BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
PROPOSED CLEAN CAR AND TRUCK STANDARDS	)	R2024-017 (Rulemaking – Air)

NOTICE OF FILING

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Please take notice that I have today filed with the Illinois Pollution Control Board the following documents: Rule Proponents' Response in Opposition to Motions to Dismiss, along with a Certificate of Service and this Notice of Filing.

Date: October 1, 2024

Respectfully submitted,

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RULE PROPONENTS' RESPONSE IN OPPOSITION TO MOTIONS TO DISMISS

The Proposed Rules in this proceeding would regulate motor vehicles' emission of pollutants that overwhelming scientific consensus finds cause massive public health and economic harms through both localized air pollution and climate change. The Chicago Environmental Justice Network, Respiratory Health Association, Center for Neighborhood Technology, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club (collectively, "Rule Proponents") ask the Board to adopt the Proposed Rules to address the public health, environmental, and economic impacts of vehicle emissions through nuanced, balanced, and phased programs that condition the sale of light-, medium-, and heavy-duty vehicles. Promulgating the Proposed Rules thus fits squarely within the Board's express statutory authority to set "standards and conditions regarding the sale" of "vehicles" to address "air pollution hazard[s.]" 415 ILCS 5/10(A)(d). Indeed, as explained below, the Board has previously exercised jurisdiction to review whether to adopt prior versions of the Proposed Rules and the General Assembly in 2019 explicitly reiterated that the Board has the power to regulate emissions from the transportation sector that contribute to climate change.

The Motions to Dismiss ("Motions") filed by the Illinois Fuel & Retail Association ("IFRA") and the Indiana, Illinois, Iowa Foundation for Fair Contracting ("IIIFFC") (collectively, "Fuel Industry Intervenors") should be denied because Fuel Industry Intervenors

ask the Board to ignore the plain language of Illinois' Environmental Protection Act ("the Act"). Sidestepping that express statutory authority, Fuel Industry Intervenors misrepresent statutory terms of art, contort allegations regarding legislative silence, and cite to past Board proceedings that actually demonstrate the Board possesses the precise jurisdiction the Motions argue it lacks. It is farcical that the Motions assert the Board has no authority to promulgate the Proposed Rules when § 10 of the Act specifically empowers the Board to "adopt regulations" that are "standards and conditions regarding the sale . . . of any . . . vehicle . . . determined by the Board to constitute an air-pollution hazard." 415 ILCS 5/10(A)(d).

To deny the Motions, the Board should look no further than that express authority to regulate that specifically covers the Proposed Rules. Because the Motions lack merit and articulate no valid legal arguments against the Board's jurisdiction to review the substance of the Rule Proponents' petition here, Rule Proponents respectfully request that the Board deny the Motions.

I. Background of the Proposed Rules and Motions to Dismiss.

Governor Pritzker committed the State in 2019 to achieve net-zero economy-wide greenhouse gas emissions no later than 2050 and, in 2021, the General Assembly established a goal of putting one million electric vehicles on Illinois roads by 2030. Statement of Reasons at 11, 16 (citing 20 ILCS § 627/45). To enable the State to meet these climate commitments and to address the public health scourge of local air pollution from vehicles—which emit 60 million tons of greenhouse gases, 71,000 tons of ozone-forming nitrogen oxides, and nearly 25,000 tons of fine particle pollution per year in Illinois, *see* Statement of Reasons at 22, 30—Rule Proponents, initiated this proceeding to request that the Illinois Pollution Control Board (the "Board") adopt California's Advanced Clean Cars II ("ACC II"), Advanced Clean Trucks

("ACT"), and Low-Nitrogen Oxides Omnibus ("Low NOx") regulations (collectively referred to as the "Proposed Rules"). *Id.* As detailed in the Statement of Reasons, implementation of the Proposed Rules in Illinois is conservatively projected to achieve tens or even hundreds of billions of dollars in cumulative, net societal benefits by 2050. Statement of Reasons at 64.

The Proposed Rules will deliver these benefits by conditioning the sale of new motor vehicles in Illinois through systems of emissions standards. The ACC II rule establishes pollution standards for light-duty cars and trucks and establishes manufacturer sales requirements for zero-emission vehicles (or "ZEVs"), which include plug-in hybrids, battery electric vehicles, hydrogen fuel cell vehicles, and any other vehicles that can operate at the standard set of zero tailpipe emissions.[1] *Id.* The ACC II rule also requires vehicle manufacturers to increase the proportion of ZEVs they sell in the state each year, culminating in a 100% new ZEV sales requirement that would begin in 2035. *Id.* The ACT and Low NOx regulations focus on reducing tailpipe pollution from medium- and heavy-duty ("M/HD") vehicles. Specifically, the Low NOx rule sets emission standards that require reductions in smog-forming pollutants—small particulate matter, often referred to as "PM 2.5," and nitrogen dioxide—emitted by new M/HD combustion engines. *Id.* Like the ACC II rule's approach to light-duty vehicles, the ACT rule regulates emissions from M/HD vehicles by requiring manufacturers to meet annual sales requirements for zero-emission and near zero-emission M/HD vehicles in the state. *Id.* Under the ACT rule, sales requirements vary by vehicle class and increase gradually over time. Since the Proposed Rules are complementary, Rule Proponents propose that they should be considered and adopted in a single rulemaking proceeding. However, each of the three Proposed Rules is

[1] The Proposed Rules define "Zero-Emission Vehicles" to include any "vehicle that produces zero or near-zero exhaust emissions of any criteria pollutant (or precursor pollutant) or greenhouse gas under any possible operational modes or conditions," and include definitions for related terms such as "near-zero-emission vehicle" and "plug-in hybrid electric vehicle." Rulemaking Petition at 232 (at proposed section 35 Ill. Adm. Code § 242.102).

designed to be implementable as a stand-alone rule, and they could be adopted on an individual basis.

The Board has express authority under state law to adopt the Proposed Rules. Statement of Reasons at 16-18. The Act aims to "restore, maintain, and enhance" state air quality, 415 ILCS 5/8, and grants the Board the broad power to "adopt regulations to promote the purposes of the Act," including, specifically, the authority to establish "standards and conditions regarding the sale, offer, or use of any fuel, vehicle, or other article determined by the Board to constitute and air-pollution hazard." 415 ILCS 5/10(a)(D). The Proposed Rules fit squarely within this explicit grant of statutory authority because they would establish standards for vehicle emissions—i.e. by defining "ZEV" and "near-ZEV" in reference to emissions levels of specific air pollutants—and condition the sale of vehicles by creating increasing sales requirements in reference to those emissions standards. As explained further below, Fuel Industry Intervenors' Motions focus on arguments opposing the regulation of gas and diesel ***fuels***, a fundamental strawman simply not at issue given that the Proposed Rules fall under the Board's express authority to regulate the sale of ***vehicles***.

The Board's consideration of the Proposed Rules is also consistent with the federal Clean Air Act. The Clean Air Act requires all new motor vehicles sold in the U.S. to be certified to the emissions standards set by either the U.S. Environmental Protection Agency ("EPA") or the State of California. 42 U.S.C. §§ 7521, 7543. Specifically, Clean Air Act § 177 allows states to adopt California's standards if that state (1) either is or was in "nonattainment" with any of the health-based National Ambient Air Quality Standards set under the Clean Air Act, (2) provides manufacturers with at least two years of lead time to comply with the California's standards, and (3) adopts emissions standards identical to California's to ensure that there are only two

standards that manufacturers must meet: the federal standard or the California standard. Statement of Reasons at 30. Promulgation of the Proposed Rules fits within this Clean Air Act authorization because the Chicago and the St. Louis metro areas currently fail to meet the federal eight-hour ozone National Ambient Air Quality Standard, and since the Proposed Rules would allow the mandatory two-year manufacturer lead time and would adopt identical model-year regulations as those in the California standards. Statement of Reasons at 30-34. Fuel Industry Intervenors do not dispute that this is how the Clean Air Act operates or that Illinois would meet the requirements to adopt the California standards at issue under § 177 in the event the Board adopts the Proposed Rules in this proceeding.

II. The Board has Express Authority to Adopt the Proposed Rules under the Act.

Fuel Industry Intervenors' Motions should be denied because they ask the Board to ignore its express statutory authority—and responsibility—to regulate "air-pollution hazards" from "vehicles" for the public benefit. The Board should exercise its clear authority and consider the important public health and economic values at stake through this rulemaking process.

A. The Act Authorizes the Board to Set Emission Standards for Sources of Harmful Air Pollution, Including Vehicles.

The Act provides broad regulatory authority to the Board and specifically provides broad powers to create emissions standards to limit air pollution. As set forth in § 8 of the Act, the General Assembly intended the Act to "assure that no air contaminants are discharged into the atmosphere without being given the degree of treatment or control necessary to prevent pollution." 415 ILCS 5/8. The purposes of the Act are broad: "protect health, welfare, property, and the quality of life." *Id.* The Act defines "air pollution" as "the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be

injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property." 415 ILCS 5/3.115. Section 10 of the Act further grants broad authority to the Board to issue regulations that advance those statutory purposes:

> (A) The Board, pursuant to procedures prescribed in Title VII of this Act, may adopt regulations to promote the purposes of this Title. Without limiting the generality of this authority, such regulations may among other things prescribe:
> …
> ***(d) Standards and conditions regarding the sale,*** offer, or use ***of any*** fuel, ***vehicle,*** or other article ***determined by the Board to constitute an air-pollution hazard****;*

415 ILCS 5/10(A) (emphasis added).

Indeed, invoking this § 10 authority, the Board already has issued regulations that set emissions standards for the emission of particulate matter and nitrogen oxides from stationary sources—types of pollutant targeted by the Proposed Rules when emitted by vehicles. *See* 35 Ill. Adm. Code § 212.100 *et seq.* (Visible and Particulate Matter Emissions); 35 Ill. Adm. Code § 217.100 *et seq.* (Nitrogen Oxides Emissions).

Because the Act's general grant of authority specifically empowers the Board to regulate via the promulgation of standards and because the Proposed Rules are precisely such "standards and conditions regarding the sale" of "vehicle[s]," Fuel Industry Intervenors' reliance on *Village of Lombard v. Pollution Control Bd.*, 66 Ill. 2d 503, 506 (1977), is entirely misplaced. IIIFFC Mot. to Dismiss at 5-6; IFRA Mot. to Dismiss at 4-5. In *Village of Lombard*, the Illinois Supreme Court endorsed the Board's broad standard-setting authority, holding that the Act "specifically empowers the Pollution Control Board to regulate [through] the establishment of *standards*." 66 Ill. 2d at 506 (emphasis added). What the Court rejected as beyond Board authority was entirely different: not a "standard" at all, but a proposed cross-municipal and regional water-pollution treatment system under which the Board would have "require[ed] the cooperation of independent units of local government." *Id.* at 508.

While the Act could not be read as implicitly empowering the Board to co-opt local governments, the Court was emphatic when it came to the Board's explicit statutory latitude in setting pollution "standards" to "promote the Environmental Protection Act's purposes and provisions." *Id.* at 507. The Act authorized the Board to establish "[w]ater quality *standards*, effluent *standards*, *standards* for the issuance of sewage-treatment-facility permits, *standards* for the certification of technical personnel at sewage-treatment plants, [and] abatement *standards* for water-pollution episodes."[2] *Id.* at 506 (emphasis in original). Here, unlike the structurally novel proposal in *Village of Lombard*, the Proposed Rules would establish standards to limit vehicle emissions through conditioning sales of new vehicles. They would not "compel independent governmental entities to cooperate with one another." *Id.* at 507. *Village of Lombard* directly undermines Fuel Industry Intervenors' arguments because the Illinois Supreme Court explicitly read the Act to broadly authorize the Board's adoption of standards—precisely what Rule Proponents ask the Board to do here.

Indeed, the Board has already exercised this standard-setting authority to consider adopting California's vehicle emissions standards under § 8 and § 10 of the Act, and, as with its misuse of *Village of Lombard*, IFRA's Motion is refuted by the very precedent it cites. In 1993, the Board previously considered using its § 10 standard-setting authority to adopt California's vehicle standards and decided—on the merits as a policy matter—not to adopt the proposed regulations at that time. *See* In the Matter of: Application of California Motor Vehicle Control Program in Illinois, PCB R89-17(C), Opinion and Order (Jan. 7, 1993); IFRA Mot. to Dismiss at 3-4. In exercising jurisdiction under the Act to consider the substance of the proposal, the Board

[2] Though *Village of Lombard* deals with authority under Title III, Water Pollution, instead of Title II, Air Pollution, as the Motions explain, the rulemaking authority under Titles II and III are analogous because §§ 11 and 13 under Title III are substantively identical to §§ 8 and 10 under Title II, respectively. *See* IIIFFC Mot. to Dismiss at 6, n.1, (citing 415 ILCS 5/8, 10, 11, 13).

"reviewed and considered all testimony and comments," which ranged from "almost unqualified support for the adoption of California standards to concern about the effect of the California standards for heavy-duty engines to suggestions that the Board defer any action to allow the United States Congress to act on the possibility of adopting the California standards as federal standards." In the Matter of: Application of California Motor Vehicle Control Program in Illinois, PCB R89-17(A) & (B), Opinion and Order (Apr. 12, 1990). The Board ultimately chose not to adopt the California standards in 1993 based on "uncertainties associated with availability of required technology, effectiveness in reducing harmful emissions, fuel implications, and economic costs," in addition to "unanswered questions regarding the appropriateness of California air standards to Illinois geography and climate." *Id.* at 4. The Board, however, stated that it had statutory authority to adopt the California standards, noting that, "dismissal of this proceeding at this time did not foreclose a future adoption of the California standards." *Rulemaking Update: Proposed California Motor Vehicles Control Program Dismissed, R89-17(C),* ENVIRONMENTAL REGISTER NO. 464 (Feb. 3, 1993) (https://pcb.illinois.gov/documents/dsweb/Get/Rendition-89168/index.htm).

Thirty years later, the same statutory authority exists, but the substantive merits of the policy question before the Board have changed. IFRA's Motion asserts that "the Board may use its own precedent to dismiss this matter," IIFRA Mot. to Dismiss at 4. However, simply reading that precedent demonstrates that the Board definitively *has* the authority to consider the Proposed Rules on their merits and, instead, "may use its own precedent" to summarily deny the Motions. The current Proposed Rules are structured differently than those old California rules and are designed to respond to technological developments in the transportation sector and an improved understanding of the threats of global climate change and local air pollution. Evidence

is now readily available demonstrating the public health effects of vehicle tailpipe emissions, particularly in low-income and environmental justice communities, and the experiences of more than a dozen states that have adopted California's standards further demonstrate the technological feasibility of industry compliance. Statement of Reasons at 14. The Board should deny Fuel Industry Intervenors' Motions and proceed to consider that evidence on its policy merits, just as it did thirty years ago.

B. The Board's Authority to Regulate "Air-Pollution Hazards" Is Not Limited to Regulation of "Hazardous Substances."

IIIFFC argues that the legislature limited the Board's authority to address "air-pollution hazards" under § 10 of the Act to only those pollutants defined as a "hazardous substance" under other parts of the Act. IIIFFC Mot. to Dismiss at 7-8. But IIIFFC offers no case, statute, regulation, or guidance even suggesting that the Board's authority is constrained in that way. There is zero evidence that the legislature intended that only a "hazardous substance" could create an "air-pollution hazard," and any such interpretation clearly conflicts with the statutory definitions in the Act.

The Act authorizes the Board to regulate "air-pollution hazards," 415 ILCS 4/10(A)(d), and defines "air pollution" as "the presence in the atmosphere of one or more contaminants in sufficient quantities and of such characteristics and duration as to be injurious to human, plant, or animal life, to health, or to property, or to unreasonably interfere with the enjoyment of life or property." 415 ILCS 5/3.115. Accordingly, contaminants are "air pollution" for the purposes of § 10 if the Board determines them to be "injurious" to life, health, or property—that is, if these contaminants pose a *hazard*. "Hazard" is not defined in the Act, but generally means "[d]anger or peril; esp., a factor contributing to a peril." HAZARD, Black's Law Dictionary (12th ed.

2024).[3] Applying the plain meaning of the statute's terms, if the Board determines "any … vehicle" creates an "air-pollution hazard,"—i.e. creates danger or risks harm through the emission of "air pollution"—then § 10 gives the Board broad authority to promulgate "[s]tandards and conditions regarding the sale, offer, or use [there]of." 415 ILCS 5/10(A)(d).

Courts consider the "plain and ordinary meaning" of a statute to be the "most reliable indicator of the legislature's intent," and here that plain meaning alone is sufficient to deny the Motions. *Town & Country Util., Inc. v. Ill. Pollution Control Bd.*, 225 Ill. 2d 103, 117 (2007); (cited in IIIFFC Mot. to Dismiss at 3-4). "Where an enactment is clear and unambiguous, this court is not at liberty to read into it exceptions, limitations, or conditions that the legislature did not express; nor should this court search for any subtle or not readily apparent intention of the legislature." *People v. Laubscher*, 183 Ill. 2d 330, 337 (1998). Had the legislature intended to limit the Board's authority to regulate "air-pollution hazards" under § 10 to only hazards caused by a "hazardous substance," as IIIFFC asserts, it could have done so by actually using the defined term "hazardous substance" in § 10. More precisely, the General Assembly would have had to amend § 10 to do so because the term "hazardous pollutants" was not even incorporated into the Act from federal law until 1986—a decade-and-a-half after the phrase "air-pollution hazards" was included in the Act as first passed in 1970. *Compare* P.A. 84-1308, Art. III, § 54,

[3] The term "hazard" has been used across state legislation in ways that show the General Assembly employs this common meaning. *See* 745 ILCS 10/3-109: Hazardous Recreational Activity; *also* 70 ILCS 1865/4.11: Removal or Relocation of Airport Hazards.

This plain meaning of "hazard" has also been applied by Illinois courts in the pollution context to describe environmental harms in general. *Kim v. State Farm Fire & Casualty Co.*, 312 Ill. App. 3d 770, 774-75 (2000) (emphasis added) (defining "traditional environmental pollution" as "hazardous" to interpret insurance policy); *see also Country Mut. Ins. Co. v. Hilltop View, LLC*, 376 Ill. Dec, 240, 249 (2013) ("Generally speaking, the scope of the things seen as hazardous to the environment, as reflected in environmental protection laws today, is far greater than what we conclude our supreme court had in mind when it spoke of 'traditional environmental pollution,'" to read insurance pollution exclusion policies in the past.)).

eff. Aug. 25, 1986 (codifying "hazardous substance" definition) *with* P.A. 76-2429, § 10, eff. July 1, 1970 (enacting § 10). Of course, the General Assembly has done no such thing.

Where, as here, the legislature uses different terms, courts and this Board must presume the choice was intentional. As one Illinois Court explained, "[t]he use of certain language in one instance and different language in another indicates that different meanings and results were intended." *Benbenek v. Chi. Park Dist.*, 279 Ill. App. 3d 930, 933 (1st Dist. 1996). "Hazardous substance," as it pertains to air pollution,[4] is statutorily defined as a "hazardous air pollutant listed under § 112 of the Clean Air Act." 415 ILCS 5/3.215(E). The Clean Air Act § 112 list includes only chemicals that U.S. EPA has found to be specifically "carcinogenic, mutagenic, teratogenic, [or] neurotoxic." *See* 42 U.S.C § 7412(b)(2). Section 10(d) of the Act, by contrast, is part of a broad section that plainly is intended to give the Board authority to promulgate regulations to address many forms of air pollution that may be detrimental to the health of Illinois residents. To read "air-pollution hazard" in § 10 of the Act as limited to specially designated "hazardous substances" as defined in entirely different federal laws ignores the legislative choice to use different phrases in these fundamentally different statutory sections.[5]

[4] The definition of "hazardous substance" under 415 ILCS 5/3.215(E) also refers to various listed or designated chemicals, wastes, and substances under other federal statutes—the Toxic Substances Control Act; the Comprehensive Environmental Response, Compensation, and Liability Act of 1980; and the Federal Water Pollution Control Act—in addition to certain air pollutants listed at § 112 of the Clean Air Act. *See* 415 ILCS 5/3.215(E). It is a highly technical term of art denoting a special "Hazardous" designation across multiple federal statutes.

[5] Although § 112 of the federal Clean Air Act excludes petroleum-related contaminants in fuels, such as "natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel," from the definition of "hazardous substances" 42 U.S.C.A. § 7412, IIIFFC Mot. to Dismiss at 7-8, that exception is simply irrelevant here. First, the specific air pollutants at issue in this proceeding are not, themselves, "fuels," and the Proposed Rules do not regulate "fuels," at all; again, the Rules set emission standards for vehicles. Second, as established above, the Board's authority under § 10 of the Act is not limited to addressing air pollution hazards caused by "hazardous substances" in any way, so any exceptions to statutory provisions that turn on that "hazardous substance" definition cannot be relevant here.

C. IEPA's Authority to Address Vehicle Electrification Under CEJA Does Not Displace the Board's Authority to Regulate Vehicle Emissions Under the Act.

IIIFFC argues that the Board cannot adopt the Proposed Rules because the IEPA has "sole rulemaking authority to implement electrification goals and programs of the Electric Vehicle Act" as modified by the Climate and Equitable Jobs Act ("CEJA"). IIIFFC Mot. to Dismiss at 12. But CEJA does not explicitly strip the Board of its existing authority under § 10 of the Act, and implicit repeals are a drastic and disfavored judicial remedy that the Board should not impose here. It is well-established that the relationship between the Board and IEPA very often involves overlapping authority, with the Board usually enacting emission standards and other regulations that IEPA is charged with implementing. *Landfill, Inc. v. Pollution Control Bd.*, 387 N.E.2d 258, 262 (Ill. 1978) (explaining that the Board "serves both quasi-legislative and quasi-judicial functions," while IEPA "performs technical, licensing, and enforcement functions").[6] In enacting CEJA, the General Assembly was presumably familiar with this well-established relationship between the Board and IEPA, as well as the express grant of authority to the Board to set "standards" on the "sale" of "vehicles" in § 10 of the Act, and should not be understood to have implicitly altered these fundamental statutory facts. *State v. Mikusch*, 562 N.E.2d 168, 170 (Ill. 1990) ("It is presumed that the legislature, in enacting various statutes, acts rationally and with full knowledge of all previous enactments.").

Contrary to IIIFFC's suggestions, the Proposed Rules are not general economic regulations or electric vehicle mandates, but emission standards that apply to identified sources of air pollution and fall squarely within the Board's authority under the Act to set "standards or

[6] Indeed, it is routine for IEPA to administer programs to support actions that advance an environmental goal while the Board also promulgates pollution standards that work toward that same goal. For example, IEPA manages revolving loan funds and other grant and financial assistance programs for public drinking water and wastewater utilities; the Board issues rules that create or incorporate substantive pollution standards and impose permit conditions applicable to those same entities.

conditions" on the "sale" of "vehicles." *See supra* II.A; Statement of Reasons at 11. The Proposed Rules do not require any vehicles to be electric; instead, the ACC II and ACT rules require an increasing percentage of new vehicles offered for sale to be zero emitting or near zero-emitting, and the Low NOx rule requires emission reductions from medium- and heavy-duty combustion vehicles. *Id.* None of the Proposed Rules purport to address the wide range of transportation electrification issues addressed by CEJA, such as charging infrastructure, utility investments, and state incentive programs.

The express language of CEJA, of course, says absolutely nothing about the Board's pre-existing authority under the Act to promulgate the Proposed Rules. Thus, IIIFFC is left with the argument that CEJA implicitly repealed or curtailed § 10 of the Act by granting IEPA authority to implement electric vehicle rebates and related objectives. IIIFFC Mot. to Dismiss at 11-13. But such implicit repeals "are not favored," and where a later-enacted statute can be reconciled with existing law, Illinois courts must construe the statutes in a way that "gives effect to both enactments." *Lily Lake Road Def. v. Cty. of McHenry*, 619 N.E.2d 137, 140-42 (Ill. 1993) (finding that IEPA authority granted by the Act did not displace pre-existing county authority under the Zoning Act, in part, because "[a]n implied repeal results only when the terms and necessary operation of a later statute are repugnant to and cannot be harmonized with the terms and effect of an earlier statute.").

Here, however, CEJA's grant of authority to IEPA is easily reconciled with the Board's preexisting rulemaking authority under the Act to promulgate the Proposed Rules—indeed the Statement of Reasons describes at length how CEJA's provisions and goals are complemented by the Proposed Rules and may only be achievable in conjunction with implementation of the

Proposed Rules. CEJA must not be construed to implicitly repeal that authority, particularly because CEJA and the Proposed Rules are in harmony.

Moreover, there is also no language in CEJA indicating an implicit legislative intent for IEPA to have *exclusive* rulemaking authority over matters related to CEJA's electric vehicle objectives in any event. CEJA provides that IEPA "shall adopt rules as necessary and dedicate sufficient resources to implement § 45 and 55," while remaining silent as to other agencies' roles and authority related to the electric vehicle goals and related matters. 20 ILCS 627/40. This statutory silence falls well short of a "clear intent" to repeal or rewrite § 8 and § 10 of the Act, which as described above, grant the Board authority to set emission standards for sources of harmful pollution, including vehicles. *See People v. Johnson*, 160 N.E.3d 31, 44 (Ill. 2019) ("[I]f the legislature meant to change the existing law, it had to indicate a clear intent to do so.").

Finally, it is not unusual that the Proposed Rules will advance the public interest in clean air and combatting climate change along with broader state transportation policies, including CEJA's electric vehicle provisions. IIIFFC's assertion that "no grants of rulemaking authority are vested in the Board under CEJA," IIIFFC Mot. to Dismiss at 13, is irrelevant. The Board's power to act here comes directly from the Act rather than CEJA, and the Board exercises "a general grant of very broad authority" encompassing "that which is necessary to achieve the broad purposes of the Act." *Granite City Div. of Nat. Steel Co. v. Ill. Pollution Control Bd.*, 613 N.E.2d 719, 734 (Ill. 1993) (noting that the Act "provides general standards to guide the Board in the exercise of its broad authority to ensure that the regulations adopted by the Board are reasonable."). In exercising this broad authority, the Board has discretion to consider whether rulemaking proposals that advance directly the Act's purposes "to restore, protect and enhance the quality of the environment" and to address "air-pollution hazard[s]" will also advance critical

state policy goals set forth elsewhere, especially policy goals like CEJA's vehicle electrification targets. Indeed, IIIFFC explicitly concedes that the Board may "consider the goals of the State when it promulgates rules within its authority." IIIFFC Mot. to Dismiss at 13.

III. That the General Assembly Has Not Advanced Bills that Would Require Adoption of the Proposed Rules Legislatively Has No Bearing on the Board's Authority to Do So Through Regulation.

Fuel Industry Intervenors argue that legislative committees' decisions not to advance bills for full General Assembly consideration that would have *required* implementation of California vehicle standards is somehow evidence that the Board lacks the *authority* to do so through its rulemaking process. IFRA Mot. to Dismiss at 4-5; IIIFFC Mot. to Dismiss at 9-11. These arguments fail. That legislative efforts to *require* adoption of the Proposed Rules by statute have not yet advanced beyond committee consideration says absolutely nothing about the Board's preexisting authority to promulgate the Proposed Rules.

First, there are innumerable reasons a bill may languish in committee and Fuel Industry Intervenors offer no precedent for reading anything into such legislative inaction as a matter of law. Fuel Industry Intervenors' reliance here on *Village of Lombard* is misplaced for two reasons. IIIFFC Mot. to Dismiss at 9, IFRA Mot. to Dismiss at 4. First, unlike here, in *Village of Lombard* the Court could find no existing statutory authority for the Board to create the mandatory regional planning structures at issue. *Vill. of Lombard*, 66 Ill. 2d at 506 ("[The] Act is neither sufficiently broad nor sufficiently specific to authorize the Pollution Control Board to mandate regional water treatment in a county[.]"). In that circumstance, the General Assembly's rejection of legislation to create such specific statutory authorization for the Board was relevant because the legislature would have needed to change the law to grant the Board the necessary

authority. *Id.* Here, no legislative change is needed for the Board to promulgate the Proposed Rules because § 10 already allows it. *Supra* II.A.

Second, the bills referenced by Fuel Industry Intervenors said nothing about the Board's preexisting statutory authority to adopt the Proposed Rules. Senate Bill 2839 would have amended the Illinois Vehicle Code to require IEPA to adopt rules to implement ACC II; this bill did not reference existing rulemaking authority at the Board. *Illinois S.B. 2839, 103rd Gen. Assemb., 2024 Ill. Gen. Assemb.* Likewise, House Bill 1634 and Senate Bill 2050, identical in nature, would have directed IEPA to implement the motor vehicle emission standards of California in totality; neither the House nor Senate discussed implementing these standards through Board action under its existing authority. *See generally Illinois H.B. 1634, 103rd Gen. Assemb., 2023 Ill. Gen. Assemb.; Illinois S.B. 2050, 103rd Gen. Assemb., 2023 Ill. Gen. Assemb.* For this reason, Fuel Industry Intervenors' reliance on *Village of Lombard* is again unavailing. As IIIFFC notes, the failed legislation in *Village of Lombard* was specifically drafted to "bring about the enactment of legislation to *grant such power to the Board*." IIIFFC Mot. to Dismiss at 9 (emphasis added) (quoting *Vill. of Lombard*, 37 Ill. App. 3d at 444). By contrast, the bills raised here by Fuel Industry Intervenors would have *required* the Board to adopt California's vehicle standards without addressing the Board's existing regulatory authority.

Fuel Industry Intervenors ask the Board to draw sweeping legal conclusions from routine legislative committee inaction. But the Board need not (and cannot) speculate on why specific legislative enactments advanced or not, particularly when those bills said nothing about the Board's existing authority to consider the Proposed Rules. Instead, the Board must only look to the explicit authority under the Act. *Supra* II.A.

Even worse, Fuel Industry Intervenors ask the Board to rely on legislative inaction while ignoring that the General Assembly ***has*** acted affirmatively to ensure that the Board can rely on its preexisting authority under § 8 and § 10 to address climate pollution from the transportation sector. In the Kyoto Protocol Act of 1998, the General Assembly changed the Board's preexisting § 10 authority by prohibiting the Board from "propos[ing] or adopt[ing] any new rule for the intended purpose of addressing the adverse effects of climate change which in whole or in part reduces emissions of greenhouse gases, as those gases are defined by the Kyoto Protocol, from the . . . transportation sector[]." 415 ILCS 140/15(a), *repealed by* P.A. 101-373, § 5, eff. Aug. 15, 2019. But in 2019, the General Assembly repealed the Kyoto Protocol Act, thus restoring the Board's preexisting authority to address climate change through the regulation of greenhouse gases from the transportation sector. *See* 415 ILCS 140/1 to 140/99. §§ 1 to 99.

IV. Adopting the Proposed Rules through the Board's Rulemaking Process Is Fully Consistent with Notice and Comment Procedures.

The Rule Proponents' petition calls for a rulemaking process that is fully consistent with all applicable procedural requirements, and the Board has conducted this proceeding in full compliance with those requirements. *See* Statement of Reasons at 9 (submitting proposal "[p]ursuant to 415 ILCS 5/27 and 5/28, and 35 Ill. Admin Code §§ 102.200, 102.202"); Notice of Hearing and Hearing Officer Order at 2-3 (Aug. 21, 2024) (ordering that the Board will conduct two hearings to allow interested participants "to testify and comment on the merits and economic impact of the proposed rule" pursuant to 415 ILCS 5/28(a) and 35 Ill. Adm. Code 102.412(a), and that members of the public may provide oral and written comments pursuant to 35 Ill. Adm. Code 102.108(b)); *see also* Order of the Board at 1-2 (July 11, 2024) (finding that the rulemaking proposal "meets the requirements of the Board's procedural rules" and accepting the proposal for hearing pursuant to 415 ILCS 5/27, 28 and 35 Ill. Adm. Code 102). IFRA's

suggestion that adopting the Proposed Rules would somehow "subvert the purpose of notice and comment rulemaking," IFRA Mot. to Dismiss at 6, rests on a fundamental misunderstanding of the proposal before the Board, and a conflation of the *substantive* range of vehicle emission standards available under the Clean Air Act with the *procedural* requirements of state law.

As IFRA states in its Motion, statutes and procedural rules require the Board to give the public a chance to meaningfully participate in the rulemaking process, to weigh and thoughtfully consider public comments, to give 45 days' notice of its intended action, and to accept comments on that intended action. IFRA Mot. to Dismiss at 6 (citing *Champaign-Urbana Pub. Health Dist. v. Ill. Labor Relations Bd.*, 354 Ill. App. 3d 482, 488 (4th Dist. 2004)); 5 ILCS 100/5–40 (b), (c); 35 Ill. Adm. Code 102.108. Notably, IFRA does *not* allege that the Board has failed to comply with any of these procedural requirements, or that the nature of the rulemaking proposal will somehow prevent the Board from doing so. Nor could it, because the Board has followed procedural rules and provided for public participation in accordance with all relevant rules and statutes, and IFRA offers no reason to believe the Board will not continue to do so.

Rather than identify any procedural requirements that it alleges have been violated, IFRA argues the Rule Proponents' petition must be dismissed because IFRA believes the Board cannot "exercise its prerogative to amend or adjust the regulatory proposal" due to the Clean Air Act requirement that states either adopt or reject California's vehicle emission standards without modifications. IFRA Mot. to Dismiss at 6. Tellingly, IFRA does not cite any authority creating such an inviolate "prerogative to amend or adjust" all parts of a regulatory proposal, nor any authority requiring the Board to exercise such a "prerogative to amend or adjust," nor authority defining that prerogative's contours. This is because no such generalized "prerogative" exists. As with any agency rulemaking, the substantive scope of the Board's authority is determined by

statute, including the boundaries established by federal statute, and the Board has discretion to act within that scope.

Similarly, IFRA fails to identify any way in which the defined role of the Joint Committee on Administrative Rules ("JCAR") in the rulemaking process would be "substantially curtailed" by adoption of the Proposed Rules that comply with the Clean Air Act. IFRA Mot. to Dismiss at 6-7. If the Board proposes to adopt the Proposed Rules, it will give second notice of its proposed adoption to JCAR pursuant to 5 ILCS 100/5-40(c) and 35 Ill. Admin. Code § 102.606, and JCAR will be able to review the proposal as set forth in the state Administrative Procedures Act, 5 ILCS 100/5-90 et seq.[7]

Finally, IFRA is simply wrong in asserting that the public "may not comment on particular provisions [of the Proposed Rules] and the effectiveness of those provisions in striking the right balance between environmental protection and economic impact in Illinois." IFRA Mot. to Dismiss at 6. Neither Rule Proponents nor the Board have suggested any limitation on the range of issues upon which members of the public may comment. Rule Proponents expect and welcome comments on whether the design of the Proposed Rules, including any and all "particular provisions," strike an appropriate balance among regulatory priorities in Illinois. To the extent that public comments identify advantages or disadvantages of particular Proposed Rule provisions that the Clean Air Act prevents the Board from changing, then the Board will be responsible for carefully considering those comments in determining whether, on balance, the Proposed Rules will advance Illinois' policy priorities and should be adopted. IFRA seems to be

[7] At the Prehearing Conference, Rule Proponents' counsel suggested that all applicable procedural requirements of the Administrative Procedures Act could be completed within calendar year 2024 if certain time periods were run concurrently. It was suggested this could be reasonable for the Rules given the specific nature of Clean Air Act § 177.Whether or not such a condensed schedule could be compliant with the Administrative Procedures Act is immaterial now, however. The Hearing Officer rejected that suggestion and the Hearing Officer issued a scheduling order that complies with the Administrative Procedures Act.

trying to draw a distinction between comments on specific provisions of the Proposed Rules and comments on "the appropriateness of the California standards being implemented in Illinois," which it concedes the public will have an opportunity to provide. IFRA Mot. to Dismiss at 6. But that distinction simply does not exist, and that concession defeats this entire section of IFRA's argument.

Furthermore, IFRA's argument relies on the false premise that the Board has zero room under the Clean Air Act to adjust the Proposed Rules. While § 177 of the Clean Air Act prevents the Board from modifying California's vehicle emission standards in a way that would require manufacturers to produce a "third vehicle" certified to specifications different than the federal or California standards, *see* Statement of Reasons at 17 (*citing* 42 U.S.C. § 7507), the Board has discretion to modify other aspects of the proposal that do not involve emissions standards certification. For example, as noted in the Statement of Reasons, the ACC II rule, the ACT rule, and the Low NOx rule are each a separate emission standard that can be adopted independently of the other Proposed Rules, although the rules were designed to complement each other and Rule Proponents urge that they be adopted as a unified package.[8] Statement of Reasons at 12. The Board may also modify segments of the rulemaking proposal that are not part of the emission standards subject to the Clean Air Act's limitation of states to choosing between only the federal or California standards, such as enforcement provisions, inspection and

[8] Delaware, Washington, D.C., and Virginia have adopted ACC II but not ACT or the Low NOx rule, and Maryland has adopted ACC II and ACT, but not the Low NOx rule. Sierra Club, *Clean Vehicle Programs: State Tracker* (last visited Sept. 19, 2024), https://www.sierraclub.org/transportation/clean-vehicle-programs-state-tracker. Similarly, the Board considered partial adoption of California's vehicle emission standards as an option in its 1993 rulemaking. *See, e.g.*, In the Matter of: Application of California Motor Vehicle Control Program in Illinois, PCB R89-17(A) & (B), Opinion and Order of the Board at 3-4 (Jan. 27, 1993) ("The Board today proposes, for First Notice, adoption of parts of the California motor vehicle control program."), https://pcb.illinois.gov/documents/dsweb/Get/Document-23522.

recordkeeping requirements, and effective dates (provided the effective dates comply with the Clean Air Act's two-year lead time requirement).

The Board can clearly adopt the Proposed Rules while complying with all applicable procedural requirements, notwithstanding the Clean Air Act's requirement that it may adopt only the California emissions standards. This is the conclusion that the Board reached when it considered adopting California vehicle emission standards from 1989 to 1993, specifically finding that "the record in this docket [was] sufficient to merit consideration as a proposal for rulemaking" and rejecting a contention "that the Board has not followed the Act or the procedural rules in this docket."[9] In the Matter of: Application of California Motor Vehicle Control Program in Illinois, PCB R89-17(A) & (B), Order of the Board at 3 (May 24, 1990), https://pcb.illinois.gov/documents/dsweb/Get/Document-23946. It is also the conclusion reached by several states that have adopted California standards in compliance with their own notice and comment requirements, which are substantially similar to Illinois'.[10] The Board should reach the

[9] Over the course of that rulemaking proceeding, the Board held several hearings and received public comments from many interested participants. There was no indication that the Board's procedures for receiving and considering public comments in that proceeding were deficient or in any way impacted by the substantive scope of potential Board action under Clean Air Act § 177. *See*, *e.g.*, In the Matter of: Application of California Motor Vehicle Control Program in Illinois, PCB R89-17(C), Opinion and Order of the Board at 2-4 (Jan. 27, 1993) (describing the procedural history of the rulemaking, including multiple hearings and review of public comments), https://pcb.illinois.gov/documents/dsweb/Get/Document-21148.

[10] For example, the Colorado Air Quality Control Commission, which has adopted ACC II, ACT, and the Low NOx rule, is subject to the Colorado Administrative Procedure Act rulemaking requirements to "hold a public hearing at which it shall afford interested persons an opportunity to submit written data, views, or arguments and to present the same orally unless the agency deems it unnecessary," and to "consider all such submissions." § 24-4-103(4)(a), C.R.S. Additionally, the New Jersey Department of Environmental Protection, which has adopted the ACC II standards, is subject to the New Jersey Administrative Procedure Act and must therefore "[a]fford all interested persons a reasonable opportunity to submit data, views, comments, or arguments, orally or in writing" and "consider fully all written and oral submissions respecting the proposed rule." N.J.S.A. 52:14B-4(a)(3). Moreover, Rhode Island has also adopted the standards subject to the Rhode Island Administrative Procedures, which calls for gathering "information relevant to the subject matter of a potential rulemaking proceeding and may solicit comments and recommendations from the public by publishing an advance notice of proposed rulemaking in the state register and on its agency website, and indicating where, when, and how persons may comment before the rulemaking process begins." R.I. Gen. Laws § 42-35-2.5.

same conclusion here as to the necessary procedures, and reject IFRA's unmoored arguments regarding required procedures to which the Board has and will adhere.

V. CONCLUSION

Fuel Industry Intervenors ask the Board to ignore (1) the plain language of the Act authorizing it to set "standards and conditions" on the "sale" of "vehicles;" (2) explicit Board precedent finding Board jurisdiction to consider the precise question posed by Rule Proponents' petition; and (3) express legislative action endorsing the Board's authority to issue regulations that address greenhouse gases from the transportation sector. Instead, the Fuel Industry Intervenors would have the Board kneecap its own authority to protect public health and the environment based on their irrational readings of irrelevant statutory phrases and legislative committee inaction. The Motions should be denied, and the Board should continue this proceeding in compliance with all procedural requirements to review the substantive merits of the Proposed Rules and, ultimately, promulgate them.

Date: October 1, 2024

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	R2024-017
PROPOSED CLEAN CAR AND TRUCK STANDARDS	)	(Rulemaking – Air)

I, the undersigned, on affirmation state the following:

That I have served the attached Rule Proponents' Response in Opposition to Motions to Dismiss, including a Notice of Filing and this Certificate of Service, by e-mail upon the individuals listed on the foregoing Notice of Filing at the e-mail addresses indicated therein.

That my e-mail address is robert.weinstock@law.northwestern.edu.

That the number of pages in the e-mail transmission is 27.

That the e-mail transmission took place before 5:00 p.m. on the

date of October 1, 2024.

Date: October 1, 2024

Respectfully submitted,

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