BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PROPOSED NEW 35 ILL. ADM. CODE 217.SUBPART U, NO_x CONTROL AND TRADING PROGRAM FOR SPECIFIED NO_x GENERATING UNITS, SUBPART X, VOLUNTARY NO_x EMISSIONS REDUCTION PROGRAM, AND AMENDMENTS TO 35 ILL. ADM. CODE 211	)	R01-17 (Rulemaking – Air)

NOTICE OF FILING

TO: Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA AIRBORNE EXPRESS)

Bobb A. Beauchamp, Esq.
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA AIRBORNE EXPRESS)

(PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have filed today with the Clerk of the Illinois Pollution Control Board an original and nine copies of the **PRE-FILED TESTIMONY OF SIDNEY M. MARDER**, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL REGULATORY GROUP,

Dated: December 7, 2000

By: Katherine D. Hodge
One of Its Attorneys

Katherine D. Hodge
HODGE & DWYER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

Karen L. Bernoteit
Illinois Environmental Regulatory Group
215 East Adams Street
Springfield, Illinois 62701
(217) 522-5512

CERTIFICATE OF SERVICE

I, Katherine D. Hodge, the undersigned, certify that I have served a copy of the attached PRE-FILED TESTIMONY OF SIDNEY M. MARDER upon:

Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Bobb A. Beauchamp, Esq.
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

by sending said documents via Airborne Express in Springfield, Illinois on December 7, 2000; and upon

(SEE ATTACHED SERVICE LIST)

by depositing copies of said documents in the United States Mail in Springfield, Illinois on December 7, 2000.

Katherine D. Hodge

R01-17

SERVICE LIST

Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Bobb A. Beauchamp, Esq.
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Matthew J. Dunn, Esq.
Office of the Attorney General
James R. Thompson Center
188 West Randolph Street
Chicago, Illinois 60601

Mr. Joe Griffiths
ENSR
27755 Diehl Road
Warrenville, Illinois 60555

Ms. Amy Clyde
Dynegy Midwest Generation, Inc.
2828 North Monroe Street
Decatur, Illinois 62526

Bryan Keyt, Esq.
Bell, Boyd & Lloyd
70 West Madison Street
Suite 3300
Chicago, Illinois 60602

Alec Messina, Esq.
Illinois Environmental
Protection Agency
1021 North Grand Avenue East
Post Office Box 19276
Springfield, Illinois 62794-9276

Mr. William A. Murray
Office of Public Utilities
800 East Monroe Street
Springfield, Illinois 62757

Mr. Leonard R. Dupuis
Dominion Generation
5000 Dominion Boulevard
Glen Allen, Virginia 23060

Mr. Alan L. Jirik, CHMM
Corn Products International, Inc.
Moffitt Technical Center
6500 Archer Road
Box 345
Summit-Argo, Illinois 60501-0345

Ms. Shannon Loveless-Bilbruck
Illinois Environmental
Protection Agency
1021 North Grand Avenue East
Post Office Box 19276
Springfield, Illinois 62794-9276

Mr. Scott Miller
Mr. Kent Wanninger
Midwest Generation EME LLC
One Financial Place
440 South LaSalle Street
Suite 3500
Chicago, Illinois 60605

Mr. Brooke Peterson
Illinois Environmental
Regulatory Group
215 East Adams Street
Springfield, Illinois 62701

Ms. Mary Schoen
Enron Corp.
Post Office Box 1188
Houston, Texas 77251

Robert C. Sharpe, Esq.
Illinois Environmental
Protection Agency
1021 North Grand Avenue East
Post Office Box 19276
Springfield, Illinois 62794-9276

Mr. Steven C. Whitworth
Ameren Services
1901 Chouteau Avenue
Post Office Box 66149
MC 602
St. Louis, Missouri 63166-6149

Gabriel M. Rodriguez, Esq.
Kevin B. Hynes, Esq.
Schiff Hardin & Waite
6600 Sears Tower
Chicago, Illinois 60606

David L. Rieser, Esq.
Ross & Hardies
150 North Michigan Avenue
Suite 2500
Chicago, Illinois 60601

Mr. Scott Hanson
Cinergy
139 East Fourth Street
Room 2603 AT
Cincinnati, Ohio 45202

by depositing said documents in the United States Mail in Springfield, Illinois on

December 7, 2000.

Katherine D. Hodge

IERG:001/Fil/R01-17 COS - Testimony

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PROPOSED NEW 35 ILL. ADM. CODE 217.SUBPART U, NO_x CONTROL AND TRADING PROGRAM FOR SPECIFIED NO_x GENERATING UNITS, SUBPART X,) VOLUNTARY NO_x EMISSIONS REDUCTION PROGRAM, AND AMENDMENTS TO 35 ILL. ADM. CODE 211	)	R01-17 (Rulemaking - Air)

PRE-FILED TESTIMONY OF SIDNEY M. MARDER

NOW COMES the Illinois Environmental Regulatory Group, by one of its attorneys, Katherine D. Hodge of HODGE & DWYER, and submits the following Pre-Filed Testimony of Sidney M. Marder for presentation at the December 20, 2000, hearing scheduled in the above-referenced matter:

Testimony of Sidney M. Marder

Good Morning. My name is Sidney M. Marder and I am the Environmental Consultant to the Illinois Environmental Regulatory Group ("IERG"). On behalf of IERG and its member companies, I want to thank the Illinois Pollution Control Board ("Board") for the opportunity to present this testimony today.

Background

IERG has been very actively involved in the negotiations leading up to the development of the regulatory proposal in this proceeding, as well as the development of all of the proposed regulations that constitute the State's response to the NOx SIP Call. IERG has served as the coordinator for industrial input on the proposed NOx SIP Call regulatory Subparts; attempted to assure that each of the affected industrial parties were aware of activities in those Subparts by which they were not directly affected; attempted

to reach out to all affected parties even if they were not members of IERG; and acted as the lead negotiator for the so-called Subpart U sources. Thus, IERG is well aware of the proposed provisions in all of the Subparts, but has particular knowledge of the intent and purposes of Subparts U and X. Importantly, IERG was a primary drafter and negotiator of Section 9.9 of the Environmental Protection Act ("Act"), which is the legislation that, among other things, requires the adoption of proposed Subpart X in this proceeding.

I am pleased to report to the Board, that the extensive negotiations between the Illinois Environmental Protection Agency ("IEPA" or "Agency") and the industrial community, as regards Subpart U, have resulted in agreement as to all provisions. As regards Subpart X, there are still areas of disagreement and those areas will be the focus of my testimony today.

It is important that the Board understand the position taken by the regulated community during the negotiation process. Quite frankly, it is our opinion that the USEPA has relied on faulty science and overestimations as to the effect that the imposition of these regulations will have on attainment with the ozone standard in the eastern states. The proposed regulations are extremely restrictive on the operations of affected sources and will have implications well into the future.

In short, as the Board is well aware, these regulations will impose an absolute cap on the total NOx emissions that a class (or classes) of emission sources is allowed to emit during the control season. And, the cap is perpetual. The regulatory result is that any new source will have to obtain offsets from an existing source, or from one that is planning to shut down. This is particularly worrisome considering that a very high

percentage of Illinois' electricity is generated from nuclear units, many of which are nearing maturity and are not likely to be replaced with new nuclear units.

While this proposal will force technological advances in pollution control – not a bad thing – it will also offer great incentive for fuel switching from coal to lower NOx emitting fuels such as natural gas. While this is, in and of itself, not a bad thing from a pollution control standpoint, it is directly in opposition to the policy that the State of Illinois has advanced for decades, i.e., the expanded use of Illinois coal.

Imposing a cap-type control system on NOx emission sources is akin to expanding the offset provisions of New Source Review to a region wide basis – quite a major shift. Certain facilities seeking to expand in nonattainment areas must obtain offsets for the increased emissions resulting from the expansion. That will be the result here too. However, the difficulty in identifying and obtaining NOx offsets will be great, and will increase as time goes by. The carrot, if you will, of the NOx SIP Call is a trading program which allows for the cap to be met in an additional way (trading rather than over-control at the source). While the regulated community welcomes this option, we must assure that it is conducted with the maximum flexibility allowable.

Having said all of this, IERG entered the negotiations on behalf of the regulated community with these basic principles:

- We will do all we can to increase the flexibility of the trading program, while maintaining the federally required dictates.
- We will propose an allocation system to the IEPA that both meets the Subpart U budget and meets our members needs.

- We will not propose any modifications that would be, on their face, not approvable by USEPA.
- We will attempt to maximize the flexibility envisioned by the Illinois General Assembly when it adopted Section 9.9 of the Environmental Protection Act.

Because of these basic principles, the regulated community conceded a number of provisions which we felt were burdensome, but necessary to receive USEPA approval. I dwell on these principles because we want the Board to clearly understand that we believe the changes and clarifications we are proposing today are fully consistent with our negotiation posture and, given the severe impact of these regulations, necessary to ease the burden of compliance.

Areas of Concern

The intent of my testimony today is to highlight the areas of concern that IERG and its member companies have with the Agency's Subpart X proposal. In reviewing the Agency's regulatory proposal, we have identified the following general areas of concern:

1. The proposal requires that applicability for Subpart X be limited to units that were permitted to operate prior to 1995. IERG would suggest that the rule should say "in operation" instead of "permitted" since applicants only have control of when to apply for permits, not when they are issued. (Proposed Section 217.805 (c).)

2. The proposal requires that only 80% of emissions generated by a Subpart X unit may be credited. (Proposed Section 217.825.)

3. The proposal contains NOx cap provisions which may constrain the equitable use of a facility in the future. (Proposed Section 217.835 (a)(5).)

Units Permitted prior to 1995

The Agency proposal, under proposed Section 217.805 (c), limits applicable units to those that were permitted to operate prior to 1995. (As noted above, IERG believes the

better term would be "in operation" and requests that the Board make such a change.) The net effect is that any unit permitted after 1995, which is emitting and will continue to emit actual emissions of NOx into the atmosphere, will be excluded for consideration as a Subpart X unit. The Agency believes that such a limitation is necessary in that the State NOx budget was based on a 1995 inventory, and that a triennial showing must be made that the budget is not exceeded.

It is important to note that these issues did not concern the USEPA when it included the "opt-in" provisions in the model-trading program. The "opt-in" provisions have no 1995 limitation and, thus, a unit that was permitted in 1998, could opt into the trading program. However, the very same unit would not be eligible under IEPA's proposed Subpart X. This would be true even though the emissions to be transferred would be identical. This is of concern to the regulated community today. Our concern will increase as time goes on and the post-1995 units become older and, thus, the more viable candidates to utilize for allocations when new sources come on line in the future. The net effect of the proposal would be to encourage the continued operation of older and, presumably, less efficient units, because they would be unavailable as a source of allocations for newer more efficient units.

The real issue is can the emissions from a post-1995 unit be verifiable, quantifiable and federally enforceable as required by Section 9.9 of the Act, as well as by the USEPA? One would presume that the answer to this question is "yes." If such is true for 1995 units, it would be even more true for post-1995 units in that the level of scrutiny and the accuracy of the reporting of annual emissions have increased as time progressed. The issue is really very simple. If the owner or operator of an emission unit can

demonstrate that an actual ton of NOx is reduced or removed from the atmosphere, it should be transferable to a trading unit. This is the principle that underlies the "opt-in" procedure, and there is no reason why USEPA should object to the same treatment for Subpart X units.

Clearly, the owner or operator of a post-1995 unit has the option of opting-in rather than using Subpart X. There is one major difference between the two, however, and that is a requirement (under the "opt-in" program) to establish a baseline by operating Part 75 (40 C.F.R. Part 75, hereinafter "Part 75") monitoring for a full year prior to the unit being allowed to opt-in. This presents a "Catch-22" situation for units seeking to opt-in and then shut down, as we expect will be the main use of Subpart X, or for units at which Part 75 monitoring is simply impractical. In the case of a shutdown, a potential opt-in unit would be required to expend the capital to install and operate a Part 75 monitoring system just to prove the emissions that will cease when it shuts down a year later. A high cost to pay to prove a baseline, but it would be approvable.

The Agency's proposal does recognize the Part 75 monitoring dilemma as it applies to pre-1995 units, in that the proposal allows for non-Part 75 monitoring procedures to determine emissions. (See Proposed Section 217.845). If this is acceptable for pre-1995 units, why not for post-1995 units? If non-Part 75 monitoring protocols are acceptable for the full panoply of federally approved programs ranging from New Source Review to Title V Permitting to ERMS, why should it not be acceptable here? The objective here should be the effect of the NOx reductions on the environment. There is no difference between a ton of NOx from a pre-1995 unit and a post-1995 unit on the

environment, and there is no justification for excluding such units from applicability under Subpart X.

Again, our concern is that, in the future, options to meet this perpetual NOx cap will become more and more scarce, and each option we can retain will become more critical. We, therefore, urge the Board to strike proposed Section 217.805(c).

80% Credit Limitation for Subpart X units

The Agency's proposal, under Section 217.825, limits the amount of creditable emissions from both shutdown and restricted-operation Subpart X units to 80% of the emissions actually reduced. As just noted, allocations may well be hard to come by and this is just one more reduction from the overall pot. It appears that the Agency's rationale for this provision, once again, hinges on the lack of Part 75 monitoring requirements under Subpart X. Again, this is used to explain why no reduction is required from units which utilize the "opt-in" procedure. This analysis presumes that the difference in validity between Part 75 monitoring and other monitoring protocols, as used in many other federally approved programs, is 20%. This stretches the bounds of credibility.

Even more importantly, in the case when a Subpart X unit will withdraw its permit and shut down, the issue of a 20% reduction in credits is even less credible. Here, monitoring is not an issue. The only issue is the determination of the baseline. Once agreement is reached on that number – by whatever means is appropriate – there is nothing to monitor. The emission reduction is simply the baseline minus zero. There is no margin of error, and thus, no justification for any reduction. USEPA will know well in advance what the proposed baseline is, in that it will have an opportunity to either

review the FESOP or the reduction plan submitted to the Agency. Accordingly, IERG can see no justification for this requirement, nor can it see why USEPA would require such a provision as a condition for approval.

Notably, the Illinois ERMS trading program has no Part 75 monitoring provisions – and after negotiations on the very same point – that rule provides that units intending to shut down and which enter into a transfer agreement would not be subject to any reduction of credits. The only reason a Subpart X unit would enter the program and shut down is, in fact, to transfer its emission allocation to another Subpart U or W unit. If this type of system is acceptable under the ERMS trading program, we are hard pressed to understand why it would not be appropriate under this proposal. We, therefore, urge the Board to strike the second and third sentences of proposed Sections 217.825 (a) and (b).

The NOx Cap Provisions

The Agency's proposal, under Section 217.810(a)(2), provides that all "like-kind or same type" emission units be subject to an overall NOx cap. The proposal at Section 217.835 (a)(5) allows the permit applicant to exempt a same type unit from the cap if a demonstration can be made that "production shifting" will not occur. IERG reluctantly agreed to such a cap after discussions with the Agency. Although no such concept appears in the "opt-in" provisions of the proposal and, thus, assumedly is not required by USEPA, the regulated community agrees that the potential for problems exists unless some protection is afforded. Our concern was, and after reviewing the transcript from the earlier hearing, still is, that the cap could unintentionally be used to disallow a source the legitimate use of its property. Ms. Kroack's answer to Ms. Hirner's question on this

point (at page 50 – 51 of the transcript) heightened our concern. (11/29/00 IPCB Hearing Transcript at pp 50-51.)

The issues appear to be what is the abuse that the cap is intended to avoid? And, can we better describe what would constitute such an abuse? The first issue is the easy one. The cap is intended to prevent "production shifting." The second issue of what constitutes "production shifting" is more difficult. The Agency has, correctly in IERG's opinion, noted that this will be a case-by-case determination. However, unless there is some agreement as to what we are determining, the result will be haphazard, at best. I would like to explain IERG's interpretation of what does and does not constitute "production shifting" by way of examples, explain why an unwarranted use of the cap would be totally objectionable to the regulated community, and offer a suggested amendment to resolve this issue.

Production shifting occurs, in IERG's opinion, when NOx emissions which resulted from a unit used to produce a product are reduced or terminated and transferred to a Subpart U or W unit, and then emissions from a new unit or increased emissions from an existing unit are used to make the same product.

Example 1. Let's assume that a source has two boilers, A & B. Each boiler operates so as to have a baseline of 50 tons of NOx in a season, for a total of 100 tons of NOx emissions per season. The output of the boilers is used to make 1,000 widgits per hour. The source shuts down Boiler A, and claims 50 tons of credit to be transferred to another source's Subpart U unit. If the source were then to increase the operational load of Boiler B, so as to generate more than 50 tons of NOx per season, in order to produce the

same 1,000 widgits per hour, that **would be production shifting**. Boiler B should be capped to prevent this result. However, the source could over-control Boiler B such that it can produce the 1,000 widgets with only 50 tons of NOx emissions per season, and meet the provisions of the cap.

Example 2. Let's assume that a facility has one boiler that operates so as to have a baseline of 100 tons of NOx emission in a season. The output of the boiler is used to make 1,000 widgits per hour. The source shuts down the boiler and claims 100 tons of credit to be transferred to another source's Subpart U unit. If the source were then to increase the operational load of another on-site boiler, so as to generate increased NOx emission in order to produce the same 1,000 widgits per hour, or construct a new boiler for purposes of producing the same 1,000 widgets, that **would be production shifting.** A cap should prevent this. However, the source could over-control the existing boiler such that it could serve its former functions and also produce the 1,000 widgits per hour at the same NOx emission level and meet the provisions of the cap.

Example 3. Let's assume that the facility in Example 1 opts to over-control Boiler B, and continues to make 1,000 widgits per hour from the existing production line. Business is good and the source has 20 acres of land available for future expansion. Management decides to build a new production facility to manufacture 2,000 additional widgets per hour. The facility will require new steam capacity and a new boiler, which will produce some 75 tons of NOx per season. The new boiler is less than 250,000,000 Btu/hr

and, thus, not subject to Subpart U. The new boiler is permitted to operate. This situation **would not be production shifting,** and the new boiler would not be subject to the cap.

Example 4. Let's assume that the facility in Example 1 opts to over-control Boiler B and continues to make 1,000 widgits per hour from the existing production line. Management decides to add a separate production line to assemble the 1,000 widgets an hour into a final product. This new assembly operation requires new steam capacity and a new boiler, which will produce some 75 tons of NOx per season. The new boiler is less than 250,000,000 Btu/hr and, thus, not subject to Subpart U. The new boiler is permitted to operate. This situation **would not be production shifting,** and the new boiler would not be subject to the cap.

Examples 3 and 4 above are cases where a source owner wishes to productively use its property for economic gain. If the source never got involved in the Subpart X process, there would be no question that they could proceed to increase emissions consistent with current permitting requirements. If a newcomer to the area wished to build a brand new source, there would be no question that they could proceed to increase emissions consistent with current permitting requirements. The point being made is that the cap should be used to prevent "gaming the system" by production shifting, but should not be used to make the cost of participation in Subpart X the loss of the use of one's property.

After considerable thought, it appears to IERG that the appropriate way to handle this issue is to have the regulation provide both the Agency and the regulated community

with some guidance as to the ground rules by which a case-by-case production shifting determination can be made. We would suggest that this could be accomplished by including a new sentence at the end of proposed Section 217.835 (a)(5) as follows:

> Production shifting shall be considered to occur if NOx emissions from all like-kind or same type units at the source are increased above their baselines, as determined in accordance with Subsection 217.820, and such increase is due to operation of the unit for the purpose of replacing the energy required to produce a product or service previously produced by an emission reduction unit.

One other issue is of particular importance to IERG and its members. The issue of how emission reductions which are generated by Subpart X units will be allocated and issued has been the subject of discussions between IERG and the Agency. At the time of drafting my testimony, I believed we had reached an agreement that satisfied the concerns of all parties. The crux of the matter is to find a fix that will provide the regulated community with the assurances it needs to move ahead in an orderly planning process; recognize that it is, indeed, the USEPA that makes the ultimate allocation based on a state's request; and effect the intent and clear language of Section 9.9 of the Act. We may ask that we be allowed to offer testimony, if necessary, at the hearing to explain and/or expand on this very important issue.

Thank you for the opportunity to testify today, and I would be pleased to answer any questions the Board may have at this time.

* * *

IERG reserves the right to supplement or modify this pre-filed testimony.

Respectfully submitted,

By: Katherine D. Hodge
Katherine D. Hodge

Dated: December 7, 2000

Katherine D. Hodge
HODGE & DWYER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

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