

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
PROPOSED NEW 35 ILL. ADM. CODE 217,) R01-9
SUBPART W FOR ELECTRICAL GENERATING)
UNITS, AND AMENDMENTS TO)
35 ILL. ADM. CODE 211 AND 217)

P.C.#8

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on behalf of the ENVIROPOWER OF ILLINOIS, L.L.C., I have filed with the Clerk of the Illinois Pollution Control Board the **PUBLIC COMMENTS OF ENVIROPOWER OF ILLINOIS, L.L.C.**, copies of which are hereby served on you.

ENVIROPOWER OF ILLINOIS, L.L.C.

By: *Bryan E. Keyt*

Dated: October 13, 2000

BELL, BOYD AND LLOYD LLC
Bryan E. Keyt
Michael K. Ohm
70 West Madison Street
Suite 3300
Chicago, Illinois 60602
312-372-1121

THIS FILING SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

PROPOSED NEW 35 ILL. ADM. CODE 217)	
SUBPART W, THE NO _x TRADING PROGRAM)	R01-9
FOR ELECTRICAL GENERATING UNITS, AND)	(Rulemaking-Air)
AMENDMENTS TO 35 ILL. ADM. CODE 211)	
AND 217)	

**PUBLIC COMMENTS OF JOSEPH N. DARGUZAS ON BEHALF
OF ENVIROPOWER OF ILLINOIS, L.L.C.**

EnviroPower of Illinois, L.L.C. ("EnviroPower") appreciates the opportunity to submit these additional comments to the Illinois Pollution Control Board ("PCB") pursuant to the Illinois Environmental Protection Act ("Act") in connection with the rule changes proposed by the Illinois Environmental Protection Agency ("IEPA") including a new 35 Ill. Admin. Code § 217, Subpart W, and amendments to 35 Ill. Admin. Code §§ 211 and 217 ("Proposed Rule").

EnviroPower has serious and fundamental concerns with the Proposed Rule as explained in detail below. Illinois is entering a new deregulated era of electrical generation and it is imperative that the calculation, allocation and trading of NO_x emission allowances be conducted on a level playing field and in an open, competitive marketplace. New, low emission sources trying to enter this market would face significant barriers to entry under the current version of the Proposed Rule, enough so that entry may be practically prohibited. EnviroPower strongly encourages the PCB to consider the stifling effect of the Proposed Rule on electricity generation and respectfully

ENVIROPOWER PUBLIC COMMENTS

requests that the PCB consider the following concerns and take appropriate action before enacting a final rule:

- (1) Section 217.764: The New Source Set Aside (“NSSA”) must be set at a level which will accommodate anticipated growth and electrical demands in Illinois. (*See infra* at 5.)
- (2) Section 217.762: The PCB should consider using an electrical output-based standard for calculating the allowances to be allocated to existing electrical generating units (“EGUs”) and new sources because this approach better correlates energy production with pollutant reduction. (*See infra* at 12.)
- (3) Section 217.762: If an electrical output-based standard is not adopted for purposes of calculating allowance, at a minimum the PCB should apply the same 0.15 lb/mmBtu standard evenly among existing sources and new sources when a new source becomes a budgeted source. (*See infra* at 14.)
- (4) Section 217.768(k): The fee charged to new sources receiving allowances from the NSSA should be priced to cover only Illinois administrative costs and not be used as a distribution of allowance wealth to existing EGUs. (*See infra* at 16.)

In these comments EnviroPower proposes that the PCB modify the language of the Proposed Rule to reflect these positions. Alternatively, EnviroPower requests that the PCB adopt the Federal Implementation Plan (“FIP”) proposed by the U.S. EPA instead of the Proposed Rule because the FIP creates a more level playing field between existing EGUs and new sources. EnviroPower also suggests that the PCB recognize the need for revising the number of allowances available to new sources and support any actions by the Illinois General Assembly to amend Section 9.9(d) of the Illinois Environmental Protection Act (the “Act”) to remove the current 5% cap on the NSSA.

EnviroPower is a new source that would be negatively impacted by the Proposed Rule. EnviroPower is a new company that was formed in the year 2000 for the purpose of developing, owning and operating independent electrical generation facilities fueled by coal or coal tailings. EnviroPower was not involved in the drafting of the Proposed Rule

ENVIROPOWER PUBLIC COMMENTS

because it did not exist at the time IEPA began developing the Proposed Rule with input from existing EGUs. EnviroPower sits in a position similar to many of the yet to be formed companies that will be needed to address the electrical generation demands in Illinois at the start of the Twenty-First century. New EGUs very likely will not be able to do business unless the Proposed Rule is modified. Accordingly, to place EnviroPower's position statements in context, the first section of these comments provides a brief overview of EnviroPower's planned project in Illinois (Section I); next we comment on how the Proposed Rule is problematic (Section II); the next section addresses the recent deregulation taking place in the electrical generation industry and related public policy (Section III); and this is followed by a discussion of the issues EnviroPower recommends that the PCB consider as part of this rulemaking procedure (Section IV).

I. ENVIROPOWER BACKGROUND

EnviroPower's first project involves the construction of a new nominal 500 megawatt ("MWe") independent power facility in Franklin County, Illinois. The project is designed to serve the base-load market and will include two 250 MWe circulating fluidized bed boilers. The project will utilize the best available control technology ("BACT") and, as indicated in our August, 2000 application to IEPA, the plant's projected NO_x emission rate will not exceed 0.125 lb/million Btu. In fact, it is anticipated that the NO_x emission rate may be as low as 0.07 lb/million Btu after optimal performance of our selective non-catalytic reduction ("SNCR") NO_x control system is achieved.

In addition to using BACT and achieving low NO_x emission rates, development and operation of EnviroPower's proposed power facility is intended to benefit public interests above and beyond the generation of power. The facility will convert a closed

ENVIROPOWER PUBLIC COMMENTS

coal mine (presently subject to restoration and related maintenance requirements) into a productive, fiscally-responsible, long-term business operation which will ensure the return of hundreds of jobs to the community. Furthermore, the use of mine tailings (*i.e.*, the removal of the mine tailing piles) at the site, as well as from many similar sites in Illinois which EnviroPower has purchased or optioned, will greatly reduce the ancillary detriments associated with otherwise allowing those piles to remain. By way of example only, removal of the mine tailing piles on site, and those piles found intermittently throughout southern Illinois will reduce potential threats to surface water and ground water from runoff and the leaching of precipitation. The removal of the piles will also eliminate the “eyesore” nuisance. In other words, a site that is currently a drain on the local economy, an environmental concern and an eyesore would, by virtue of EnviroPower’s project, positively impact the Illinois economy and environment. Furthermore, this project will create a much needed base-load generating facility utilizing clean coal technology pollution control equipment to serve the electricity demand for the growing Illinois population for decades to come. To date the IEPA has been extremely helpful and supportive of our project.

II. IMPORTANT COMPONENTS OF PROPOSED RULE EFFECTIVELY PREVENT NEW SOURCES FROM ENTERING MARKET

Below we recommend that the PCB revise certain sections of the Proposed Rule to:

- better level the playing field between all regulated EGUs;
- better comply with the underlying purposes of the NO_x Trading Program;
- improve the quality of our environment; and

ENVIROPOWER PUBLIC COMMENTS

- foster a fair and competitive electrical generation market in Illinois that is more consistent with the interests of the General Assembly and sufficient to satisfy Illinois' future electricity generation needs.

These revisions include: (a) setting the NSSA at no less than 5%; (b) revising the basis for allocation of allowances to utilize an output rather than heat input standard; (c) utilize the same standard for allocating allowances to new and existing sources; and (d) delete or reduce the fee charged to new sources for allowances.

A. THE NEW SOURCE SET-ASIDE WILL NOT ALLOW FOR THE REPLACEMENT OF RETIRED NUCLEAR GENERATING FACILITIES WITH FOSSIL FUEL-FIRED GENERATING FACILITIES.

Multiple nuclear facilities currently serving the Illinois base-load market will need to be replaced over the next ten to fifteen years. For example, the license for Dresden 2 nuclear reactor expires in January 2006, and in January 2011 for Dresden 3. This means that by January 2011, Illinois will need to replace 1,545 MWe of base-load generation capacity. This assumes other nuclear facilities are not retired early like both Zion reactors. In December 2012, both Quad Cities reactors will be shut down creating a need for an additional 1,538 MWe of generating capacity.¹ According to U.S. Department of Energy ("DOE") Projections, "no new nuclear units are expected to become operable by 2020, because natural gas and coal-fired plants are projected to be more economical." *Annual Energy Outlook 2000* at 68 (December 1999). A July 1998 Report of Commerce and Community Affairs examined the Mid America Interconnect Network (MAIN) Region around Illinois and found the situation even worse. In MAIN and states contiguous to Illinois, based-load deficiencies are even more severe and expected to occur in the 2003 to 2005 time frame.

¹ http://www.eia.doe.gov/cneaf/nuclear/page/at_a_glance/reactors/nuke8.html

ENVIROPOWER PUBLIC COMMENTS

EnviroPower will be a base-load facility that could replace some of this base-load power demand. The EnviroPower facility will be a 500 MWe nominal capacity generator with an initial NO_x emission rate of 0.125 lbs NO_x /mmBtu and a targeted emission rate of 0.07 lbs NO_x / mmBtu. EnviroPower will emit approximately 1,170 tons of NO_x during the "Control Period." Assuming the same NO_x emission rate per MWe-hr as EnviroPower, by 2012 approximately 7,217 tons/ozone season of allowances will be needed for new sources to replace retired nuclear generation capacity in Illinois. Because nuclear power production does not generate NO_x and thus is not considered by the Proposed Rule, these allowances will not be obtained from retired nuclear facilities. At the same time that demand for allowances will be increasing (due to projected growth and nuclear facility closure), the Proposed Rule would reduce the NSSA. After 2006 the new source set-aside will be 2% of the budget or 614 tons per ozone season. Proposed Rule, Section 217.760(a)(2).

On a national level, similar to what is expected to occur in Illinois, the DOE has concluded that demand will be increasing at the same time that nuclear facilities will be closing. The Administrator of the Energy Information Administration, U.S. Department of Energy, annually prepares a report that contains national trends and projections of energy consumption and supply. The *Annual Energy Outlook 2000* ("AEO2000") presents midterm forecasts of energy supply, demand, and prices through 2020. The projections are based on the Energy Information Administration's (EIA) National Energy Modeling System. According to *AEO2000*:

- "more than 40% of currently operating nuclear capacity is expected to retire by 2020." *AEO 2000* at 65.

ENVIROPOWER PUBLIC COMMENTS

- “assuming an average plant capacity of 300 megawatts, a projected 1,000 new plants with a total of 300 gigawatts of capacity will be needed by 2020 to meet growing demand and to offset requirements. Of the new capacity, 90% is projected to be combined-cycle or combustion turbine technology fueled by natural gas or both oil and gas.” Id. at 65.
- “More than 21 gigawatts of new coal-fired capacity is projected to come on line between 1998 and 2020, accounting for almost 7% of all expansion.” Id. at 65.

Based on economics, between 1998 and 2020, existing generators are expected to maintain most of their older coal-fired plants while retiring many of their older, higher cost oil- and gas-fired generating plants. Id. at 70.

According to DOE data, the newest emission unit listed on Appendix F of the Proposed Rule was constructed in 1978, with many sources being significantly older. The majority of these sources are coal-fired and, therefore, projected to be operational through 2020 based on DOE estimates. Therefore, allocations from retired coal-fired sources in Illinois will not be available to new sources through the trading program. Because the NSSA is so inadequate, new sources that want to build in Illinois will need to obtain additional allowance allocations from existing EGUs who will be in a position to limit or prevent the development of new sources by limiting the availability of allowances, or by making the cost per allowance economically unreasonable. Thus, the limited NSSA encourages reliance on older, less efficient emission units and discourages the development of newer, more efficient generating capacity. These expected consequences run counter to recent deregulation legislation by discouraging competition and allowing existing utilities to regulate power development and receive compensation from the development of new sources.²

² From an economic development standpoint, an additional irony on the anti-competitive components of the Proposed Rule is important to note. The irony

ENVIROPOWER PUBLIC COMMENTS

We are at a critical juncture in the development of future electrical generation capacity and the proposed decrease in the NSSA will impede the development of much needed new power plants. Nuclear facilities will be retired as electricity demand is increasing. EIA projections conclude that coal-fired power plants are expected to be the key source of electricity through 2020, with 49% of generating capacity. *AEO2000* at 68. Due to long construction lead times, it is unlikely that any new coal plants, other than the EnviroPower project in Franklin County, Illinois will be built before 2005. *Id.* at 66. Yet, in 2006, the NSSA is scheduled to be reduced to 2% or 614 tons/ozone season, which is insufficient for even one coal-fired plant. In order to accommodate new growth the PCB should revise the Proposed Rule to include a NSSA of no less than 5%.

1. THE PROPOSED NSSA IS NOT CONSISTENT WITH U.S. EPA'S INTENT

U.S. EPA did not require states to adopt the 5% NSSA and, in fact, realized that a greater NSSA may be appropriate. In the preamble to U.S. EPA's *Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Group Region for Purposes of Reducing Regional Transport of Ozone Rule*, U.S. EPA advocated that: a "NSSA should be large enough to provide all new units entering the trading program with allocations." 63 Fed. Reg. 57471 (Oct. 27, 1998). It further recognized that "States may

devolves from Illinois' effort several years ago to jump start economic development in southern Illinois by enacting SB 629, the Illinois Coal Act. Among other things, the General Assembly designed that law to promote use of Illinois coal which would, in turn, help return some semblance of economic vitality to the coal producing regions of Illinois. If the Proposed Rule is finalized, it will in affect discourage use of Illinois coal and encourage the further use of coal from Western states by further subsidizing the extremely large users of western coal in Illinois. The importation of coal into Illinois from other coal-producing states has been a growing trend in recent years. In 1996, Illinois utilities purchased approximately 65% of its coal from sources outside of Illinois. The majority of this coal is from western states.

ENVIROPOWER PUBLIC COMMENTS

find that a 5% set-aside is not sufficient to accommodate all their new source growth, and may want to consider a larger set-aside or alternative means to accommodate new sources.” Id.

U.S. EPA’s model rule does not require or even recommend that individual states place a cap on the number of allowances to be distributed to new sources as part of the NSSA. Instead the U.S. EPA indicated that a 5% set aside might be appropriate. The importance of this U.S. EPA position is critical to the PCB remedy of the Proposed Rule. U.S. EPA’s openness to a NSSA higher than 5% means the environmental protection goals of NO_x reduction are not jeopardized by a higher NSSA. Section 217.764 should provide for the maximum 5% NSSA.

2. Proposed Rule is Designed to Protect Existing EGUs from Competition with New Sources

The Proposed Rule provides a set-aside for new sources of 5% of the total allotment of allowances received by Illinois. Currently Illinois has established a trading budget of 30,701 emission credits of which 1,535 will be made available to new sources in each of the first three years of the program. Proposed Rule, Section 217.760.³ This set-aside is barely sufficient to allow the construction of EnviroPower’s first planned base-load power plant which will require as many as 1170 allowances to operate during the control period, let alone the seventy or more plants currently planned for construction in

³ U.S. EPA used complicated economic modeling to allocate allowances to the twenty-two states subject to the NO_x SIP call. This analysis included applying an 8% growth rate for Illinois. August 28, 2000 Hearing Transcript at 110. The State of Illinois commented to U.S. EPA that this 8% figure was too low. In fact, during public hearings on this matter it was indicated that the growth rate could actually be closer to 34%. August 29, 2000 Hearing Transcript at 261-62. Thus, IEPA knew and anticipated significant growth in Illinois, but failed to design a rule to accommodate the projected growth rate.

ENVIROPOWER PUBLIC COMMENTS

Illinois. EnviroPower roughly estimates that for all of the projects currently pending before IEPA and scheduled to begin operation during the first three years of the program, no less than 5670 allowances per year will be needed.⁴ These figures do not begin to consider the effect of nuclear power plant closings. Because of the changing base-load from nuclear to fossil fuel-fired EGUs, logic dictates a high demand for a very limited amount of NO_x emission allowances. As the demand for allowances increases, the Proposed Rule is designed to reduce the number of allowances available to new sources, thereby based on the principle of supply and demand, driving up the cost per allowance. Companies considering building a new EGU to fill this demand will have serious reservations about entering the market considering such regulatory constraints. First, a new entrant to the market must trust that allowances will be available through the interstate NO_x trading market.⁵ There is no guarantee that allowances will be available for trading. If allowances are available, it may very well be that the price for the allowances is so high that it is impossible to generate revenues to cover costs, or the company will purchase allowances at very high costs and be forced to significantly raise

⁴ Chris Romaine of the IEPA testified that he expects that only 70 of a total of 130 turbines either permitted or applying for a permit will be built in Illinois with expected seasonal emissions from those 70 units totaling approximately 4,500 tons NO_x. Testimony of Chris Romaine at 242-44 (Aug. 29, 2000). The EnviroPower project will require 1170 allowances. Obviously, if more of the 130 turbines are constructed, then seasonal emissions will increase proportionally.

⁵ In order to become a participant in the U.S. EPA's Federal Interstate NO_x Trading Program, a state must incorporate by reference into its SIP the applicable federal provisions. *See* 40 CFR § 96.1 Without incorporating the Federal Interstate Trading Program into the Proposed Rule, there is no legal mechanism for Illinois EGUs to trade NO_x allowances with entities outside Illinois' boundaries. EnviroPower suggest that the PCB ensure that any final rule approved as a result of this rulemaking include the provisions necessary to allow Illinois EGUs to participate in the regional trading program.

ENVIROPOWER PUBLIC COMMENTS

the cost of power charged to its customers. Neither of these results are consistent with the purpose or spirit of recent federal and state deregulation laws.

Existing EGUs identified in Appendix F to the Proposed Rule will be able to install control technology to their existing systems in order to reduce emissions or transfer allowances between their own facilities, and thereby stay within their allowances. New sources automatically subject to BACT, will not have the luxury of manipulating the control technology to accommodate the allowance supply. Because an insufficient number of allowances are included in the NSSA, new sources will be forced to purchase allowances, presuming such allowances are available, through the NO_x trading program because they will already be utilizing BACT, and therefore will have little opportunity to reduce emission rates. Thus the rule as proposed protects the existing Appendix F EGUs which will be granted the number of allowances they have negotiated from IEPA over the past several years, while new sources utilizing state of the art control equipment may not be able to enter the market because too few allowances will be available.⁶ Yes, new sources could conceptually go out and buy allowances held by the Appendix F sources. Such a scenario presumes the Appendix F sources would be willing to sell excess allowances. The Proposed Rule affords them discretion to sell or hoard those allowances. Even if they elect to sell, it will likely be at an artificially inflated price considering the number of new EGUs that will need to obtain a significant number of allowances. Any money paid by new sources for Appendix F allowances will be in essence both a windfall

⁶ This disparity is confirmed by testimony presented during this rulemaking. Existing EGUs have stated they will need to meet an emission rate below the 0.15 mm/Btu standard to operate and also comply with the Proposed Rule. *See* Testimony of Dominion Energy, Sept. 26, 2000 Hearing Transcript at 128-29. New sources should be given this same opportunity.

ENVIROPOWER PUBLIC COMMENTS

and subsidy for the Appendix F sources. By virtue of automatically receiving an allotment of allowances as an existing source, Appendix F sources will receive a significant head start that may prevent new sources from entering the market and competing. The rule as proposed allows the character and nature of the old monopoly system to prevail under the guise of deregulation.

B. THE ALLOCATION PROVISION OF SUBPART W SHOULD UTILIZE AN ELECTRICAL OUTPUT-BASED STANDARD

Allowances should be allocated to both existing EGUs and new sources based on a standard, we recommend an electrical output-based standard, that is directly tied to the environmental goal: measurable, predictable NO_x reductions. The testimony presented during the two hearings in this matter, and bolstered by the Peaker Inquiry hearings, reveals the fact that the universe of allowances is not expected to come close to satisfying the existing demand, let alone any reasonable projection of future growth. During questioning of several witnesses, PCB members, including the rulemaking lead, Dr. Flemal, queried witnesses on their collective experiences with ongoing NO_x and other similar environmental allowance trading programs. The PCB further questioned representatives of IEPA, pre-1995 existing EGUs, and Peaker Plants regarding the prospects of the trading program working; the prospects of predicting supply of allowances; and the expected pricing considerations for allowances. The responses were articulate and well-intended but ultimately can be paraphrased as “we can only speculate it may work.” Such speculation is dangerous because the regulatory and business climates are in flux, in effect moving targets, and, therefore, any static measure chosen today, may very well be wrong tomorrow.

ENVIROPOWER PUBLIC COMMENTS

In the Proposed Rule the IEPA has suggested allocating allowances to sources based on the amount of emission input which EnviroPower believes is a misguided approach. Allocation, for example, based on an electrical output-based standard (i.e., lb. NO_x/MWe-hr) is a much truer and more predictable reference point. Though U.S. EPA's model rule included an optional heat, input approach, the Agency recognized that (1) the states have flexibility to develop their own allocation methodology; (2) indicated that U.S. EPA is developing an output-based approach because of the significant environmental benefits that can be obtained; and (3) stated that it "would support a decision by a state to use either heat input or output data as a basis for source allocations . . ." 63 Fed. Reg. 57470 (Oct. 27, 1998).

Allocation methodologies using heat-input as the reference point miss the target for several reasons. The data generated is subject to multiple interpretations because it results from a myriad of variables. To illustrate by way of simple example, compare the generation of power to the production of hamburger. Animal feed is the "fuel" given to a steer that eventually results in the hamburger sold at the supermarket. Between the time the animal eats the food to when it is slaughtered and sold at the supermarket, many variables impact on the quantity and quality of the hamburger produced (e.g., weather, disease, genetics). Trying to regulate the quality of the product, hamburger, by solely targeting the fuel or animal feed is overly-complicated and illogical given the number of other factors that will ultimately impact the end product. Electricity generation is similar in a number of pertinent respects. After the fuel is added to the combustion unit, many factors may impact what ultimately comes out of the stack in the form of NO_x (e.g., combustion, temperature, combustion air, fuel quality, etc.). Considering the inherent

ENVIROPOWER PUBLIC COMMENTS

need here for accountability and predictability, it seems only logical to correlate allowance allocation with a predictable, less variable standard, output, which also measures environmental benefit, NO_x reductions. If the standard were tied to output, it also would likely focus attention on pollution reduction, thereby supporting the fundamental goals of the NO_x SIP Call. EnviroPower understands from the testimony on the record that such electrical output-based standards for calculating allowances are in place in several states including Connecticut, Massachusetts and New Jersey.

The Proposed Rule should ultimately invite and encourage power generation development which results in optimal pollution reduction and cost-effective power generation. As written presently, the Proposed Rule does the opposite by creating an uneven playing field with the clear advantage going to less efficient pre-1995 EGUs. Changing the allowance allocation methodology to an electrical output-based standard not only continues to protect the environment, but allows the allocation process to be consistent with the principles of free market competition and fundamental fairness.⁷

C. EXISTING EGUs AND NEW SOURCES SHOULD BE TREATED EQUALLY FOR PURPOSE OF APPLYING A NO_x EMISSION RATE OF 0.15 LB/MILLION BTU

If an electrical output-based standard is not selected by the PCB, then EnviroPower respectfully recommends that Section 217.762 be revised to allocate allowances to sources using the same standard, and thereby incentivize both existing and

⁷ Though Section 217.756(d)(7) of the Proposed Rule provides that allowances allocated by the IEPA do not constitute a property right, the rights and privileges granted under the Proposed Rule to existing sources in fact operate as a grant of a property interest in allowances. Accordingly, if passed in its current form, the Proposed Rule raises significant federal and state constitutional issues involving, *inter alia*, the Interstate Commerce Clause and substantive and procedural due process provisions.

ENVIROPOWER PUBLIC COMMENTS

new sources to improve the quality and operation of their control equipment. If a source is able to generate more power with the same or fewer NO_x emissions, then it should be able to at least buy fewer through the NO_x trading program. This result is good for the economy and the environment and is fair competition.

Under the Proposed Rule, IEPA intends to calculate allowances for existing budget EGUs using a 0.15 lb/mmBtu NO_x emission rate. Section 217.762. A different standard is proposed for budget EGUs not listed in Appendix F, *i.e.*, new sources. For new sources, IEPA intends to calculate allowances using the more stringent of 0.15 lb/mmBtu or the permitted NO_x emission rate, but not less than 0.055 lb/mmBtu. Section 217.762(a). When new sources become budgeted EGUs, their allocation rate does not change to 0.15 lb/mmBtu, but remains at their original new source allocation rate, which is determined by 217.768(e). Since these sources will be using BACT for NO_x emission rates, there is little chance of further reductions and therefore little opportunity to sell excess allocations. This is not the case with existing EGU's. Existing EGUs that obtain a emission rate below 0.15 lb/mmBtu can, as an option, sell or retain the excess allotments. We believe that new sources that become budgeted sources should be afforded the same opportunity and that their budgeted allotment also be based on 0.15 lb/mmBtu to create a level playing field. Again, the Proposed Rule is drafted with prejudice to new sources. The bias, importantly has no rational connection to environmental protection but is solely aimed at existing EGU financial protection. Existing EGUs are to receive credits at a set standard, regardless of their permit limits while new sources are held to potentially a more stringent standard. This, again, cuts against the principles U.S. EPA articulated in the NO_x SIP Call preamble where it

ENVIROPOWER PUBLIC COMMENTS

maintained “that as much as possible within the context of the overall trading budget, allocations should be provided to new sources on the same basis as that used for existing units until the time when the new sources receive an allocation as part of an updating allocation system.” *See* 63 Fed. Reg. 5741. When Kathy Bassi of the IEPA was asked about a cost analysis or any other specific analysis supporting this distinction, she indicated that there was none. August 29, 2000 Hearing Transcript at 173-74. Applying different NO_x emission rates to new sources without being able to provide a rational basis or justification contradicts the principles inherent in a deregulated marketplace in which all participants have equal access to opportunity.

Under the Proposed Rule, a new source is actually punished even though it may be emitting at the same or a lower rate compared to an existing EGU. Moreover, the Proposed Rule provides no incentive for new sources to seek to operate at less than a 0.15 mm/Btu standard. Further, the disparate treatment acts as a disincentive and possibly a barrier for new sources to enter the market. This result is contrary to the PCB’s inherent charter to promote protection of human health and the environment and the fundamental principles behind the NO_x SIP Call. Additionally, where new sources already will be in a difficult position of obtaining sufficient allowances to cover their needs despite having installed BACT, such disparate treatment between existing EGUs and new sources makes it even more difficult for new sources to operate, let alone compete.⁸

⁸ The PCB should note that some of the existing sources identified in Appendix F to the Proposed Rule are receiving allowances based on many years of coal utilization, yet by the time that the Appendix F sources are utilizing allowances, some (e.g. Ameren, Grand Tower) will have actually switched to gas-fired operations which generate fewer NO_x emission. *See* Hearing Transcript, 101-05. Though EnviroPower supports the use of cleaner burning EGUs, it suggests this different treatment of existing EGUs and new sources is fundamentally unfair.

ENVIROPOWER PUBLIC COMMENTS

D. FEE CHARGED TO NEW SOURCES UNDER SECTION 217.768 (k) SHOULD ONLY COVER IEPA ADMINISTRATIVE COSTS

In addition to revisions to the universe of NSSA allowances and how the allowances are allocated and calculated, EnviroPower respectfully suggests that there should be no fee assessed for withdrawal of allowances from the NSSA. As proposed, Section 217.768(k) provides that the IEPA shall charge new sources a fee in exchange for allowances. We understand the fee would equal the “market index price” for NO_x allowances allocated from the NSSA. The rule as proposed would distribute proceeds from NSSA allowance sales to first recoup IEPA program expense and thereafter be distributed to the Appendix F sources. Such a distribution is not required or even suggested by the U.S. EPA Model Rule and only serves as a subsidy to existing EGUs. It would be an additional barrier to entry by new sources. In the alternative, to the extent that administration of the trading program will burden the IEPA resources, EnviroPower suggests that a NSSA allowance withdrawal fee be limited to solely cover IEPA program expenses as a reasonable compromise.

The IEPA’s Statement of Reasons filed in support of the Proposed Rule accepts, without further investigation, the Appendix F EGUs’ argument.⁹ The PCB should not only reject the Existing EGU position on its face, but should avoid participating in this effort to manipulate the otherwise desirable role of competition.

Furthermore, the U.S. EPA Model Rule does not include a fee for NSSA allowances. We respectfully suggest to the PCB that the lack of a fee mechanism in the

⁹ The Appendix F EGU position, as summarized in the Statement of Reasons, states that because the Existing EGUs allege retrofitting controls are more expensive than new construction and because the Illinois NO_x budget is based, in part, on Existing EGU historic operation, sharing of the NSSA allowance must include a return subsidy to Existing EGUs.

ENVIROPOWER PUBLIC COMMENTS

U.S. EPA Model Rule confirms that it has no bearing on achieving any of the environmental protection goals of 40 C.F.R. Part 96. As such, the Proposed Rule should only include a fee mechanism if necessary to cover its administration costs.

EnviroPower realizes that Section 9.9(i) of the Act allows for the IEPA to proffer such an allowance fee scenario. Here, however, distinct from the 5% NSSA cap, the enabling authority is discretionary. We urge the PCB to act here to allow the free market to work as intended by the recent deregulation legislation by deleting the proposed fee or limiting it to solely cover IEPA costs. Should the PCB deem it necessary to weigh whether the financial impact of the NSSA allowance distribution justifies a fee designed to subsidize the older EGUs, we respectfully suggest that the record before the PCB on this issue lacks any comprehensive analysis that would fairly assess the impact upon all foreseeable types of EGUs.¹⁰

III. PUBLIC POLICY AND RECENT DEREGULATION LEGISLATION SUPPORT ENVIROPOWER'S PROPOSED REVISIONS

Our Illinois law makers have mandated that a deregulated electricity generation market is in the best interest of the nation including the citizens of Illinois. Comprehensive Electricity Competition Act (H.R. 1828, S. 1047); Illinois Electric Service Customer Choice and Rate Relief Act of 1997 (collectively "Deregulation Laws"). The passage of deregulation legislation in Illinois reflects the state's efforts to be at the front of a national trend aimed at eliminating the electric utilities' historic monopoly and insuring a transition resulting in open, free-market competition for power generation. Though the issues inherent to deregulation were addressed in the

¹⁰ Lacking any substantive record justifying the return of sale proceeds to Existing EGUs, at a minimum this issue, if finalized would be subject to a constitutional challenge based n the doctrine of procedural due process.

ENVIROPOWER PUBLIC COMMENTS

Deregulation Laws, the legislators who crafted the language would attest that it remains “a work in progress.” For example, the importance of free-market, open competition in electric generation was so much in the forefront of the General Assembly’s collective mind that the Deregulation Law, at Section 16-120, requires the Illinois Commerce Commission to study and regularly monitor the “development of [the] competitive market.” 220 ILCS § 5/16-120. The Commission’s duty to assess competition includes analysis of “any barriers to entry” into the market and “any impediments to the establishment of a fully competitive energy and power market in Illinois.” *Id.* at 5/16-120(a). To avoid immediate challenge, particularly in the area of “barriers to entry,” the proposed amendments to Subpart W must at a minimum not conflict with or undercut Deregulation Laws.

The Proposed Rule, particularly where it creates a dual system of allocating allowances dependent on EGU status, is a barrier to entry into the generation market and an impediment or “chilling” factor to overall energy competition. An example of such a barrier is the consequence of the rule’s “fixed-flex” allocation. The formulaic approach, a notable and questionable departure from the U.S. EPA Model Rule, insures pre-1995 EGUs a fixed percentage of their allocation regardless of historic operations. The result would guarantee pre-1995 EGUs a significant majority of allowance allocations for at least the first seven years of the program. Particularly because this approach has no rational basis other than subsidizing the existing EGUs, it will discourage new entries into the market. A likely consequence of the dual allowance allocation system would include Illinois maintaining its notorious position of having some of the most expensive electricity in all the nation because new competition would be discouraged and existing

ENVIROPOWER PUBLIC COMMENTS

EGUs would not be motivated to improve their production efficiency. The PCB can make a positive difference by moderating how allowances are allocated.

Further, the Proposed Rule's duality regarding EGU type is not authorized by the Illinois Environmental Protection Act. The General Assembly, at Section 9.9, authorizes the cap and trading program; distinguishes between EGU and non-EGU; allows for distribution of allowance proceeds from the NSSA sale to existing EGUs; and directs the PCB to reconcile the NO_x trading program "relative to the traditional regulatory control requirements . . . for EGUs and non-EGUs." The Act does not direct the PCB to effectively create an allowance allocation class system within the EGU universe as provided by the Proposed Rule. With the exception of the NSSA proceeds provision, it is unmistakable that the Section 9.9 legislative directives are designed to assure a protected environment and clean air. On the other hand, it is inconsistent with Illinois law, particularly considering the intent and purpose of the Deregulation Law, for the rule to attempt to balance and manipulate the relative components of the free market, here – allocation and administration of allowances.

In addition to the need to act in a manner consistent with Illinois statute, sound public policy requires that the allowance allocation be meted out as neutrally and independently as possible. In an ideal setting where all factors were fixed or predictable, it would remain questionable as to what basis would justify environmental regulation dictating financial impacts where the environmental purposes – here NO_x reductions – were otherwise satisfied. In the matter at hand, the electricity generation industry is anything but static. The factors relevant to financial impact from access to allowances are wholly variable, changing continuously, and, therefore, result in a dynamic,

ENVIROPOWER PUBLIC COMMENTS

subjective situation that can only be properly served by a fluid and reactive system. The proposed fixed-flex methodology is not such a system (e.g. in fact, the record is replete with statements confirming that allocation of allowances as proposed will critically under serve the future power generation needs). The system needed in this instance is chomping at the bit to operate; the system is the free market. This Proposed Rule must not preclude the role of the free market.

IV. RECOMMENDED ACTIONS THE PCB SHOULD TAKE TO CREATE A LEVEL PLAYING FIELD

The Proposed Rule currently being considered by the PCB is needed to comply with the Federal Clean Air Act, the NO_x SIP Call, and the Illinois Environmental Protection Act. Intended benefits include a reduction in the amount of ozone emitted by electrical generating units (“EGUs”) and a reduction in the regional transport of ozone-contributing constituents with the ultimate goal of protecting our environment. However, as currently drafted, the Proposed Rule will likely cause results inconsistent with this intent and make it much more difficult and, in some cases, impossible for new sources such as EnviroPower to construct and operate new base-load EGUs.

EnviroPower sincerely believes its comments go well beyond “jockeying for economic leverage” between existing EGUs, Peaker Plants and now EnviroPower and other similar projects. EnviroPower acknowledges leveling of the proverbial playing field would result in added benefits to the Peaker Plants and new EGUs. Such a circumstance is clearly one of the objectives of Deregulation Laws, namely encourage new generation competition. Similarly, the leveling of the playing field serves a primary goal of the NO_x SIP Call and the Act: promote upgrading of old facilities to reduce NO_x

ENVIROPOWER PUBLIC COMMENTS

emissions. The changes we propose below provide the following critical benefits which the Proposed Rule would otherwise preclude:

1. An open and competitive electricity generation market.
2. Cost-effective production of electricity.
3. Cost competitive sale of electricity.
4. Competition to develop and implement innovative pollution control and reduction technology and practices.

EnviroPower recommends the PCB make the following revisions. In the alternative, should the PCB determine that time constraints or the lack of a sufficient record dictate that the below revisions cannot be incorporated into the Proposed Rule without further deliberation, notice and public comment, EnviroPower recommends that the PCB set aside the Proposed Rule for further hearings and adopt the Federal Implementation Plan set forth by U.S. EPA.¹¹

¹¹ The PCB has agreed to subject this rulemaking to its expedited rulemaking procedure authorized by Section 28.5 of the Act. In theory, this made some sense when first presented, considering the pressure from U.S. EPA to comply with the NO_x SIP Call or face a FIP. EnviroPower respectfully suggests that the record before the PCB now dictates reconsideration of the fast-track. For example, events beyond the control of the State of Illinois, namely the progress (or lack thereof) of certain contiguous Region 5 states towards achieving compliance with the NO_x SIP Call, when considered in the context of the prohibition in Section 9.9(f) of the Act, effectively means rushing to judgment on the critical issues before the PCB is inconsequential. For example, EnviroPower is concerned that Illinois not make the mistake of rushing to enact rules that: (a) are not enforceable because of other Section 9.9(f) states slower SIP timelines; (b) were derived from a record lacking sufficient analysis on financial impact of the rule for all foreseeable types of EGUs; and (c) discourage rather than encourage open competition in a manner consistent with Illinois. The bottom line, if modified, is that this rulemaking affords the PCB the opportunity to institute a NO_x trading program that can serve the citizens of the State by assuring NO_x reductions and allowing the market to encourage affordable electricity via open competition.

ENVIROPOWER PUBLIC COMMENTS

EnviroPower believes that the Proposed Rule can satisfy the various requirements, including the NO_x SIP Call, and, be consistent with the Deregulation Law, if the PCB:

- (1) Revises Section 217.764 to provide for an NSSA which anticipates the realistic electricity generation growth and demand. In the short term, that means revising the rule to set the NSSA at 5% but building in a provision that allows the 5% cap to be automatically increased when the General Assembly eliminates the statutory NSSA limit.¹² EnviroPower further proposes that the PCB ensure that any final rule include provisions necessary for Illinois EGUs to participate in the NO_x regional trading program.
- (2) Revise Section 217.762, to insert an allowance calculation method based upon an electrical output-based standard. Such a standard would insure a more reliable correlation between energy production and NO_x reduction. An electrical output-based standard will also incentivize all EGUs to improve NO_x control/ reduction technology and power plant operations.
- (3) In the alternative, should the PCB elect to not implement an electrical output-based standard, a reasonable compromise of allowance calculation would be for the PCB to apply the same 0.15 lb/mm Btu Standard to new sources that become budget EGUs in Section 217.762.
- (4) Revises Section 217.768(k) to eliminate the proposed fee for new sources purchasing NSSA allowances or, in the alternative, limit NSSA allowance to solely cover IEPA's administrative costs.

V. CONCLUSION

EnviroPower is grateful to the PCB for the opportunity, to provide comments and fully anticipates the PCB's full and deliberate consideration of the complex and important issues presented by the Proposed Rule. The PCB and the IEPA have taken on a daunting

¹² As the neutral and independent arbiter of the law and facts which comprise this docket, EnviroPower respectfully requests the PCB acknowledge the significant demand for new, cleaner EGUs in Illinois and further state on the record that the 5% statutory cap on the NSSA is insufficient to meet anticipated needs. The General Assembly will then have an opportunity to consider those comments as it is reviewing Section 9.9(d) of the Act.


ENVIROPOWER PUBLIC COMMENTS

task and, from EnviroPower's view, tackled the rulemaking in a most professional and well-intended fashion. We only ask the PCB to help us to help provide for continued economic development in an environmentally responsible manner in our home state of Illinois.

Thank you for considering our comments.

Respectfully submitted,

ENVIROPOWER OF ILLINOIS, L.L.C.

By: 
Its attorney

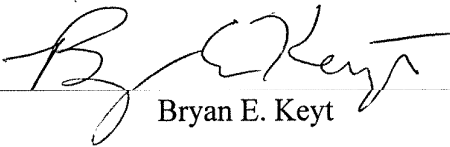
Bryan E. Keyt
Michael K. Ohm
Bell, Boyd & Lloyd LLC
70 West Madison Street
Suite 3300
Chicago, Illinois 60602
312-372-1121

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing **PUBLIC COMMENTS OF ENVIROPOWER OF ILLINOIS, L.L.C.** were served on behalf of EnviroPower of Illinois, L.L.C.:

See: Attached Service List

on or before 5:00 p.m. on this 13th day of October, 2000, by first class U.S. Mail, postage prepaid.


Bryan E. Keyt

SERVICE LIST – R01-9

Karen L. Bernoteit
Illinois Environmental Regulatory Group
215 East Adams Street
Springfield, IL 62701

Rick Diericx
Dynergy Midwest Generation Inc.
2828 N. Monroe Street
Decatur, IL 62526-3269

Lenny Dupuis
Dominion Generation
5000 Dominion Blvd.
Glen Allen, VA 23060

J. Derek Furstenwerth
Reliant Energy, Incorporated
P.O. Box 286
Houston, TX 77001

Dorothy Gunn
Illinois Pollution Control Board
Clerks Office
100 West Randolph Street
No. 11-500
Chicago, IL 60601

Steven J. Harvey
Ameren Services
1901 Chouteau
P.O. Box 66149, MC 602
St. Louis, MO 63166-6149

Bill Hoback
3695 South 6th Street
Springfield, IL 62703

Leonard Hopkins
Southern Illinois Power Coop.
11543 Lake of Egypt Road
Marion, IL 62959-8500

Bryant Lamer
Sidley & Austin
10 South Dearborn
Chicago, IL 60603

Joe Darguzas
EnviroPower
505 Hamilton Wood
Homewood, IL 60430

Carol L. Dorge, Esq.
315 East Sheridan Road
Lake Bluff, IL 60044

Cindy Faur
Sonnenschein, Nath & Rosenthal
8000 Sears Tower
633 S. Wacker Drive
Chicago, IL 60601

Daniel J. Goodwin
Goodwin Environmental Consultants, Inc.
400 Bruns Lane
Springfield, IL 62702-4617

Heidi E. Hanson
H.T. Hanson, Esq. P.C.
4721 Franklin Avenue
Suite 1500
Western Springs, IL 60558-1720

Vera Herst
Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

Katherine D. Hodge
Hodge & Dwyer
3150 Roland Avenue
P.O. Box 5776
Springfield, IL 62705-5776

Laurel Kroack
Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

Shannon Loveless-Bilbruck
Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

Joe McGervey
Energy and Environmental Analysis, Inc.
1655 North Fort Myer Drive
Arlington, VA 22209

Tracey Milhelic
Baker & McKenzie
130 East Randolph
One Prudential Plaza
Suite 3500
Chicago, IL 60601

Scott Miller
Kent Wanninger
Midwest Generation EME, LLC
1 Financial Plaza
440 South LaSalle Street
Suite 3500
Chicago, IL 60605

Frederick G. Muckerman
Compliance Technologies
70 West Madison Street
14th Floor
Chicago, IL 60602

William A. Murray
City Water, Light & Power
800 East Monroe
Springfield, IL 62757

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

David Rieser
Ross and Hardies
150 North Michigan Avenue
Suite 2500
Chicago, Illinois 60601-7576

Daniel Rosenblum
Environmental Law and Policy Center
35 East Wacker Drive
Suite 1300
Chicago, IL 60601

Mary Schoen
Enron Corp.
P.O. Box 1188
Houston, TX 77251

Patricia Sharkey
Mayer, Brown & Platt
190 South LaSalle
Chicago, IL 60603

Tony Shea
ABB Energy Ventures
202 Carnegie Center
Suite 100
Princeton, NJ 08540

Brad Sims
ENSR
27755 Diehl Road
Suite 100
Warrenville, IL 60555

Brian Urbaszewski
American Lung Association of Metropolitan Chicago
1440 West Washington
Chicago, IL 60607

Steven C. Whitworth
Ameren Services
1901 Chouteau
P.O. Box 66149, MC 602
St. Louis, MO 63166-6149

Sheldon Zabel
Schiff Hardin & Waite
6600 Sears Tower
Chicago, IL 60608