilities also must comply with regulations on visible and PM requirements, including opacity of emissions and prohibition against visible PM emissions. *Id*., citing 35 Ill. Adm. Code 212. There are also rules governing fugitive PM, including management of storage piles, conveyor loading operations, and traffic areas surrounding storage piles. *Id*. KCBX claims that IEPA does not explain why the petcoke and coal facilities need additional regulation. *Id*.

Also, with the exemptions in the rule for the source, site or facility that produces or consumes coal or coke, KCBX contends that IEPA has excluded facilities that have millions of tons of coal in the aggregate. PC 8 at 17. KCBX argues that IEPA does not explain why those excluded facilities are not a part of the "emergency". *Id*.

Burdens of Compliance on Regulated Facilities

KCBX offers that it cannot, in this limited time, submit detailed comments on all aspects of the proposed emergency rule; however, KCBX comments on some content to demonstrate the excessive and impossible burdens the emergency rule will impose on KCBX. PC 8 at 21. KCBX looks to the requirement that within 60 days all coke and coal piles be on impermeable surfaces and indicates that the areas for KCBX's facilities are 40 and 60 acres. *Id*. To create impermeable bases in the storage areas, KCBX would be required to shut down operations for several months remove all material from its facilities, and spend millions of dollars to install impermeable bases or pads. *Id*. KCBX claims that during this time-period, KCBX would be unable to perform its contracts and would lose customers. *Id*.

KCBX also offers comment on the proposed requirement that the facilities demonstrate that they are being graded in a way to ensure proper drainage and prevent pooling water. PC 8 at 21. KCBX explains that its facilities are currently graded to direct drainage to collection ponds, but are not graded so as to "prevent pooling of water". *Id*. KCBX explains that pooled water acts as a dust inhibitor and, to some extent, is beneficial and encouraged. *Id*. This proposed rule

requirement would cause KCBX and other similarly situated companies to have to shut down their businesses, remove material from their properties, and re-grade those properties, during which time KCBX and those other affected companies would be unable to perform their contracts and would lose customers. *Id*.

Regarding the requirement that sedimentation ponds be lined within 45 days, KCBX states its ponds are not lined and KCBX would be required to reconstruct them. PC 8 at 21. Also considering requirements for paving and grading, those changes would promote additional runoff, which would require an increase in the size of ponds. *Id*. These activities would require significant resources and also require shut down. *Id*. at 22. KCBX also points to issues with pile height, transfer points, and rumble strips. *Id*.

Adverse Impact on Commerce

KCBX argues that the owners or operators of bulk terminals will be adversely impacted by the emergency rule, but also commerce in the State and throughout the region would be adversely affected. PC 8 at 23. Due to increased costs of compliance or curtailment of activities, KCBX claims upstream and downstream producers, consumers and transporters would be impacted. This could result in the loss of jobs, product shortages, and price increases in the State and throughout the region. *Id*.

IEPA's Motion is Legally Deficient

KCBX argues that IEPA has failed to provide details on economic reasonableness or technical feasibility of the emergency rule and that is information the Board must have to consider the rule. PC 8 at 24, citing 415 ILCS 5/27(a) (2012). KCBX further argues that IEPA failed to provide information on the scope of the rule, how many facilities will be covered, or why the current rules are not sufficient. *Id*. at 25. KCBX argues that these types of facilities are already highly regulated and imposing the emergency rules would be economically unreasonable and technically infeasible. *Id*. Finally, KCBX argues that the IEPA's motion is not supported by evidence and relies merely on hearsay. PCB 8 at 25-26.

IEPA's Proposed Emergency Rules are Flawed

KCBX takes issue with specific provisions of the emergency rules including those provisions that require actions beyond the 150 day period that the rule will be effective. PC 8 at 28. Also, the inclusion of waste rules in the emergency rule is inappropriate as the alleged emergency by IEPA is the inadequate control of fugitive emissions of PM along with inadequate control of discharges of stormwater and wastewater. KCBX notes that IEPA does not even mention hazardous waste in its motion, and petcoke is not a waste. *Id*. at 29.

U.S. Constitution Would be Violated

KCBX argues that the emergency rules impose an impermissible burden and must be struck under the "Dormant Commerce Clause of the U.S. Constitution". PC 8 at 31, citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)). KCBX claims the rule discriminates against

interstate commerce and the rules threaten cross-border commerce. PC 8 at 32-33. Finally, KCBX argues that the emergency regulations apply to the instrumentalities of commerce. *Id*.

KCBX also argues that the emergency rules violate due process, by failing to give opportunity for comment and the lack of notice. PC 8 at 34. KCBX also takes issue with IEPA's acceptance of comments from certain entities but not all, and the rules will impact the business of KCBX and others. *Id*. at 34-35.

Request for Hearing and Stay of Any Adopted Rules

KCBX asks that the Board conclude that no emergency exists; however if the Board needs additional support for denial, KCBX asks that the Board hold a hearing on the emergency rule. PC 8 at 35. KCBX is prepared to provide testimony at such a hearing in order to further establish that an emergency does not exist. *Id*.

KCBX asks that if the Board agrees that an emergency exists, KCBX ask that the Board stay the enforcement of the rules pending judicial review. PC 8 at 35.

Illinois Petroleum Council (IPC) (PC 9)

IPC urges the Board to reject the proposed rulemaking, which is an "onerous and unnecessary" regulation regarding the handling of petcoke and coal. PC 9. IPC argues that there is no justification for the "emergency" rulemaking because the complaints of fugitive emissions from the facilities in question have already been addressed by either removing petcoke from the property or making investments in advanced emissions control equipment. *Id.* IPC claims that the existing state regulations are sufficient to prevent petcoke from causing a nuisance to surrounding property. *Id.* IPC opines that Petcoke is a valued commodity that is non-toxic and non-carcinogenic. *Id.* The USEPA classifies petcoke as a "'traditional fuel' that has been historically managed as a 'valuable fuel product.'" *Id.* IPC further opines that the large refineries in Illinois that produce petcoke are vital to the Illinois economy by contributing billions of dollars and providing jobs. *Id.* IPC urges the Board to reject the proposed rulemaking as there is no threat to the public interest or welfare necessitating an "emergency" designation. *Id.*

American Waterways Operators (AWO) (PC 10)

AWO, the national trade association for the tugboat, towboat and barge industry, is urging the Board to reject the designation of "emergency disaster" and review this proposal through the regular rulemaking process. PC 10 at 1. AWO's industry is responsible for moving 800 million tons of cargo each year, and consists of 4,000 tugboats and towboats, and over 27,000 barges of all types. *Id.* The emergency ruling would have effect on their members that transport petcoke and coal within the Great Lakes and Illinois waterways. *Id.*

AWO points out that under the Act the Board may only permit emergency rulemaking when one of the following conditions exists: a disaster emergency, or a severe threat to the public health, interest, safety, or welfare. *Id.* AWO states that petcoke, coal, or other related

bulk materials have not contributed to, nor have they created, any public health or disaster-related emergencies. *Id.* at 2. AWO also states that, based on a study by the USEPA petcoke is non-toxic. *Id.*

Illinois Marine Towing Inc. (IMT) (PC 11)

IMT is a towing company, operating in the Chicago area, which transports bulk dry materials, including petcoke. PC 11 at 1. IMT states their support of the comments from the CICI (PC 1) and AWO (PC 10). *Id.* IMT would be "greatly and negatively" affected by the proposed emergency rule. *Id*. IMT states that the Act requires certain conditions must exist in order to trigger emergency rulemaking, including either: a disaster emergency, a severe public health emergency, or welfare. *Id.* IMT points to the USEPA's report to show that petcoke is non-toxic and non-hazardous, and therefore such bulk storage does not constitute an emergency. *Id.* IMT urges the Illinois Pollution Control Board to reject the emergency rulemaking process and proceed with a normal rulemaking process. *Id.*at 2.

National Association of Manufacturers (NAM) (PC 12)

NAM strongly supports the comments filed by the IMA (PC 4) and suggests that IEPA proceed with extreme caution with respect to how IEPA approaches coke. PC 12. Metcoke is used extensively by the iron and steel industry. *Id.* Calcined petcoke is "absolutely essential to the aluminum industry," as it is the only product that can be used to make anodes for smelting, which in turn produces aluminum. *Id.* Aluminum has a vast variety of uses, as does titanium dioxide, which petcoke is also used to produce. *Id.* NAM states that USEPA classifies petcoke as "highly stable and non-reactive at ambient conditions." *Id.* The CRS recently concluded that chemically, petcoke is essentially inert, and if released into the environment, "it would not be expected to undergo many of the environmental fate pathways which could lead to environmental risks." *Id.* Coke is a product that manufacturers need and that cannot be easily replaced. *Id.* Environmental regulation of this substance needs to be done in a balanced, reasonable way. *Id.*

Horsehead Corporation (Horsehead) (PC 13)

Horsehead states that its Chicago operations, a zinc oxide manufacturing facility, are "not accurately described as a "coke or coal bulk terminal." PC 13 at 2. But, Horsehead contends, the proposed IEPA definition of such facilities at Section 213.115 is "unclear and confusing," and application of the proposed rules to Horsehead would have "significant adverse effects on its operation." *Id.* Consequently, Horsehead filed a public comment "to protect its interests by objecting to IEPA's request for emergency rulemaking". *Id.*

Horsehead articulates procedural concerns, as well as concerns with the rule text and suggested changes as it may apply to its facility. Horsehead requests that the Board assess the proposed rules for economic reasonableness and technical feasibility as required by Section 27 of the Act, and suggests that the rules as proposed do not satisfy either the requirements of the IAPA or the Act. *Id* at 18. Horsehead urges the Board to consider the proposed rules during the

regular rulemaking process. But, alternatively, Horsehead suggests rule modifications discussed below.

Horsehead's Chicago Zinc Oxide Manufacturing Facility

Horsehead owns and operates a facility located at 2701 E. 114th St. in Chicago, at which it manufactures a zinc oxide product. PC 13 at 9. Horsehead reminds that the Board has "had occasion to review the operations at its facility" in Petition of Horsehead Resource and Development Company, Inc. for an Adjusted Standards under 35 Ill. Adm. Code 720.131(c), AS 00-2 (Feb.17, 2000)). The opinion describes the production process for what was then called "crude zinc oxide" (CZO) but now is called "Waelz Oxide." *Id*. at 4-6. 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 nonhazardous zinc-bearing feedstocks." *Id*. None of these feedstocks are "coke or coal materials." *Id*. But, the Board also stated, "Just before the feedstocks enter the Waelz kilns, a carbon source (such as coke) is added." *Id* at 5.

Horsehead reports in PC 13 that:

> the carbon source used today is either petcoke or metcoke. Horsehead maintains less than 10,000 cu[bic] y[ar]ds 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." The process "results in no waste nor water discharges." 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 IEPA's proposed exclusion from the definition of "coke or coal bulk terminal."
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> * * *
>
> [In the AS proceeding,] 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 IEPA and the Board closely reviewed Horsehead's operations. Accordingly, Horsehead requests that the Board deny IEPA'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 IEPA'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. PC 13 at 10-11.

Procedural Concerns

Procedurally, Horsehead argues that no "undue delay or material prejudice" will occur if the Board does not allow the 14-day response time to IEPA's motion provided for in 35 Ill. Adm.

Code 101.500. PC 13 at 18. Like other commenters, Horsehead further contends that there is no emergency situation justified in this docket within the meaning of the Act or IAPA. *Id* at 4-17.

Among other record deficiencies, Horsehead points to "the vagueness of IEPA's proposed emergency rules, the lack of any IEPA statement of reasons to provide further explanation of their scope and applicability, and the limited time allowed for the preparation of [its] response, [such that] Horsehead is not even certain that the proposed emergency rules are intended to regulate its Illinois operations." PC 13 at 8-9.

Horsehead reports that studies by USEPA and the CRS on petcoke "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)." PC 13 at 12, citing passages from the CRS report entitled "Petroleum Coke: Industry and Environmental Issues, by Anthony Andrews & Richard K. Lattanzio, CRS Report R43263, Oct. 29, 2013 (PC 8 Exh. 3). Horsehead suggests that existing rules already provide requirements for control of fugitive emissions or runoff discharges from petcoke piles. PC 13 at 13-15.

Rule Text Concerns

As to the rule text, Horsehead also requests that the Board "require IEPA to clarify the intended scope of these proposed rules prior to their adoption." *Id* at 2. Horsehead suggests a revision to the first sentence of the definition of "coke or coal bulk terminal" to exclude a "facility that produces or consumes the coke **or coal or uses it as a carbon source in a manufacturing process.** *Id* at 19 (new language underscored, emphasis in original). Alternatively, Horsehead suggests that the Board

> exclude from the emergency rules "smaller operation for which compliance would be economically unreasonable and/or technically unfeasible due to the different nature of the operations versus large bulk terminal operations. IEPA 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." *Id* at 19-20.

Adverse Effects of Emergency Rule Requirements

Horsehead states that adoption of the proposed emergency rules would cause "significant adverse effects to affected parties," due to the fact that substantial requirements become effective immediately or with only a number of days afterwards. PC 13 at 16. These include requirements that regulated facilities expend funds 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)). PC 13 at 17 (citations in original).

Horsehead concludes that this record simply does not support immediate application of these requirements to its facility, for all of the reasons established above.

Southeast Environmental Task Force (SETF) (PC 14)

SETF is a community-based organization that advocates for public health and environmental quality on the Chicago's southeast side. PC 14 at 1. SETF states that it "agrees with [IEPA] that the environmental and public health impacts of the outdoor storage of coke and/or coal justifies an emergency rulemaking." *Id.* SETF adds that it "endorses" the technical analysis set forth in the filed comments of the Environmental Law and Policy Center, and explains that the purpose of its comments is to call attention to the "dangerous and chaotic situation" now being experienced on Chicago's southeast side because of outdoor coke and coal storage. *Id.* According to SETF, this situation could become worse still absent emergency regulations as outdoor storage areas "multiply," and could be "repeated throughout Illinois." *Id.*

SETF bases its comments on "publicly documented actions" arising from the "current crisis on Chicago's southeast side," all of which were initiated in a roughly one-month period beginning October 24, 2013. PC 14 at 1-2. SETF adds that these actions concern the operations of just two southeast side operators, Beemsterboer Slag Company (Beemsterboer) and KCBX Terminals Company (KCBX). Given the intensity of the public response to their outdoor storage operations, an emergency rule is necessary before similar operations "begin to proliferate in Illinois." *Id.* at 2.

SETF recites that on October 24, 2013, IEPA issued a notice of violation (NOV) to Beemsterboer, a copy of which is attached to SETF's comments as Exhibit 1. PC 14 at 2. The NOV alleges that Beemsterboer's outdoor storage of coke and coal caused, threatened, or allowed the discharge of particular matter into the atmosphere, causing or tending to cause "air pollution" in violation of Section 9(a) of the Act (415 ILCS 5/9(a) (2012); *see also id.* at 5/3.115 (defining "air pollution")). *Id.* at 2 & Exh. 1. The NOV ordered Beemsterboer to immediately cease causing or tending to cause air pollution, and to submit a compliance plan to ensure the prevention of air pollution that causes, threatens or allows unreasonable interference with local citizens' enjoyment of life and property. *Id.*

Next, SETF notes that on October 31, 2013, four named plaintiffs brought a class action lawsuit in Cook County circuit court on behalf of residents affected by "sprawling," uncovered piles of coal and petcoke up to five stories high on Chicago's southeast side. PC 14 at 2. The complaint, attached as Exhibit 2 to the comments, alleges that "every day," the wind blows black clouds of "fugitive" coal and petcoke dust from the defendants' uncovered piles onto

neighborhood homes, businesses, yards, streets, alleys, parkways, and other properties. *Id.* at 3 & Exh. 2.

According to SETF, these allegations are consistent with local residents' testimony at public hearings in southeast Chicago concerning the City of Chicago's proposed regulations to address outdoor bulk material storage, most recently on January 13, 2014. PC 14 at 3. Local residents expressed concerns about (1) the effects of blown material, leachate, and runoff in Calumet-area waterways; (2) the effects of runoff of such material into local sewers; (3) dust on cars and personal property; (4) fugitive emissions landing on vegetable gardens and outdoor markets; (5) the effects of such emissions on schools, including inside school buildings; (6) ambient air quality effects, especially for outdoor recreation; (7) dust accumulation outside and inside homes; and (8) health effects of dust inhalation. *Id.*

In addition, SETF recites that on November 4, 2013, the People of the State of Illinois (People) filed an environmental enforcement complaint against KCBX in circuit court. PC 14 at 3. The complaint, SETF continues, alleges that petcoke and coal dust emissions threatened local residents' health and unreasonably interfered with their enjoyment of life and/or property. *Id.* at 3 & Exh. 3.

That filing, SETF adds, was followed by another circuit court action against Beemsterboer that the City of Chicago and the People filed on November 22, 2013. PC 14 at 4. The complaint, attached as Exhibit 4, notes the close proximity of residential neighborhoods, schools, and playgrounds to the piles, and alleges that "fine particles" escape from Beemsterboer's terminal in moderate to heavy winds and "inundat[e] the surrounding community with black dust." *Id.* at 14 & Exh. 4. Accordingly, the complaint further alleges, residents must curtail their activities to protect their health and well-being, and children are driven indoors to avoid inhaling black dust. *Id.* According to the complaint, during the past summer, even families without air conditioning had to keep their windows shut so that dust from the piles would not blow into their homes, and residents had to frequently wash black dust off the exterior of their homes. *Id.*

SETF further states that on November 25, 2013, five affected residents filed a second class action on behalf of southeast Chicago residents, a copy of which is attached to the comments as Exhibit 5. PC 14 at 4. The complaint alleges that homes and other property have been exposed to fugitive petcoke dust contamination, and asserts claims of willful and wanton conduct (by BP, as generator of the petcoke), strict liability, trespass, nuisance, and related claims. *Id.* at 4 & Exh. 5.

In summary, SETF asserts that in a little more than a month, the outdoor storage of coke and/or coal in Chicago generated an NOV, two enforcement complaints in circuit court, two class action lawsuits, and, shortly thereafter, the City of Chicago Department of Public Health's December 19, 2013 promulgation of proposed regulations. PC 14 at 5. Without "immediately effective" statewide regulations, SETF adds, the same "chaotic and dangerous" future awaits other Illinois communities—"unmistakable evidence of an emergency situation that justifies a proactive, precautionary regulatory response." *Id.* SETF states this is especially so because of the "proliferation of proposals for storage of such materials" that IEPA's filing notes. *Id.* SETF

stresses that without emergency regulations, southeast Chicago will "spiral even farther into chaos," and its experience will be replicated across Illinois. *Id.*

SETF maintains that while urgently needed, the City of Chicago Department of Public Health's proposed regulations, attached as Exhibit 6 to the comments, are not the "comprehensive statewide approach" to the issue that is required. PC 14 at 5. SETF contends that regulated facilities should be subject to "uniform, baseline statewide requirements" to protect air, water, and land quality. *Id.* at 6. Absent such an approach, SETF opines that a Chicago-only approach will simply drive bulk storage operations to other places in Illinois. *Id.* at 5. SETF cautions that a county-by-county, municipality-by-municipality "race to the bottom" will follow as petcoke is generated in "exponentially increasing amounts" by Illinois and other states' refineries' transitioning to heavier varieties of crude oil. *Id.* at 5-6. SETF adds that local governments lack the resources to develop and implement the "quality of regulations" that IEPA now proposes. *Id.* at 6. SETF asserts that IEPA's proposed emergency regulations will provide "clear notice of the statewide regulatory regime" that storage operations must achieve, while leaving "basic aspects of local land use control" to local governments. *Id.*

In conclusion, SETF expresses the "hope" that the Board, considering the "devastating effects" of outdoor coke and coal storage on SETF's neighborhood, will understand the "urgent need" for emergency regulations to protect all Illinois communities. PC 14 at 6.

Dynegy Midwest Generation (Dynegy) (PC 15)

Dynegy argues that the proposed rulemaking would impose significant and costly compliance requirements on the Havana Dock facility, which is owned by Havana Dock Enterprises, a wholly-owned subsidiary of Dynegy. PC 15. Because the emergency rule does not apply to coal-fired power plants and because the Havana Dock facility is a critical component of the Hennepin Power Station, the Havana Dock facility should be considered a part of the power station and thus not covered by this emergency rule. *Id.* Dynegy claims that the proposed rule raises several concerns, including "fairness to affected facilities, infeasibility of certain key compliance requirements, and otherwise flawed implementation provisions." *Id.* The proposed rule would also impose unreasonable compliance deadlines. *Id.* Affected facilities should be able to submit their input regarding these unreasonable requirements through the Board's regular rulemaking process. *Id.* Further, the proposed rule does not provide any flexibility to address facility-specific situations. *Id.* Dynegy urges the Board to deny the motion for emergency rulemaking, so that the concerns can be fully addressed through the regular rulemaking process. *Id.* The emergency rulemaking is overly broad and the Havana Dock facility should not be subject to the rule. *Id.*

Kindra Lake Towing, L.P. (PC 16)

John Kindra owns a local tugboat and barge company and is a member of the Illinois Chamber of Commerce. PC 16 at 1. Mr. Kindra supports the Chamber's position (PC 3) to reject the emergency regulations. *Id.* Mr. Kindra contends that the Governor "has acted too hastily" and that "the potential for unintended consequences is large" without an in-depth review of the regulations. *Id.* Mr. Kindra argues that an inability to meet the proposed regulations may

lead to petcoke being handled in nearby states, impacting his business and employees. *Id.* He states that the regulations must take into consideration the possibility of job losses. *Id.*

Illinois Coal Association (ICA) (PC 17)

ICA opposes IEPA's proposed emergency rules. ICA, a professional trade organization, states that its members "produce the majority of coal mined in Illinois, which in 2013 totaled over 50 million tons." PC 17 at 1. ICA asserts that although "petcoke and coal are completely different commodities" and the underlying event that triggered this rulemaking involved petcoke, IEPA seeks to "regulate collectively, and without distinction, "coke and coal bulk terminals." *Id*. ICA states that bulk terminals are often used in transporting Illinois coal "as 85% of our production is used out of state." *Id*. According to ICA, the "nature and scope" of the proposed emergency rules will have a "significant - and wholly unwarranted - negative impact on the Illinois coal industry by imposing substantial costs in getting our product to the market." *Id*. ICA argues that coal bulk terminal operations in Illinois are already subject to "comprehensive state and federal laws, regulations and permit requirements," including requirements for monitoring and controlling fugitive dust, and that it is unaware of any current violations relating to storing or transloading coal at bulk terminals. PC 17 at 1-2.

Further, ICA maintains that IEPA has "failed to provide any evidence" that an emergency exists as defined by Illinois law. PC 17 at 2. According to ICA, the burden for adopting emergency rules is "so high" because meaningful notice and comment is dispensed with, and IEPA has not met that burden. *Id*. ICA asks the Board to "allow this proposal to go through the normal rulemaking process so all parties have adequate time to respond and participate." *Id*.

ExxonMobil Oil Corporation (ExxonMobil), Joliet Refinery (PC 18)

ExxonMobil's Joliet refinery, although not directly affected by the proposed emergency rules, urges the Board to reject IEPA's proposed emergency rule. PC 18 at 1. If the Board determines that there is a need for rulemaking, ExxonMobil asks the Board to complete the rulemaking process in a normal, non-emergency, fashion. *Id.* at 3.

ExxonMobil claims there is no justification for emergency rulemaking in this scenario because of the Act's requirement that one of the following conditions must be met: a disaster emergency exists, a severe public health emergency exists, or there is a threat to the public interest, safety, or welfare. *Id.* at 1-2. ExxonMobil claims that the facilities who received complaints in Cook County have already acted positively to fix the problem, and that there have been no complaints in regards to petcoke outside of Cook County. *Id.* at 2. Therefore ExxonMobil argues that no severe public health emergency exists.

ExxonMobil also believes that current Illinois fugitive dust regulations have sufficiently dealt with fugitive dust from outdoor storage of petcoke, and that there is no justification for additional operating requirements. *Id.* ExxonMobil lists the following existing regulations in regards to IEPA's concerns:

> Storage piles must be covered or sprayed with water or a surfactant "on a regular basis," unless the particulate matter does not cross property lines. *Id*., citing 35 Ill. Adm. Code 212.304.
>
> Conveyor loading operations must utilize sprays, telescopic chutes, stone ladders, or other methods to control dust. *Id*., citing 35 Ill. Adm. Code 212.305.
>
> Access roads must be paved or treated with water or dust suppressants "on a regular basis." *Id*., citing 35 Ill. Adm. Code 212.306.
>
> Vehicles must be covered to prevent the release of particulate matter into the atmosphere. *Id*., citing 35 Ill. Adm. Code 212.315.

ExxonMobil also points out the "operating program" that operators must comply with to "significantly reduce" their fugitive emissions. *Id*., citing 35 Ill. Adm. Code 212.309. Operators must comply with several requirements in this program like: submitting their plan to IEPA for review, programs must significantly reduce fugitive particulate matter, and include minimum details about the site and how fugitive dust is managed. *Id*., citing 35 Ill. Adm. Code 212.310. Any amendments to the program must also be submitted to IEPA for review. PC 18 at 2.

City of Springfield, Office of Public Utilities, d/b/a City Water, Light and Power (CWLP) (PC 19)

CWLP opposes IEPA's proposed emergency rules. CWLP, a not-for-profit municipal utility, includes the Dallman Power Station, which is a coal-fired power plant that provides electricity to Springfield's residents and businesses. PC 19 at 1. CWLP is concerned with the emergency rules' proposed application to coal on a statewide basis, as CWLP understands that it is only one or more recent petcoke incidents in the Chicago area that prompted the proposal. PC 19 at 1-2. CWLP asserts that coal and petcoke have very different characteristics and that "there is no documented public protest, let alone anything reaching the level of a health and welfare emergency, caused by the transfer and storage of coal - which is done under pollution-control permits covering air and water quality." PC 19 at 2.

According to CWLP, "[u]surping the regular rulemaking process should be done only in extreme cases," and the threshold of an emergency under Illinois law has not been met here. *Id*. CWLP believes that the Board's adoption of these emergency rules could cause "widespread economic harm" with "little to no benefit to public safety, public health or the environment" and would "open[] the door to enact emergency rules in nonemergency situations for whatever reasons are convenient at that moment." *Id*. CWLP is also concerned with any expansion of IEPA's proposed emergency rules to include electric generating units. CWLP argues that its Dallman Power Station is already "highly regulated under the Clean Air Act, Clean Water Act, State Act, [and] its Title V Permit, along with detailed storm water management and fugitive dust emission plans, among others." *Id*. CWLP requests that the Board deny IEPA's request and "instead work within the rulemaking process, which provides the benefit of perspective, time, reason, research and the opportunity for public input." PC 19 at 3.

Peabody Energy (Peabody) (PC 20)

Peabody operates multiple underground mines and surface operations across the country and in Illinois. PC 20 at 1. Peabody asks the Board to reject the emergency proposal, stating that "[b]ulk material facilities are critical to the delivery of our product to [United States] utilities and manufacturing facilities in a safe, efficient and affordable manner." *Id.* Peabody believes that the proposed rule language will "disrupt the ability to deliver low-sulfur coal that brings affordable and reliable electricity to the benefit of the citizens of Illinois." *Id.* Peabody argues that no current emergency exists and the possibility of future violators is not an emergency authorizing the Agency to circumvent the regulatory requirements of passing new rules. *Id.* at 2. Peabody also contends that petcoke and coal "have been safely stored and transported throughout the state for decades" and that employers will now have to "comply with the rule without the economic impact of the rule being reviewed." *Id.* Peabody also believes this action will set a precedent whereby the emergency rulemaking process will be abused in future. *Id.*

Knight Hawk Coal (Knight Hawk) (PC 21)

Knight Hawk opposes IEPA's proposed emergency rules. Knight Hawk argues that there is no emergency, stating its understanding that "the Chicago facilities that were at the source of this action have been cooperating with City officials for months addressing concerns and have already spent millions of dollars in efforts to mitigate any site specific issues." PC 21 at 1. Without an emergency present, Knight Hawk advocates that "the normal rule making process be utilized to rationally address the alleged issue." *Id*. Knight Hawk notes that fugitive dust regulations already exist and maintains that the company has not been cited for any violations. *Id*. Adoption of the proposed emergency rules, according to Knight Hawk, would impose significant economic burdens on Illinois coal and "could result in closure of some or all of [Knight Hawk's] operations." *Id*. Along with urging the Board to reject IEPA's emergency proposal, Knight Hawk emphasizes that (1) no additional regulations are required and (2) the adoption of any additional regulations should follow the normal rulemaking process. *Id*.

Empire Dock, Inc. (Empire Dock) (PC 22)

Empire Dock opposes IEPA's proposed emergency rules. Empire Dock is a coal trans-loading and storage facility that employs eight workers, approximately 167 contracted truck-drivers, and various other laborers. PC 22 at 1. Empire Dock asserts that there is no threat to the public interest, safety, or welfare as USEPA "does not classify petcoke/coal as a hazardous material." PC 22 at 1. Empire Dock cites rules (1 Ill. Adm. Code 230.550) under which JCAR can suspend emergency rules. PC 22 at 1. In determining whether to suspend emergency rules, continues Empire Dock, JCAR "must consider whether 'the emergency rule impose[s] unreasonable or unnecessary economic costs on any citizen of this State . . . .'" PC 22 at 2, quoting 1 Ill. Adm. Code 230.550(a)(3)(A). According to Empire Dock, the emergency rules, if adopted, would result in a "significant economic burden" to itself and other companies that have not created or contributed to any emergency. PC 22 at 2. Empire Dock's initial cost estimates for complying with the emergency rules exceed $27,000,000. *Id*. Empire Dock also claims that the proposed timeframes are "exceptionally tight" and in some instances physically impossible to meet, all of which would have been brought to IEPA's attention had IEPA consulted with

industry prior to proposing the emergency rules. *Id*. Empire Dock, which maintains that it has had "zero incidents regarding fugitive dust," asks that the Board not adopt the emergency rules and requests that any rulemaking go through the normal process. *Id*.

American Coal Company (AmCoal) (PC 23)

AmCoal is a coal mine and coal preparation company that owns and operates trans-loading facilities located in Southern Illinois. PC 23 at 1. AmCoal opposes both the content of the proposed emergency rules and the designation of the proposed rules as an emergency. *Id*. AmCoal requests that the Board proceed under the "normal rulemaking process" because there is "no threat to public interest, safety or welfare" justifying emergency rulemaking in this case. *Id.* at 1-2. Additionally, AmCoal argues that the "exceptionally tight" timeline included in the proposed emergency rulemaking "will not be physically possible to comply with" at its trans-loading facility. *Id.* at 2.

Joint Comment by Illinois Environmental Regulatory Group (IERG), Illinois Coal Association (ICA) and Illinois Association of Aggregate Producers (IAAP) (PC 24)

The joint comment argues that because IEPA did not file a technical support document with the rule, it is difficult to determine why IEPA determined that the piles of coke and coal required additional regulatory scrutiny. PC 24 at 1. The joint comment concedes an awareness of two complaints being filed by the Illinois Attorney General's Office against two material handling facilities in the Chicago area; however, both matters concern alleged violations which occurred in August and June 2013. *Id*. The joint comment states that coke and coal piles have long been regulated by IEPA and fugitive dust emission control has been included in air permits. However, due to the new enforcement actions and media attention surrounding those incidents, IEPA has been "keenly aware of heightened attention" since the June-August 2013 timeframe. PC 24 at 1-2. The joint comment states that "despite having ample opportunities since concerns initially arose" IEPA has not met with IERG, IAAP, or ICA, nor are they aware of any outreach with the regulated community regarding deficiencies in the fugitive emission dust program. PC 24 at 2. The joint comment notes that the emergency rules were shared with some stakeholders before filing the rules with the Board, but why IEPA did not reach out to others is unclear. *Id*.

The joint comment notes two main issues with IEPA's proposal. The first being that the proposal sets "an absurdly low bar for future emergency rulemakings" if the Board accepts the emergency rule. PC 24 at 2. Second, the proposal is "hopelessly flawed". *Id*. The specific argument to these points is summarized below.

No Emergency

The joint comment argues that IEPA provides no concrete evidence to justify the proposed emergency. PC 24 at 2. The joint comment claims that IEPA has provided no substantiation of the conditions IEPA states it observed nor has IEPA explained why a statewide emergency exists now. *Id*. at 2-3. Furthermore, IEPA has not described any specific threats that have occurred at coke and coal terminals and such information supporting the emergency must

be provided. *Id*. at 3, citing Citizen's for Better Environment v. IPCB, 152 Ill. App. 3d 105, 504 N.E.2d 166 (1st Dist. 1987).

The joint comment opines that IEPA fails to explain why coke and coal are so different from other material to warrant unique emergency rules over and above the existing rules. PC 24 at 3. The joint comment notes that IEPA indicates the emergency rules are necessary to establish more detailed control requirements for coke and coal bulk terminal but provides no support as to why existing rules are inadequate. *Id*.

The joint comment offers that IEPA's proposal seems to be a shift in policy rather than an emergency fix. PC 24 at 3. The joint comment speculates that if an emergency solution were necessary, why was there not a proposal immediately after the issues arose in June and August of 2013. *Id*. A true emergency should have lead to "true, timely emergency action". *Id*.

The joint comment argues that IEPA ignores the definition of "emergency" and relies on two unadjudicated nuisance actions as an argument of emergency rules. PC 24 at 3. The joint comment opines that if coke and coal were inherently dangerous materials or a threat to the public at large, emergency rules might be proper, but that is not the case here. Coke and coal are not new materials, are already regulated, and storing these materials in large piles is common throughout the State. *Id*.

The joint comment cautions that finding "simple unadjudicated enforcement matters that do not involve inherently dangerous materials" support a finding of an emergency will invalidate the meaning of "emergency". PC 24 at 3. Such a finding by the Board would create a standard where "virtually every rule" imposing new requirements would be an emergency. *Id*.

Technical Flaws

Without a statement of reasons, the joint comment indicates that IEPA has failed to provide a technical basis for the rule or an analysis of the impact of the rule on the regulated community. PC 24 at 4. The joint comment opines that without that analysis, the Board cannot satisfy its statutory obligation to take into account the technical feasibility and economic reasonableness of the rule. *Id*., citing 415 ILCS 5/27 (2012). The joint comment offers that a review of the proposal demonstrates that IEPA has proposed a one size fits all scheme on issues that are best managed through the permitting process. *Id*. While IEPA's refers to bulk terminals in Cook County, IERG is aware of facilities throughout the State, some located in areas with low population or in areas where threats from fugitive dust or runoff are minimal. *Id*.

The joint comment expresses concerns that the definitions proposed are too broad and will take in facilities not intended to be regulated by the emergency rule. PC 24 at 4. The joint comment opines that requiring enclosure of all coke and coal piles, related equipment and work areas may not be necessary and "demands greater investigation". *Id*. Equally concerning is the setback requirements which may not be necessary or even reasonable at many sites. *Id*.

The joint comment notes that IEPA has presented no economic information; however the USEPA recently addressed fugitive dust emissions. PC 24 at 4, citing 78 Fed. Reg. 10006 (Feb. 12, 2013). USEPA had proposed rules requiring control of fugitive emission from open clinker

storage piles by partial enclosure, damping down piles, and shielding piles from the wind. *Id*. The joint comment claims that after reviewing economics and hearing from the regulated community, USEPA declined to require enclosures and only imposed work practices. *Id*. at 4-5.

The joint comment argues that costs and operational changes required by the emergency rulemaking will debilitate commerce in Illinois. PC 24 at 5. Facilities may shut down or reduce capacity and at the very least complying with the emergency rules will drastically increase the cost for operating. *Id*.

Conclusion

The joint comment argues that the proposal is a complex one and raises many technical and economic concerns. The joint comment asserts that it is inappropriate to proceed under the emergency rulemaking procedures and the Board should decline to do so. PC 24 at 5.

Joint Environmental Response (PC 25)

On January 21, 2014, the Board received a joint response to IEPA's motion for emergency rulemaking and its proposed Part 213 of the Board's air pollution regulations from the Environmental Law and Policy Center, the Illinois Environmental Council, the Natural Resources Defense Council, the Respiratory Health Association, and the Southeast Environmental Task Force (collectively, Environmental Groups) (PC 25). The Environmental Groups state that they "wholly support" IEPA's request that the Board address coal and petcoke issues by exercising its emergency rulemaking authority. PC 25 at 1. However, the Environmental Groups claim that "the proposed emergency rules, as drafted, fail to address those problems as the emergencies they are." *Id*. at 1, 12. They argue that IEPA's proposed emergency rules "must be significantly modified in order to *immediately* abate these serious threats." *Id*. at 12 (emphasis in original). The Board summarizes the Environmental Groups' response in the following subsection of the opinion.

Whether Emergency Exists

The Environmental Groups cite the IAPA's authorization of emergency rulemaking as "when a state IEPA finds that a situation 'constitutes a threat to the public interest, safety, or welfare.'" PC 25 at 1, citing 5 ILCS 100/5-45 (2012). The Environmental Groups argue that the Governor has concluded that coal and coke bulk terminals pose a threat of this nature. PC 25 at 1-2 (citations omitted). The Environmental Groups also note IEPA's statement that emissions and discharges resulting from operations at these terminals constitute such a threat and warrant emergency rules. PC 25 at 2, citing Mot. at 5 (¶12).

The Environmental Groups argue that "the coke and coal handled at bulk terminals are forms of PM – a pollutant with well documented and serious adverse health impacts." PC 25 at 2, citing Mot. at 2 (¶3). The Environmental Groups cite IEPA's statement that these impacts include respiratory and cardiovascular effects as well as increased mortality. PC 25 at 2, citing Mot. at 2 (¶3). The Environmental Groups argue that this material is already "coating homes and schools near coke and coal terminals on Chicago's southeast side." PC 25 at 2. They claim that

IEPA's proposed emergency rules "are an appropriate first step to address this serious, present threat to Illinois residents' health and wellbeing." *Id*. However, the Environmental Groups argue that the proposed rules fail to provide an immediate abatement of that threat and must be significantly amended in order to do so. *Id*. In the following subsections, the Board summarizes the amendments suggested by the Environmental Groups.

Permitting New or Expanded Facilities

The Environmental Groups support IEPA's position that IEPA will not issue a permit for a new or expanded petcoke or coal bulk terminal unless the facility "can and will comply with the Act and not put Illinois citizens' health and welfare at risk." PC 25 at 2. The Environmental Groups claim that IEPA's proposal does not effectively reflect this position. *Id*. They argue that emergency rules "should clarify that compliance with the proposed rules shall not constitute compliance with the standard for permit issuance set forth in 35 Ill. Adm. Code 201.160." *Id*. The Environmental Groups further argue that the proposal should also provide "that the standard for permit issuance for new or expanded facilities cannot be met pending further investigation, and hence no such permits shall be issued regardless of compliance with the emergency rules." *Id*. at 2-3.

The Environmental Groups claim that the emergency rulemaking proposal had been "hastily formulated" and includes a number of "technical shortcomings." PC 25 at 3. They also claim that "further research and investigation is necessary to determine the level of control, if any, that will actually protect public health." *Id*. The Environmental Groups argue that emergency rules should reflect that "[t]he information necessary to determine whether permits for new and expanded sources can be issued consistent with the requirements of 35 Ill. Adm. Code 201.160 is simply lacking at present." *Id*.

Scope and Applicability of Proposed Rules

The Environmental Groups note that IEPA proposed in Section 213.110 to apply emergency rules to "coke or coal bulk terminals." PC 25 at 3, citing Mot. at 3. They also note that IEPA's proposed definition of "coke or coal bulk terminal" in Section 213.115 excludes "the source, site, or facility that produces or consumes the coke of coal." PC 25 at 3, citing Mot. at 3. The Environmental Groups argue that Illinois has a number of facilities producing petcoke, which could conduct large-scale on-site storage operations. PC 25 at 3. They further argue that many of them operate under air permits that include "dated and insufficient provisions governing fugitive emissions from petcoke piles." PC 25 at 3. The Environmental Groups recommend that the definition "be revised to include *any* facilities where coke, coal or other bulk solid material is stored, handled, blended, processed, transported or managed, including at facilities where those bulk solid materials are produced or consumed." *Id*. (emphasis in original).

The Environmental Groups also recommend that the sources of PM subject to the proposed emergency rules should be expanded. PC 25 at 3. They cite draft rules for the City of Chicago as an example of this expansion. *Id*., Exh. A. The Environmental Groups argue that emergency rules "should cover all bulk solid materials, defined as 'any solid substance or material that can be used as fuel or as an ingredient in a manufacturing process that may become

airborne or be scattered by the wind, including but not limited to ores, coal, and coke, including petcoke and metcoke." PC 25 at 3. They also argue that, to ensure emergency rules cover all petcoke, the definition of that term should "be clarified to include such residues produced by petroleum upgraders in addition to petroleum refining." *Id*.

Proposed Immediate Enclosure Requirement

The Environmental Groups cite IEPA's statement that "[e]missions of fugitive PM from coke or coal bulk terminals are inadequately controlled, *and cannot be adequately controlled* unless certain operations at the facilities, including storage, processing, handling, and transfer operations, *are enclosed within a building or structure*." PC 25 at 4 (emphasis in original), citing Mot. at 6 (¶14). The Environmental Groups argue that IEPA has not proposed emergency rules requiring enclosure of bulk storage operations or cessation of those operations until they are fully enclosed. PC 25 at 4. They claim that abating the emergency requires that the proposed rules "*immediately* prohibit the continued operation of coke and coal bulk terminals until all storage, processing, handling and transfer operations are conducted *inside* properly designed, fully enclosed structures, with strict emissions control requirements for all loading/unloading operations." *Id*. (emphasis in original). The Environmental Groups elaborate by claiming that "no operations should be permitted unless and until all the requirements for the Plan for Total Enclosure in draft Section 213.220(a) – (e) are completed and the structure is ready for use." *Id*.

Proposed Immediate Implementation

The Environmental Groups note that IEPA's proposed emergency rules require that "bulk terminal operators submit a plan to enclose coke or coal bulk terminals in *two years*." PC 25 at 4 (emphasis in original). They add that the proposal provides "no clear requirement that the piles must actually be enclosed" after two years, does not require that operators comply with the enclosure plan and lacks "significant protective measures to the taken in the meantime." *Id*. The Environmental Groups argue that this two-year deadline "is a prime example of the rule's failure to address petcoke and other PM sources as the existing, urgent threat they already pose." *Id*. They propose additional requirements "[t]o ensure meaningful, immediate protection of public health and the environment." *Id*.

Fugitive Dust. The Environmental Groups note that Section 212.301 of the Board's air pollution regulations provides that "[n[o person shall cause or allow the emission of fugitive particulate matter from any process, including any material handling or storage activity, that is visible by an observer looking generally toward the zenith at a point beyond the property line of the source." PC 25 at 4, citing 35 Ill. Adm. Code 212.301. They argue that emergency rules should apply this requirement to coal and coke bulk terminals. PC 25 at 4.

The Environmental Groups also argue that emergency rules should "establish a stringent opacity limit of no more than 5% opacity for no more than three minutes in any 1 hour, to apply within the property line." PC 25 at 4. They note that "[a] 5% opacity limit applies to a number of parallel fugitive dust sources, including barge loading, in Granite City, Illinois, under the state's fugitive dust regulations." *Id*. They argue that densely-populated areas such as the

Calumet area warrant "at least as rigorous an opacity standard as that which already applies in less densely populated areas." *Id*. at 5.

Fugitive Dust Compliance Demonstration. The Environmental Groups argue that enforcement of proposed emission limits require the addition of compliance demonstration provisions. PC 25 at 5. First, the Environmental Groups claim that emergency rules "should make clear that testing for opacity must be completed using Method 9, 40 CFR part 60, Appendix A, pursuant to 35 Ill. Adm. Code 212.109, and that testing for visible emissions should be conducted using Method 22, 40 CFR part 60, Appendix A, pursuant to 35 Ill. Adm. Code 212.107." *Id*. Second, they argue that emergency rules should establish a schedule with testing occurring on at least a quarterly basis. *Id*. As a third proposed requirement, they recommend that "the rules should set out a full range of weather and atmospheric conditions under which testing must occur, such that representative conditions at the facility are covered." *Id*. Fourth, the Environmental Groups argue that nighttime testing should be prohibited "because measurement of opacity at night is infeasible." *Id*. Fifth, the Environmental Groups propose that emergency rules establish "a cumulative daily limit on excess opacity levels." *Id*. They named as an example a requirement that "operators shall not exceed three three-minute periods of excess opacity in any consecutive 24-hour period." *Id*. They claim that "24 hours of three-minute exceedances can equal a significant amount of fugitive dust in a single day." *Id*.

Six-Month Storage Limit. The Environmental Groups note that proposed Section 213.215 would require that, "within 60 days after the effective date of these rules, owners or operators must remove all coke and coal that have been at the source for more than one year." PC 25 at 5; *see* Mot. at 6. They state that they support this proposed prohibition on long-term storage but "believe the limit should be 6 months rather than one year, which is more consistent with RCRA requirements." PC 25 at 5. They add that this limit should apply to all bulk materials. *Id*. They also claim that "removal should be required as soon as possible, but no later than 60 days after the rules are adopted." *Id*.

Tarps During Wind Events. The Environmental Groups first propose that emergency rules "should require that, effective immediately, operators must put tarps over any unenclosed storage piles during Wind Events as defined at Section 213.240," which they propose to amend as summarized below. PC 25 at 5, 7-8; *see* Mot. at 7.

Wind Barriers. The Environmental Groups also address wind barriers by arguing that "[t]he rules should require that, within 60 days of adoption of the rules, each operator must erect a wind barrier for all bulk solid material piles. . . ." PC 25 at 5. They state that, based upon communication with an entity that erects winds barriers, "60 days for a 40 foot high fence is eminently achievable." *Id*. n.2. The Environmental Groups argue that this wind barrier must be "located at a distance of twice the height of the pile upwind from that pile." PC 25 at 5. They further argue that the barrier must be "at least 125 percent as high as the pile." *Id*. n.3. They also argue that the barrier must be "as least 1.5 times as wide as the pile is tall." PC 25 at 5. The Environmental Groups claim that a wind barrier must meet these three requirements "in order to protect the public from PM emissions before enclosure of the terminals is complete." *Id*.

Submission of Enclosure Plan. The Environmental Groups refer to communication with an entity that constructs enclosures and state that enclosing a storage pile may take up to nine months. PC 25 at 6 n.4. They argue that, even if enclosure cannot be completed within the 150-day period during which emergency rules are effective, the rules should require that owners or operators within 30 days submit a plan to enclose bulk terminals within one year of filing that plan. PC 25 at 6. They state that the plan should undergo public comment and be approved by IEPA. *Id*. They also argue that emergency rules should require owners and operators to begin to prepare for enclosures "immediately after the plan is approved." *Id*.

Enclosure of Non-Storage Operations. The Environmental Groups claim that, if it does not require two years to enclose a storage pile, it is not necessary to allow two years to enclose operations including "conveyors, transfer points, loading and unloading areas, screening areas, crushing areas, and seizing areas." PC 25 at 6. They argue that the Board should set different deadlines to enclose these other operations. *Id*. They note that the City of Chicago had proposed separate deadlines, but they did not endorse the specific deadlines proposed. *Id*. n.5.

Additional Setbacks. Although the Environmental Groups support setbacks for unenclosed pile within property boundaries, they argue that the proposed "200 feet is extremely minimal when dealing with fugitive dust that can travel much further. . . ." PC 25 at 6. They recommend extending the setback distance, "going beyond the facility boundary if necessary to ensure that dust does not burden health and welfare." *Id*. They noted that the City of Chicago proposed great setbacks from facilities such as schools, hospitals, and residential buildings. *Id*.

The Environmental Groups also argue that the 200-foot setback from specified waters sources is also inadequate. PC 25 at 6. They also claim that the proposed emergency rules refer to a minimum setback and suggest that a greater setback distance may be imposed. *Id*. at 7. However, they claim that the proposal does not give IEPA discretion to do so or standards for the exercise of any discretion. *Id*.

Finally, the Environmental Groups argue that, even once enclosed, bulk material storage can pose risks including fire and explosion and continuing fugitive emissions. PC 25 at 7. They claim that requirements including setbacks "should continue to apply even after enclosure is complete." *Id*.

Pile Height Restrictions. The Environmental Groups argue that, to ensure that their recommended wind barriers are effective, "the pile height should be limited to no more than ten feet." PC 25 at 7. They also argue that this height restriction "should be required as soon as possible but no later than 60 days after the rules are adopted." *Id*. The Environmental Groups claim that "[t]here is no justification for allowing 30-foot piles," which "will be subject to significant wind disturbance given the wind gusts that can occur at these heights." *Id*. They add that "[s]pray systems are known to be of limited effectiveness at high winds, as spray can be redirected away from piles by the wind." *Id*.

Prohibition of Operations During Wind Events. The Environmental Groups support IEPA's proposed prohibition of operations during specified wind events, they argue that "Wind Events" should be defined as "all occasions when wind speeds exceed *fifteen* miles per hour (not

twenty five), as is called for in the City of Chicago's draft regulations." PC 25 at 7 (emphasis in original). They claim that winds speeds greater than 15 miles per hour can trigger significant emissions of fugitive dust, the hazard addressed by these proposed emergency rules. *Id*. at 7-8.

The Environmental Groups also suggest clarifications of these provisions. First, they argue that proposed Section 213.240 should clearly provide that operators must cease operations whenever they detect wind speeds exceeding those in the definition of "Wind Event." PC 25 at 8. Second, they also argue that this definition should specify the elevation at which wind speed is to be measured. *Id*. They add that, "[w]hile typically wind speed is measured at a height of 10 meters, in this case it may be more appropriate to base the wind speed measurement at an elevation specific to the expected height of sources such as piles or loading activities." *Id*. Third, the Environmental Groups suggest that USEPA guidance and protocols should provide a basis for the design and operation of weather stations "to ensure that wind speed measurements are accurate." *Id*. Finally, the Environmental Groups argue that "facilities must follow protocols for siting weather stations, such that they are located in an unsheltered position, centrally placed in relation to the sources, and that installation of the weather stations does not itself create significant fugitive dust emissions." *Id*.

Prohibition of Accumulations. The Environmental Groups note that "[t]he City of Chicago's draft regulations require owners or operators to maintain 'all areas within the [bulk terminal] free of any accumulation.'" PC 25 at 8; *see id*., Attach. A at 10. They note that these proposed rules define "accumulation" as any surface deposit of material greater than three ounces in in one square foot other than inside an approved storage area, conveyor, transport vehicle, slurry bin, water collection channel or separation pond." *Id*.; *see id*. Attach. A at 2. The Environmental Groups argue that emergency rules should also immediately prohibit accumulations," which should be less than the amount proposed by the City and should be measured in grams per square meter." *Id*.

Paving and Transport on Paved Roads. The Environmental Groups note that proposed Section 213.245 requires paving of roads only within the source. PC 25 at 8. They argue that this requirement is insufficient because "dust disturbance on unpaved roads outside the facility creates a significant public health risk." *Id*. They cite both USEPA and the South Coast Air Quality Management District Rule 1158 in support of required paving. *Id*. The Environmental Groups also claim the that IEPA's paving requirement is inadequate in light of proposed Section 213.250(a), which requires a street sweeper and vacuum system "to clean all roads used to transport coke or coal inside the source or within one quarter mile of the perimeter of the source." PC 25 at 8; *see* Mot. at 8. They argue that sweeping unpaved roads does not effectively control PM, "so this requirement only makes sense if the roads used to transport bulk solid within 1/4 mile of the bulk terminal are paved." PC 25 at 8. They add that "transport on unpaved roads should be explicitly prohibited." *Id*. at 8-9. The Environmental Groups claim that "[t]hese restrictions should apply as soon as feasible, but no later than the 90 day limit set forth at Section 213.245." *Id*. at 9; *see* Mot. at 9.

Transfer Points and Dust Suppression

The Environmental Groups argued that propose Section 213.260(b) addressing transfer points and proposed Section 213.265(a) addressing dust suppression should clarify the requirement to install and operate fugitive dust control devices. PC 25 at 9. They claim that the regulations should require "those devices to be installed and operated sufficient to prevent *all* offsite fugitive dust emissions and to control onsite fugitive dust emission sufficiently to achieve the stringent 5% opacity limit. . . ." *Id*. (emphasis in original).

Proposed Additional Transport Restrictions

The Environmental Groups claim that IEPA's proposal requires additional restrictions "to limit fugitive dust from trains, trucks and barges used to transport petcoke, coal or other sources of PM to bulk terminals." PC 25 at 9. First, they note that the proposed emergency rules include "*no requirements whatsoever* for the covering of railcars or barges. *Id*. (emphasis in original). Citing a risk of fugitive dust emissions from the top of barges and trains, the Environmental Groups claim that "it is imperative that the rules require that railcars and barges, including both those loading materials at the bulk terminals, as well as those from which the bulk terminal accepts materials, be covered." *Id*.

Second, the Environmental Groups claim that proposed Section 213.250(c) "should prohibit the use of bottom-dump rail road cars, which can leak dust-forming materials onto the tracks." PC 25 at 9. Third, they argued that proposed Section 213.275 "should prohibit leaks of both liquid and solid material. . . ." *Id*. They further argue that Section should also "add measures equivalent to those for trucks for railcars and barges." *Id*. They recommend that "all outgoing railcars should be cleaned, and there should be a prohibition on holes in railcars and barges such that material leaks (in solid or liquid form) from the cars." *Id*. Finally, the Environmental Groups note that proposed Section 213.275 sets a speed limit for trucks of 8 miles per hour within the source. *Id*. at 10; *see* Mot. at 9. They claim that trucks' ability to generate dust "depends on many factors including truck weight, number of tires, speed, etc." *Id*. They argue that IEPA should either justify its proposed speed limit or modify it. *Id*.

Proposed Review and Approval of Proposed Plans

The Environmental Groups note that the proposed emergency rules require bulk terminals to develop four plans to control fugitive dust emissions and protect water. PC 25 at 10. They claim that the rules do not "require that IEPA review or approve the plans, nor do the rules specify criteria for IEPA to do so, or a deadline by which IEPA must review and approve or disapprove those plans." *Id*. They further claim that emergency rules cannot allow owner and operators to follow their own plan without IEPA oversight. *Id*. The Environmental Groups add that the proposed emergency rules should require that IEPA consider all public comments submitted pursuant to proposed Section 213.135 on a plan in determining whether to approve it. *Id*. To effectuate this proposal, they suggested that Section 213.135 include a requirement that IEPA "post the plans on its website promptly after it receives them." *Id*.

In addition, the Environmental Groups note that proposed Section 213.135 requires IEPA to post plans submitted to it pursuant to Section 213.325, which addresses wastewater and stormwater runoff controls. PC 25 at 10; *see* Mot. at 13-14. They claim that proposed Section 213.135 thus "appears to contemplate public review and comment of water pollution controls under Section 13.135." PC 25 at 10. They claim, however, that "controls required at [Section] 213.325 are not required to be submitted to IEPA in the form of a plan to be reviewed and approved or disapproved by that IEPA." *Id*. The Environmental Groups argue that Section 213.135 should require submission of a comprehensive wastewater and runoff control plan to IEPA and also require that it be made available for public comment. *Id*.

Proposed Clarification of Recordkeeping and Recording Requirements

The Environmental Groups ask that the recordkeeping and recording requirements be clarified and additional requirements be added. First, they argue that proposed Section 213.285 "should require that a person trained and certified in dust management be responsible for and certify all records and reports under this section." PC 25 at 11. Second, they claim that the reference in proposed Section 213.285(a)(1) to the type of coke and coal is vague. *Id*.; *see* Mot. at 11. They argue that this subsection "should specifically require reporting of the composition of the material derived through testing." PC 25 at 11.

Third, the Environmental Groups note that proposed Section 213.285(a)(6) requires owners and operators to report periodic visual observations, noting visible emissions and corrective actions to reduce them. PC 25 at 11; *see* Mot. at 11. They argue that this provision should be strengthened and clarified by requiring reporting demonstrating compliance with various proposed provisions. Specifically, they sought to require demonstrating compliance with requirements that testing for opacity and visible emissions was performed using specified methods, that testing occurred according to the testing schedule, that testing was conducted under a range of conditions, and that nighttime operation is prohibited. PC 25 at 11.

Fourth, the Environmental Groups argue that proposed Section 213.285(c) should not allow an owner or operator "to submit only the raw data, which may be difficult and time consuming for IEPA and the public to review. Rather, it should be required to submit quarterly summary reports concerning the referenced records, along with the monthly data." PC 25 at 11.

Proposed Water Provisions

The Environmental Groups argue that proposed Section 213.325(a)(2), which addresses sedimentation ponds to treat runoff from a 100-year storm even, is "insufficient." PC 25 at 11; *see* Mot. at 14. They claim that, because the frequency and severity of storms has recently increase, "the 500-year event would be a more appropriate benchmark." PC 25 at 11. Referring to the consequences of this benchmark, they note that "one facility's sedimentation pond is located directly adjacent to the Calumet River." *Id*.

Municipal Authority

The Environmental Groups argue that, "[t]o ensure maximum protection of the public and the environment against the growing threat posed by petcoke, coal and other particulate matter (PM) sources, the rules should explicitly provide that Home Rule municipalities may promulgate their own PM bulk terminal rules that go above and beyond the state rules, as well as empower non-Home Rule municipalities to promulgate such more-stringent rules." PC 25 at 12.

Squire Sanders on behalf of ArcelorMittal USA (PC 26)

ArcelorMittal USA is both a supplier and customer of coal and coke and the largest integrated iron and steel company in the world, with operations in the State of Illinois. PC 26 at 1. ArcelorMittal objects to the emergency rulemaking on the basis that there is no emergency. ArcelorMittal argues that "[t]he 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." *Id.* at 2. ArcelorMittal distinguishes the instant case from previous emergency rulemakings, arguing that in those cases there was a clear presence of an actual threat, rather than a potential threat. *Id*. at 3. Further, ArcelorMittal states that the Agency "must explain why the existing rules are inadequate" which it cannot do in this case because "every one of the facilities targeted by EPA's proposal is subject to fugitive dust regulation . . . and stormwater discharge regulation." *Id*. at 4.

Midwest Region of the Laborers' International Union of North America (LiUNA) and Illinois Laborers'-Employers' Cooperation and Education Trust (IL LECET) (PC 27)

LiUNA and IL LECET oppose IEPA's proposed emergency rules. LiUNA has 20,000 members and IL LECET represents hundreds of signatory contractors. PC 27 at 1. LiUNA and IL LECET feel that adopting IEPA's "sweeping" rules in "such a compressed time frame is not a recipe for producing sound public policy." *Id*. LiUNA and IL LECET would like to have more time than a "holiday weekend" to ascertain the impacts that the proposed rules would have on present and future jobs at refineries and other petcoke producers. *Id*. LiUNA and IL LECET suggest that the Board "take a step back" to allow for "educated public comment and debate that the standard rulemaking process affords." PC 27 at 1-2.

American Electric Power Service Corporation on behalf of AEP Generating Company (AEPSC) (PC 28)

American Electric Power Service Corporation (AEPSC) submitted comments objecting to the proposed emergency rulemaking on behalf of AEP Generating Company, the owner of the Cook Coal Terminal in Massac County. PC 28 at 1. AEPSC argues that the proposed emergency rulemaking "does not satisfy the requirements for emergency action," is "overly prescriptive, technically and economically infeasible, internally inconsistent", and generally lacks justification. *Id*. AEPSC states that the proposed emergency rulemaking contains deadlines for compliance that are infeasible for both technical and climatological reasons. *Id*. AEPSC argues that the permitting programs under current regulatory schemes administered by IEPA sufficiently control the problems allegedly addressed by the proposed emergency rulemaking.

Id. at 2. AEPSC also urges the Board to consider the impact the proposed emergency rulemaking may have on the economy if facilities are forced to take job-cutting measures or even close as a result of the rule. *Id*. at 5.

Kinder Morgan, Inc. (PC 29)

Kinder Morgan, Inc. owns three bulk coal terminals in Illinois and objects to the proposed emergency rulemaking because, it argues, the rulemaking does not meet the legal standard of an emergency. PC 29 at 1. Kinder Morgan notes that the Board already has regulations in place that cover both fugitive emissions and the Agency "has not demonstrated in its motion why the current regulations . . . are ineffective." *Id*. at 2. Kinder Morgan also argues that the proposed emergency rulemaking includes broad mandates whereas in a true emergency, only the emergency issues should be addressed, while the remaining issues are more properly addressed through the traditional rulemaking process. *Id*. Finally, Kinder Morgan states that elements of the proposed emergency rulemaking would be impossible to achieve, forcing Kinder Morgan to turn to litigation in opposition of the rule. *Id*.

Arch Coal, Inc. (PC 30)

Arch Coal, Inc. (Arch Coal) is the second largest U.S. coal producer and has coal mining operations in Illinois. PC 30 at 1. While Arch Coal acknowledges that the proposed emergency rulemaking may not apply directly to coal mining operations, it objects to the emergent nature of the rulemaking, arguing that there is no emergency, severe public health emergency, or threat to the public interest. *Id*. at 2. Arch Coal argues that "moving forward with [the] rule as currently written could have severe, adverse consequences for our operations in Illinois and elsewhere," because the proposed emergency rulemaking "threatens to constrain and potentially even eliminate" operations at terminals that facilitate moving coal across the nation. *Id*.

City of Chicago (City) (PC 32)

The City of Chicago (City) seeks to "advise the Board regarding local actions to address bulk solid material dust issues." PC 32 at 1. The City has identified as a "major public health and environmental concern" windborne dust from bulk solid material storage and handling facilities on the City's southeast side, and is pleased that the Agency shares these concerns and is taking action on the issue. *Id.* The City is also "encouraged" that the Agency's proposed emergency rules include "many of the same tough requirements" as the City's proposed bulk material regulations. *Id.*

According to the City, the severity of the impacts of windborne dust is demonstrated by the City's Department of Public Health inspection findings that facilities have violated the dust and debris provisions of municipal environmental ordinances. The City also claims that citizen complaints, and local community forums demonstrate this severity. PC 32 at 1. The issue is of "special concern" to the City because the facilities are located in a "densely populated area" of the City along the Calumet River, near "residential and other sensitive uses." *Id.* Many local residents, the City continues, have reported the dust from bulk material facilities has negatively impacted their homes, properties, and quality of life. *Id.*

In response to such complaints, the City has developed and is implementing a three-pronged strategy, involving enforcement litigation, increased, "very frequent" inspections of bulk storage and handling facilities, and stringent regulations that the City has proposed governing the handling and storage of bulk material piles. PC 32 at 1-2. The City notes that the joint enforcement action it filed along with the Attorney General's Office has already resulted in one facility's agreeing to remove all material from its site. *Id.*

The City's draft regulations, published December 19, 2013, were developed by the Department of Public Health, in "close consultation with state and federal regulators," and specify detailed measures to protect public health and the environment. PC 32 at 2, citing www.cityofchicago.org/petcoke. The public comment period was extended by two weeks to February 7, 2014, at the request of the community and industry. *Id.* The City notes that comments may be submitted online, at petcokecomments@cityofchicago.org, or by mail, to the City's Department of Public Health. *Id.*

Given the importance of this "complex issue," the City states that it seeks to "move quickly" in developing regulations while at the same time "engaging and listening" to all stakeholders. PC 32 at 2. A public hearing held by the City in the affected community gave the opportunity for "considerable" public input, the City adds, and the City has agreed to hold smaller stakeholder meetings upon request, which will be summarized for the public record. *Id.* The City states that it is closely reviewing all comments and will address them in a publicly available "responsiveness document." *Id.* The City intends to adopt final regulations by early spring, when the regulated facilities are expected to be "increasingly active" and the risk of windborne dust therefore greater. *Id.*

The City concludes that it will keep the Board apprised of developments relating to its regulation of bulk material storage and handling. PC 32 at 2.

American Milling, LP and Cahokia Acres, LLC (American) (PC 33)

American Milling, LP and Cahokia Acres, LLC (American) are affiliated companies that operate barge loading facilities on the Illinois River in Pekin and on the Mississippi River in Cahokia. PC 33 at 1. American notes that the Cahokia facility received its most recent operating permit from the Agency on March 15, 2013, adding that the permit imposes "all the most current standards." *Id.*

American adds that it has invested $27 million, purchased land, and hired engineers and environmental consultants to build a facility that will never operate if the proposed emergency rules go into effect. PC 33 at 1. American submitted applications to the Agency, the Illinois Department of Natural Resources, and the US Army Corps of Engineers for the facility, and consulted with the appropriate regulators and "received the required permits." *Id.*

Yet, American continues, the Agency's proposed requirements to totally enclose a storage facility and limit pile height to 30 feet would be "fatal to the design and the project" and would halt construction and cost jobs associated with the new facility. PC 33 at 1. American

stresses that the facility is in a "remote area with plenty of buffer space; it intends to operate within permit limits; and it has made "substantial investments" in reliance on its permits. *Id.*

Next, American states it is negotiating an "important contract to load millions of tons of coal annually" onto barges at the Cahokia facility. PC 33 at 1. Competition for that operation comes from Missouri, Indiana, and Kentucky, according to American. *Id.* American warns that if the emergency rules are adopted, these states will win the business, jobs, and "on-going capital investment." *Id.*

American states that their CEO is a native Illinoisan who worked with the State on, and provided "[m]ost of the investment" for, the new Cahokia facility. PC 33 at 2. American urges the Board to reject the proposed emergency rules immediately and allow the "normal rulemaking process" to proceed so American may present its "case for survival" to the Board. *Id.*

PC 34

On January 23, 2014, the Board received a public comment signed by 27 members of the Illinois House of Representatives: Representative Bill Mitchell, Representative Adam Brown, Representative David Reis, Representative Wayne Rosenthal, Representative C.D. Davidsmeyer, Representative Chad Hays, Representative Charles Meier, Representative John Cavaletto, Representative John D. Anthony, Representative David Leitch, Representative Mike Bost, Representative Jil Tracy, Representative Josh Harms, Representative Rich Brauer, Representative Dan Brady, Representative Norine Hammond, Representative Ron Sandack, Representative Jeanne Ives, Representative Tom Demmer, Representative Kay Hatcher, Representative Robert Pritchard, Representative John Cabello, Representative Ed Sullivan, Representative Michael Unes, Representative Raymond Poe, Representative Don Moffitt, and Representative Brad Halbrook. The comment requests that the Board use the regular rulemaking process, rather than the emergency rulemaking process.

The representatives note that the Agency had filed a motion for emergency rulemaking to address the storage, handling, and transportation of coal and petcoke. PC 34 at 1. They request that the Board "reject the proposed emergency rules and require the EPA to utilize the regular rulemaking process." *Id*. They express disappointment that the Agency sought Board action within seven calendar days and claimed that the Agency had "failed to discuss this issue with state legislators or even the impacted industries before filing these rules." *Id*. They argue that "[m]ajor environmental rule changes should not be made quickly or without sufficient public debate that include oversight by state lawmakers." *Id*.

The representatives also cite USEPA to state that "petcoke is not deemed either a hazardous or toxic material." PC 34 at 1. Based on this statement, they did not see the Agency's basis to address that material on an emergency basis. *Id*. They add that "Illinois and more than thirty states have safely handled both coal and petcoke for seventy years." *Id*.

IEPA'S REPLY

IEPA's proposal is intended to address uncontrolled emissions of fugitive PM to the "extent they reasonably constitute a threat to the public interest, safety, or welfare". PC 31 Reply at 1. IEPA is not asserting that there is a "disaster emergency" or a "severe public health emergency" as set forth in Section 27(c) of the Act (415 ILCS 5/27(c) (2012)). *Id*. IEPA argues that recent events justify an emergency rulemaking for coke or coal bulk terminals statewide due to an increase in volume and frequency to an extent that in one area of Illinois residents have been significantly impacted. *Id*. IEPA has also seen an increase in the number of permit applications statewide, indicating a possible expansion of such operations. *Id*. Thus, IEPA argues that statewide regulatory consistency is required to prevent bulk terminals from shifting within the State. *Id*. at 2.

IEPA proposes controls for both petcoke and coal as bulk transfer stations often handle both materials in similar ways and fugitive PM from both can be addressed in the same manner. PC 31 Reply at 2. IEPA has not proposed regulating other bulk materials as there has been no identified emergency for other materials. *Id*.

IEPA concedes that the evaluation and development of regulations has taken some time; however any "perceived delay" should not "diminish IEPA's determination" that there exists a reasonable threat to the public interest, safety, or welfare. PC 31 Reply at 3. IEPA does not intend that the proposed regulations negatively impact other industries, nor does IEPA expect there will be a negative impact. *Id*. IEPA believes the requirements in the rule are technically feasible and economically reasonable, with many requirements already a part of facilities efforts to comply with existing rules and regulations. *Id*. IEPA does not intend to interfere with the transport of coke and coal or shut down existing facilities. *Id*.

IEPA notes that the rule calls for submittal of a plan for total enclosure of "certain operations" but not total enclosure. PC 31 Reply at 3. The hazardous waste determination is designed to ensure that petcoke or coal stored for over a year is not a hazardous substance. *Id*. IEPA disagrees with KCBX that it will need to shut down its operations to comply with water pollution requirements and that pooling of water on piles is acceptable. *Id*. at 4.

EMERGENCY RULEMAKING BEFORE THE BOARD

While emergency rulemaking by the Board is not unprecedented, it is not an ordinary occurrence. During the past 20 years, the Board has been requested to adopt emergency rules only a dozen or so times. As discussed below, in some instances, the Board has been presented with sufficient evidence and argument to allow it to find that "a situation exists which reasonably constitutes a threat to the public interest, safety or welfare" within the meaning of Section 27(c) of the Act and Section 5-45 of the IAPA. In other instances, the Board has not, resulting in use of the regular rulemaking process to address the situation presented.

Public Health Threats to Public Interest, Safety, or Welfare

Mississippi Flood-Waste

The Board has adopted emergency rules to ameliorate public health and safety threats without first calling for and accepting public comments. These include rulemakings to facilitate disposal of non-hazardous waste in 20 "disaster area" counties impacted by the flooding of the Mississippi River and its tributaries. Emergency Rulemaking: Amendments to the Open-Burning Permit Rules, 35 Ill. Adm. Code 237, R93-15 (Aug. 20, 1993); Emergency Amendments to the Landfill Rules for On-Site Burial of Dead Animals in Flood-Disaster Counties: 35 Ill. Adm. Code 8-7.106, R93-25 (Sept. 23, 1993); RCRA Subtitle D Extension 35 Ill. Adm. Code 814 (Emergency Rule), R94-13 (May 5, 1994) (citing adoption of P.A. 88-540, eff. Apr.30, 1994). In each docket, the Board found that the situation qualified as an "emergency" for the affected counties within the meaning of the Act and IAPA.

Livestock Waste Management

The Board also adopted emergency rules to prevent a threat to the "public interest, safety, and welfare" resulting from the language of the Livestock Facilities Management Act (LMFA), P.A. 89-456, eff. May 21, 1996. Emergency Rulemaking: Livestock Waste Regulations, 35 Ill. Adm. Code 505, R97-14 (Oct. 29, 1996) (R97-14). On October 15, 1996, the Department of Agriculture (DoAg) proposed emergency rules, accompanied by a statement of reasons. DoAg explained that certain provisions of the LMFA, including design standards for livestock waste lagoons, would not go into effect until the Board adopted rules implementing the LMFA. But, under the terms of the LMFA, such Board action could not occur until after a six-month public hearing process which could not begin until the DoAg's filed rulemaking proposal with the Board on or about November 21, 1996.

On October 17, 1996, the Board issued an order setting a brief public comment period, ending October 25, 1996. The Board received over 100 public comments, including comments submitted by the other three State agencies involved in the LMFA rulemaking process (*i.e.* the Agency, the Department of Natural Resources, and the Department of Public Health). Most—but not all comments favored adoption of the emergency rules while the regular rulemaking process continued. The Board adopted emergency rules to become effective upon filing, for a period of no more than 150 days as provided by the IAPA, and not subject to renewal. *See* 5 ILCS 100/5-45.

Following adoption of the emergency rules, the Board initiated regular rulemaking following receipt of the DoAg proposal. The Board adopted first notice rules by order on December 5, 1996, and a second notice order on March 20, 1997. Livestock Waste Regulations, 35 Ill. Adm. Code 506, R97-15A (Dec. 15, 1996 (first notice); Mar. 20, 1997 (second notice)) (R97-15A). But, the emergency rules were scheduled to expire some two months prior to the time the Board could complete the IAPA regular rulemaking process. But, consistent with specific legislative authorization granted in P.A. 89-714, eff. Feb. 21, 1997 to remove the IAPA-prohibition, the Board adopted an extension of the emergency rules to prevent a coverage gap. R97-14 (Mar. 20, 1997). The Board completed rulemaking in R97-15A on March 15, 1997.

(Related financial surety rules not part of the R97-14 rulemaking package were completed in R97-15B on November 5, 1998).

Other Threats to "Public Interest, Safety or Welfare"

Gasoline Dispensing

The Board has also found that other threats to the "public interest, safety or welfare" have justified emergency rulemaking. Prior to the flood-waste rulemakings, the Board adopted emergency rules in Emergency Rule Amending the Stage II Gasoline Vapor Recovery Rule in the Metro-East Area, 35 Ill. Adm. Code 219.586(d), R93-12 (May 20, 1993) (R93-12). In a May 3, 1993 proposal, the Agency petitioned the Board to adopt as an emergency rule an extension from May 1, 1993 to September 28, 1993 of the date for compliance with Stage II vapor recovery requirements as required by the federal Clean Air Act. The requirements for the recovery of gas emissions from the fueling of motor vehicles were applicable to gasoline dispensing facilities in the Metro-East nonattainment area. (Similar requirements subject to the Chicago non-attainment area were not part of the proposal.) The alleged emergency related in part to asserted failure of the United States Environmental Protection Agency (USEPA) to timely promulgate replacement rules for on-board vapor recovery.

On May 5, 1993 the Board issued an order soliciting additional material from the Agency as well as any other public comments by May 17, 1993. Among other things, the Board noted that

> The Board may only adopt rules on the basis of the record before it, and this record contains no information or legal argument to support the Agency's conclusion that an emergency exists. While the Agency states that it estimates there are some 400 affected gas stations in the Metro-East area and that required Capital expenditures are estimated at $14 million, its unsworn motion contains no information to lead the Board to conclude that any of these stations were out of compliance . . . The Agency motion as worded speaks of "the specter of a very large capital outlay", rather than of a reality. While the Agency may well have identified or been approached by sources who have yet to comply with the Stage II requirements, evidence of this has not been submitted into this record. R93-12, slip op. at 6-7 (May 5, 1993).

The Board received a supplemental filing from the Agency, in addition to eight public comments. This additional information allowed the Board to conclude that the situation presented a "threat to the public interest" justifying adoption of emergency rules. But in so finding in its May 20, 1993 opinion and order, the Board commented that "more timely" action by the Agency to the situation could have avoided the need for the "extreme action" of an emergency rulemaking. R 93-12, slip op. at 8-9 (May 20, 1993).

Similarly, in another docket the Board adopted emergency rules based in part on the emergency and hardship alleged by the interplay of state and federal rules—this time, the gasoline volatility rules. Emergency Rule Amending the 7.2 psi Reid Vapor Pressure

Requirement in the Metro-East Area, 35 Ill. Adm. Code 219.585(a), R95-10 (Feb. 23, 1995) (R95-10). The Board found that the Agency sufficiently established that a "situation exists which reasonably constitutes a threat to the public interest, safety, or welfare". *Id*, slip op. at 5.

The Board concluded that the Agency justified a one-month delay in the compliance date of a gasoline volatility rule requiring "supply facilities" (including refiners, distributors, and bulk terminals) in the Metro-East area to lower gasoline Reid Vapor Pressure (RVP) during the ozone season to 7.2 pounds per square inch (psi). R95-10, slip op. at 1. The Board did not establish a public comment period after its receipt of the Agency's February 14, 2013 proposal, which was accompanied by a Technical Support Document. *Id*, slip op. at 3, 5. As detailed in the Board's R95-10 opinion, the Agency proposal supplied letters sent to the Agency by members of the regulated community who requested or supported the change, and otherwise provided support for the change. *Id*, slip op. at 5

The Board found that the May 1 compliance date for Illinois facilities was not consistent with the federal rules' June 1 date for southern tier nonattainment areas storing the lowest required RVP gas. And, since the petroleum refining industry does not distinguish between the Illinois and Missouri St. Louis metropolitan area, the Illinois supply facilities would be required to supply and sell 7.2 psi RVP gasoline to a very limited portion of the entire area. R95-10, slip op. at 4-5.

Among other things, the Board observed that an emergency rule would have little environmental effect, due to the continued applicability of the federal 9.0 psi requirement during the month of May. R95-10, slip op. at 4. But, the Board agreed that the asserted economic and other hardship to the petroleum industry was "real". *Id* at 5.

The Board additionally noted that

> The original May 1 compliance date was agreed to by the Agency and the regulated community, and pursuant to the Section 28.5 fast-track rulemaking requirements, the Board adopted the agreed-upon rule [in 15% ROP Plan Control Measures for VOM Emissions-Part I: Pressure/Vacuum Relief Valves and 7.2 RVP: Amendments to 35 Ill. Adm. Code Parts 201, 211, 218, and 219, R94-12 (Sept. 15, 1994)]. The Agency states that, "[a]t the time of the original [R94-14] proposal, it was unaware of the different federal May supplier requirements between Class C [including Illinois]and Class B [including Missouri] areas". The Board accordingly cannot find that the hardship to the industry is self-imposed, so as to preclude consideration of this matter as an IAPA "emergency" under the facts of this case. R95-10, slip op. at 4.

The Nitrogen Oxide Docket

In contrast to its finding in R95-10, in 2011 the Board did not find that emergency rulemaking had been justified by the affected regulated community concerning the most recent alleged emergency. This was a consolidated docket, the first of which was filed by the Agency

and the second by the Illinois Environmental Regulatory Group (IERG): Nitrogen Oxides (NOx) Emissions, Amendments to 35 Ill. Adm. Code 217, R11-24 and Illinois Environmental Regulatory Group's Emergency Rulemaking, Nitrogen Oxides (NOx) Emissions: Amendments to 35 Ill. Adm. Code Part 217, R11-26 (cons.)(Aug. 18, 2011)(final, non-emergency rules adopted) (individually, R 11-24 and R11-26, but together R11-24/R11-26(cons.)).

In R11-24, the Agency proposed a modification of the date for compliance with the requirements of various Subparts of 35 Ill. Adm. Code Part 217, Nitrogen Oxides Emissions, which contain provisions relating to the control of nitrogen oxides (NOx) emissions from various source categories, including emission units within these source categories such as industrial boilers, process heaters, glass melting furnaces, cement kilns, lime kilns, furnaces used in steel making and aluminum melting, and fossil fuel-fired stations. The Agency requested expedited rulemaking, citing an impending compliance date of January 1, 2014 and uncertainty about various anticipated USEPA regulatory actions. The Agency contended that expedited processing was required "so as to avoid compliance requirements and unreasonable and unnecessary expenditures upon the regulated community prior to the imposition of federal requirements." By order of April 7, 2011, the Board denied expedited review citing resource limitations. But, the Board also authorized immediate first notice publication of the Agency proposal to advance the proceeding. R11-24 slip op. at 4-5.

Some two-weeks later, on April 22, 2011, IERG filed its proposal for emergency rulemaking. By order of May19, 2011, the Board denied IERG's proposal for emergency rulemaking. The Board noted that IERG had cited various emergency rule cases (many as described in the preceding three pages of the opinion in this case, R14-20). But, the Board found that the R11-16 situation was more closely comparable to the situation in an even earlier Board emergency rulemaking, in which a court later found that there was no emergency. That case was Citizens for a Better Environment v. PCB, 152 Ill. App. 3d 105, 505 N.E.2d 166 (1st Dist., 1987) (CBE).

In CBE, a citizen's group and the state appealed a Board order adopting emergency rules that the Board found were necessary to guide the implementation of Section 39(h) of the Act (415 ILCS 5/39(h)). Hazardous Waste Prohibitions (Emergency Rule), R86-9A (Oct. 23, 1986) (emergency rules adopted). Effective January 1, 1987, Section 39(h) prohibited deposit of hazardous waste streams in permitted hazardous waste sites unless the waste generators and site owners and operators obtained specific authorization from the Agency. In the absence of a rulemaking proposal from the Agency or any other person, the Board initiated a rulemaking in June of 1986 and held hearings. The Agency, for its part, at that time issued a set of implementation guidelines. CBE, 152 Ill. 2d at 168.

On October 23, 1986, the Board adopted emergency rules, after receipt of public comment on emergency rules proposed for public comment on October 9, 1986. Among other things, the Board stated that the emergency rules would reduce appeals of its determinations and ease the transition period when final rules would be adopted. The Board also noted that rulemaking should have been completed at least a year prior to the effective date. CBE, 152 Ill. 2d at 169. The Appellate Court for First District found that the Board had failed to justify emergency rulemaking, reasoning:

> [A]n "emergency" is present, which would justify the employment of the emergency rulemaking procedures under section 5.02, when there *exists* a situation which reasonably constitutes a *threat* to the public interest, safety, or welfare. Stated differently, the need to adopt emergency rules in order to alleviate an administrative need, which, by itself, does not threaten the public interest, safety, or welfare, does not constitute an "emergency." *Id.* at 109-10.

The CBE Court noted that the administrative problem faced by the Board could have been prevented. CBE, 152 Ill. App. 3d at 110. The Court stated that, similar to a previous case, the situation presented "an administrative problem that was self-created and an attempt to remedy the situation was made at the eleventh hour." *Id.*, citing Senn Park Nursing Center v. Miller, 118 Ill. App. 3d 733, 455 N.E.2d 162 (1st Dist. 1983). The Court in CBE determined that "the emergency rulemaking powers . . . cannot be utilized [in all instances of delay.] Rather, only when delay has resulted in a situation that threatens the public interest, safety, or welfare is the use of [the emergency rulemaking powers] proper." *CBE*, 152 Ill. App. 3d at 110.

Further, the CBE Court stated that the Board's position that Section 39(h) needed clarification "so as to reduce uncertainty within the industry" did not amount to a threat to the public. CBE, 152 Ill. App. 3d at 110. The Court further noted that "the Board's argument as to potential appeals to the Board and courts [does not] reflect the existence of a threat to the public." *Id.* The CBE Court went on to state that the Court "[does] not believe that easing the transition period before final rules are adopted satisfies the requirements of section 5.02, as helpfulness in administering regulatory statutes is not the standard contemplated by that section." *Id.*

In reviewing the R11-16 IERG proposal in light of CBE, the Board found that, based on the record before it, the potential for future liability faced by the regulated industry did not constitute a threat to the public. R11-16, slip op at 10 (May 19, 2011). Likewise, the Board found that the basis for the proposals in R11-24 or R11-26 appeared to have arisen some time before they were submitted to the Board. To that extent, the Board found the claim "emergency" is due to delay by IEPA and the regulated community, in similar fashion to that in CBE and Senn Park. *Id.* Finally, the Board held that, in light of cited authority to the contrary, financial hardship imposed on the industry does not on its own constitute a threat the public interest, safety, or welfare. *Id*, slip op. at 11.

But, noting the importance of the issues to IERG and its members, the Board consolidated the IERG & Agency proposals for hearing. The Board noted that it believed the consolidation would allow completion of the rulemaking that summer or early fall. R11-26, slip op. at 1 (May 19, 2011). IERG moved for reconsideration of the May 19, 2011 order. The Board denied that motion in its opinion and order of July 21, 2011; that order also adopted rules for second notice review by the Joint Committee on Administrative Rules. The Board completed regular rulemaking in the consolidated dockets by adopting final rules on August 18, 2011.

DISCUSSION

As described above, the Board has used the emergency rulemaking provisions of the Act and the IAPA on occasion; however, those have been rare occasions and must be preserved for only the truly emergent situations. For the Board to adopt an emergency rule, the Board must find "that a situation exists which reasonably constitutes a threat to the public interest, safety or welfare" (415 ILCS 5/27(c) (2012)). The language in the Act is identical to the language of the IAPA, which also states that there is an emergency when a situation exists that an "agency finds reasonably constitutes a threat to the public interest, safety, or welfare" (5 ILCS 100/5-45(a) (2012)). Therefore, a threshold issue is whether or not the record before the Board establishes that there is a situation that reasonably constitutes a threat to the public interest, safety or welfare.

In addition to a determination whether or not an emergency exists, under the Act the Board is required to take into account "the existing physical conditions, the character of the area involved, including the character of surrounding land uses, zoning classifications, the nature of the existing air quality or receiving body of water, as the case may be, and the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution." 415 ILCS 5/27(a) (2012). In fulfilling this statutory responsibility, the Board need not conclude that compliance with a regulation is economically reasonable and technically feasible as other regulatory relief, such as variances and adjusted standards, is available. Granite City Division of National Steel Co. v. IPCB, 155 Ill.2d 149 (1993).

The Board first addresses the issue as to whether or not an emergency situation exists, as "emergency" is defined by the Act and IAPA. IEPA argues that an emergency does exist because of the danger of fugitive emissions from petcoke and coal due to the threat to public interest, safety, or welfare. *See* Mot. at 2. IEPA argues that PM can have "serious health consequences" and is subject to NAAQS. IEPA further argues that adverse effects include "aggravated asthma, decreased lung function, increased respiratory symptoms such as difficulty breathing, irregular heartbeat, and nonfatal heart attacks." *Id*. SETF and the Environmental Groups agree that an emergency exists and ask the Board to adopt emergency rules.

By contrast, other commenters have pointed out that studies by USEPA and CRS indicate that petcoke dust pose low risk to human health. *See* e.g. PC 8 at 8. The CRS study notes that "[m]ost toxicity analyses of petcoke, as referenced by EPA, find it has low health hazard potential in humans, with no observed carcinogenic, reproductive, or developmental effects." PC 8, Exh. 3 at 9. Also of note is that while there may be uncontrolled fugitive PM emissions, KCBX, one of the operators of a bulk terminal, provided data on testing done by an independent firm of soil and dust removed from surfaces surrounding KCBX's facility. The test results indicate that there is no significant amount of petcoke or coal deposited in soils in the sample area. *See* PC 8 at 12-13.

Another concern raised by commenters regarding whether this is an emergency situation is that IEPA failed to explain why petcoke and coal are different from other bulk materials. Petcoke and coal are often stored in piles outdoors, but they are not the only bulk materials stored in this manner.

Commenters indicate that petcoke and coal bulk terminals are already subject to regulations and offer citation to those regulations. KCBX notes it has air permits for both of its facilities and an NPDES permit for one facility. IEPA claims that additional regulation, specific to petcoke and coal, are necessary due to the "emergency" that exists; while other bulk terminal operations do not have circumstances that constitute an "emergency".

Commenters offered information indicating that the problems initiating the concerns of IEPA, are being resolved. Specifically, KCBX indicated that it had addressed issues regarding fugitive emissions such that a significant wind event in November produced no visible PM emissions escaping the site. SETF has provided some detail regarding the two incidents that led IEPA to its proposal. *See* PC 14. However, KCBX has described to the Board steps it has taken to resolve the problem, and the People have filed an enforcement action against Beemsterboer alleging violations pertaining to fugitive emissions.

Concerns about the application of this emergency rule statewide were also raised. IEPA identified facilities in Cook County, responsible for the alleged emergency that would be subject to the rules, but no downstate facilities that were responsible for the emergency were identified. Instead, IEPA, SETF, and the Environmental Groups argue for statewide application of the emergency rules because of possible relocation of these facilities or new facilities being developed. While the Board did receive comments from Dynegy concerning one of its facilities, Dynegy is clarifying that its facility would not be subject to these rules.

The Board carefully reviewed IEPA's proposal, the public comments, and IEPA's reply. The Board appreciates the substantive comments received from members of the public; however, the Board notes that IEPA's reply did not address all of the concerns raised. The Board cannot find, based on this record, that a "situation exists which reasonably constitutes a threat to the public interest, safety or welfare" (415 ILCS 5/27(c) (2012)). The Board agrees that fugitive emissions and PM from petcoke and coal may be a problem; however, these issues are addressed by Board regulations as evidenced by pending enforcement actions. Thus, IEPA and other commenters have not provided the Board with evidence sufficient to identify a threat to the public interest, safety or welfare. The Board is convinced that improperly controlled emissions could be a nuisance, and in at least two instances action is being taken. However, this record provides evidence petcoke dust poses low risk to human health. KCBX provided evidence that there is no significant amount of petcoke or coal deposited in the soils within neighborhoods around its facility. IEPA and other commenters provided contrary anecdotal evidence and observations, but much of that evidence involves the incidents in August of 2013. KCBX has provided observations that indicate that issue has been addressed.

Furthermore, the record lacks any evidence that bulk terminals for petcoke and coal are causing uncontrolled fugitive emissions in areas other than Cook County. Therefore, the Board finds no evidence in this record that supports a determination that facilities of this kind outside of Cook County now pose a "threat to the public interest, safety or welfare".

While the Board is not convinced an "emergency" exists, the Board does have regulations addressing these facilities, and the Board believes that the rules governing bulk terminal

operations for petcoke and coal could be improved. Also, the Board believes that the proposal will benefit by proceeding through the regular rulemaking process. Therefore, in order to examine this issue more closely, the Board will proceed with IEPA's proposal under Section 27 of the Act (415 ILCS 5/27 (2012)) as general rulemaking. The Board directs the hearing officer to enter an order asking IEPA to amend its proposal to include the information required in 35 Ill. Adm. Code 102.

Although the Board's finding that no emergency exists means that the Board need not examine the proposal pursuant to Section 27(a) of the Act (415 ILCS 5/27(a) (2012)) for technical feasibility and economic reasonableness, the Board notes that many such concerns were raised by industry. The Board is cognizant of those concerns and would expect that IEPA will provide more information to address these concerns during the development of this rulemaking record.

CONCLUSION

IEPA sought an emergency rule proposal to address fugitive emissions of PM from petcoke and coal bulk terminals. The Board allowed for responses to the proposal and allowed IEPA the opportunity to reply. The Board has received 34 comments on this rulemaking and after careful consideration of all of these, the Board declines to propose an emergency rule. The Board finds that IEPA has failed to demonstrate "that a situation exists which reasonably constitutes a threat to the public interest, safety or welfare" (415 ILCS 5/27(c) (2012)). Therefore, the Board cannot proceed with an emergency rule.

However, the Board will continue with this proposal under Section 27 of the Act (415 ILCS 5/27 (2012) as a general rulemaking to address the public health and environmental concerns raised by IEPA.

ORDER

The Board denies the Illinois Environmental Protection Agency's motion to adopt and emergency rule. However, the Board will proceed with the proposal under Section 27 of the Environmental Protection Act (415 ILCS 5/27 (2012)) as a general rulemaking.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on February 6, 2014, by a vote of 4-0.

John T. Therriault, Clerk
Illinois Pollution Control Board