

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF: )  
 )  
AMENDMENTS TO 35 ILL. ADM. CODE )  
217 NITROGEN OXIDES EMISSIONS ) R11-24  
 ) (Rulemaking – Air)  
 )

**NOTICE OF FILING**

To:

John Therriault, Assistant Clerk  
Illinois Pollution Control Board  
100 West Randolph, Suite 11-500  
Chicago, IL 60601-7447

Persons on the attached service list

Please take notice that on the 6<sup>th</sup> Day of June, 2011, I filed with the Office of the Clerk of the Illinois Pollution Control Board the attached **COMMENTS OF NRDC AND SIERRA CLUB**, a copy of which is hereby served upon you.

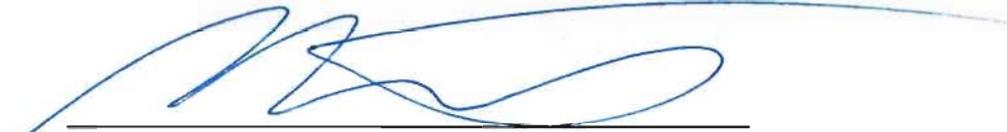
By:   
Shannon Fisk, Natural Resources Defense Council

Dated: June 6<sup>th</sup>, 2011

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**CERTIFICATE OF SERVICE**

I, Shannon Fisk, the undersigned attorney, hereby certify that I have served the attached **COMMENTS OF NRDC AND SIERRA CLUB** on all parties of record (Service List attached), by depositing said documents in the United States Mail, postage prepaid, from 227 W. Monroe, Chicago, IL 60606, before the hour of 5:00 p.m., on this 6<sup>th</sup> Day of June, 2011.



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NATURAL RESOURCES DEFENSE COUNCIL

June 6, 2011

John Therriault  
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**Re: Comments Regarding Docket # R11-24, In the Matter of: Nitrogen Oxides Emissions, Amendments to 35 Ill. Adm. Code 217**

Dear Mr. Therriault,

On behalf of the Natural Resources Defense Council, the Sierra Club, and their thousands of Illinois members, I submit the following comments on the proposed amendments to 35 Ill. Adm. Code Part 217, Nitrogen Oxides (NO<sub>x</sub>) Emissions. These comments are timely, as they are filed within 45 days of the publication of the Notice of Proposed Rulemaking related to this proceeding in the *Illinois Register*. 35 Ill. Reg. 6770 (Apr. 22, 2011); 5 Il. Comp. Stat. §100/5-40. I urge the Illinois Pollution Control Board ("Board") to reject IEPA's proposal to delay the feasible and economically reasonable NO<sub>x</sub> RACT requirements by three years, as such delay will improperly slow the time in which all of Illinois comes into compliance with the ozone National Ambient Air Quality Standards ("NAAQS") and unnecessarily subject Illinois residents to unhealthy levels of ozone for an additional three years.

#### **I. Procedural Background**

In 2009, the Board adopted amendments to 35 Ill. Adm. Code Part 217, Subparts D, E, F, G, H, I and M. *See* 33 Il. Reg. 13326 (Sept. 25, 2009) ("NO<sub>x</sub> RACT Rules"). These 2009 NO<sub>x</sub> RACT Rules impose limits on emissions of NO<sub>x</sub> by various categories of major stationary sources of NO<sub>x</sub> located in Illinois areas that were designated as nonattainment for the 1997 8-hour ozone and the 1997 24-hour fine-particulate ("PM<sub>2.5</sub>") NAAQS. Generally, the rules set the date for compliance with the limits as January 1, 2012. On March 9, 2011, U.S. EPA Region V sent IEPA a letter noting some

shortcomings in the state NO<sub>x</sub> RACT Rules, including that the January 1, 2012 effective date for the rules was “unacceptable” because U.S. EPA’s Phase 2 ozone implementation policy required NO<sub>x</sub> RACT rules to be implemented by May 1, 2009. (Mar. 9, 2011 Ltr. from Cheryl Newton, U.S. EPA to Laurel Kroack, IEPA, Attachment at 3, *citing* 70 Fed. Reg. 71,612, 71,617, 71,658-59).

On April 4, 2011, IEPA submitted a Rulemaking Proposal entitled “Amendments to 35 Ill. Adm. Code 217, Nitrogen Oxides Emissions” with a Motion for Expedited Review to the Board. *In the Matter of: Amendments to 35 Ill. Adm. Code 217, Nitrogen Oxides Emissions*, R11-24, Rulemaking Proposal and Motion for Expedited Review (Apr. 4, 2011).<sup>1</sup> IEPA’s proposed amendments do not change the substantive standards and requirements, but generally postpone the date of compliance by three years.

On April 7, 2011, the Board denied IEPA’s Motion for Expedited Review, but accepted the Rulemaking Proposal *In the Matter of: Amendments to 35 Ill. Adm. Code 217, Nitrogen Oxides Emissions*, R11-24, Order of the Board (April 7, 2011).<sup>2</sup> Subsequently, the Board published a Notice of Proposed Rulemaking. 35 Ill. Reg. 6770 (Apr. 22, 2011).<sup>3</sup>

On April 21, 2011, the Illinois Environmental Regulatory Group (IERG) submitted a Motion for Emergency Rule to the Board, urging it to adopt IEPA’s proposed amendments. *In the Matter of: Illinois Environmental Regulatory Group's Emergency Rulemaking, Nitrogen Oxides Emissions: Amendments to 35 Ill. Adm. Code Part 217, R11-26, Motion for Emergency Rule* (Apr. 21, 2011).<sup>4</sup> IERG’s motion made substantially the same arguments found in IEPA’s proposal, but argued further that the Board should adopt Illinois EPA’s proposed amendments immediately under an Emergency Rule.

On May 19, 2011, the Board issued an Order denying IERG’s Motion for Emergency Rule and consolidating that matter with IEPA’s Rulemaking Proposal. *In the Matter of: Amendments to 35 Ill. Adm. Code 217, Nitrogen Oxides Emissions*, R11-24, Order of the Board (May 19, 2011).<sup>5</sup>

## II. The Proposed Amendments

Nonattainment designations trigger the CAA requirements for states to submit plans requiring stationary sources in those areas to adopt RACT. 42 U.S.C. §§7502(b) and (c)(1).

At the time the Administrator promulgates the designation of an area as nonattainment . . . the Administrator shall establish a schedule according

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<sup>1</sup> See <http://www.ipcb.state.il.us/documents/dsweb/Get/Document-71866>.

<sup>2</sup> See <http://www.ipcb.state.il.us/documents/dsweb/Get/Document-71914>.

<sup>3</sup> See <http://www.ipcb.state.il.us/documents/dsweb/Get/Document-72013>.

<sup>4</sup> See <http://www.ipcb.state.il.us/documents/dsweb/Get/Document-72055>.

<sup>5</sup> See <http://www.ipcb.state.il.us/documents/dsweb/Get/Document-72335>.

to which the State containing such area shall submit a plan or plan revision . . . meeting the applicable requirements of subsection (c) of this section and section 7410 (a)(2) of this title. Such schedule shall at a minimum, include a date or dates, extending no later than 3 years from the date of the nonattainment designation, for the submission of a plan or plan revision . . . meeting the applicable requirements of subsection (c) of this section and section 7410 (a)(2) of this title.

42 U.S.C. §7502(b). Subsection (c)(1) of 42 U.S.C. 7502 provides that the State plans shall require implementation of RACT “as expeditiously as practicable.” On March 17, 2008, U.S. EPA informed IEPA that Illinois had improperly failed to timely submit a NOx RACT State Implementation Plan as required by the Clean Air Act. 73 Fed. Reg. 15,416.

When the Board adopted the NOx RACT Rules that were finally proposed by IEPA, the Board pointed to four rationales supplied by IEPA: (1) the Clean Air Act (“CAA”) requirement for NOx Reasonably Available Control Technology (RACT) requirements for major sources located in areas designated as nonattainment under the 1997 8-hour ozone NAAQS, (2) the CAA requirement for Reasonably Available Control Measures (RACM), including RACT, for areas designated as nonattainment under the 1997 PM2.5 NAAQS, (3) future RACT requirements for areas designated nonattainment under the 2006 PM 2.5 NAAQS and (4) future RACT requirements for areas designated nonattainment under the 2008 ozone NAAQS. *In the Matter of: Nitrogen Oxides Emissions from Various Source Categories: Amendments to 35 Ill. Adm. Code Parts 211 and 217*, R08-19, Opinion and Order of the Board, Adopted Rule, pp. 6-7 (Aug. 20, 2009).<sup>6</sup>

On September 1 and 2, 2009, IEPA submitted the proposed NOx RACT rules to U.S. EPA for approval. Since the Illinois NOx RACT Rules were implemented, U.S. EPA has determined that the Illinois areas previously designated nonattainment for the 1997 ozone standards have reached attainment and waived the NOx RACT requirements for those areas. *See* 76 Fed. Reg. 9655 (Feb. 22, 2011). U.S. EPA has also found that the Illinois areas previously designated as nonattainment for 1997 PM 2.5 standards and the 2006 P.M. 2.5 standards have reached attainment. 76 Fed. Reg. 12302 (Mar. 7, 2011) (proposing to determine that the St. Louis-MO-IL area has attained the 1997 PM standard); 74 Fed.Reg. 62243 (Nov. 27, 2009) (determining the IL-IN-Chicago area has attained the 1997 PM standard); 74 Fed.Reg. 58688 (Nov. 13, 2009) (determining that the Illinois areas had attained the 2006 PM standard).

Further, U.S. EPA has delayed designation of nonattainment areas under the 2008 ozone NAAQS while it reconsiders that standard. U.S. EPA proposed to strengthen the standard in 2010, and has indicated that it will issue a final decision on the reconsideration by the end of July 2011.<sup>7</sup> 75 Fed. Reg. 2938 (Jan. 19, 2010).

<sup>6</sup> See <http://www.ipcb.state.il.us/documents/dsweb/Get/Document-66168>.

<sup>7</sup> See <http://www.epa.gov/glo/actions.html#impl>.

Because Illinois has attained the 1997 ozone standard and the 1997 and 2006 PM 2.5 standards, and U.S. EPA has not designated nonattainment areas under the 2008 ozone standards, IEPA and IERG have concluded that there is no current CAA requirement for Illinois to implement NOx RACT. IEPA expects that new nonattainment areas will be designated in 2012, and, accordingly, which the Agency claims enables it to delay the NOx RACT until the beginning of 2015. *In the Matter of: Amendments to 35 Ill. Adm. Code 217, Nitrogen Oxides Emissions*, R11-24, Rulemaking Proposal, Statement of Reasons, p. 4 (Apr. 4, 2011).

IEPA and IERG now argue that because federal law purportedly will not require Illinois to comply with NOx RACT until 2015, the compliance date for the NOx RACT Rules should be extended until then to avoid prematurely imposing costs of compliance on the regulated community. *Id.* at 12. IERG also argues that the compliance date should be postponed because the definition of what is “reasonably available” for purposes of establishing RACT rules may change due to technology advances by the time compliance is required under the CAA. *In the Matter of: Illinois Environmental Regulatory Group's Emergency Rulemaking, Nitrogen Oxides Emissions: Amendments to 35 Ill. Adm. Code Part 217*, R11-26, Motion for Emergency Rule, pp. 2-3, 10-11 (Apr. 21, 2011).

### **III. The Stated Reasons for the Proposed Amendments are Unsubstantiated**

IEPA and IERG argue that the Board’s initial rationales for implementing the NOx RACT Rules no longer apply. However, at the time the Board adopted the rules, it relied on both current and future CAA requirements. The Board knew at the time of adoption that IEPA intended to request that U.S. EPA redesignate Chicago as attainment for the 1997 8-hour ozone NAAQS. *In the Matter of: Nitrogen Oxides Emissions from Various Source Categories: Amendments to 35 Ill. Adm. Code Parts 211 and 217*, R08-19, Opinion and Order of the Board, Proposed Rule, First Notice, p. 10 (May 7, 2009). Presumably, IEPA also knew there was a possibility that the 1997 NOx RACT requirements would be waived. Nonetheless, IEPA continued to support the NOx RACT Rules, focusing on the likelihood that Illinois would be subject to more stringent requirements under future nonattainment designations and emphasizing that the implementation of NOx RACT is crucial to air quality in both Illinois and downwind states. *Id.* at 17.

These latter grounds for supporting adoption of the NOx RACT Rules continue to exist. As IEPA stated, NOx RACT is crucial to air quality. Further, although U.S. EPA has delayed official nonattainment designations under the 2008 ozone NAAQS, its proposals indicate it has done so because it intends to strengthen the standard. IEPA acknowledges that Illinois areas are not attaining the 2008 ozone standard and that it believes that the controls in the NOx RACT Rules will be required in Illinois when the new ozone and PM2.5 NAAQS nonattainment designations are made. *In the Matter of:*

*Amendments to 35 Ill. Adm. Code 217, Nitrogen Oxides Emissions*, R11-24, Kaleel Testimony to the Board, p. 2 (May 19, 2011).

The only rationale IEPA and IERG offer for further delaying the compliance date for the NO<sub>x</sub> emissions limitations is that the rules impose costs on the regulated community purportedly sooner than required under the CAA. This contention is undermined by the fact that NO<sub>x</sub> RACT Rules should have gone into effect as of May 1, 2009 and, therefore, IEPA's proposal is simply further delaying already tardy limits on NO<sub>x</sub> emissions in areas where ozone levels remain higher than the public health standards require.

In addition, IEPA does not argue that the costs of compliance will decrease over this time or that the controls may not be necessary. All IEPA and IERG argue is that the costs and controls are purportedly not necessary *yet*. In doing so, they ignore the fact that portions of the state continue to exceed even the inadequately stringent 2008, that U.S. EPA is not going to make the ozone NAAQS less stringent and will likely make it more stringent, and that people's health continues to suffer due to elevated levels of ozone pollution in portions of Illinois.

Also, IEPA and IERG acknowledge that the regulated community has already incurred costs for satisfying the existing 2012 compliance deadline. *See In the Matter of: Illinois Environmental Regulatory Group's Emergency Rulemaking, Nitrogen Oxides Emissions: Amendments to 35 Ill. Adm. Code Part 217*, R11-26, Motion for Emergency Rule, Attachments C and D (Apr. 21, 2011) (letters from companies indicating the planned expenditures for compliance projects increased rapidly as of April 2011, by which time construction and installation costs would be incurred). IEPA and IERG do not address the issue of how much time, preparation, and money will be wasted if the regulated community halts its compliance projects when they are halfway complete, only to revive them in three years, or of the fairness of allowing for a three-year delay when some companies have already taken steps to comply by 2012.

IEPA and IERG propose postponing the compliance date because the NO<sub>x</sub> RACT Rules impose costs on the regulated community that are not yet necessary. However, at the time the Board adopted the NO<sub>x</sub> RACT Rules, it found that they were technically feasible and economically reasonable. *In the Matter of: Nitrogen Oxides Emissions from Various Source Categories: Amendments to 35 Ill. Adm. Code Parts 211 and 217*, R08-19, Opinion and Order of the Board, p. 8 (Aug. 20, 2009). In particular, the Board noted that IEPA had negotiated extensively with interested parties for over a year, and that IEPA had revised provisions in the rules to memorialize agreements with those parties, including provisions relating to compliance deadlines and emissions limitations. *Id.*

If the Board was correct in its finding that the costs associated with 2012 compliance are economically reasonable, and those costs will still be necessary in the future, there is little reason or benefit to delay compliance by an additional three years. On the other hand, there are significant costs to delaying compliance by such a long period of time. Among these is the potentially large amount of economic waste due to

already-incurred compliance costs by the regulated community, and, not least, the cost of delaying for three years improved public health and air quality for the citizens of Illinois,<sup>8</sup> as well as the economic benefits that flow from their improved health.

There is no dispute that polluters in Illinois will need to comply with the NOx RACT Rules at some point. To this end, IEPA has requested that U.S. EPA consider the Rules for approval as NOx RACT in the Illinois State Implementation Plan under the ozone standard U.S. EPA is currently considering, 75 Fed. Reg. 76332 (Dec. 8, 2010). The costs of complying with the NOx RACT Rules will have to be incurred sooner or later, but the benefit to air quality and to Illinois citizens will be greater if the Rules are implemented now.

#### **IV. The Proposed Amendments Thwart the Purposes of the CAA and the Illinois Environmental Protection Act**

In addition to omitting a practical analysis of the costs and benefits of delaying compliance with the NOx RACT Rules by 3 years, IEPA and IERG stretch the CAA to its outermost compliance limits with this proposal. IEPA and IERG also ask the Board to adopt a regulation that runs contrary to the purposes of the Illinois Environmental Protection Act

It is true that nonattainment designations trigger the CAA requirement for State Implementation Plans (“SIPs”) to include RACT under 42 U.S.C. § 7502(b). However, that provision requires the U.S. EPA to set a schedule for states with nonattainment designations to submit SIPs, and that schedule must “*at a minimum*, include a date or dates, extending *no later than* 3 years from the date of the nonattainment designation, for the submission of a plan or plan revision . . . meeting the applicable requirements . . . .” 42 U.S.C. § 7502(b) (emphasis added). Further, the SIPs must require implementation of RACT “*as expeditiously as practicable.*” 42 U.S.C. § 7502(c)(1) (emphasis added).

Here, 1997 ozone non-attainment areas were designated in Illinois as of June 15, 2004, which means that Illinois should have submitted NOx RACT rules to U.S. EPA by June 15, 2007, and those rules should have required compliance by May 1, 2009. Instead, IEPA is seeking to delay the NOx RACT Rules yet again, so that compliance would not have to be achieved until five-and-a-half years after it should have been required. Given that portions of Illinois exceed the 2008 ozone NAAQS and that U.S. EPA is likely to make that standard even more protective of public health and air quality, IEPA’s request to further delay compliance with NOx RACT Rules runs directly counter to the CAA’s “as expeditiously as practicable” requirement.

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<sup>8</sup> Breathing ozone can trigger or worsen chest pain, coughing, throat irritation, congestion, bronchitis, emphysema, and asthma. It can reduce lung function and inflame the lung lining, and repeated exposure can permanently scar lung tissue. See <http://www.epa.gov/air/ozonepollution/health.html>.

Additionally, although Illinois may have been released from the requirement to implement NOx RACT for purposes of the 1997 ozone standard, it has not been released from its obligation to comply with the 2008 ozone NAAQS. States must submit "infrastructure" SIPs establishing basic programs to implement and enforce NAAQS within three years of any revision, regardless of designation. 42 U.S.C. §7410(a)(1). For the 2008 ozone standard, these plans were due by March 12, 2011. 73 Fed. Reg. 16436, p. 16503 (Mar. 27, 2008). IEPA acknowledges that some areas of Illinois are not attaining the 2008 ozone standard, but desires to postpone a technically feasible and economically plan to reach attainment.

"Considered as a whole, the [CAA] reflects Congress's intent that air quality should be improved until safe and never allowed to retreat thereafter." *South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 900 (D.C. Cir. 2006). The CAA requires U.S. EPA to reconsider the NAAQS every 5 years. 42 U.S.C. § 7409(d)(1). If Illinois finds that U.S. EPA's reconsideration of its air quality standards is a reason to postpone implementation of state rules intended to achieve them, Illinois air quality will improve at a pace that thwarts the intent and purposes of the CAA.

Finally, IEPA and IERG ask the Board to adopt a rule amendment that contradicts the purposes of the Illinois Environmental Protection Act. Under Title II of the Act, the Board "may adopt regulations to promote the purposes and provisions of this Title." 415 Il. Comp.Stat. §5/13. The purpose of Title II is "to restore, maintain, and enhance the purity of the air of this State in order to protect health, welfare, property, and the quality of life and to assure that no air contaminants are discharged into the atmosphere without [the] treatment or control necessary to prevent pollution." 415 Il. Comp. Stat. §5/8. Postponing a technically feasible and economically reasonable compliance date for reduction of air pollutants in no way "restores, maintains, or enhances" the purity of the air in the State of Illinois. Therefore, the Board cannot and should not adopt the proposed amendments to the NOx RACT Rules.

Thank you for considering our comments,



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