BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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| 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**

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**(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, **ILLINOIS ENVIRONMENTAL REGULATORY GROUP'S PRE-FILED ANSWERS TO THE POLLUTION CONTROL BOARD'S PRE-FILED QUESTIONS,** copies of which are hereby served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP

Dated: February 15, 2022

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

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| PART 232: TOXIC AIR CONTAMINANTS | ) | |

**THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP'S PRE-FILED ANSWERS TO THE POLLUTION CONTROL BOARD'S PRE-FILED QUESTIONS**

The ILLINOIS ENVIRONMENTAL REGULATORY GROUP ("IERG"), by and through its attorneys, HEPLERBROOM, LLC, hereby submits its Pre-Filed Answers to the Illinois Pollution Control Board's ("Board") Pre-Filed Questions dated January 27, 2022. IERG's Pre-Filed Answers are submitted pursuant to 35 Ill. Adm. Code 102.424 and the Board's Notice of Hearing dated December 9, 2021.

**Questions for Mr. Alec Davis**

1. **On page 3, you state, "The changes to Section 9.1(c) of the Act per Public Act 99-0463 must be read consistently with the stated purpose and intent of Section 9.1(a) of the Act that the Board avoid the existence of duplicative, overlapping or conflicting State and federal regulatory systems." Please specifically identify the provisions of the Act and the Board regulations that are duplicative, overlapping or conflicting with the federal regulatory system.**

IERG submitted its proposal to amend the Board's Nonattainment New Source Review ("NA NSR") regulations to be up-to-date and consistent with the Clean Air Act and implementing federal regulations. Illinois first proposed state NA NSR regulations in 1979 prior to the codification of the federal NA NSR blueprint rule in the early 1980s. The Board adopted amendments to the NA NSR rules in 1983 and 1988, the latter being federally approved into the Illinois State Implementation Plan ("SIP") in 1992. Subsequently, the Board's NA NSR regulations were amended a number of times to address amendments to the Clean Air Act, but the federal regulations had not yet been updated to reflect the statutory amendments. The Board's NA NSR regulations, now located at 35 Ill. Adm. Code Part 203, were last amended in 1998. There have been several updates to the federal regulations since 1998 that have not been incorporated into Part 203. As explained in the Statement of Reasons ("SOR"), the updates to Part 203 proposed by IERG are such that a comprehensive update was chosen, instead of a section-by-section revision to existing Part 203. The spreadsheet attached to the SOR shows the

basis for each proposed provision, which indicates the general level of difference between the federal rules and existing Part 203. *See* Rule Spreadsheet, attached as Exhibit 2 to the Statement of Reasons. Below are a few examples of current Part 203 provisions that conflict with the federal NA NSR provisions and the proposed amendments which are based on the federal provisions:

- Current 203.104(b)-(c) allow use of allowable emissions or PTE as the pre-change actual emissions rate from an existing emissions unit, in lieu of using the average rate at which unit actually emitted during a representative time period, when determining emissions increases. The proposed rule will require use of baseline actual emissions, which by definition is lower than the allowable emissions or PTE.
- Even where the pre-change actual emissions rate used to determine emissions increases will be based on the average rate at which unit actually emitted during a representative time period, current 203.104(a) allows the Agency to approve use of something other than a consecutive 24-month time period, even for units other than electric utility steam generating units. This provision allows, for example, non-consecutive time periods or consecutive time periods of less than 24 months. The proposed rule removes this allowance and requires use of a consecutive 24-month time period for units other than electric utility steam generating units.
- Similarly, where the pre-change actual emissions rate used to determine emissions increases will be based on the average rate at which unit actually emitted during a representative time period, current 203.104(a) does not expressly require downward adjustment of historical emissions in excess of applicable limits. The proposed rule requires downward adjustment: For electric utility steam generating units, the rate must be adjusted to eliminate emissions in excess of any limit that applied during the baseline period; for other types of units, the rate must be adjusted to eliminate emissions that were in excess of any limit that applied during the baseline period or that would exceed a currently applicable limit.
- Current 203.208 does not explicitly impose any recordkeeping or other requirements relating to enforceability of major modification applicability determinations. The proposed rule requires monitoring, recordkeeping, and reporting to validate the preconstruction projections and expressly provides that the project is a major modification if the post-project monitoring data show the project caused significant emissions increases.

Revising Part 203 to be consistent with the language in the federal NA NSR regulations is beneficial to the Illinois Environmental Protection Agency ("Illinois EPA"), the Board, regulated industries, and third parties. Moreover, because Illinois EPA and sources often rely upon USEPA guidance when interpreting and implementing federally derived programs, updating Part 203 will bolster consistency in the application of USEPA's guidance documents. In addition to mirroring the federal language, IERG's proposed revisions to Part 203 also track, when possible, the language and regulatory structure in the Board's Prevention of Significant Deterioration ("PSD") regulations at 35 Ill. Adm. Code Part 204. Consistency in the language and regulatory scheme between the Board's NA NSR regulations and PSD regulations is valuable especially because regulated entities will likely be required to go through both a PSD analysis and NA NSR analysis when proposing a project that would trigger NSR review.

Lastly, in response to Illinois EPA's Initial Comments and Recommendations for Additional Revisions filed on January 18, 2022, it is not IERG's position that the current NA NSR regulations at Part 203 do not meet the requirements of the Clean Air Act or federal regulations. It is also not IERG's position that Illinois EPA has issued construction permits for projects in nonattainment areas that potentially conflict with the Clean Air Act. Because of the benefits and value explained above, IERG is proposing to amend Part 203 to be consistent with the federal regulatory language, as well as the PSD provisions in Part 204 when possible.

2. **On page 4, you state since the most recent amendments to Part 203 in 1998, significant amendments to the federal NA NSR requirements have been made and IERG's Proposal addresses those amendments to make the Board's NA NSR rules consistent with the CAA and underlying United States Environmental Protection Agency ("USEPA") regulations.**

    a. **Please comment on whether IERG's proposal includes the recent USEPA amendments to the federal NA NSR rules published in 85 Fed. Reg. 74,890 (Nov. 24, 2020).**

Yes, IERG's proposal includes the recent USEPA amendments to the federal NA NSR rules published on November 24, 2020. 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 that were promulgated on November 24, 2020, and became effective on December 24, 2020.

    b. **If so, please identify the specific provisions of the proposed rules that rely on 2020 federal amendments.**

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 that were promulgated on November 24, 2020, and became effective on December 24, 2020.

    c. **Because the 2020 federal amendments have been challenged before the U.S. Court of Appeals for the District of Columbia. New Jersey, No. 21-1033 (D.C. Cir. Jan. 22, 2021) and held in abeyance by the Court at the request of USEPA, please comment on whether any revisions based on the 2020 amendments should be considered only after the resolution of the challenges before the Court.**

The 2020 federal amendments are currently in effect; these provisions are not currently held in abeyance or otherwise stayed. It is the case referenced in the Board's question, and consolidated cases which challenge the 2020 federal amendments at issue, that are currently held in abeyance. Therefore, it is the challenges to the 2020 federal amendments that are held in abeyance, not the federal amendments themselves. The 2020 federal amendments are currently in effect and, therefore, IERG believes it is appropriate to proceed with the proposed revisions to Part 203 that rely on the 2020 federal amendments, including proposed Section 203.1410(c)(5)-

(6). Such proposed revisions are consistent with provisions of the federal blueprint rule that are currently in effect.

IERG intends the above responses to Question 2 to also address the Pre-Hearing Comment filed by the Illinois Attorney General's Office on January 4, 2022.

**Questions on TSD (for Mr. Colin Campbell)**

3. **On page 5, the TSD states, "Because the proposed revisions to Part 203 are substantially identical to the currently applicable federal regulation, no substantive or quantifiable technical or economic impacts will result from the adoption of revisions to Part 203."**

    a. **Please clarify whether the currently applicable NA NSR federal regulations are being implemented under the Illinois SIP.**

The federal NA NSR regulations are not in effect with respect to currently designated nonattainment areas because the current Part 203 rule provisions are a part of the approved State Implementation Plan ("SIP") for Illinois for these areas. Please see previous discussion in Question 1. This creates a disconnect between existing Part 203 and the current federal rules as well as federal guidance concerning the NSR program.

The Emission Offset Interpretative Ruling at 40 CFR Part 51 Appendix S ("Appendix S") is currently in effect in Illinois with respect to new major stationary sources or major modifications located in attainment or unclassifiable areas which would cause or contribute to a violation of any National Ambient Air Quality Standard ("NAAQS"), because Part 203 has not been amended for this circumstance. Appendix S also would apply to any $PM_{2.5}$ nonattainment area, because Part 203 has not been amended to include the federal $PM_{2.5}$ provisions. Historically Appendix S did apply when the Chicago and Metro East areas were designated nonattainment with respect to the $PM_{2.5}$ NAAQS, although there are currently no $PM_{2.5}$ nonattainment areas in Illinois.[1]

    b. **If so, comment under what authority they are being implemented.**

The federal regulations specify the use of Appendix S. Specifically, 40 CFR § 52.24(k) states: "For an area designated as nonattainment after July 1, 1979, the Emission Offset Interpretative Ruling, 40 CFR part 51, appendix S shall govern permits to construct and operate applied for during the period between the date of designation as nonattainment and the date the NSR permit program meeting the requirements of part D is approved." 40 CFR § 52.24(k).

[1] See "Review of Illinois Environmental Protection Agency's New Source Review and Title V Permit Programs, 2017 Evaluation Final Report," USEPA, Region 5, Air & Radiation Division (September 2017) , pp.15-16 ("For purposes of NA NSR permitting for PM2.5, until the completion of these revisions, IEPA will continue to rely on Appendix S to 40 C.F.R. Part 51 – Emission Offset Interpretative Ruling – to ensure that emissions of PM2.5 and precursors from the construction and modification of stationary sources do not cause or contribute to a violation of the PM2.5 NAAQS."). This report is available online at https://www.epa.gov/caa-permitting/illinois-title-v-and-nsr-program-evaluation.

Additionally, Section 9.1(a) of the Act acknowledges that the Clean Air Act and federal regulations establish "complex and detailed provisions for State-federal cooperation in the field of air pollution control" and provide for a PSD and NA NSR program. 415 ILCS 5/9.1(a). Section 9.1(a) goes on to acknowledge that "the General Assembly cannot conveniently or advantageously set forth in this Act all the requirements of such federal Act or all regulations which may be established thereunder." Further, Section 9.1(c) of the Act requires the Board to adopt regulations establishing permit programs for PSD and NA NSR permits meeting the requirements of Sections 165 and 173 of the Clean Air Act. 415 ILCS 5/9.1(c). Lastly, Section 9.1(d) of the Act provides that no person shall violate any provisions of Sections 165 or 173 of the Clean Air Act or federal regulations adopted pursuant thereto. 415 ILCS 5/9.1(d)(1).

Moreover, Section 39(a) of the Act states: "When the Board has by regulation required a permit for the construction, installation, or operation of any type of facility, equipment, vehicle, vessel, or aircraft, the applicant shall apply to the Agency for such permit and it shall be the duty of the Agency to issue such a permit upon proof by the applicant that the facility, equipment, vehicle, vessel, or aircraft will not cause a violation of this Act or of regulations hereunder." 415 ILCS 5/39(a). Additionally, Section 39(f) of the Act references Section 9.1. Specifically, Section 39(f)(1) of the Act states: "In making any determinations pursuant to Section 9.1 of this Act: (1) The Agency shall have authority to make the determination of any question required to be determined by the Clean Air Act, as now or hereafter amended, this Act, or the regulations of the Board, including the determination of the Lowest Achievable Emission Rate, Maximum Achievable Control Technology, or Best Available Control Technology, consistent with the Board's regulations, if any." 415 ILCS 5/39(f)(1).

**c. If they are not being implemented, please explain why implementation of the current federal regulations will have no substantive or quantifiable technical or economic impacts on the regulated community.**

IERG proposes to revise the Part 203 requirements to be up-to-date with the federal NA NSR provisions and to track the language of the federal regulations, and Part 204, as closely as possible. Because the federal regulations were promulgated under USEPA's assessment that the rules were economically justified, the Board may similarly find IERG's proposed revisions to be economically justified. *See* Final Opinion and Order, PCB R 19-1, at 159-60 (Aug. 27, 2020) (finding that the Part 204 proposal was economically reasonable). Similarly, because the proposed amendments to Part 203 are consistent with the current federal rules, the proposed amendments are technically feasible. *See* Final Opinion and Order, PCB R 19-1, at 158-59 (Aug. 27, 2020) (finding that the Part 204 proposal was technically feasible). The current federal NA NSR regulations have been in place for many years and are based on decades of experience in implementing the federal NA NSR program. This experience lends to better understanding of emissions and control technology, and the associated costs, leading to technologically feasible and economically reasonable requirements.

**4. On page 8, the Footnotes 4 through 7 list the various revisions to the federal NA NSR regulations since the most recent amendments to Part 203 in 1998.**

**a. Please comment on whether any of the revisions listed in the footnotes are currently being reviewed in the federal courts.**

The revisions to the federal NA NSR rule that were promulgated on November 24, 2020 are currently being challenged before the U.S. Court of Appeals for the District of Columbia. However, as explained in response to Question 2(c) above, these challenges have not stayed the rule's effectiveness. The 2020 federal amendments are currently in effect.

IERG is not aware of any challenges to the other federal amendments listed in Footnotes 4-7 of the TSD. IERG searched the federal court online docket database and the USEPA Office of General Counsel website and did not find any other pending litigation regarding the listed amendments.

**b. If so, please identify the specific federal rules that are being reviewed and comment on the status of the pending appeals.**

As discussed above, the revisions to the federal NA NSR rule that were promulgated on November 24, 2020 are currently being challenged before the U.S. Court of Appeals for the District of Columbia. The appeals challenging the amendments are currently held in abeyance. The 2020 federal amendments are currently in effect. Pursuant to an order from the court attached as Attachment 1, the parties are required to file motions to govern future proceedings in the referenced litigation by February 10, 2022.

**c. Please delineate the proposed revisions to Parts 203 and 204 that are based on the federal rules being reviewed by the courts and comment on whether these provisions should be tabled for later adoption upon resolution of the court review and USEPA response.**

As discussed above, the provisions in proposed Section 203.1410(c)(5)-(6) are 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 that were promulgated on November 24, 2020, and became effective on December 24, 2020.

As to Part 204, the proposed revisions to 35 Ill. Adm. Code 204.800(d)(5)-(6) are consistent with the currently effective federal blueprint rule provisions at 40 CFR § 51.166(a)(7)(iv)(f)-(*g*), including the revisions to that rule that were promulgated on November 24, 2020, and became effective on December 24, 2020.

IERG does not believe that these provisions should be tabled for later adoption. 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. For example, in the PSD Rulemaking at R 19-1, Illinois EPA proposed and the Board adopted provisions relating to enforceability of the actual-to-projected-actual emissions increase test at 35 Ill. Adm. Code 204.1400. The corresponding provisions of the federal blueprint rule at 40 CFR § 51.166(r)(6) were at that time subject to a challenge being held in abeyance. *New Jersey v. EPA*, 989 F.3d 1038 (D.C. Cir. 2021). Ultimately, the Court ruled that the petitioner failed to show that USEPA's action was arbitrary or capricious, and denied the petition challenging the provisions at issue. *See id*.

Furthermore, the Board adopted coal combustion residual ("CCR") regulations in R 20-19 that were based on federal CCR rules that were being challenged. *See* In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845, PCB R 20-19. Throughout the CCR rulemaking, Illinois EPA maintained that the proposed rules were based upon or consistent with the federal CCR rules at 40 CFR Part 257. 40 CFR Part 257 was subject to two pending revisions during the Board rulemaking. *See* 85 Fed. Reg. 53516 (Aug. 28, 2020); *see also* 85 Fed. Reg. 72506 (Nov. 12, 2020). 40 CFR Part 257 was also subject to one appeal during the Board rulemaking, which appeal continues. *See Labadie Environmental Organization v. EPA*, Case No. 20-1467 (D.C. Cir. Filed Nov. 24, 2020). Additionally, in the Board rulemaking adopting the 2014 ozone NAAQS, PCB R 16-22, the 2015 ozone NAAQS was the subject of numerous federal appeals. *See Murray Energy Corp. v. EPA, et al*., 936 F.3d 597 (D.C. Cir. 2019). Case No. 15-1385 (Aug. 23, 2019) (consolidated cases). Ultimately, the petitions to challenge the standard were granted in part, vacated in part, and remanded. *See id*.

As explained throughout this proceeding, it is IERG's intent that its proposal bring the NA NSR regulations up-to-date with the federal regulations. After the proposal is adopted, it should be relatively straightforward to keep both the NA NSR regulations and PSD regulations up-to-date with the federal regulations. This is consistent with Illinois EPA's position in the PSD rulemaking. See Illinois EPA's Post-Hearing Comments, PCB R 19-1, at 23 (Apr. 4, 2019) (". . . it is only appropriate for the Illinois EPA to state that it will propose any changes to Part 204 that are necessary for the State of Illinois to maintain its USEPA-approved state PSD program."). Therefore, the potential that the 2020 federal amendments may be overturned should not cause any concern because, if that does occur, Illinois EPA may propose to amend the Board regulations appropriately.

5. **On page 9, the TSD states, "Section 182(f) of the CAA allows the USEPA to waive the NA NSR requirements for NOx for sources located in ozone nonattainment areas upon determination that the net air quality benefit is greater in the absence of NOx reductions from the sources in the area ("NOx waiver")." Please comment on whether Illinois has received a "NOx waiver" from USEPA. If so, would a waiver be affected by the proposed rules.**

Illinois has not received a $NO_X$ waiver that is currently in effect. Illinois did receive a $NO_X$ waiver for its NA NSR program previously, but that waiver is no longer in effect. See 61 Fed. Reg. 2,428 (Jan. 26, 1996).

The effect of a $NO_X$ waiver would be no different under the proposed revisions as under the currently effective NA NSR rules in Part 203. The currently effective portion of Section 203.206(b)(3) regarding the effects of a $NO_X$ waiver is proposed to be recodified to proposed Section 203.1450(a).

6. **On page 9, the TSD notes that unlike $SO_2$ and NOx, emissions of VOM and ammonia are regulated as $PM_{2.5}$ precursors only in $PM_{2.5}$ nonattainment areas after a two-year transition period. Please comment on why VOM and ammonia are not regulated outside of a nonattainment area where construction or modification of a major stationary source outside a nonattainment area would cause or contribute to a NAAQS violation.**

Volatile organic material ("VOM") and ammonia are regulated as $PM_{2.5}$ precursors in $PM_{2.5}$ nonattainment areas because the U.S. Court of Appeals for the District of Columbia found in *NRDC v. EPA*, 706 F.3d 428 (D.C. Cir. 2013) that such regulation is required pursuant to subpart 4 of title I of the federal Clean Air Act (specifically § 189(e)). VOM and ammonia are not regulated as $PM_{2.5}$ precursors in attainment or unclassifiable areas because this statutory provision does not apply to such areas. *See* 81 Fed. Reg. 58,010 at p. 58,109 ("As subpart 4 includes requirements only pertinent to nonattainment areas, the EPA does not consider the portions of the 2008 PM2.5 NSR Rule that address requirements for PM2.5 attainment and unclassifiable areas to be affected by the court's opinion in *NRDC v. EPA*.").

7. **The TSD on page 9 states that currently there are no $PM_{2.5}$ nonattainment areas in Illinois. Please comment on whether IERG is aware of any recent modeling performed by IEPA that indicates any potential areas of concern with respect to nonattainment of $PM_{2.5}$.**

First, IERG would like to clarify that air monitoring, not modeling, is generally used by Illinois EPA to determine whether an area must be designated as nonattainment. IERG is not aware of any monitoring values that would indicate any potential areas of concern with respect to nonattainment of the current $PM_{2.5}$ NAAQS. However, based on recent federal activity, it is IERG's expectation that the $PM_{2.5}$ NAAQS will likely be revised to be lower in the near future. It is IERG's understanding that, based on current monitoring values, there would be numerous potential areas of concern in Illinois for designation as nonattainment if the $PM_{2.5}$ NAAQS is lowered substantially. As such, with the likelihood of $PM_{2.5}$ nonattainment areas in the near future, IERG proposes to amend Part 203 to include the provisions in the federal regulations for $PM_{2.5}$ nonattainment areas.

8. **Table on page 12 lists the thresholds for the major stationary sources in nonattainment areas with higher classifications. Please clarify why thresholds are not specified for CO and $PM_{10}$/$PM_{2.5}$ for areas classified as marginal/moderate, severe, and extreme NAA.**

The major stationary source threshold for CO, $PM_{10}$, and $PM_{2.5}$ nonattainment areas classified as moderate is 100 tons per year. Omission of this value from the table on page 12 of the TSD was inadvertent.

The Clean Air Act establishes marginal, severe, and extreme classifications only for ozone nonattainment areas. Compare, § 181(a)(1) (establishing marginal, moderate, serious, severe, and extreme classifications for ozone nonattainment areas) with § 186(a)(1) (establishing moderate and serious classifications for CO nonattainment areas) and § 188(a)-(b) (establishing moderate and serious classifications for $PM_{10}$ nonattainment areas).

IERG acknowledges that proposed Section 203.1230(a)(5)(A) does not explicitly address moderate nonattainment areas for CO. IERG would be amenable to revising proposed Section 203.1230(a)(5) to include an explicit reference to moderate nonattainment areas, as follows:

5) For an area designated nonattainment for CO, a major stationary source is a stationary source which emits or has the potential to emit:

A) 100 tpy or more of CO in an area classified as moderate nonattainment ~~area~~, except as provided in subsection (a)(5)(B);

B) 50 tpy or more in an area classified as serious nonattainment for CO where stationary sources significantly contribute to ambient CO levels, as determined under rules issued by the USEPA, pursuant to the CAA.

**9. Regarding "potential to emit", TSD on pages 12-13 states,**

> **In addition to being legally enforceable, in order to be considered enforceable for purposes of limiting PTE, a permit condition or other limitation or requirement must be enforceable as a practical matter. This means that the limitation must be amenable to assessment of compliance on an ongoing basis, and be accompanied by requirements for testing, monitoring, inspections, and recordkeeping, as appropriate.**

**a. Please explain the rationale for adding the concept of "practical enforceability" to the definition of "Potential to emit".**

IERG's proposal includes adding a clause to the definition of the term "potential to emit" at proposed Section 203.1290—specifically the words "or legally and practicably enforceable by a state or local air pollution control agency"—in order to add clarity and to be consistent with case law regarding the concept of practical enforceability in interpreting the meaning of this term. See pages 22-23 of the Statement of Reasons for further explanation and citations. Additionally, the language and concept of "practical enforceability" in the definition of "potential to emit" is consistent with the language in the definition of "potential to emit" in the PSD program. *See* 35 Ill. Adm. Code 204.560.

**b. Comment on whether under the existing definition of "potential to emit" under Section 203.128 testing, monitoring, inspections, and recordkeeping information were being utilized for purposes of enforcing any PTE based limitations.**

Yes, enforcement of limitations on PTE is through testing, monitoring, inspections, and recordkeeping under the existing definition at Section 203.128 in the same manner as under the proposed definition at Section 203.1290. See, for example, IEPA's *Responsiveness Summary for Public Questions and Comments on the Construction Permit Application from Christian County Generation for the Taylorville Energy Center in Taylorville, Illinois—Source Identification No.: 021060ACB* (April 2012) at p. 231 (explaining that the PTE limits are enforceable as a practical matter because "the Permit includes comprehensive and detailed compliance provisions for these emissions limitations, including requirements for testing, monitoring, recordkeeping, and reporting"), excerpt attached as Attachment 2.[2] Additionally, as explained in response to Question 23 below, it is IERG's understanding that the phrase "enforceable as a practical matter" has a meaning consistent with that set forth by USEPA guidance:

> In general, practical enforceability for a source-specific permit term means that the provision must specify (1) a technically accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation (hourly, daily, monthly, annually); and (3) the method to determine compliance including appropriate monitoring, recordkeeping and reporting.[3]

**10. On page 17, TSD notes that the term "installation" is added to the currently codified definition of the term "major stationary source." Please comment on the implications of this change on the universe of regulated sources.**

The proposed addition of the word "installation" to the meaning of the term "major stationary source" will have no implications on the universe of regulated sources. The only effect of this change is an improvement in clarity. The proposed definition of "building, structure, facility, or installation" at Section 203.1090(a) is substantially equivalent to the currently effective definition of "building, structure and facility" at Section 203.112(a). Adding the word "installation" will make the language of the NA NSR rule consistent with that of the PSD rule at 35 Ill. Adm. Code 204.290(a). This change will improve clarity as the universe of regulated sources is interpreted consistently between the two programs.

**11. Regarding the definition of "Major modification" on page 19, the TSD states that a new term "project" is added to address applicability for physical changes or changes in the method of operation of stationary sources. Please clarify why the**

[2] The full document is publicly available on Illinois EPA's website at https://www2.illinois.gov/epa/Documents/epa.state.il.us/public-notices/2011/christian-county-generation/responsiveness-summary.pdf.

[3] Memorandum from J.S. Seitz, Director, USEPA Office of Air Quality Planning and Standards, Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act, Jan. 25, 1995. Available at https://www.epa.gov/sites/production/files/2015-07/documents/ptememo.pdf.

**term "project" is not used in the proposed definition of "Major modification" under Section 203.1220.**

The term "project" is not used in the proposed definition of "major modification" under Section 203.1220 because doing so would be inconsistent with the definitions of this term in 35 Ill. Adm. Code 204.490 and 40 CFR § 51.165(a)(1)(v). Additionally, the term "project" is used in the applicability provision at proposed Section 203.1410 to describe when a major modification occurs.

12. **Also, on the same page, TSD states, "revised definition splits the applicability analysis into two tests, i.e. the project will result in both a significant emissions increase and a significant net emissions increase, except that this two-step analysis does not apply with respect to VOM and NOx emissions for sources located in ozone nonattainment areas classified as serious, severe, or extreme. Please clarify how these two steps work given that the definition of "significant emissions increase" states that "significant" is as defined in the definition of the term "Significant" under Section 203.1370, which refers to a "net emissions increase".**

The reference in the definition of "significant emissions increase" to the definition of "significant" is to the numeric values for an increase in emissions in the "significant" definition, not to the language in the "significant" definition referring to net emissions increases. Clarity of this concept is provided in the prescribed applicability determination process at proposed Section 203.1410(c). This approach is consistent with that used in the corresponding PSD provisions at 35 Ill. Adm. Code 204.660, 204.670, and 204.800(d). See Section III of the TSD for a detailed explanation of this two-step process.

13. **On page 19, TSD states, "When determining the applicability of NA NSR, a source owner is not allowed to split a project into multiple, nominally separate changes, each with its own analysis of emissions increase, possibly circumventing NA NSR permitting for the project as a whole." Please comment on whether this intent is reflected in the proposed definition of "Project" under Section 203.1310.**

Yes, the intent to interpret the meanings of the terms "project" and "major modification" in Part 203 in a way that would preclude circumvention of preconstruction NA NSR permitting requirements is reflected in the definitions of these terms. USEPA has established criteria for when nominally separate changes, which it refers to as "activities," should or should not be aggregated:

> [A]ctivities should be aggregated for the purposes of the NSR applicability determination only in cases where there is a substantial relationship among the activities, either from a technical or an economic standpoint.. 74 Fed. Reg. 2,376 at p. 2,377 (Jan. 15, 2009).

USEPA considered adopting, but ultimately declined to adopt, codified rule language relating to this intent:

> [W]e have concluded that the terms "economically viable" and "technically viable," and what is meant to be economically or technically dependent, are difficult to define clearly and should not be adopted as regulatory bright lines. We are, therefore, not promulgating the proposed rule for aggregation, nor are we adopting the descriptions of technical and economic viability and dependence that were set forth in the 2006 proposal preamble. We believe the statements made in this notice better explain the NSR Aggregation policy and enable permitting authorities and sources to better implement the current rule text without revision. 74 Fed. Reg. 2,376 at p. 2,381 (Jan. 15, 2009).

**14. On page 20, the TSD states that the proposed 70 tons per year (tpy) threshold for $PM_{2.5}$ nonattainment areas is "consistent with the approach used in Ohio where USEPA approved a statewide NA NSR rule entirely omitting ammonia from the list of regulated PM2.5 precursors based on a modeling analysis showing that ammonia increases do not contribute significantly to PM2.5 formation in the Cleveland area."**

**a. Please comment on whether, like Ohio, a modeling analysis should be conducted in Illinois to determine impact of $PM_{2.5}$ in potential nonattainment areas to establish an ammonia threshold.**

IERG does not recommend that a modeling analysis be performed in order to determine the relative contributions of ammonia or other precursors to a hypothetical $PM_{2.5}$ nonattainment area in Illinois. IERG did not intend to convey that the proposed ammonia significant level of 70 tons per year is based on Ohio's approach. USEPA's approval of that SIP was provided as an example of a statewide approach for no ammonia significant level. Ammonia has not been shown to be a significant contributing precursor in $PM_{2.5}$ nonattainment areas as a general matter, and, based on emissions inventory information, IERG expects this would be true if an area in Illinois were designated nonattainment for $PM_{2.5}$.

**b. Explain why the proposed ammonia threshold of 70 tpy based on Ohio's approach is appropriate for Illinois. Are there any reasons for not using a lower threshold for ammonia in the range of 40 tpy?**

As explained above, IERG did not intend to convey that the proposed ammonia significant level of 70 tpy is based on Ohio's approach; USEPA's approval of the Ohio SIP was provided as an example of a statewide approach for no ammonia significant level. Ammonia has not been shown to be a significant contributing precursor in $PM_{2.5}$ nonattainment areas as a general matter, and, based on emissions inventory information, IERG expects this would be true if an area in Illinois were designated nonattainment for $PM_{2.5}$.

**15. On Page 21, TSD states, "there are only four facilities in Illinois with reported actual ammonia emissions above the major stationary threshold of 100 tpy". Please comment on whether the number of facilities would change if the ammonia threshold is lowered to 70 or 40 tpy.**

To clarify, the reference in the TSD to four ammonia-emitting facilities relates to the major stationary source threshold of 100 tpy. This threshold is established in § 302(j) of the federal Clean Air Act

IERG is unaware of any basis for lowering the major stationary source threshold to a level less than 100 tpy, other than in a serious $PM_{2.5}$ nonattainment area, where the threshold for direct $PM_{2.5}$ emissions or emissions of any $PM_{2.5}$ precursor is 70 tpy.

If it was the Board's intention to ask how many facilities have facility-wide reported actual ammonia emissions in excess of the proposed 70 tpy significant level or an alternative 40 tpy significant level, IERG provides the following response: Based on 2017 emission inventory data, which was the basis for the referenced statement in the TSD, there are a total of seven facilities in Illinois with reported actual ammonia emissions above 70 tpy and a total of eight facilities with reported actual emissions above 40 tpy. (Each of these figures includes the four facilities with reported actual emissions above 100 tpy.)

**16. On pages 21 and 22, the TSD explains how the increase in emissions for a new unit is determined under the revised NA NSR rule. Please comment on whether this revised method differs significantly from how increase in emissions is determined under the current rule. If so, explain the difference with examples.**

The proposed revisions to the NA NSR rule language governing determination of increases in emissions for new emissions units are clarifying revisions and will not result in material changes to how these determinations are made under the currently effective rules.

Under Sections 203.104(c) and 203.208 of the current rules, the increase in emissions from construction of a new emissions unit is generally based on its potential to emit. This outcome is not readily apparent from the rule language, but rather is based on long-standing policy regarding the meaning of the defined terms major modification, net emissions increase, and actual emissions. Under this interpretive policy, the new emissions unit is deemed not to have begun normal operations and the emissions increase is the amount by which its post-change potential to emit exceeds its pre-change actual emission rate of zero. Under the proposed rule revisions, these ambiguous provisions, including the subjective "begun normal operations" criterion, are deleted in favor of bright-line tests and prescribed calculation methods.

The proposed revisions to the NA NSR rule governing determination of emissions increases from new emissions units are identical to those adopted in the PSD rule at 35 Ill. Adm. Code 204.800(d)(4).

**17. On page 28, TSD states, "Consistent with the federal blueprint rule at 40 CFR § 51.165(a)(1)(x)(B) as revised by USEPA in 2005, the de minimis rule provisions are proposed to be incorporated in the definition of the term "significant." Please clarify whether the current rules under Parts 203 and 204 incorporate the de minimis rule provisions. If not, comment on whether the proposed rules by incorporating the de minimis rule would be less stringent that the current rules.**

The current PSD rule in Part 204 does not incorporate the de minimis rule, as this rule is established in § 182(c)(6) of federal Clean Air Act specifically for emissions of ozone precursors in serious and severe ozone nonattainment areas. Part 204 does not apply to emissions of ozone precursors in serious and severe ozone nonattainment areas. No revisions to Part 204 are proposed in this regard.

The proposed revisions to the NA NSR regulations pertaining to the Clean Air Act de minimis rule will not affect the stringency of the rule. As discussed at page 21 of the Statement of Reasons, the change from "increase (other than a de minimis increase)" in existing Section 203.207(d)-(e) and Section 203.301(f) to "significant increase" in Section 203.1220(d) and the adoption of the 25 tpy threshold in the definition of "significant" at Section 203.1370(c) are proposed in order to improve consistency with the federal blueprint rule.[4] It should be noted, however, that the current NA NSR rule is more stringent than the federal blueprint rule and this greater stringency is retained in the proposed rule revisions. Specifically, the federal blueprint rule requires calculation of the net emissions increase only if the proposed project by itself would cause a significant increase in emissions of VOM or $NO_X$. Part 203, in contrast, requires calculation of the net emissions increase if the project would cause an emissions increase of any magnitude.

**Questions on Rule Language**

18. **The term "Actual construction" is defined in the current rules at Section 203.103. However, IERG's proposal under Subpart I does not include a definition of that term even though that term is used in proposed Section 203.1080. Please comment on whether a definition of "Actual construction" should be added under Subpart I. If not please explain the rationale for not including the definition.**

It is not necessary or appropriate to include a definition of the term "actual construction" in the NA NSR rules. This term is used only in the context of identifying the point in time at which actual construction begins. The definition of the term "begin actual construction" is sufficient for that purpose. The approach used in drafting the proposed rule revisions is consistent with that in the currently effective PSD rule at 35 Ill. Adm. Code 204.270 and in the federal NA NSR blueprint rule at 40 CFR § 51.165(a)(1)(xv).

19. **Under the proposed definition of "Actual emissions" at Section 203.1040, please comment on whether there is any alternative for the Agency to consider in the absence of reliable actual emissions data like the provision in the current rules under Section 203.104(b).**

IERG does not consider it necessary to continue to include in the definition of "actual emissions" at proposed Section 203.1040 an alternative that would provide for presuming actual emissions are equivalent to source-specific allowable emissions in the absence of reliable data. Under the currently effective NA NSR rules, the term "actual emissions" governs the determination of pre-project actual emissions as used in emissions increase calculations, and the

[4] Note that, in the Statement of Reasons on page 21, IERG references existing Sections 203.207(d)-(f); however, the reference to 203.207(f) was inadvertent.

rule allows for substitution of allowable emissions in this calculation. In the proposed rule revisions, as in the currently effective PSD rule at 35 Ill. Adm. Code 204.210(a) and in the federal NA NSR blueprint rule at 40 CFR § 51.165(a)(1)(xii)(A), the term "baseline actual emissions" is used for this purpose. Under the definition of "baseline actual emissions" at proposed Section 203.1070(a)(4) and (b)(5), the source owner must select a baseline period for which there is adequate information to determine annual emissions.

20. **Please comment on whether the subsections under the definition of "Good engineering practice" (Section 203.1200) should be renumbered as follows to be consistent with the definition of the same term in Section 204.420:**

**Section 203.1200 Good Engineering Practice**
**a) "Good engineering practice," with respect to stack height, means the greater of:**

**~~a~~1) 65 meters, measured from the ground-level elevation at the base of the stack;**

**~~b~~2) The following:**

**~~1~~A) For a stack in existence on January 12, 1979, and for which the owner or operator had obtained all necessary preconstruction approvals or permits required under 40 CFR Part 52:**

**Hg = 2.5H,**

**provided the owner or operator produces evidence that this equation was actually relied on in establishing an emission limitation;**

**~~2~~B) For all other stacks:**

**Hg = H + 1.5L**
**where:**
**Hg = good engineering practice stack height, measured from the ground-level elevation at the base of the stack,**
**H = height of nearby structure(s) measured from the ground-level elevation at the base of the stack,**
**L = lesser dimension, height or projected width, of nearby structure(s), provided that the USEPA or the Agency may require the use of a field study or fluid model to verify good engineering practice stack height for the source; or**

**~~b~~3) The height demonstrated by a fluid model or a field study approved by the USEPA or the Agency, which ensures that the emissions from a stack do not result in excessive concentrations of any air pollutant as a result of atmospheric downwash, wakes, or eddy effects created by the source itself, nearby structures or nearby terrain features.**

**~~e~~b) For purposes of this definition, "stack" means any point in a source designed to emit solids, liquids, or gases into the air, including a pipe or duct but not including flares.**

Yes, IERG agrees that the definition of "good engineering practice" should be renumbered as suggested by the Board.

**21. Under proposed Section 203.1220(a), please comment on whether the phrase "(as defined in Section 203.1370)" should be added next to "a significant net emissions increase" to avoid any confusion as follows:**

**a) Except as provided in subsections (d) through (f) below, "major modification" means any physical change, or change in the method of operation of a major stationary source that would result in: a significant emissions increase (as defined in Section 203.1380) of a regulated NSR pollutant (as defined in Section 203.1340); and a significant net emissions increase (as defined in Section 203.1370) of that regulated NSR pollutant for which the source is a major stationary source.**

No, IERG does not believe that the definition of "major modification" should be revised by adding the phrase "(as defined in Section 203.1370)" after the term "a significant net emissions increase" in proposed Section 203.1220(a). The term "significant net emissions increase" is not a defined term, but rather is a sequence of two defined terms: "Significant" is defined at proposed Section 203.1370 and "net emissions increase" is defined at proposed Section 203.1260. The definition of "major modification" in the federal blueprint rule does not include a citation after the term "a significant net emissions increase" in 40 CFR § 51.165(a)(1)(v)(A)(*2*).

**22. Also, in Section 203.1220(b), comment on whether "net emissions increase (as defined in Section 203.1260)" be revised to "significant net emissions increase (as defined in Section 203.13701260)'.**

No, IERG does not believe that the definition of "major modification" should be revised by adding the word "significant" before the term "net emissions increase" in proposed Section 203.1220(b) because this term is followed by the words "that is significant." This phrasing is consistent with the definition of "major modification" in the federal blueprint rule at 40 CFR § 51.165(a)(1)(v)(B).

**23. Several provisions of the proposed rule include the phrase "enforceable as a practical matter". See Sections 203.1260(b)(3)(A), 203.1350(d), 203.2130, 203.2200, 203.2310(a)(1) and 203.2350(b)(2)(B). Please explain what that phrase means in the context of its use in the proposed provisions and provide a definition of the phrase.**

The use of the phrase "enforceable as a practical matter" in the proposed revisions to the NA NSR rule in Part 203 is generally consistent with the federal NA NSR blueprint rule and

with the corresponding provisions of the currently effective PSD rules at Part 204 as summarized below.

- Section 203.1260(b)(3)(A) is consistent with the phrasing in 40 CFR § 51.165(a)(1)(vi)(E)(*2*) and in Section 204.550(e)(2).

- Section 203.1350(d) is consistent with the phrasing in 40 CFR § 51.165(a)(1)(xxi)(D) and in Section 204.620(d).

- Section 203.2130 is consistent with the phrasing in 40 CFR § 51.165(f)(2)(ii)(A) and in Section 204.1630.

- Section 203.2200 is consistent with the phrasing in 40 CFR § 51.165(f)(2)(v) and in Section 204.1690.

- Section 203.2310(a)(1) is consistent with the phrasing in 40 CFR § 51.165(f)(4)(i)(A) and in Section 204.1800(a)(1).

- Section 203.2350(b)(2)(B) is consistent with the phrasing in 40 CFR § 51.165(f)(8)(ii)(B)(*2*) and in Section 204.1840(b)(2)(B).

The phrase "enforceable as a practical matter" is not defined in the currently effective PSD regulation nor in the federal NA NSR blueprint rule. IERG understands this term to have a meaning consistent with that set forth by USEPA in guidance issued in 1995:

> In general, practical enforceability for a source-specific permit term means that the provision must specify (1) a technically accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation (hourly, daily, monthly, annually); and (3) the method to determine compliance including appropriate monitoring, recordkeeping and reporting.[5]

**24. Section 203.2320 specifies that the Agency must address all material comments before taking final action on the permit. Please clarify what "material comments" mean. Comment on whether this section should require the Agency to address all public comments.**

IERG believes that proposed Section 203.2320 should be left as is. The language in proposed Section 203.2320 is consistent with the corresponding PSD provision at 35 Ill. Adm. Code 204.1810 and is consistent with the federal NA NSR regulations.

It is IERG's understanding that "material comments" means all comments that include substantive discussions on or proposed revisions regarding the proposed permitting decision. It

[5] Memorandum from J.S. Seitz, Director, USEPA Office of Air Quality Planning and Standards, Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act, Jan. 25, 1995. Available at https://www.epa.gov/sites/production/files/2015-07/documents/ptememo.pdf.

is IERG's understanding that Illinois EPA typically receives voluminous comments where the commenters copy and paste the same generic, non-substantive language as in numerous other comments. It is IERG's understanding that these types of comments would not be considered "material comments" that would require a response from Illinois EPA.

**25. In Section 203.2350(b)(2), would it be acceptable revise the proposed language as follow:**

**2) The Agency ~~shall have discretion to~~ may reopen the PAL permit for the following:**

IERG does not consider substitution of the word "may" for the phrase "shall have discretion to" to be acceptable in the referenced provision relating to reopening of a PAL permit. The word "may" has multiple meanings. In addition to a meaning relating to permission or discretion, which is the intended meaning in this context, "may" also can convey possibility. The proposed phrasing, which is consistent with that in the federal NA NSR blueprint rule at 40 CFR § 51.165(f)(8)(ii)(B) and in the corresponding provisions of the PSD rules at 35 Ill. Adm. Code 204.1840(b)(2), more clearly conveys the intended meaning.

**26. Section 203.2350(b)(2)(A) specifies that the Agency may reopen a PAL permit to reduce the PAL to reflect newly applicable federal requirements (for example, NSPS) with compliance dates after the PAL effective date. Please comment on whether the Agency must wait until the Board rules are amended to reflect the new federal requirements before reopening PAL permits.**

No, the Board does not act on new federal NSPS or NESHAP rules before they become effective in Illinois. See 415 ILCS 5/9.1(b).

**27. Section 203.2360(b) specifies that "[t]he Agency may approve the use of monitoring systems (source testing, emission factors, etc.) other than CEMS, CERMS, PEMS, or CPMS to demonstrate compliance with the allowable emission limitation. Please clarify whether CEMS, CERMS, PEMS, or CPMS is required for compliance demonstration and any other monitoring system (source testing, emissions factors, etc.) approved by the Agency would be considered as an alternative system. If so, under what circumstances would the Agency specify an alternative monitoring system? Instead of the proposed language, would it be acceptable to provide a cross reference to the monitoring requirements under Section 203.2390?**

The proposed phrasing in Section 203.2360(b), relating to demonstration of compliance with emission limitations established following expiration of a PAL permit, is consistent with that in the federal NA NSR blueprint rule at 40 CFR § 51.165(f)(9)(ii) and in the corresponding provisions of the PSD rules at 35 Ill. Adm. Code 204.1850(b). IERG would consider it acceptable to provide a cross reference to proposed Section 203.2390 instead of the proposed language, but would suggest that a corresponding change also be made to 35 Ill. Adm. Code 204.1850(b) (in order to cross-reference Section 204.1880).

In many instances, instrumental monitoring using CEMS, CERMS, PEMS, or CPMS will not be required for demonstration of compliance and other approaches such as source testing, emission factors, or mass balance calculations will be appropriate. IERG expects that Illinois EPA would approve non-instrumental monitoring approaches in circumstances where such monitoring will provide adequate information to determine compliance with the emission limitation at issue.

**28. Under Section 203.2410, please clarify the meaning of the terms "prompt" and "promptly" with respect to submission of the deviation report. Comment on whether a time limitation can be specified for filing the deviation report.**

The proposed use of the terms "prompt" in Section 203.2410 and "promptly" in Section 203.2410(b), and the reference to the facility's Clean Air Act Permit Program ("CAAPP") permit as establishing the meaning of these terms, is consistent with that in the federal NA NSR blueprint rule at 40 CFR §§ 51.165(f)(14) and (f)(14)(ii) and in the corresponding provisions of the PSD rules at 35 Ill. Adm. Code 204.1900 and 204.1900(b). USEPA explained its rationale for reliance on the facility's operating permit when establishing this requirement:

> Your permit must also require you to meet the semi-annual monitoring and prompt deviation reporting requirements of the title V operating permit program, since the terms and conditions of an approved PAL become title V applicable requirements that will be placed in your title V permit.[6]

Illinois EPA has discretion to establish in the CAAPP permit for a particular facility the meaning of "prompt" for purposes of deviation reporting. 415 ILCS 5/39.5(7)(f)(ii). The corresponding provision of the federal operating permits program at 40 CFR § 70.6(a)(3)(iii)(B) requires that the "permitting authority shall define 'prompt' in relation to the degree and type of deviation likely to occur and the applicable requirements."

Specifying a time period that establishes the meaning of "prompt" and "promptly" for this purpose in Sections 203.2410 and 203.2410(b) could conflict with the time period established by Illinois EPA in the CAAPP permit for a particular facility. For this reason, IERG recommends using the proposed language.

**29. In Section 203.2520, please clarify whether the phrase "fulfillment for the requirements" means "comply with the requirements". If not, please explain the proposed intent. If so, would it be acceptable if this section is reworded as follows:**

> ~~**In the absence of fulfillment of the requirements of both subsections (a) and (b) by**~~ **If the owner or operator of the proposed major stationary source or major modification does not comply with the**

[6] USEPA, Office of Air Quality Planning and Standards, *Technical Support Document for the Prevention of Significant Deterioration and Nonattainment Area New Source Review Regulations* at p. I-7-63 (Nov. 2002)(available at https://www.epa.gov/sites/production/files/2015-12/documents/nsr-tsd_11-22-02.pdf).

**requirements of both subsections (a) and (b), the Agency ~~shall~~ must deny the proposed construction.**

Because failure on the part of the source owner to fulfill the listed requirements does not represent a violation or a non-compliance situation, IERG recommends using the term "fulfill" rather than "comply with." Accordingly, IERG proposes the following rewording of the first paragraph of proposed Section 203.2520:

~~In the absence of fulfillment of the requirements of both subsections (a) and (b) by~~ If the owner or operator of the proposed major stationary source or major modification does not fulfill the requirements of both subsections (a) and (b), the Agency ~~shall~~ must deny the proposed construction.

**30. Section 203.2530(c) requires the Agency to follow the public participation procedures of either Section 203.1610 or Section 204.1320. While both provisions require the Agency to provide a notice of the proposed issuance or modification of a permit, a comment period, and opportunity for public hearing under the Agency's public participation procedures specified in 35 Ill Adm Code 252, Section 203.1610 includes additional requirements. Considering this, please comment on whether it would be acceptable to delete the reference to Part 204 provision as follows:**

**c) In issuing a permit under this Subpart, the Agency ~~shall~~ must comply with ~~follow~~ the public participation procedures of Section 203.1610 ~~or Section 204.1320 of 35 Ill. Adm. Code Part 204~~.**

The public participation procedures are similar, but not identical, under Parts 203 and 204. Proposed Section 203.1610(a) is the same as the PSD provision at 35 Ill. Adm. Code 204.1320, which requires that Illinois EPA's public participation procedures at 35 Ill. Adm. Code Part 252 be followed. In conjunction with the PSD rulemaking at R 19-1, Illinois EPA amended Part 252 to include PSD-specific requirements required under the federal PSD regulations at 40 CFR § 51.166. *See* Statement of Reasons, PCB R 19-1, at 3 (July 2, 2018) (". . . Illinois EPA is currently amending relevant Agency rules at 35 Ill. Adm. Code Part 252, Public Participation in the Air Pollution Control Permit Program, to accommodate at SIP-approved PSD program in Illinois"). Therefore, the reference to Part 252 in Section 204.1320 incorporates all public participation requirements applicable to PSD permits.

On the other hand, Part 252 does not include all public participation requirements applicable to NA NSR permits per the federal rules at 40 CFR § 51.165. *See* 40 CFR § 51.165(i). Because 35 Ill. Adm. Code Part 252 is an Illinois EPA rule, IERG cannot amend Part 252 in conjunction with this rulemaking to address the additional public participation requirements in 40 CFR § 51.165. Thus, it is IERG's intent to address these additional requirements in proposed Section 203.1610(b), instead of requesting Illinois EPA re-open Part 252 to include these requirements.

As noted above, the public participation procedures under Parts 203 and 204 are not identical. Therefore, IERG believes the reference to Section 204.1320 in Section 203.2530(c) should remain. Section 203.2530(c) provides public participation requirements with respect to new major stationary sources or major modifications located in attainment or unclassifiable areas which would cause or contribute to a violation of any NAAQS. IERG's intent was to provide Illinois EPA the flexibility of using the public participation procedures under Part 204 for these projects. It is possible that a new major stationary source or major modification in an attainment or unclassifiable area may need both a PSD permit and a NA NSR permit under proposed Part 203, Subpart R. In that situation, Illinois EPA may decide to address the Part 203, Subpart R requirements in the PSD construction permit. Therefore, Illinois EPA should have the flexibility to use the PSD public participation requirements for that permit.

**31. In Section 232.120, please comment on whether the cross-reference to Section 203.120 in the definition of "fugitive emissions" must be changed 35 Ill Adm Code 203.1190 instead of 35 Ill Adm Code Part 203.**

IERG believes that the proposed cross-reference to Part 203 in the definition of "fugitive emissions" in 35 Ill. Adm. Code 232.120 should remain as is. IERG was deliberate in cross-referencing Part 203 generally, instead of the definition of "fugitive emissions" in proposed Section 203.1190, in order to prevent having to amend 35 Ill. Adm. Code 232.120 in the future. Per the transition provision in proposed Section 203.100, the current provisions in Part 203 Subparts A through H continue to be in effect until IERG's proposed amendments in Subparts I through R are federally approved. Therefore, the proposed definition in Section 203.1190, located in Subpart I, would not be in effect until it is federally approved. Revising 35 Ill. Adm. Code 232.120 now to reference Part 203 generally, instead of proposed Section 203.1190, will prevent having to amend Section 232.120 upon federal approval of IERG's proposed amendments. Additionally, referencing Part 203 generally will also prevent having to amend the cross-reference in 35 Ill. Adm. Code 232.120 if the definitions in Part 203 are renumbered in the future.

**Illinois EPA's Initial Comments and Recommendations for Additional Revisions**

In its Initial Comments and Recommendations, filed on January 18, 2022, Illinois EPA proposed several amendments to the rulemaking proposal. *See* Initial Comments and Recommendations for Additional Revisions, PCB R 22-17 at 8-9 (Jan. 18, 2022). As acknowledged by Illinois EPA, IERG's proposal already includes two of the revisions proposed by Illinois EPA. *See id*. at 8 (regarding proposed revision to 35 Ill. Adm. Code 204.490(c)(3) and 204.930(c)(4)); *see also* SOR at 35-36. In addition to those revisions, Illinois EPA proposed amendments to 35 Ill. Adm. Code 204.620, 204.1500, 204.420, 204.330, and 204.290(a). *Id*. at 8-10. Illinois EPA also proposed to amend several sections within Part 201 and 202, including 35 Ill. Adm. Code 201.169(a)(3), 201.175(g)(2)(A), 201.175(g)(2)(A)(ii), and 201.175(g)(2)(B)(iii), and 35 Ill. Adm. Code 202.306(d). *Id*. at 10-12. IERG does not object to any of the revisions proposed by Illinois EPA to Parts 201, 202, or 204 in its Initial Comments.

WHEREFORE, for the above and foregoing reasons, the Illinois Environmental Regulatory Group hereby respectfully requests the Illinois Pollution Control Board accept its Pre-filed Answers to the Pollution Control Board's Pre-Filed Questions.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP

Dated: February 15, 2022

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

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# United States Court of Appeals

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 21-1033** **September Term, 2021**

**EPA-85FR74890**

**Filed On: November 15, 2021** [1922297]

State of New Jersey, et al.,

Petitioners

v.

Environmental Protection Agency and
Michael S. Regan, in his official capacity as
Administrator of the United States
Environmental Protection Agency,

Respondents

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Consolidated with 21-1039

## ORDER

Upon consideration of EPA's unopposed motions to govern filed October 18, 2021, and November 12, 2021, it is

**ORDERED** that these consolidated cases remain in abeyance pending further order of the court. The parties are directed to file motions to govern future proceedings by February 10, 2022.

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/
Catherine J. Lavender
Deputy Clerk

**ATTACHMENT 1**

Illinois Environmental Protection Agency
Bureau of Air
Permit Section

April 2012

# Responsiveness Summary for Public Questions and Comments on the Construction Permit Application from Christian County Generation for the Taylorville Energy Center in Taylorville, Illinois

Source Identification No.: 021060ACB
Application No.: 05040027

Table of Contents


| | |
|---|---|
| Decision | 1 |
| Background | 1 |
| Comment Period and Public Hearing | 1 |
| Availability of Documents | 2 |
| Appeal Provisions | 2 |
| Questions and Comments with Responses by the IEPA | 3 |
| For Additional Information | 325 |
| Listing of the Significant Changes Between the Draft Permit and Issued Permits | 326 |
| Listing of the Editorial Changes Between the Draft Permit and Issued Permits | 330 |




**ATTACHMENT 2**

LEGAL REQUIREMENTS FOR RESTRICTING A SOURCE'S POTENTIAL TO EMIT

101. The definition of "potential to emit" requires first that the "potential to emit" of a source reflect its maximum capacity to emit a pollutant. Second, it requires that, to the extent that the owner or operator of the source or an agency claims that maximum capacity to emit is constrained in any way, a permit must explicitly set forth the constraint as a physical or operational limit - *e.g.*, a specific limit on fuel, hours of operation, or pollution control equipment operating parameters — that is federally and practically enforceable.

The definition of potential to emit in 40 CFR Part 63 is virtually identical to the definition of potential to emit in the PSD rules, 40 CFR 52.21(b)(4). Courts have interpreted the definition of potential to emit in 40 CFR 52.21(b)(4) to require restrictions on operating hours or production levels or types of material combusted, rather than simply imposing limits on tons of pollutants emitted per year. *See United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1122, 1133 (D. Colo. 1987) (blanket restrictions on actual emissions cannot be considered in determining potential to emit because these blanket emission restrictions, unlike limitations on hours of operation, fuel consumption, or production, "would be virtually impossible to verify or enforce.")

Courts have emphasized the need to ensure that any constraints assumed on potential to emit are grounded in enforcement reality. *See United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1122 (D. Colo. 1987); *Weiler v. Chatham Forest Products,* 392 F. Supp. 532, 535 (2d Cir. 2004) ("In short, then, a proposed facility that is physically capable of emitting major levels of the relevant pollutants is to be considered a major emitting facility under the Act unless there legally and practicably enforceable mechanisms in place to make certain that the emissions remain below the relevant levels").

Shortly after the *Louisiana-Pacific* decision discussed above, the USEPA issued policy on limiting potential to emit on June 13, 1989.[498] In this final guidance, USEPA specified requirements for properly limiting potential to emit. USEPA made it clear that, to be federally enforceable, limitations must be enforceable as a practical matter. USEPA stated that proper limits on potential to emit must include a production or operational limitation in addition to an emission limitation "where the emission limitation does not reflect the maximum emissions of the source operating at full design capacity without pollution control equipment."[499] Restrictions on production or operation would include limitations on amount of fuel combusted, hours of operation, or conditions which require the source to install and operate air pollution control technology to a specified emission rate or specified efficiency level. EPA stated that there are two exceptions to the prohibition on using blanket emission restrictions to limit potential to emit. One exception pertained to surface coating operations, and the other exemption applies when setting operating parameters for control equipment is infeasible. In such cases, a permit that includes "short term emission limits (*e.g.*, lbs per hour) would be sufficient to limit potential to emit, provided that such limits reflect the operation of the control equipment, and the permit includes requirements to install, maintain,

[498] USEPA Memorandum from Terrell E. Hunt to John S. Seitz with subject "Guidance on Limiting Potential to Emit in New Source Permitting" (June 13, 1989), (Commenter's Exhibit 107)
[499] *Id.* at 5-6.

and operate continuous emission monitoring ("CEM") system and to retain CEM data, and specifies that one can use the CEM data to determine compliance with emission limit.[500]

USEPA's 1989 guidance document also discussed "sham operation permits." Specifically, USEPA stated "permits with conditions that do not reflect a source's planned mode of operation are void ab initio and cannot act to shield the source from the requirement to undergo preconstruction review."[501]

Subsequent to the 1989 policies, USEPA issued a policy in January 1995 that discussed the various mechanisms available to create federally enforceable limits on HAP emissions.[502] Permitting programs approved under the SIP can only impart federal enforceability with respect to criteria pollutant emission limits. To create federally enforceable emission limitations for HAPs, the permitting program must be approved under Section 112(1) of the Clean Air Act. USEPA's January 25, 1995 guidance elaborated on prior policies including EPA's June 13, 1989 guidance on creating federally and practically enforceable limitations on potential to emit. These policies are still relied on today for determining whether permit conditions effectively limit potential to emit. *See, e.g.,* USEPA Objection to Proposed Title V Permit for Quebecor World Franklin located in Franklin, Kentucky (Aug. 29, 2002); *see also United States v. Questar Gas Mgmt. Co.,* 2:08-CV-167 TS, 2011 WL 1793172 (D. Utah 2011) ("the Court finds that, as it relates to the NESHAP regulations [HAP regulations], limitations on a facility's emissions may only be considered when they are legally and practicably enforceable by a governmental entity").

The state of Illinois developed a state operating permit program to, among other things, create federally enforceable limits on potential to emit. USEPA approved that program as part of Illinois' State Implementation Plan (commonly referred to as the "SIP") and under Section 112 of the Clean Air Act on March 7, 1995. 60 FR 12,478 (March 7, 1995). In that approval, USEPA reiterated the criteria of its July 28, 1989 Federal Register notice that permit limitations must create federally enforceable limitations on potential to emit. USEPA explicitly stated, it was "promulgating approval of Illinois' federally enforceable state operating permit program (FESOP) for the purposes of creating federally enforceable limitations on the potential to emit of Hazardous Air Pollutants (HAP) regulated under section 112 of the CAA. The USEPA is approving this program as meeting the criteria articulated in the June 28, 1989, Federal Register notice for State operating permit programs to establish limits federally enforceable on potential to emit and the criteria established in Section 112(1)." 60 FR 12,482; *see also* 35 IAC 211.2270, 35 IAC 211.4970. IEPA has proposed to issue the permit for the TEC pursuant to its state FESOP program.

**These comments present a discussion of USEPA guidance on limiting potential emissions through permit conditions, and conclude that the limitations in the permit would not effective in limiting the TEC's emissions of HAPs. The IEPA disagrees with the conclusion.**

[500] *Id.* at 8.
[501] *Id.* at 12.
[502] Memorandum from Kathie A. Stein to the USEPA Regional Air Division Directors with Subject "Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and § 112 Rules and General Permits." (Commenter's Exhibit 108)

**USEPA has generally stated that limitations that are properly structured and enforceable are effective in limiting a source's PTE. *See generally,* Memorandum, dated January 25, 1995, from Kathie A. Stein, Director, Air Enforcement Division, to Director, Air and Pesticides and Toxics Management Division, Regions I and IV, *et al.*, entitled *Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and § 112 Rules and General Permits,* at 6-9. Permit limits for synthetic minor emissions, such as those addressed in the permit, are, in fact, a commonly used mechanism for limiting source-wide PTE. According to USEPA guidance, the critical issue is whether the permit terms limiting emission are practically enforceable.**

**Practically enforceable permit limits on PTE must: (1) provide a clear explanation of how the actual limitation or requirement applies; and (2) enable for the regulatory authority, the USEPA, and the public to ascertain compliance. *See, Sierra Club v. Public Serv. Co.,* 894 F. Supp 1455, 1460 (D. Colo. 1995)). USEPA has recognized that permit limits designed to be practically enforceable provide for a valid and effective constraint on a source's PTE. *See,* USEPA/Region 8 Objections to Proposed Title V Renewal Operating Permit for Big Stone Power Plant in South Dakota and cover letter, dated January 22, 2009 (recognizing that source-wide limits are sufficient to constrain PTE, provided that the limits are written with adequate compliance certification, testing, monitoring, reporting and recordkeeping requirements).**

**In this instance, the HAP emissions limits contained in the permit are consistent with the requirements in USEPA guidance and are therefore effective in limiting PTE for these pollutants. First, the emissions limitations are specific and accurate, as they clearly identify the pollutants that are limited and specify the numerical limits that must be achieved. *See, Guidance on Enforceability Requirements* at 6 (a permit limitation for PTE is specific and technically accurate if "a source is fairly on notice as to the standard it must meet"). In addition to the plant-wide single and combined HAP emission limits contained in Condition 3.4(a), the permit contains the following limits on HAP emissions: 1) plant-wide annual mercury emissions (Condition 3.4(b)), 2) annual methanol emissions from the AGR vent (Condition 4.1.6(a)), 3) annual COS emissions from the AGR vent (Condition 4.1.6(a)), 4) annual COS emissions from the flare (Condition 4.1.6(b)), 5) annual formaldehyde emissions from the combustion turbines (Condition 4.2.6(a) and Attachment 1 Table I), 6) annual hexane emissions from the coal dryers (Condition 4.3.6(d)), 7) annual hexane emissions from the auxiliary boiler (Condition 4.5.6), 7) annual methanol emissions from the methanol tank (Condition 4.8.6), 8) annual COS emissions from equipment leak components (Condition 4.9.5), and 9) annual methanol emissions from equipment leaks (Condition 4.9.5). These conditions likewise identify the regulated pollutants and specify the applicable emissions limitation.**

**In addition, the compliance period specified for the HAP emissions limits in the permit "readily allows for determination of compliance," as compliance is to determined monthly on a 12-month rolling basis. *See, Guidance on Enforceability Requirements* at 8 (stating that "EPA policy allows for rolling limits not to exceed 12 months or 365 days where the permitting authority finds that the limit provides an assurance that compliance can be readily determined and verified."). Moreover, the Permit includes**

**comprehensive and detailed compliance provisions for these emissions limitations, including requirements for testing, monitoring, recordkeeping, and reporting. *See,* Conditions 4.1.9(b)-(d), 4.1.10-2(b), 4.1.10-3(a), 4.1.10-4(f), 4.2.7(a)(i)(A), 4.2.10(d), 4.3.7-1(d), 4.3.10(f), 4.5.7(a), 4.5.9(g), 4.8.8(e), 4.9.6, and 4.9.7(c); *see also, See, Guidance on Enforceability Requirements* at 8 (observing that the method to determine compliance must "state the monitoring requirements, record keeping requirements, reporting requirements, and test methods as appropriate for each potential to emit limitation"). The compliance procedures for these emission limits apply to all periods of HAP emissions, including malfunctions.[503]**

THE PLANT IS NOT A "GENUINE MINOR SOURCE"

102. The TEC would have the potential to emit HAPs. Emission points include the flare, the sulfur recovery unit ("SRU") and acid gas reduction ("AGR") unit vent in the gasification block; the combined cycle combustion turbines ("turbines") in the power block; and various other emission units at the plant. The IEPA finds that the TEC would not be a major source of HAPs because potential emissions from the plant would be less than the applicable thresholds of 25 tons per year in the aggregate for total HAPs and less than 10 tons per year for any single HAP. Accordingly, the IEPA finds that the plant is not subject to the National Emission Standards for Hazardous Air Pollutants ("NESHAPs"), adopted by USEPA under 40 CFR 63, that apply to major sources of HAPs. [504] The IEPA finds further that a case-by-case determination of maximum achievable control technology ("MACT") pursuant to Section 112(g) of the Clean Air Act is not needed for those emission units at the TEC that would not be subject to the NESHAP standards.

As demonstrated below, IEPA's conclusions are erroneous and based on severely flawed and not adequately supported emission estimates for HAPs. The Draft Permit then compounds these errors by failing to reflect the emission calculations in enforceable permit limits. When properly estimated, potential emissions of HAPs from the TEC by far exceed the major source thresholds for both single and total HAPs, making the proposed facility a major stationary source of HAPs and requiring MACT for all applicable sources.

The data for the plant's potential emissions of HAPs are not adequately supported. The IEPA does not provide a discussion of HAP emission estimates in the Project Summary and appears to have accepted CCG's emission estimates wholesale. Many of CCG's estimates for HAP emissions rely on emission factors from emission testing at other facilities, vendor-supplied information, or other studies that were not made available for public review. Thus, a considerable portion of CCG's emission estimates for HAPs are unsupported in the record. The following information, used by CCG to develop emission estimates for the TEC, was not made available:

— The metallic HAP content of coal, used to determine the raw and sweet syngas combustion emission factors for the flare and AGR and the SNG combustion emission factor

[503] **Incidentally, the comment's discussion of USEPA's approval of Illinois' FESOP program as authority for the limitations on HAP emissions in the permit is not relevant. This is because a construction permit is being issued to the TEC. The FESOP program is a means to establish limits on emissions of regulated pollutants from existing sources, that are already in operation. The authority for provisions in the permit that limit HAP emissions arise from the Illinois's various sources of authority for issuance of construction permits.**

[504] Project Summary, p. 20; Draft Permit, p. 3.

## CERTIFICATE OF SERVICE

I, Melissa S. Brown, the undersigned, hereby certify that I have served the attached **ILLINOIS ENVIRONMENTAL REGULATORY GROUP'S PRE-FILED ANSWERS TO THE POLLUTION CONTROL BOARD'S PRE-FILED QUESTIONS** on February 15, 2022, to the following:

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

That the number of pages in the email transmission is 31 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 February 15, 2022.

/s/ Melissa S. Brown

Date: February 15, 2022