BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
AMENDMENTS TO 35 ILL. ADM. CODE	)	R22- 17
PART 203: MAJOR STATIONARY SOURCES	)	(Rulemaking – Air)
CONSTRUCTION AND MODIFICATION,	)	
35 ILL. ADM. CODE PART 204: PREVENTION	)	
OF SIGNIFICANT DETERIORATION, AND	)	
PART 232: TOXIC AIR CONTAMINANTS	)	

NOTICE OF FILING

TO: Don A. Brown
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
Don.Brown@illinois.gov

Mr. Daniel Pauley
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph Street
Suite 11-500
Chicago, Illinois 60601
Daniel.Pauley@illinois.gov

(See Persons on Attached Service List)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board, **SECOND POST-HEARING COMMENT OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP,** copies of which are hereby served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP

Dated: April 4, 2022

By: /s/ Melissa S. Brown
One of Its Attorneys

N. LaDonna Driver
Melissa S. Brown
HEPLERBROOM, LLC
4340 Acer Grove Drive
Springfield, Illinois 62711
LaDonna.Driver@heplerbroom.com
Melissa.Brown@heplerbroom.com
(217) 528-3674

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
AMENDMENTS TO 35 ILL. ADM. CODE	)	R22-17
PART 203: MAJOR STATIONARY SOURCES	)	(Rulemaking – Air)
CONSTRUCTION AND MODIFICATION,	)	
35 ILL. ADM. CODE PART 204: PREVENTION	)	
OF SIGNIFICANT DETERIORATION, AND	)	
PART 232: TOXIC AIR CONTAMINANTS	)	

SECOND POST-HEARING COMMENT OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP

The ILLINOIS ENVIRONMENTAL REGULATORY GROUP ("IERG"), by and through its attorneys, HEPLERBROOM, LLC, hereby submits its Second Post-Hearing Comment. This Comment responds to the Illinois Environmental Protection Agency's ("Illinois EPA") Comments and Recommendations for Additional Revisions filed on March 21, 2022 (hereinafter "Illinois EPA's Comment").

IERG's Rationale/Support for Proposal

To reiterate IERG's Pre-Filed Answers to the Illinois Pollution Control Board's ("Board") Pre-filed Questions, it is not IERG's position that the current nonattainment new source review ("NA NSR") regulations at existing 35 Ill. Adm. Code Part 203 do not meet the applicable requirements of the Clean Air Act or federal regulations. IERG is proposing to revise Part 203 to be consistent with the language in the federal NA NSR regulations. Aligning the language in Part 203 to more closely track the federal NA NSR language, as well as with the Prevention of Significant Deterioration ("PSD") regulations at 35 Ill. Adm. Code 204 where appropriate, is beneficial to Illinois EPA, the Board, regulated industries, and third parties.

IERG maintains that Illinois EPA's continuing issue with the discussion of conflict between existing Part 203 and federal regulations is misplaced and unnecessary. IERG, in its

various filings in this proceeding, has explained how the decades that have passed since Part 203 has been updated has resulted in differences between those rules and the federal regulations. This implicates many federal regulatory changes, including various developments with ozone and $PM_{2.5}$ nonattainment requirements.

IERG has carefully developed a holistic set of proposed regulations that begin with the federal blueprint rule, include appropriate provisions of 40 CFR Part 51 Appendix S, and retain certain aspects of existing Part 203. The result is intended to provide all interested parties with a regulation that is up-to-date and inclusive of all pertinent requirements in one set of rules. The amount of work that has gone into this effort also indicates the degree of difference that exists between current Part 203 and the federal requirements. As indicated by IERG in the Statement of Reasons ("SOR"), this comprehensive work led IERG to conclude that the update to Part 203 would be best accomplished by creating entirely new Subparts, rather than attempting to revise Part 203's Subparts as they have existed for more than two decades.

IERG engaged in lengthy discussions with Illinois EPA on the proposed rules. IERG made various changes to the proposed rules at Illinois EPA's suggestion, dealing with organization, wording and substance. As will be discussed further herein, IERG has also agreed to certain changes to the proposed provisions, as requested by Illinois EPA in its post-hearing comment. IERG asks that the Board move forward with the proposed rules, so that the Board, the Illinois EPA, the regulated community and other parties may have a current, cohesive set of requirements in Part 203.

IERG does want to clarify the following statement made by Illinois EPA in its comments:

> IERG is correct, existing 203.308 [sic] does not explicitly impose any monitoring, recordkeeping or reporting requirements addressing major modification applicability determinations. However, such requirements are implicit in that the permitting of most projects requires limits on potential

> to emit be made practically enforceable which necessarily includes appropriate monitoring, recordkeeping and reporting to ensure a project is not major. One of the consequences of 2002 NSR Reform is, for changes to existing emission units, such emissions would no longer be limited in terms of an enforceable permit restriction or limit. Given this change, NSR Reform requires sources to track and potentially report post-change emissions for modifications to existing emissions units that had a "reasonable possibility" of triggering major NSR review. As such, these provisions do not conflict; rather any differences between pre- and post-reform reflect the need for monitoring, recordkeeping or reporting under NSR Reform as it no longer required enforceable restrictions on emissions.

Illinois EPA is incorrect in asserting that, under existing Part 203, practicably enforceable limits on potential to emit are required for changes to existing emissions units at the time of permitting of "most projects." To the contrary, under these regulations, determinations of whether a planned project is a major modification is based on whether there is a significant net emissions increase. 35 Ill. Adm. Code 203.207(a). Under existing Section 203.208, the net emissions increase from the project is the "increase in actual emissions from" the project; there is no mention of potential to emit or enforceability in these definitions of "major modification" or "net emissions increase."

The pertinent provisions of existing Part 203 mirror the 1980 federal NA NSR regulations.[1] These regulations do not prescribe how this "increase in actual emissions" is to be calculated, which leaves much room for interpretation and has led to frequent litigation. One interpretation is that the increase is based on the potential to emit of the emissions unit following this project. This interpretation is based on the following subparagraph within the definition of "actual emissions" at existing Section 203.104(c).

[1] See 45 Fed. Reg. 52676 at 52744 adopting a definition of "major modification" at 40 CFR § 51.18(j)(1)(vi)(*a*) that is consistent with Section 203.207(a), a definition of "net emissions increase" at § 51.18(j)(1)(vii)(*a*) that is consistent with Section 203.208, and a definition of "actual emissions" at § 51.18(j)(1)(xv) that is consistent with Section 203.104.

> c) For any emissions unit which has not begun normal operations on the particular date, the Agency shall presume that the potential to emit of the emissions unit is equivalent to the actual emissions on that date.

Until 1990, the United States Environmental Protection Agency ("USEPA") and many state permitting authorities applied this presumption broadly to many projects involving existing emissions units. Federal case law beginning with the decision of the 7th Circuit in *WEPCO v. Reilly*, 893 F 2d. 901 (1990) rejected this broadly applied presumption and clarified that the circumstances in which an existing emissions unit is deemed not to have begun normal operations are uncommon. As one federal court stated in *Sierra Club v. Talen Montana LLC*, 2015 WL 13714343 (Dist. MT 2015), citing the preamble to USEPA's final WEPCO rule, "EPA has likewise determined that the actual-to-potential test only applies to units if a project is so significant that 'there is no relevant operating history' so 'it is not possible to reasonably project post-change utilization for those units.' 57 Fed. Reg. at 32317."

As explained in greater detail by USEPA:

> Duke concedes the existence of the actual-to-projected-actual test under EPA's 1992 rules, but argues that these rules are evidence that such a test did not exist prior to 1992. That argument ignores EPA's application of the actual-to-projected-actual test under the 1980 rules on remand from the Seventh Circuit's WEPCO decision, and confirmation in the Federal Register that EPA would continue to apply that test under the 1980 rules at units that have begun normal operations. In the 1991 preamble and the 1992 rules, EPA made it clear that it was merely clarifying the existence and scope of the actual-to-projected-actual test for existing units. By "clarifying" the actual-to-projected-actual test in the 1992 rules, EPA was simply making "explicit something that was already implicit" in the 1980 rules, and providing "crisper and more detailed lines." This portion of the 1992 rules, then, was interpretative, and does not imply that the actual-to-projected-actual test was impermissible for units that have begun normal operations under the 1980 rules. The 1992 rule as it related to the actual-to-projected-actual test was only legislative where it supplemented existing law; that is, where it broadened application of this test to virtually all electric utility units regardless of whether they had begun normal operations. [Internal citations and footnotes omitted.]

Plaintiff's Opposition to Duke Energy Corporation's Motion for Summary Judgment, *U.S., et al. v. Duke Energy Corp*., 2008 WL 751088 (M.D.N.C. Jan. 4, 2008).

Thus, under existing Part 203, contrary to the assertion in Illinois EPA's Comment, the major modification applicability test is based on the projected increase in actual emissions from an existing emissions unit, rather than its potential to emit, and the rules do not provide any mechanism relating to enforceability of those projections.

Further, even for those few projects involving existing emissions units where the major modification applicability test is based on "potential to emit" (i.e., where the emissions unit is deemed not to have begun normal operations because the change to the unit is so significant that there is no relevant operating history), the definition of this term at Section 203.128 generally does not require establishment of practicably enforceable limits in permits. Instead, under this definition, the unit's potential to emit is generally based its capacity to emit a pollutant under its physical and operational design. Enforceable permit limits are required only where the source owner elects to establish the potential to emit of the existing emissions unit based on a value less than its capacity to emit a pollutant under its physical and operational design.

In summary, for the majority of projects involving only existing emissions units which have begun normal operations, the current Part 203 neither imposes any monitoring, recordkeeping or reporting requirements addressing major modification applicability determinations, as noted by IERG in its Pre-Filed Answers, nor, for the reasons provided above, requires practicably enforceable limits on potential to emit. As pointed out previously by IERG, updating Part 203 to include the current blueprint rule approach for determining project emissions will provide greater clarity to all interested parties.

Section 203.100 Effective Dates

Proposed Revisions to Sections 203.100(c) and (d)

IERG does not oppose revising the transition language in Section 203.100(c) to clarify that permits historically issued by Illinois EPA pursuant to existing Part 203 Subparts A through H continue to be in effect. However, IERG disagrees with a portion of Illinois EPA's proposed revisions, indicated in bold text below:

> (c) On the effective date of the full approval of Subparts I through R of this Part by the USEPA as part of Illinois' State Implementation Plan, ~~Subparts A through H of this Part will sunset and no longer apply~~ **the permitting and operation of projects that began construction before this date shall continue to be in accordance with Subparts A through H of this Part.**
>
> ~~(d) Permits under this Part shall be issued pursuant to the provisions of this Part in effect at the time of permit issuance.~~

IERG agrees with Illinois EPA's intent behind the revision that permits historically issued pursuant to existing Part 203 Subparts A through H will continue to be in effect.[2] IERG also agrees that sources must continue to use existing Part 203 when revising conditions of the historically issued permit for that project or when revisiting a historical NA NSR applicability determination. However, IERG's concern is that Illinois EPA's proposed revision hinges on when a project began construction, instead of when a final permit was issued, as initially set forth in subparagraph (d). Also, it is IERG's intention that any future project will use the new Subparts I through R even where this new project involves equipment that was the subject of a historical NA NSR applicability determination. As such, IERG proposes the following amendments, as indicated in bold text, to Illinois EPA's proposed revisions:

[2] IERG notes that USEPA did not preserve the prior versions of 40 CFR 52.21 or 40 CFR Part 51, Appendix S when they were amended to include the 2002 NSR Reform revisions.

(c) On the effective date of **~~the full~~** approval of Subparts I through R of this Part by the USEPA as part of Illinois' State Implementation Plan, **Subparts A through H of this Part will sunset**~~. and no longer apply **the permitting and operation of projects that began construction before this date shall continue to be in accordance with Subparts A through H of this Part~~**. **Projects permitted under construction permits issued under Subparts A through H of this Part before the date of USEPA's approval of Subparts I through R of this Part as part of Illinois' SIP, shall continue to be subject to Subparts A through H of this Part.**

IERG believes the above revision is sufficiently tailored to satisfy both Illinois EPA's concern and IERG's concern. Also, in order to provide further clarity on what subsections are applicable, IERG proposes to retain Section 203.100(d) as initially proposed by IERG.

Section 203.1340(c) VOM and Ammonia as $PM_{2.5}$ Precursors and Proposed Revisions to Sections 203.100(a), (b) and (c)

IERG disagrees with Illinois EPA's proposed deletion of the reference to Section 203.100(b) in Section 203.100(a), the deletion of Section 203.100(b), and proposed addition of "the full approval of" language as it applies to approval of Subparts I through R by USEPA as part of Illinois' State Implementation Plan ("SIP"), in Section 203.100(c). Illinois EPA's proposed revisions to these sections are shown below:

(a) ~~Except as provided in subsection (b) below,~~ Subparts I through R of this Part do not apply until the effective date of approval of all of those Subparts by the United States Environmental Protection Agency (USEPA) as a revision to the Illinois State Implementation Plan.

~~(b) The effective date of Subpart I of this Part is not dependent on approval of Section 203.1340(c)(3) by USEPA as a revision to the Illinois SIP.~~

(c) On the effective date of the full approval of Subparts I through R of this Part by the USEPA as part of Illinois' State Implementation Plan, ~~Subparts A through H of this Part will sunset and no longer apply~~ the permitting and operation of projects that began construction before this date shall continue to be in accordance with Subparts A through H of this Part.

Illinois EPA also proposes to remove the entirety of Section 203.1340(c)(3), which provides a transitional period concerning the regulation of volatile organic material ("VOM") and ammonia as precursors to $PM_{2.5}$. Specifically, Section 203.1340(c)(3) states:

> 3) Except as provided in subsection (c)(3)(A), VOM and ammonia are precursors to $PM_{2.5}$ in any $PM_{2.5}$ nonattainment area beginning 24 months after the date of designation of the area as nonattainment for $PM_{2.5}$.
>
> A) If the following conditions relating to a demonstration of insignificant contribution for a particular precursor in a particular $PM_{2.5}$ nonattainment area are met, the precursor or precursors addressed by the NA NSR precursor demonstration (VOM, ammonia, or both) shall not be regulated as a precursor to $PM_{2.5}$ in such area: The Agency submits a SIP for USEPA review which contains the state's preconstruction review provisions for $PM_{2.5}$ consistent with 40 CFR 51.165 and a complete NA NSR precursor demonstration consistent with 40 CFR 51.1006(a)(3); and such SIP is determined to be complete by the USEPA or deemed to be complete by operation of law in accordance with subsection 110(k)(1)(B) of the CAA (42 USC 7410) by the date 24 months after the date of designations.
>
> B) If the USEPA subsequently disapproves the state's preconstruction review provisions for $PM_{2.5}$ and the NA NSR precursor demonstration, the precursor or precursors addressed by the NA NSR precursor demonstration shall be regulated as a precursor to $PM_{2.5}$ in such area as of the date 24 months from the date of designation, or the effective date of the disapproval, whichever date is later.

Proposed Section 203.1340(c)(3) establishes VOM and ammonia as precursors to $PM_{2.5}$. Because existing Part 203 does not address $PM_{2.5}$ as a regulated NSR pollutant, Illinois EPA has implemented 40 CFR Part 51 Appendix S with respect to direct $PM_{2.5}$ emissions and $PM_{2.5}$ precursors. IERG's proposal includes addressing $PM_{2.5}$ as a regulated NSR pollutant consistent with the federal NA NSR regulations. Per Appendix S and IERG's proposed revisions, emissions of VOM and ammonia are regulated as $PM_{2.5}$ precursors only in $PM_{2.5}$ nonattainment areas and only following a two-year transition period for each such area, which is explained

more below. The purpose of proposed Section 203.100(b) is to address this two-year transition period for $PM_{2.5}$ nonattainment areas.

There are currently no $PM_{2.5}$ nonattainment areas in Illinois. Consistent with the federal NA NSR rules in Appendix S and 40 CFR § 51.165, Section 203.1340(c) and the transition provisions in Section 203.100 will provide for an orderly transition period for regulation of VOM and ammonia as precursors in a particular $PM_{2.5}$ nonattainment area following its redesignation. Specifically, per the federal rules, for the first 24 months following an area's redesignation to nonattainment for $PM_{2.5}$, VOM and ammonia are not regulated as $PM_{2.5}$ precursors. If Illinois EPA submits to USEPA, within 24 months following redesignation, a complete demonstration of insignificant contribution for a particular precursor (or precursors), that precursor will continue to not be regulated as a $PM_{2.5}$ precursor until and unless USEPA disapproves the submittal. If Illinois EPA does not submit the regulatory transition provisions or a complete precursor demonstration within this timeframe, then the affected precursor will be regulated as a $PM_{2.5}$ precursor on such date. No SIP submission is required in order to effect the transition provisions prior to, or for the first 24 months following, redesignation of a particular area as nonattainment for $PM_{2.5}$. This transitional period is explained in more detail on pages 9-11 of the Technical Support Document ("TSD").

Illinois EPA argues in its Comment that such transition provisions are unnecessary because the federal rules already provide for a transition period if an area is designated nonattainment for $PM_{2.5}$. Illinois EPA's Comment at 14 (referencing 40 CFR § 52.24(k) and 40 CFR Part 51, Appendix S). IERG agrees that the federal rules already provide for a transition period; such federal rules are the basis for proposed Section 203.1340(c)(3). However, the purpose of IERG's Proposal is to update Part 203 to be consistent with the language in the

federal regulations. Along these lines, the effect of the Proposal, if adopted, would mean that affected entities would no longer need to look at multiple sources, i.e., Part 203, the federal blueprint rule, 40 CFR § 52.24, and Appendix S, in order to determine which requirements are applicable. Instead, the effect of IERG's Proposal would mean that one would just need to look at one place – Part 203 – to see what requirements apply. This is beneficial to all entities that deal with the NA NSR rules, including Illinois EPA, the Board, regulated entities, and third parties. This is consistent with Illinois EPA's Comment as to Section 203.1340(d), in which Illinois EPA stated: "Rather than making referencing [sic] to the undefined phrase, the 'applicable SIP,' the definition of 'Regulated NSR Pollutant' *should be clear to the Board, the regulated community and the public without the need for additional information and extensive research*." Illinois EPA's Comment at 18 (emphasis added).[3] As such, IERG proposes to retain Section 203.1340(c) and the related provisions in Section 203.100. Relatedly, IERG also proposes to retain the reference to 40 CFR 51.1006(a)(3) in Section 203.1000 (Incorporation by Reference).

Moreover, Illinois EPA argues that the transition provisions relating to Section 203.1340(c)(3) cause a conflict with the statutory definition of "NA NSR permit," which hinges on whether a permit or a portion thereof is issued under a NA NSR program that has been approved by USEPA into the Illinois SIP. Illinois EPA's Comment at 15-16. Specifically, Illinois EPA asserts that if any part of a construction permit would be issued pursuant to proposed Section 203.1340(c)(3) that had not been approved by USEPA, the permit would not

[3] Furthermore, this inclusionary approach is consistent with Illinois EPA's position concerning the inclusion of the compliance certification and alternatives analysis requirements at proposed Sections 203.1820 and 203.1830, respectively. During pre-filing discussions, Illinois EPA suggested that IERG include these provisions in its Proposal. However, such provisions would already apply as a matter of federal law and are not required for SIP approval; therefore, the only reason for their inclusion in IERG's Proposal is to make Part 203 complete so that entities can identify all applicable NA NSR requirements in Part 203 without having to refer to other various statutes and regulations.

meet the definition of NA NSR permit. This assertion is incorrect. During the transition period— the first 24 months after redesignation plus any additional time during which a complete precursor demonstration submitted by Illinois EPA remains pending before USEPA— no NA NSR permit (or portions thereof) regulating VOC or ammonia as $PM_{2.5}$ precursors will be issued by Illinois EPA. The scenario that is the purported basis for Illinois EPA's comment could not occur during the transition period.

The scenario identified by Illinois EPA can occur after the transition period: A NA NSR permit could be issued regulating VOM or ammonia as $PM_{2.5}$ precursors beginning 24 months after the nonattainment designation if Illinois EPA does not timely submit a precursor demonstration or later if Illinois EPA has timely submitted a precursor demonstration and the Part D SIP submission for $PM_{2.5}$ is subsequently disapproved by USEPA. However, the implications of this scenario are not as asserted by Illinois EPA. During this time period, as explained in detail by IERG (TSD at 10), the same provisions will apply both pursuant to Appendix S, as required by 40 CFR § 52.24, and pursuant to Section 203.1340(c)(3). Under the alternative proposed by Illinois EPA, these provisions would apply only pursuant to Appendix S, as required by 40 CFR § 52.24. (This situation existed when there were $PM_{2.5}$ nonattainment areas in Illinois historically.) These scenarios and their implications are precisely why it is beneficial to include the transition provisions in Part 203. These provisions provide clarity to everyone affected – Illinois EPA, the Board, regulated entities, and third parties – on what to expect during the transition period.

Section 203.1100 Commence

As referenced by Illinois EPA, IERG included the definition of "commence" in its Proposal for purposes of proposed Section 203.1430 concerning relaxation of source-specific

limitation. Statement of Reasons ("SOR") at 20. IERG acknowledges that the word "commenced" is included in the stack heights provision at proposed Section 203.1500. However, the definition of "commence" in Part 203 would not be applicable to Section 203.1500. Section 203.1500(d) provides:

> d) Subsection (a) shall not apply with respect to coal-fired steam electric generating units subject to the provisions of Section 118 of the CAA (42 USC 7418), which commenced operation before July 1, 1957, and whose stacks were constructed under a construction contract awarded before February 8, 1974.

Proposed 35 Ill. Adm. Code 203.1500(d).

As seen above, Section 203.1500(d) utilizes the word "commence" in reference to commencing operation. The use of the word "commence" in this provision is consistent with the language in the federal rules. *See* 40 CFR § 51.118(b)(2). However, the definition of "commence" in proposed Section 203.1100 is limited to commencing construction, as seen below:

> "Commence," **as applied to construction of a major stationary source or major modification**, means that the owner or operator has all necessary preconstruction approvals or permits and either has:
>
> a) Begun, or caused to begin, a continuous program of actual on-site **construction** of the source, to be completed within a reasonable time; or
>
> b) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual **construction** of the source to be completed within a reasonable time.

Proposed 35 Ill. Adm. Code 203.1100 (emphasis added).

Therefore, per the plain language of the definition, the definition of "commence" in Section 203.1100 would not apply to the stack heights provision in Section 203.1500(d). The

common definition of "commence," i.e., to begin or start,[4] would be applicable to Section 203.1500(d). "It is accepted practice that words that are not defined in an act or a regulation are given their plain and ordinary meaning." *Environmental Protection Agency v. Darrel Slager, D/b/a Rapid Liquid Waste and Rubbish Removal*, PCB 78-28, 1980 WL 13666, at *1 (1980); *General Motors Corp. v. The Industrial Commission*, 62 Ill. 2d 106, 112 (1975); *see Illinois Environmental Protection Agency v. Chicago & North Western Transportation Co., et al*., PCB 76-155, 1978 WL 9179, at *3 (1978) (accepting the common dictionary definition of "cause" to interpret the meaning of "cause" in 415 ILCS 5/9(a)). Here, while the word "commence" is defined in Part 203, the definition is limited to commencing construction. Because there is no definition of "commence" in Part 203[5] that is applicable to the use of "commence" in Section 203.1500(d), the common definition applies.

Section 203.1230 Major Stationary Source

Illinois EPA recommends revising proposed Section 203.1230(a)(5)(A) to be written similar to other requirements in proposed Section 203.1230. IERG agrees with Illinois EPA's proposed revisions to Section 203.1230(a)(5)(A) as provided on page 6 of Illinois EPA's Comment.

Section 203.1260 Net Emissions Increase

Illinois EPA recommends revising proposed Section 203.1260(b)(3)(D) to reference 40 CFR § 52.21 in order to address PSD permits historically issued by Illinois EPA as a delegated

[4] "Commence." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/commence. Accessed 25 Mar. 2022.

[5] Proposed Section 203.1030 (Definitions) provides that, unless otherwise defined in Part 203, terms used in Part 203 have the same meaning as the terms used in 35 Ill. Adm. Code Part 211. There is no definition of "commence" in Part 211 that would be applicable to the use of "commence" in Section 203.1500(d).

permitting authority. IERG agrees with Illinois EPA's revision and proposes to revise Section 203.1260(b)(3)(D) as shown below:

> D) The Agency has not relied on it in issuing any permit under 35 Ill. Adm. Code 201.142 or 201.143 or this Part or 35 Ill. Adm. Code Part 204 or 40 CFR 52.21 and has not relied on it for demonstrating attainment or reasonable further progress.

For the reasons explained by IERG in the TSD, inclusion of rule citations other than Part 203 in Section 203.1260(b)(3)(D) is, in fact, immaterial. Illinois EPA indicates disagreement with this statement. Illinois EPA does not indicate disagreement with the substantive explanation in the TSD, namely that the provision at issue only concerns emissions offsets under the nonattainment requirements and that such would only be manifested in a permit issued by Illinois EPA under Part 203. *See* Illinois EPA's Comment at 9. Nonetheless, IERG is not requesting that the Board characterize any provision of the adopted rule as immaterial.

Section 203.1340 Regulated NSR Pollutant

IERG proposes to retain Section 203.1340(c), as explained above. Inclusion of the transition provision concerning VOM and ammonia as $PM_{2.5}$ precursors would serve to make Part 203 complete. If IERG's revisions are adopted, affected entities would no longer need to look at multiple sources, i.e., Part 203, the federal blueprint rule, and Appendix S, in order to determine which requirements are applicable. Instead, the effect of IERG's Proposal would mean that affected entities would need to look at just one place – Part 203 – to see what requirements apply. This is beneficial to all entities that deal with the NA NSR rules, including Illinois EPA, the Board, regulated entities, and third parties. As such, IERG proposes to retain Section 203.1340(c) and related provisions.

Further, Illinois EPA recommends revising proposed Section 203.1340(d) to remove references to "the applicable SIP" in order to clarify what constitutes direct $PM_{2.5}$ emissions and

PM_{10} emissions prior to January 1, 2011 for purposes of "regulated NSR pollutant." Illinois EPA's Comment at 17-19. IERG agrees with Illinois EPA's suggested revisions to Section 203.1340(d) as provided on page 18 of Illinois EPA's Comment.

Section 203.1370 Significant

Proposed Section 203.1370(a) provides a 70 tons per year significant threshold for ammonia as a precursor to $PM_{2.5}$. Illinois EPA argues that the 70 tons per year significant threshold is not sufficiently justified and recommends either not setting a significant level for ammonia or setting the significant level at 40 tons per year. Illinois EPA's Comment at 22-23. While IERG disagrees with Illinois EPA's position that the proposed 70 tons per year threshold is not sufficiently justified, IERG does not oppose revising the significant threshold for ammonia to 40 tons per year.

Section 203.1410 Applicability

IERG reiterates its position that IERG's proposed revisions to include Project Emissions Accounting in Part 203 should remain as is. Illinois EPA and the Attorney General's Office have referenced USEPA's initiation of a rulemaking process to consider revisions to address concerns raised by the Petition for Reconsideration of the Project Emissions Accounting Rule. Illinois EPA's Comment at 26, Footnote 34; Post-Hearing Comment of the Illinois Attorney General's Office, PCB R 22-17 (Mar. 16, 2022) (hereinafter "IAGO's Post-Hearing Comment"). However, notably, neither Illinois EPA nor the Attorney General's Office recommends removing the Project Emissions Accounting provisions from IERG's Proposal.

As explained in its responses to the Board's Pre-filed Questions, proposed Section 203.1410(c)(5)-(6) is consistent with the currently effective federal blueprint rule provisions at 40 CFR § 51.165(a)(2)(ii)(F)-(G), including the revisions to that rule concerning Project

Emissions Accounting that were promulgated on November 24, 2020, and became effective on December 24, 2020. Illinois EPA has proposed, and the Board has adopted, numerous regulatory provisions in the past that were based on federal rules being challenged at the time of adoption. IERG does not anticipate that there would be a time when the Board could adopt revisions to the NA NSR regulations that are consistent with then-current federal requirements without adopting rule provisions that are subject to legal challenge, as the NSR regulations are frequently subject to litigation. The federal Project Emissions Accounting provisions are currently in effect and, therefore, IERG believes it is appropriate to proceed with the proposed revisions to Part 203.

Further, IERG takes issue with statements by the Attorney General's Office that characterize the Project Emissions Accounting rule as being the basis for IERG's Proposal. *See* IAGO's Post-Hearing Comment at 1 (". . . initiated a new Federal rulemaking process addressing the Project Emissions Accounting rule, which is the basis for the proposal currently before the Board in the above-captioned matter. . . .") and 2 ("As discussed in the most recent Board hearing, the Project Emissions Accounting rule is the basis for the Proposal before the Board."). IERG did not assert at the first hearing, and has not stated in any filings entered into the record at the hearing, that the Project Emissions Accounting rule is the sole basis for this Proposal. *See* Transcript for February 7, 2022 Hearing, PCB R 22-17 (Feb. 7, 2022). As explained at the first hearing and in numerous filings in this proceeding, the purpose of IERG's Proposal is to make the Board's NA NSR regulations up-to-date and consistent with the federal NA NSR regulations. Transcript for February 7, 2022 Hearing at 8:6-17; IERG's Pre-Filed Answers to Board's Pre-Filed Questions, PCB R 22-17 at 1-2 (Feb. 15, 2022); Pre-filed Testimony of Alec Davis, PCB R 22-17 at 3 (Jan. 6, 2022); Statement of Reasons, PCB R 22-17 at 2-3, 15, 42 (Aug. 16, 2021).

The provisions incorporating the Project Emissions Accounting rule are only a fraction of the updated federal NA NSR rules incorporated into IERG's Proposal.

IERG also takes issue with the statements by the Attorney General's Office that USEPA has decided to amend the Project Emissions Accounting rule. *See* IAGO Post-Hearing Comment at 2. The Attorney General's Office references and attaches the February 10, 2022 Motion to Govern filed by USEPA in support of its assertions. *See id*. However, these statements are incorrect and the Motion to Govern does not support such assertions. Instead, the Motion to Govern states that USEPA has initiated its rulemaking process and references its prior statement, which stated that USEPA "plans to initiate, at its own discretion, a rulemaking process to *consider* revisions to the EPA's New Source Review regulations . . . ." *See id*., Exhibit A (emphasis added). In the Motion, USEPA requests the cases be held on abeyance "to allow the agency to *consider* revisions to the challenged rule." *See id*. (emphasis added). Therefore, as a point of clarification for the Board, USEPA has recently initiated a rulemaking in which it will *consider* changes related to the Project Emissions Accounting rule. USEPA is only considering these changes and it is possible that USEPA may decide to not make any changes to the NA NSR rules based on the petitioners' concerns.

Lastly, in Footnote 32, Illinois EPA asserts that, under existing Part 203, the increase in emissions from the construction of a new emissions unit is equal to its potential to emit and that the basis for this is in the plain language of existing Section 203.208 and Section 203.104(c), without need for interpretative policy. Illinois EPA's Comment at 25, Footnote 32. These assertions are incorrect. As explained previously, under existing Section 203.208, the emissions increase from a project is the "increase in actual emissions from" the project, and the currently effective regulations do not prescribe how this increase is to be calculated. For many projects

involving installation of a new emissions unit, the most appropriate and representative way of calculating the "increase in actual emissions" is based on something other than the potential to emit of the new emissions unit. For example, where the project is the replacement of an existing emissions unit with a new emissions unit or where a new emissions unit will result in a decrease in utilization of an existing emissions unit, the project will necessarily result in both an increase in emissions at the newly constructed unit and a decrease in emissions at the existing unit. Under existing Part 203, an appropriate way to calculate the increase in actual emissions is the amount by which the post-project actual emissions of the new unit exceeds the pre-project actual emissions of the existing unit.

IERG does not disagree that the current rule language can be construed as allowing the calculation approach described by Illinois EPA; indeed, IERG acknowledges that this approach—ignoring the decrease in emissions from an existing unit that will be replaced or will experience a decrease in utilization as a result of the project—was recommended by USEPA policy interpreting the 1980 federal NA NSR regulations.[6] However, this result is clearly a result of interpretative policy and IERG strenuously disagrees that it is dictated by the plain language of the currently effective NA NSR regulations in Illinois. This fact was acknowledged by USEPA when proposing rule revisions in 2006:

> The EPA recognizes that in the past some sources and permitting authorities have counted decreases in emissions at the individual units involved in the project when determining an overall project emissions increase (*i.e.*, Step 1 of the NSR test), while some have not. In other words, some States allowed sources to "project net" and other States only allowed project decreases to be considered when netting on a source-wide basis (*i.e.*, in Step 2 of the NSR test).
>
> ***

[6] See, for example, 1/12/1989 letter from E.J. Lillis, USEPA, to M.J Hayes, Illinois EPA, at 5, publicly available on USEPA's website at https://www.epa.gov/sites/default/files/2015-07/documents/argo_ii.pdf.

> We are concerned with inconsistent implementation of our past **policy** to only consider increases in Step 1, and we frequently receive questions related to our policy on project netting.

"Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Debottlenecking, Aggregation, and Project Netting," 71 Fed. Reg. 54235, pp. 54248-49 (Sept. 14, 2006) (emphasis added).

It is important to note, however, that the above discussion does not relate to a proposed recommendation or revision by Illinois EPA. It is solely to provide clarity in the record in this proceeding, particularly by addressing and correcting Illinois EPA's explanation in Footnote 32 of its Comment. IERG notes, however, that such discussion points to the benefit of the blueprint rule's clear approach for determining how project emissions are to be calculated.

Section 203.1810 Emission Offsets

Section 203.1810(f)(1)(A)

Illinois EPA recommends adding the phrase "federally enforceable" to proposed Section 203.1810(f)(1)(A) in order to clarify that emissions reductions from shutdowns or curtailments must be federally enforceable in order to be credited for offsets. Illinois EPA's Comment at 29-30. However, as Illinois EPA acknowledges, the requirement that emissions reductions relied upon as emissions offsets be federally enforceable is already addressed in proposed Section 203.1810(c)(1). *See id.* at 28. While IERG believes including "federally enforceable" in Section 203.1810(f)(1)(A) would be redundant, IERG nevertheless does not object to Illinois EPA's proposed revision as provided on page 30 of Illinois EPA's Comment.

Section 203.1810(g)(3)

Illinois EPA proposes to revise Section 203.1810(g)(3) to align more closely with the language in Section 173(c)(2) of the Clean Air Act. Illinois EPA's Comment at 30-31.

However, the phrase "emissions reductions for purposes of any such offset requirement" that Illinois EPA suggests should be added, is redundant. This language is essentially the same as the initial wording in Section 203.1810(g) ("The determination of emissions reductions for offsets must be made as follows"), which prefaces Section 203.1810(g)(3). Additionally, the phrase "such offset requirement" as used in Section 173(c)(2) of the Clean Air Act makes sense because the core requirement for offsets is located in the immediately preceding paragraph in Section 173(c)(1). However, in the proposed amendments to Part 203, the core offset requirement is located forty-two paragraphs and subparagraphs above Section 203.1810(g)(3) in Section 203.1810(a)(1). Therefore, the phrase "such offset requirement" does not make sense in Section 203.1810(g)(3).

Further, the inclusion of the word "incidental" ahead of "emission reductions[7] which are not otherwise required by this Act" is superfluous. The inclusion of "emissions reductions for purposes of any such offset requirement" and the word "incidental" is so superfluous that USEPA decided to not include the language in the blueprint rule or Appendix S. IERG's proposed wording of Section 203.1810(g)(3) is intended to make the provision clearer and does not alter the substantive meaning of the provision. Therefore, IERG recommends leaving proposed Section 203.1810(g)(3) as is.

Section 203.1810(h)

Illinois EPA recommends removing proposed Section 203.1810(h) in its entirety. Illinois EPA's Comment at 31-33. Proposed Section 203.1810(h) allows for interprecursor trading

[7] Note that Illinois EPA's block quote of proposed Section 203.1810(g)(3) contains a typographical error. The second sentence of proposed Section 203.1810(g)(3) should start with "Emissions reductions" not "Emissions reduction". *See* Illinois EPA's Comment at 30.

("IPT") of emissions offsets for $PM_{2.5}$. The basis for the proposed IPT provisions is the blueprint rule. Specifically, 40 CFR § 51.165(a)(11) states:

> The plan shall require that, in meeting the emissions offset requirements of paragraph (a)(3) of this section, the emissions offsets obtained shall be for the same regulated NSR pollutant, unless interprecursor offsetting is permitted for a particular pollutant as specified in this paragraph. The plan may allow the offset requirements in paragraph (a)(3) of this section for direct $PM_{2.5}$ emissions or emissions of precursors of $PM_{2.5}$ to be satisfied by offsetting reductions in direct $PM_{2.5}$ emissions or emissions of any $PM_{2.5}$ precursor identified under paragraph (a)(1)(xxxvii)(C) of this section if such offsets comply with the interprecursor trading hierarchy and ratio established in the approved plan for a particular nonattainment area.

40 CFR § 51.165(a)(11). The federal NA NSR rule clearly provides for IPT of emissions offsets for $PM_{2.5}$.

As referenced in the Statement of Reasons, the D.C. Circuit Court in 2021 struck down IPT for ozone, but did not rule on IPT for $PM_{2.5}$. Statement of Reasons at 31 (*citing Sierra Club, et al. v. Environmental Protection Agency, et al*., 985 F. 3d 1055 (D.C. Cir. 2021)). Illinois EPA offers a different, more tenuous, reading of the D.C. Circuit case to support its recommendation to remove Section 203.1810(h) from IERG's Proposal. Illinois EPA argues that "a closer reading of the D.C. Circuit's 2021 decision *suggests* that this court would not find authority for IPT for $PM_{2.5}$ under the Clean Air Act *if this question were ever before it*." Illinois EPA's Comment at 31-32 (emphasis added). Indeed, the question for authority of IPT for $PM_{2.5}$ was not in front of the D.C. Circuit in *Sierra Club v. EPA* and, as such, the Court made no such ruling as to $PM_{2.5}$ IPT. *Sierra Club v. EPA*, 985 F. 3d 1055; *see* Illinois EPA's Comment at 32 ("The case before the D.C. Circuit did not directly address $PM_{2.5}$ but rather concerned the implementation of the NAAQS for ozone."). Instead, Illinois EPA asserts that the findings that the D.C. Circuit made as to ozone "is transferable" to $PM_{2.5}$ IPT. Illinois EPA's Comment at 34.

However, because the D.C. Circuit did not rule on, or even address $PM_{2.5}$ IPT in its 2021 opinion, the authority for $PM_{2.5}$ IPT remains in the blueprint rule.

Additionally, IERG strenuously disagrees with Illinois EPA's speculation regarding what would transpire if $PM_{2.5}$ interprecursor trading were to be reviewed by the D.C. Circuit or another court with jurisdiction regarding the Illinois SIP. The rationale of the D.C. Circuit in the 2021 case relied almost entirely on statutory language that exists only in subpart 2 of part D of title I of the Clean Air Act. This subpart is specific to ozone and its precursors. There is no comparable language in subparts 1 and 4 of part D of title I, which are the provisions governing emissions offsets in $PM_{2.5}$ nonattainment areas. The only statutory provision cited by the D.C. Circuit in its decision regarding ozone IPT which also applies to $PM_{2.5}$ IPT is Section 173(c)(1) of the Clean Air Act, which is the core offset requirement in subpart 1 of part D applicable to all criteria pollutants. 42 USC § 7503 ("The owner or operator of a new or modified major stationary source may comply with any offset requirement in effect under this part for increased emissions of any air pollutant only by obtaining emission reductions of such air pollutant...."). The D.C. Circuit's consideration of this provision was solely for the purpose of noting that ozone is not directly emitted from stationary sources. This is not true of $PM_{2.5}$, which is directly emitted from stationary sources.

Because the D.C. Circuit did not rule on, or even address $PM_{2.5}$ IPT in its 2021 opinion, the authority for $PM_{2.5}$ IPT remains in the blueprint rule. There is no action on behalf of USEPA to reconsider the authority for $PM_{2.5}$ IPT and USEPA has not issued a SIP call to any State for which the approved implementation plan provides for $PM_{2.5}$ IPT. Therefore, IERG proposes that Section 203.1810(h), and the provisions referencing IPT, should remain as is.

Subpart Q – Plantwide Applicability Limits

Illinois EPA recommends that, without justification by IERG, proposed Sections 203.2280, 203.2290, and 203.2330 be revised so the wording aligns more closely with the blueprint rule language. Illinois EPA's Comment at 35-36. These proposed provisions do not include the following phrase in the blueprint rule as it relates to the applicable significant level: "or in the CAA, whichever is lower." IERG acknowledges that this phrase is included in the blueprint rule provisions; however, this language is not clear because there are no significant levels in the Clean Air Act. As such, inclusion of this phrase only serves to add confusion to these provisions. Of note, in pre-filing discussions on the draft rule language, Illinois EPA did not object to IERG's proposed approach with the suggestion that additional explanation be included in the Technical Support Document ("TSD"). IERG included additional explanation on page 14, footnote 13 of the TSD. Therefore, IERG proposes that Sections 203.2280, 203.2290, and 203.2330 remain as proposed by IERG.

As to proposed Section 203.2360, Illinois EPA disagrees with the Board's revisions to this section as proposed in the Board's Pre-filed Questions. Illinois EPA's Comment at 36-37. Illinois EPA asserts that the Board's proposed revisions would fail to include all monitoring systems indicated in Section 203.2360(b). *Id*. at 37. Illinois EPA goes onto assert that it would prefer consistency between the blueprint rule, state regulations, Part 204 and proposed Part 203 unless a substantive reason exists for a difference. *Id*. However, Illinois EPA does not recommend a specific revision to proposed Section 203.2360. As such, IERG proposes reverting to the language in Section 203.2360 as originally proposed by IERG.

Lastly, as to Illinois EPA's "Clarification to IERG's TSD" on page 37 of its Comment, IERG believes no such clarification is needed. The proposed rule language at Section

203.2360(a)(2), which is consistent with the blueprint language at 40 CFR § 51.165(f)(9)(i)(B), provides that "[t]he Agency shall decide whether and how the PAL allowable emissions will be distributed and issue a revised permit incorporating allowable limits for each emissions unit, or each group of emissions units, as the Agency determines is appropriate." The description of this provision in the TSD is accurate and requires no clarification. Illinois EPA's assertion that the blueprint rule "does not discuss the establishment of new emission caps by the permitting authority" is incorrect.

203.2530 Construction Permit

Illinois EPA proposes to revise proposed Section 203.2530(c) in order to more clearly address the public participation obligations that would apply in circumstances involving a permit issued under proposed Part 203, Subpart R. Illinois EPA's Comment at 39-41. In order to accomplish this, Illinois EPA proposes to include the phrase "as applicable" at the end of proposed Section 203.2530(c). *See id* at 41. IERG does not object to this revision.[8]

Additional Items in Part 203

On pages 41-42 of Illinois EPA's Comment, Illinois EPA recommends several revisions to proposed Sections 203.2390 and 203.2520. Illinois EPA recommends these revisions based on the approach that the Joint Committee on Administrative Rules ("JCAR") took in the rulemaking to adopt Part 204. Illinois EPA's Comment at 41. IERG agrees with Illinois EPA's suggested revisions to these sections, as provided on pages 41-42 of Illinois EPA's Comment.

[8] Illinois EPA stated in its Comment that "[i]t is possible that a new major stationary source or major modification in an attainment or unclassifiable area that would cause or contribute to a NAAQS violation may need both a PSD permit under Part 204 and proposed Part 203, Subpart R *and a NA NSR permit under Part 203*." Illinois EPA's Comment at 40 (emphasis added). However, for clarification purposes, a NA NSR permit under Part 203, other than Subpart R, would not be issued in an attainment or unclassifiable area because Part 203 contains the permit requirements for nonattainment areas.

Proposed Revisions to Part 204

In its Comment, Illinois EPA offers additional explanation as to the effect of the proposed revisions to Part 204 to include Project Emissions Accounting. Illinois EPA's Comment at 42-44. Notably, Illinois EPA does not offer a recommendation as to these proposed revisions. *See id*. Also notably, Illinois EPA states that "IERG's proposed revisions to Part 204 would likely be acceptable as a revisions [sic] to Illinois' SIP. . . ." Illinois EPA's Comment at 44. Therefore, the proposed revisions to Part 204 should remain.

Lastly, as the Board will note, this filing does not address several portions of Illinois EPA's Comment. This is because Illinois EPA's discussions of those sections simply offered additional insight or explanation concerning those provisions, which IERG does not take issue with. IERG reserves the right to supplement this post-hearing comment prior to the second hearing in this proceeding.

WHEREFORE, for the above and foregoing reasons, the Illinois Environmental Regulatory Group hereby respectfully submits its Second Post-Hearing Comment for the Illinois Pollution Control Board's consideration.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP

Dated: April 4, 2022

By: /s/ Melissa S. Brown
One of Its Attorneys

N. LaDonna Driver
Melissa S. Brown
HEPLERBROOM, LLC
4340 Acer Grove Drive
Springfield, Illinois 62711
LaDonna.Driver@heplerbroom.com
Melissa.Brown@heplerbroom.com
(217) 528-3674

CERTIFICATE OF SERVICE

I, Melissa S. Brown, the undersigned, hereby certify that I have served the attached **SECOND POST-HEARING COMMENT OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP** on April 4, 2022, to the following:

Don A. Brown
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
Don.Brown@illinois.gov

Mr. Daniel Pauley
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph Street
Suite 11-500
Chicago, Illinois 60601
Daniel.Pauley@illinois.gov

Sally Carter
Assistant Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794
Sally.Carter@illinois.gov

Renee Snow
General Counsel
Illinois Department of Natural Resources
One Natural Resource Way
Springfield, Illinois 62702-1271
renee.snow@illinois.gov

Kathryn A. Parmenter
Assistant Attorney General
Jason James
Assistant Attorney General
69 West Washington Street
Suite 1800
Chicago, Illinois 60602
Kathryn.Pamenter@ilag.gov
Jason.James@ilag.gov

Deborah Williams
Regulatory Affairs Director
City of Springfield
800 East Monroe
Office of Public Utilities
Springfield, IL 62757
deborah.williams@cwlp.com

Daryl Grable
Greater Chicago Legal Clinic, Inc
211 West Wacker Drive, Suite 750
Chicago, IL 60606
dgrable@clclaw.org

That my email address is: Melissa.Brown@heplerbroom.com.

That the number of pages in the email transmission is 28 total pages.

That the email transmissions, depositing said documents in the United States Mail, and depositing said documents in a UPS drop box, as noted above, took place before 5:00 p.m. on the date of April 4, 2022.

/s/ Melissa S. Brown

Date: April 4, 2022