ILLINOIS POLLUTION CONTROL BOARD
August 20, 2009

IN THE MATTER OF:	)	
	)	
NO_x TRADING PROGRAM:	)	R06-22
AMENDMENTS TO 35 ILL. ADM. CODE	)	(Rulemaking - Air)
PART 217	)	

ORDER OF THE BOARD (by A.S. Moore):

On August 3, 2009, the Illinois Environmental Regulatory Group (IERG) filed two motions in this rulemaking docket, a "Motion for Emergency Rule" (Mot. Emer.) and a "Motion for Expedited Action on the Illinois Environmental Regulatory Group's Alternative Proposal" (Mot. Exp.). In an order dated August 6, 2009, the Board directed participants to file responses to the motions no later than Thursday, August 13, 2009, and directed IERG to a file a reply, if it wished to do so, no later than Monday, August 17, 2009. Fourteen participants filed timely comments, and IERG filed a timely reply.

For the reasons stated below, the Board today denies IERG's motion for adoption of an emergency rule and denies IERG's motion for expedited review of an alternative rulemaking proposal in this docket. However, if IERG wishes to file a rulemaking proposal, the Board will consider it in a separate docket.

In this order, the Board first provides the procedural history of this rulemaking docket. The Board then provides a summary of IERG's motions. The Board then summarizes the various responses to those motions and IERG's reply. After providing relevant legal authorities, the Board discusses the two motions and reaches its conclusion on both of them.

PROCEDURAL HISTORY

On January 19, 2006, Illinois Environmental Protection Agency (Agency or Illinois EPA) filed a rulemaking proposal accompanied by a motion for waiver of various copy and filing requirement. A Statement of Reasons accompanied the proposal. In an order dated February 2, 2006, the Board accepted the proposal for hearing and granted, with specified exceptions, the motion for waiver of copy and filing requirements. On February 21, 2006, the Agency filed a motion to supplement its rulemaking proposal with materials for which the Board did not waive copy and filing requirements. In an order dated March 16, 2006, the Board granted the motion to supplement.

As required by Section 27(b) of the Environmental Protection Act (Act) (415 ILCS 5/27(b) (2008)), the Board requested in a letter dated February 27, 2006, that the Department of Commerce and Economic Opportunity (DCEO) determine whether it would conduct an economic impact study of the Agency's rulemaking proposal. The Board has received no response from DCEO to that request.

On March 13, 2006, IERG filed a motion for expedited review, accompanied by its initial comments on the Agency's proposal. On March 27, 2006, the Agency filed its response to the motion for expedited review. On March 31, 2006, IERG filed a motion for leave to reply to the Agency's response, accompanied by its reply. In an order dated April 20, 2006, the Board denied IERG's motion for expedited review. The Board found that IERG had failed to demonstrate material prejudice and noted the Board's schedule of air rulemakings. NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217, R06-22, slip op. at 4 (April 20, 2006).

In an order dated October 29, 2007, the hearing officer noted that the Board had denied the motion for expedited review and that the Board, since that denial, had received no request to schedule hearing or take any other action. NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217, R06-22 (Oct. 29, 2007). The order directed the Agency as proponent to file within 21 days a brief status report on its readiness to schedule hearing. *Id*. On November 20, 2007, the Agency filed a motion for leave to file *instanter*, accompanied by its status report. In that report, the Agency stated that

> [t]he Illinois EPA has had discussions with interested parties concerning R06-22, and will continue to do so. The Illinois EPA is in the process of evaluating whether the proposed amendments are now moot, or whether some of the amendments would best be addressed in an upcoming rulemaking concerning the transition of both industrial boilers and utility boilers from the NOx SIP Call trading program to the Clean Air Interstate Rule (CAIR) trading program. The Illinois EPA is planning to proceed with that rulemaking early this winter, and, at that time it will be in the best position to determine whether any outstanding issues from R06-22 would be best addressed in that rulemaking or whether the above proposal, in an amended format, should proceed. NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217, R06-22 (Nov. 20, 2007).

In an order dated May 13, 2008, the hearing officer noted that there had been no substantive activity in the docket since the Agency's November 20, 2007, status report and directed the Agency within 30 days to file a status report "addressing whether the Agency has determined whether to proceed in this docket with an amended proposal or to address the proposed amendments in another docket." NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217, R06-22 (May 13, 2008) (hearing officer order). On June 25, 2008, the Agency filed a motion for leave to file *instanter*, accompanied by its status report. In that report, the Agency stated that

> The Illinois EPA has had discussions with interested parties concerning R06-22, and will continue to do so. The Illinois EPA is in the process of evaluating whether the proposed amendments are now moot, or whether some of the amendments would best be addressed in an upcoming rulemaking concerning the transition of both industrial boilers and utility boilers from the NOx SIP Call trading program to the Clean Air Interstate Rule (CAIR) trading program. The Illinois EPA is planning to proceed with that rulemaking this Fall, and, at that

> time it will be in the best position to determine whether any outstanding issues from R06-22 would be best addressed in that rulemaking or whether the above proposal, in an amended format, should proceed. NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217, R06-22 (June 25, 2008).

In an order dated July 2, 2008, the hearing officer noted the Agency's filing of the June 25, 2008 status report and directed that Agency within 120 days "to file a brief status report addressing whether the Agency has determined whether to proceed in this docket with an amended proposal or to address the proposed amendments in another docket." NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217, R06-22 (July 2, 2008) (hearing officer order). On October 20, 2008, the Agency filed a status report in which it stated that

> On July 11, 2008, the Clean Air Interstate Rule ("CAIR") rule was vacated by the United States Court of Appeals; however the requirements to address interstate transport from large NO_x sources remain. North Carolina v. EPA, No. 05-1244 (D.C. Cir. July 2008). The decision left the NO_x SIP Call trading program intact. The United States Environmental Protection Agency ("USEPA") requested a rehearing on September 24, 2008, and the court has not yet ruled on that request.
>
> In light of the above decision and the possible rehearing, the Illinois EPA is in the process of evaluating whether the proposed amendments affecting the NO_x SIP Call trading program are now moot, or whether some of the amendments would best be addressed when the Illinois EPA addresses its obligations to mitigate interstate transport. The timetable for addressing that requirement is uncertain at this time; the Illinois EPA will be in a better position to determine its timetable when the court rules on USEPA's and other petitioners' requests for rehearing. NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217, R06-22 (Oct. 20, 2008).

In an order dated November 7, 2008, the hearing officer noted the Agency's filing of the October 20, 2008 status report and directed the Agency by March 9, 2009, "to file a brief status report addressing whether it has determined that proposed amendment affecting the NO_x SIP Call are moot or whether it would deal with the proposed amendments in meeting its obligations to mitigate interstate transport." NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217, R06-22 (Nov. 7, 2008) (hearing officer order). On March 9, 2009, the Agency filed a status report in which it stated that

> On July 11, 2008, the Clean Air Interstate Rule ("CAIR") rule was vacated by the United States Court of Appeals; however the requirements to address interstate transport from large NO_x sources remain. North Carolina v. EPA, No. 05-1244 (C.A.D.C. Cir. July 2008). The decision left the NO_x SIP Call trading program intact. The United States Environmental Protection Agency ("USEPA") requested a rehearing on September 24, 2008. On December 23, 2008, the court reversed in part its earlier decision and remanded the CAIR rule to USEPA

> without *vacatur*. North Carolina v. EPA, 550 F.3d 1176 (C.A.D.C. 2008). This opinion means that the CAIR rule remains in effect.
>
> In light of the above decision and the reinstatement of the obligation for meeting interstate NO_x reductions for industrial boilers, the Illinois EPA is planning to replace Subpart U with a new rule and withdraw this rulemaking, R06-22, at that time. The new rulemaking will integrate the Non-EGUs [Electrical Generating Units] into the CAIR rule. The timetable for addressing that requirement is expected to be the Spring of 2009.

On August 3, 2009, IERG filed a motion for emergency rule (Mot. Emer.) and a motion for expedited consideration of its alternate proposal (Mot. Exp.). In an order dated August 6, 2009, the Board reserved ruling on the motions but directed participants to file responses to the motions no later than Thursday, August 13, 2009, and directed IERG to a file a reply, if it wished to do so, no later than Monday, August 17, 2009.

On August 11, 2009, the Board received responses from Prairie Power, Inc. (Prairie Power) (PC 2); the Argo Plant of Corn Products International, Inc. (Corn Products) (PC 3); the Chemical Industry Council of Illinois (CICI) (PC 4); and the Illinois Chamber of Commerce (Chamber) (PC 5). On August 12, 2009, the Board received responses from the Illinois Manufacturers' Association (IMA) (PC 6); Flint Hills Resources, LP (Flint Hills) (PC 7); and Duke Energy Generation Services, Inc. (Duke Energy) (PC 8). On August 13, 2009, the Board received responses from Bunge North America, Inc. (Bunge) (PC 9); CITGO Petroleum Corporation (CITGO) (PC 10); Archer Daniels Midland Company (ADM) (PC 11); the Illinois Petroleum Council (IPC) (PC 12); Marathon Petroleum Company, LLC (Marathon) (PC 13); and the Agency (PC 14).

On August 17, 2009, IERG filed its reply to the Agency's response to the motions (PC 15).

MOTION FOR EMERGENCY RULE

Introduction

IERG states that the Act requires adoption of a NO_x SIP Call Budget Trading Program for Non-EGUs. Mot. Emer. at 1, 5, citing 415 ILCS 5/9.9 (2008). The Board has enacted such a program as Subpart U of Part 217 of its air pollution regulations. *See* 35 Ill. Adm. Code 217.450-217.482. IERG describes Subpart U as "valid and applicable" and claims that "Illinois facilities subject to Subpart U must hold NO_x SIP Call allowances for the 2009 season on November 30, 2009." Mot. Emer. at 3, citing 35 Ill. Adm. Code 217.456(d). IERG further claims that "most facilities subject to Subpart U also have NO_x SIP Call budget unit requirements in their Clean Air Act Permit Program ("CAAPP") permits." Mot. Emer. at 3. IERG concludes that the Agency, USEPA, and citizen groups can enforce these regulatory and permit requirements. *Id*.

IERG claims that, in recently adopting the federal Clean Air Interstate Rule (CAIR), the United States Environmental Protection Agency (USEPA) stated "that it would no longer issue NO_x SIP Call allowances after the 2008 ozone season." Mot. Emer. at 3. IERG further claims that "[t]he federal NO_x SIP Call trading program for non-EGUs ceased to exist after the 2008 ozone season." *Id*. at 4 (emphasis in original). IERG argues that the Agency nonetheless "has failed to take any action to establish a new regulatory mechanism for issuing NO_x SIP Call allowances to sources subject to Subpart U for the 2009 ozone season." *Id*. at 4.

IERG expresses some doubt that CAIR NO_x allowances would be sufficient to demonstrate compliance with Subpart U. *See id*. at 4-5. IERG also expresses the understanding that "unused NO_x SIP Call allowances issued during previous years are being converted to CAIR allowances so even if impacted sources attempted to purchase NO_x SIP Call allowances for the 2009 ozone season, there may not be enough NO_x SIP Call allowances on the market to buy without receiving an allocation for 2009 from the Illinois EPA." *Id*. IERG argues that, even if facilities purchase CAIR allowances to try to comply with Subpart U, CAIR compliance accounts do not exist for them. *Id*. at 4-5. IERG understands that USEPA will not establish those accounts for NO_x SIP Call budget units "until a rule is in place at the state level that provides for the allocation of CAIR NO_x allowances to Non-EGUs." *Id*. at 5. IERG further argues that the unanticipated purchase of CAIR NO_x allowances "presents an unreasonable hardship." *Id*.

IERG also claim that its publicly-held members would be required to report a potential liability in filings with the Securities and Exchange Commission (SEC). Mot. Emer. at 5. IERG argues that "such companies would be required to identify 'known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrants' liquidity increasing or decreasing in any material way." *Id*., citing 17 C.F.R. 229.303 (Regulation S-K, Item 303).

IERG argues that, because no regulation now issues CAIR allowances to sources that are subject to Subpart U, "an emergency rule is necessary in order to require that the Illinois EPA distribute allowances to impacted facilities and prompt the USEPA to establish CAIR compliance accounts for such facilities." Mot. Emer. at 6. IERG requests that the Board exercise its authority to adopt emergency rules by revising Subpart U to bring NO_x SIP Call budget units "into the CAIR NO_x Ozone Season Trading Program, using a slightly revised Non-EGU budget and the same applicability requirements, as found in the current Subpart U." *Id*., *see id*., Exh. 1 (proposed emergency rule amending Part 217); *see* 5 ILCS 100/5-45 (Illinois Administrative Procedure Act), 415 ILCS 5/27(c) (2008); 35 Ill. Adm. Code 102.612 (Adoption of Emergency Regulations). IERG expresses its understanding that "the rule must be final prior to the end of the ozone season (September 30, 2009) in order for USEPA to consider allocating the 2009 NO_x allowances to the Illinois EPA, and thus, it is imperative that an emergency rule be adopted for the 2009 control period." Mot. Emer. at 16.

Procedural Background

IERG incorporates by reference its motion for expedited review, as it states that the information in that other motion, including a history of this rulemaking proceeding, background

on the alternative proposal, and a summary of the proposed amendments, is relevant to the motion for emergency rulemaking. Mot. Emer. at 6-7.

IERG states that, on September 7, 2007, Illinois amended Part 225 "to implement the sulfur dioxide ("SO_2"), NO_x annual, and NO_x ozone season trading programs under CAIR, applicable only to EGUs." Mot. Emer. at 7, citing 31 Ill. Reg. 12864 (Sept. 7, 2007). IERG further states that USEPA approved Illinois' SIP revision implementing CAIR for EGUs. Mot. Emer. at 7, citing 72 Fed. Reg. 58528, 58531 (Oct. 16, 2007). IERG argues that the Agency took no action adopting such a program for Non-EGUs, "even though it knew, as a result of the adoption of the federal CAIR in May 2005, that some action would need to be taken with regard to Non-EGUs." Mot. Emer. at 7, citing 70 Fed. Reg. 25162 (May 12, 2005). IERG further argues that the Agency instead waited for USEPA action regarding CAIR. Mot. Emer. at 7, citing NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217, R06-22 (Oct. 30, 2008; Mar. 9, 2009) (Agency status reports).

IERG states that USEPA has indicated action required of states under CAIR to address non-EGUs:

> [i]f States affected by the NO_x SIP Call do not wish to use EPS's CAIR ozone season NO_x trading program to achieve reductions from non-EGU boilers and turbines required by the NO_x SIP call, they would be required to submit a SIP Revision deleting the requirements related to non-EGU participation in the NO_x SIP Call Budget Trading Program and replacing them with new requirements that achieve the same level of reduction. . . ." Mot. Emer. at 8, citing 70 Fed. Reg. 25290.

IERG also states that USEPA has also indicated how states can satisfy the requirements of the NO_x SIP Call for non-EGUs through the CAIR ozone season trading program:

> [i]f the only changes a State makes with respect to its NO_x SIP Call regulations are: (1) To bring non-EGUs that are currently participating in the NO_x SIP Call Budget Trading Program into the CAIR ozone season program using the same non-EGU budget and applicability requirements that are in their existing NO_x SIP Call Budget Trading Program; and (2) to achieve all of the emissions reductions required under the CAIR from EGUs by participating in the CAIR ozone season NO_x trading program, EPA will find that the State continues to meet the requirements of the NO_x SIP Call. Mot. Emer. at 8, citing 70 Fed. Reg. 25290.

IERG argues that the Agency recognizes the need to replace Subpart U and has indicated in this docket that it would begin the process of doing so in the spring of 2009. Mot. Emer. at 8, citing NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217, R06-22 (Mar. 9, 2009) (Agency status report). IERG further argues that the Agency has not begun this process of replacing Subpart U and "has not submitted a SIP Revision deleting the requirements related to the NO_x SIP Call Budget Trading Program for Non-EGUs and replacing them with new requirements achieving the same level of reduction." Mot. Emer. at 8-9. IERG claims that,

without a mechanism to allocate allowances, "each ton of NO_x emitted during the control period ending on November 30, 2009, constitutes a separate violation of the Act. *Id*. at 9, citing 415 ILCS 5.42(a) (2008), 35 Ill. Adm. Code 217.465(d)(3).

IERG urges that emergency rulemaking is necessary "to establish a NO_x trading program for the 2009 ozone season, which ends on September 30, 2009." Mot. Emer. at 9. Accordingly, IERG offers a rulemaking proposal bringing the NO_x SIP Call units into the CAIR NO_x Ozone Season Trading Program. *Id*., *see id*., Exh. 1.

Emergency Rulemaking

IERG argues that "[a]n 'emergency' is present, justifying the employment of the emergency rulemaking procedures under Section 5-45 of the IAPA [Illinois Administrative Procedure Act], when 'there exists a situation which reasonably constitutes a threat to the public interest, safety or welfare.'" Mot. Emer. at 11 (emphasis in original), citing Citizens for a Better Environment, *et al*. v. PCB, *et al*., 152 Ill.App.3d 105, 504 N.E.2d 166, 169 (1st Dist. 1987) (invalidating emergency rules). IERG argues that the Court determined that "the need to adopt emergency rules in order to alleviate an administrative need, which, by itself, does not threaten the public interest, or welfare, does not constitute an 'emergency.'" Mot. Emer. at 12, citing Citizens for a Better Environment, 152 Ill.App.3d at 109. IERG further argues that the Court stated that it may be proper to exercise emergency rulemaking when a delay in adopting rules results in a situation threatening the public interest, safety, or welfare. Mot. Emer. at 12, citing Citizens for a Better Environment, 152 Ill.App.3d at 110.

IERG elaborates that its proposal is not solely administrative in nature. Mot. Emer. at 12. IERG argues that the failure to bring NO_x SIP Call budget units into the CAIR NO_x Ozone Season Trading Program subjects sources to liability for violating Subpart U. *Id*. IERG also argues that this failure renders Section 9.9 of the Act inoperable and meaningless, which "defies the public interest." *Id*.

IERG claims that "the Board has issued emergency rules based on the threat of economic hardship and potential liability to affected facilities, which were determined to have constituted a threat to the public interest warranting immediate action." Mo. Emer. at 13. IERG argues that the Board adopted an emergency rule changing compliance deadline where it

> found that uncertainty as to the USEPA's position regarding the promulgation of court-mandated onboard vapor recovery rules resulted in a situation where gas stations in the Metro-East were forced to make significant capital outlays to meet a compliance deadline to install Stage II vapor recovery equipment, which outlays would be unnecessary of the USEPA promulgated onboard vapor recovery rules. Mot. Emer. at 13, citing Emergency Rule Amending the Stage II Gasoline Vapor Recovery Rule in the Metro-East Area, 35 Ill. Adm. Code 219.586(d), R 93-12 (May 20, 1993).

IERG also argues that Board has adopted emergency rules "to address inconsistency between federal and state annual compliance dates for supplying lower RVP gasoline and alleviated the hardships to refiners, distributors, and bulk gasoline terminals resulting from the inconsistency." Mot. Emer. at 14, citing Emergency Rule Amending 7.2 psi Reid Vapor Pressure Requirement in the Metro-East Area, 35 Ill. Adm. Code 219.585(a), R95-10 (Feb. 23, 1995).

IERG likens the situation of its members to the two cases cited above: "economic hardship and potential for liability experienced by industrial facilities is a threat to the public interest." Mot. Emer. at 14. IERG particularly notes the unexpected expense of having to purchase CAIR allowances to substitute for NO_x SIP Call allowances that the Agency had distributed to sources. *Id*. IERG also notes the risk of becoming subject to an enforcement action and the financial impact of having to report such potential actions to the SEC. *Id*. at 15. IERG suggests that its members could not have avoided these risks, which result from the Agency's failure to establish rules for the 2009 ozone season. *Id*. at 15-16. Accordingly, IERG requests that the Board adopt its proposed emergency rule. *Id*., *see id*., Exh. 1.

MOTION FOR EXPEDITED ACTION

Introduction

IERG seeks expedited action on its alternate rulemaking proposal in this docket. Mot. Exp. at 1; *see id*., Exh. 1. IERG states that its alternate proposal includes a new Subpart U to Part 217, revisions to Appendix E to Part 217, and revisions to the incorporation by reference at 35 Ill. Adm. Code 217.104. Mot. Exp. at 1; *see id*., Exh. 1. IERG states that Subpart U of the Board's air pollution regulations requires that affected non-EGUs hold NO_x allowances on November 30, 2009, but argues that the Agency has not issued any of those allowances to non-EGUs for 2009. Mot. Exp. at 2, 11-12. IERG further argues that "a rule is necessary in order to incorporate NO_x SIP Call budget units into the CAIR NO_x Ozone Season Trading Program and distribute allowances accordingly." *Id*. at 2. IERG states that, because of the Agency's failure to act, "IERG is compelled to offer this alternative proposal to address the problems that will be faced by owners/operators of affected Non-EGUs should they not hold the requisite NO_x allowances through no fault of their own." *Id*. at 11.

Background of Alternate Proposal

IERG argues that USEPA adopted CAIR to replace the NO_x SIP Call trading program. Mot. Exp. at 8, citing 70 Fed. Reg. 25162 (May 12, 2005). IERG notes USEPA's statement that it "will no longer operate the NO_x SIP Call trading program after the 2008 ozone season." Mot. Exp. at 8, citing 40 C.F.R. 51.122(r)(1); 70 Fed. Reg. 25290. IERG states that, on July 11, 2008, the United States Court of Appeals for the District of Columbia vacated CAIR in its entirety and remanded it to USEPA. Mot. Exp. at 8, citing North Carolina v. EPA, 531 F.3d 896 (D.C.Cir. 2008). IERG further states that the Court's opinion provided "that the NO_x SIP Call trading program would remain in place." Mot. Exp. at 8, citing North Carolina, 531 F.3d at 930. IERG continues by noting that, "[o]n December 23, 2008, the D.C. Circuit issued an opinion modifying

its July 11, 2008 order, and remanded CAIR without *vacatur*. Mot. Exp. at.8, citing North Carolina v. EPA, 550 F.3d 1176 (D.C.Cir. 2008).

IERG argues that "CAIR includes the NO_x ozone season trading program." Mot. Exp. at 9, citing 70 Fed. Reg. 25274. IERG further argues that USEPA has provided direction to states wishing to meet NO_x SIP Call obligations through a federal trading program. Mot. Exp. at 9-10, citing 70 Fed. Reg. 25275. IERG claims that USEPA has specifically addressed meeting the requirements of the NO_x SIP call for Non-EGU's through the CAIR ozone season trading program. Mot. Exp. at 10-11, citing 70 Fed. Reg. 26290.

IERG states that Illinois has amended Part 225 "to implement the sulfur dioxide ("SO_2"), NO_x annual, and NO_x ozone season trading programs under CAIR, applicable only to EGUs." Mot. Exp. at 11 citing 31 Ill. Reg. 12864 (Sept. 7, 2007). IERG further states that USEPA approved Illinois' SIP revision implementing CAIR for EGUs. Mot. Exp. at 11 citing 72 Fed. Reg. 58528, 58531 (Oct. 16, 2007). IERG argues that the Agency has taken no action adopting such a program for Non-EGUs. Mot. Exp. at 11. IERG claims that, as a result of this vacuum, it must offer an alternative proposal to provide a mechanism for the allocation of NO_x allowances. *Id*. at 11-12.

Alternative Proposal

IERG notes that the revised Subpart U attached to the motion for an emergency rule is "identical" to the alternative proposal attached to the motion for expedited action. Mot. Exp. at 12, n.5. Nonetheless, IERG distinguishes the two motions from one another: the emergency rule is intended to address the allocation of allowances only for the 2009 control period, while the alternative proposal "is intended to be the rule requiring the allocation of allowances for the 2010 control period and beyond." *Id*. at 12. IERG argues that the "alternative proposal will satisfy the requirement for Illinois to have regulations in place to address the NO_x SIP Call emissions reduction from Non-EGU's, absent the USEPA's continued administration of the NO_x SIP Call trading program." *Id*. at 13; *see id*., Exh. 1.

IERG argues that adoption of the alternate proposal will result in positive economic impacts. Mot. Exp. at 15. IERG claims that owner and operator would avoid the risk of violating the Board's Subpart U regulations and the terms of their CAAPP permits. *Id*. IERG also claims that they can participate in the CAIR trading program, in which they can take part in the multi-state market for buying and selling allowances. *Id*. IERG argues that its proposed alternative "will maintain the same budget and applicability requirements, as provided by the USEPA in its approval of Illinois NO_x rules as satisfying the State's NO_x SIP Call obligations. *Id*. at 15-16, citing 66 Fed. Reg. 56449 (Nov. 8, 2001).

IERG provides a summary of the rulemaking proposal it has submitted to the Board and on which it seeks expedited action. *See id*. at 16-26. IERG states that it drafted its alternate proposal "to mirror as closely as possible the Illinois regulations implementing CAIR ozone season trading for EGU's. *Id*. at 16, citing 35 Ill. Adm. Code 225, Subpart E.

RESPONSES TO IERG MOTIONS

Prairie Power (PC 2)

Prairie Power states that it is the "owner/operator of budget unit(s) subject to the current Subpart U." PC 2 at 1, citing 35 Ill. Adm. Code Part 217.Subpart U. It expresses the concern, however, that it may soon be in violation of Subpart U and its CAAPP permit if the Board does not take immediate action. PC 2 at 2.

Specifically, Prairie Power states that it has "not received allocations of NO_x allowances for the 2009 ozone season, nor for any subsequent years." PC 2 at 1. However, it expresses the understanding "that the current version of Subpart U is a valid and enforceable regulation in Illinois that requires subject sources to hold NO_x allowances for each ton of NO_x emitted during the ozone season by November 30 of the applicable year." *Id*. at 2. Prairie Power believes that "USEPA is no longer issuing allowances for the NO_x Budget Trading Program, as would be required to satisfy" that requirement under Subpart U. *Id*. It also believes

> that NO_x allowances could potentially be obtained through the purchase of Clean Air Interstate Rule ("CAIR") NO_x allowances, although we are uncertain whether those allowances would be legally sufficient to satisfy the Subpart U requirements to hold NO_x SIP Call allowances. Nor, even if sufficient, could we demonstrate compliance with the requirement, due to our inability to obtain CAIR compliance accounts from the USEPA Clean Air Markets Division ("CAMD"), absent a federally approved trading program in Illinois. *Id*.

Prairie Power requests that the Board grant IERG's motion for an emergency rule "in order to require that 2009 NO_x allowances be distributed to impacted sources." PC 2 at 2. Prairie Power also requests that the Board grant IERG's motion for expedited review of its alternate proposal "in order to bring NO_x SIP Call budget units into the CAIR NO_x Ozone Season Trading Program for the 2010 control period and beyond." *Id*. Prairie Power argues that "it is in the best interest of Illinois to adopt rules" of this kind. *Id*. at 1.

Corn Products (PC 3)

Corn Products states that it is the "owner/operator of budget unit(s) subject to the current Subpart U." PC 3 at 1, citing 35 Ill. Adm. Code Part 217.Subpart U. Corn Products states that it has "not received allocations of NO_x allowances for the 2009 ozone season, nor for any subsequent years." PC 3 at 1. However, it expresses the understanding "that the current version of Subpart U is a valid and enforceable regulation in Illinois that requires subject sources to hold NO_x allowances for each ton of NO_x emitted during the ozone season by November 30 of the applicable year." *Id*. Corn Products believes that "USEPA is no longer issuing allowances for the NO_x Budget Trading Program, as would be required to satisfy" that requirement under Subpart U. *Id*. It also believes

> that NO_x allowances could potentially be obtained through the purchase of Clean Air Interstate Rule ("CAIR") NO_x allowances, although we are uncertain whether those allowances would be legally sufficient to satisfy the Subpart U requirements to hold NO_x SIP Call allowances. Nor, even if sufficient, could we demonstrate compliance with the requirement, due to our inability to obtain CAIR compliance accounts from the USEPA Clean Air Markets Division ("CAMD"), absent a federally approved trading program in Illinois. *Id*. at 2.

Corn Products requests that the Board grant IERG's motion for an emergency rule "in order to require that 2009 NO_x allowances be distributed to impacted sources." PC 3 at 2. Corn Products also requests that the Board grant IERG's motion for expedited review of its alternate proposal "in order to bring NO_x SIP Call budget units into the CAIR NO_x Ozone Season Trading Program for the 2010 control period and beyond." *Id*. Corn Products argues that "it is in the best interest of business in Illinois to adopt rules" of this kind. *Id*.

CICI (PC 4)

CICI states that its "membership includes companies that are owners or operators of budget units subject to the current Subpart U." PC 4 at 1, citing 35 Ill. Adm. Code Part 217.Subpart U. It expresses the concern, however, that its members may soon be in violation of Subpart U and their CAAPP permits if the Board does not take immediate action. PC 4 at 2. CICI argues that the risk of violation could subject its members "to federal, state, or third-party enforcement action, in addition to being required to disclose the potential liability on Securities and Exchange Commission filings." *Id.*

Specifically, CICI expresses the understanding that "no sources subject to the current Subpart U have received allocations of NO_x allowances for the 2009 ozone season, nor for any subsequent years." PC 4 at 1. However, it believes "that the current version of Subpart U is a valid and enforceable regulation in Illinois that requires subject sources to hold NO_x allowances for each ton of NO_x emitted during the ozone season by November 30 of the applicable year." *Id*. CICI also believes that "USEPA is no longer issuing allowances for the NO_x Budget Trading Program, as would be required to satisfy" that requirement under Subpart U. *Id*. It also states

> that NO_x allowances could potentially be obtained through the purchase of Clean Air Interstate Rule ("CAIR") NO_x allowances, although we are uncertain whether those allowances would be legally sufficient to satisfy the Subpart U requirements to hold NO_x SIP Call allowances. Nor, even if sufficient, could our members demonstrate compliance with the requirement, due to our inability to obtain CAIR compliance accounts from the USEPA Clean Air Markets Division ("CAMD"), absent a federally approved trading program in Illinois. *Id*.

Accordingly, CICI requests that the Board grant IERG's motion for an emergency rule "in order to require that 2009 NO_x allowances be distributed to impacted sources." PC 4 at 2. CICI also requests that the Board grant IERG's motion for expedited review of its alternate proposal "in order to bring NO_x SIP Call budget units into the CAIR NO_x Ozone Season Trading Program

for the 2010 control period and beyond." *Id*. CICI argues that "it is in the best interest of business in Illinois to adopt rules" of this kind. *Id*. at 1.

Chamber (PC 5)

The Chamber states that its "membership includes companies that are owners or operators of budget units subject to the current Subpart U." PC 5 at 1, citing 35 Ill. Adm. Code Part 217.Subpart U. It expresses the concern, however, that its members may soon be in violation of Subpart U and their CAAPP permits if the Board does not take immediate action. PC 5 at 2. The Chamber argues that the risk of violation could subject its members "to federal, state, or third-party enforcement action, in addition to being required to disclose the potential liability on Securities and Exchange Commission filings." *Id.* at 2-3.

Specifically, the Chamber expresses the understanding that "no sources subject to the current Subpart U have received allocations of NO_x allowances for the 2009 ozone season, nor for any subsequent years." PC 5 at 2. However, it believes "that the current version of Subpart U is a valid and enforceable regulation in Illinois that requires subject sources to hold NO_x allowances for each ton of NO_x emitted during the ozone season by November 30 of the applicable year." *Id*. The Chamber also believes that "USEPA is no longer issuing allowances for the NO_x Budget Trading Program, as would be required to satisfy" that requirement under Subpart U. *Id*. It also states the understanding

> that NO_x allowances could potentially be obtained through the purchase of Clean Air Interstate Rule ("CAIR") NO_x allowances, although we are uncertain whether those allowances would be legally sufficient to satisfy the Subpart U requirements to hold NO_x SIP Call allowances. Nor, even if sufficient, could our members demonstrate compliance with the requirement, due to our inability to obtain CAIR compliance accounts from the USEPA Clean Air Markets Division ("CAMD"), absent a federally approved trading program in Illinois. *Id*.

Accordingly, the Chamber requests that the Board grant IERG's motion for an emergency rule "in order to require that 2009 NO_x allowances be distributed to impacted sources." PC 5 at 3. The Chamber also requests that the Board grant IERG's motion for expedited review of its alternate proposal "in order to bring NO_x SIP Call budget units into the CAIR NO_x Ozone Season Trading Program for the 2010 control period and beyond." *Id*. The Chamber argues that "it is in the best interest of business in Illinois to adopt rules" of this kind. *Id*. at 1.

IMA (PC 6)

IMA states that it is "a statewide business trade group representing nearly 4,000 member companies and nearly 60,000 employees." PC 6 at 1. IMA further states that "many of our member companies own or operate budget units and are therefore subject to Subpart U." PC 6 at 1; *see* 35 Ill. Adm. Code Part 217.Subpart U. It expresses the concern that its members may soon be in violation of Subpart U and their CAAPP permits if the Board does not take immediate action. PC 6 at 2. IMA argues that the risk of violation could subject its members "to federal,

state, or third-party enforcement action, in addition to being required to disclose the potential liability on Securities and Exchange Commission filings." *Id.* at 2.

Specifically, IMA states that the Agency "has yet to issue any NO_x allocation for the 2009 ozone season or subsequent years despite the fact that it is a valid and enforceable Illinois regulation." PC 6 at 1. IMA believes that the Agency's failure "to issue NO_x allowances could place manufacturing companies in jeopardy of violating the regulation that requires subject sources to hold allowances by November 30 for each ton of NO_x emitted during the ozone season." *Id*. IMA expresses the understanding that "USEPA is no longer issuing allowances for the NO_x Budget Trading Program, as would be required to satisfy" that requirement under Subpart U. *Id*. It also states the understanding

> that NO_x allowances could potentially be obtained through the purchase of Clean Air Interstate Rule ("CAIR") NO_x allowances, although we are uncertain whether those allowances would be legally sufficient to satisfy the Subpart U requirements to hold NO_x SIP Call allowances. Nor, even if sufficient, could our members demonstrate compliance with the requirement, due to our inability to obtain CAIR compliance accounts from the USEPA Clean Air Markets Division ("CAMD"), absent a federally approved trading program in Illinois. *Id*. at 1-2.

IMA also argues that action on the issue of NO_x allowances is necessary because the Illinois General Assembly requires adoption of a NO_x State Implementation Plan (SIP) and trading plan. *Id*. at 1, citing 415 ILCS 5/9/9 (2008), 35 Ill. Adm. Code 217.Subpart U. IMA further argues that this requirement remains valid, despite the fact that the USEPA states that it will no longer issue NO_x SIP Call allowances after the 2008 ozone season. PC 6 at 1 (emphasis in original).

IMA requests that the Board grant IERG's motion for an emergency rule "in order to require that 2009 NO_x allowances be distributed to impacted sources." PC 6 at 2. IMA also requests that the Board grant IERG's motion for expedited review of its alternate proposal "in order to bring NO_x SIP Call budget units into the CAIR NO_x Ozone Season Trading Program for the 2010 control period and beyond." *Id*.

Flint Hills (PC 7)

Flint Hills states that it is "an owner and operator of an emission unit subject to the current regulations at 35 Ill. Admin. Code Part 217 Subpart U." PC 7 at 1. It expresses the concern that it may soon become difficult or impossible to comply with Subpart U and its CAAPP permit without immediate action by the Board. *Id*. at 2.

Specifically, Flint Hills states that it "owns and operates a boiler (CB-706) located at its Joliet Facility that is covered by the Subpart U NO_x Budget Trading Program, but has never received an allocation of NO_x allowances." *Id*. Flint Hills argues that the Agency's Statement of Reasons acknowledged that it had been inadvertently excluded from Subpart U and proposed to allocate it six allowances. *Id*., citing NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217, R06-22 (Jan. 19, 2006). Flint Hills further argues that it now "requests an additional

eight allowances to better reflect the facility's current operating scenario, which has changed since this rulemaking was initially proposed." PC 7 at 2.

Flint Hills states that it has "not received allocations of NO_x allowances for the 2009 ozone season, nor for any subsequent years." PC 7 at 2. However, it expresses the understanding "that the current version of Subpart U is a valid and enforceable regulation in Illinois that requires subject sources to hold NO_x allowances for each ton of NO_x emitted during the ozone season by November 30 of the applicable year." *Id*. Flint Hills states that USEPA "is no longer issuing allowances for the NO_x Budget Trading Program, as would be required to satisfy the requirement to hold NO_x SIP Call allowances. *Id*. It also understands

> that NO_x allowances could potentially be obtained through the purchase of CAIR NO_x allowances. However, it is uncertain whether those CAIR allowances would be legally sufficient to satisfy the Subpart U requirement to hold NO_x SIP Call allowances. Even if sufficient, source will not be able to demonstrate compliance with the requirement, due to the inability to obtain CAIR compliance accounts from the USEPA Clean Air Markets Division ("CAMD"), absent a federally approved trading program in Illinois. *Id*. at 2.

Flint Hills requests that the Board grant IERG's motion for an emergency rule "in order to require that 2009 NO_x allowances be distributed to impacted sources." PC 7 at 2. Flint Hills also requests that the Board grant IERG's motion for expedited review of its alternate proposal "in order to bring NO_x SIP Call budget units into the CAIR NO_x Ozone Season Trading Program for the 2010 control period and beyond." *Id*. Corn Products argues that "it is in the best interest of business in Illinois to adopt rules" of this kind. *Id*.

Duke Energy (PC 8)

Duke Energy states that it is an "owner/operator of budget unit(s) subject to the current Subpart U." PC 8 at 1, citing 35 Ill. Adm. Code Part 217.Subpart U. It expresses the concern, however, that it may soon be in violation of Subpart U and its CAAPP permit if the Board does not take immediate action. PC 8 at 2.

Specifically, Duke Energy states that it has "not received allocations of NO_x allowances for the 2009 ozone season, nor for any subsequent years." PC 8 at 1. However, it expresses the understanding "that the current version of Subpart U is a valid and enforceable regulation in Illinois that requires subject sources to hold NO_x allowances for each ton of NO_x emitted during the ozone season by November 30 of the applicable year." *Id*. Duke Energy believes that "USEPA is no longer issuing allowances for the NO_x Budget Trading Program, as would be required to satisfy" that requirement under Subpart U. *Id*. at 2. It also expresses the understanding

> that NO_x allowances could potentially be obtained through the purchase of Clean Air Interstate Rule ("CAIR") NO_x allowances, although we are uncertain whether those allowances would be legally sufficient to satisfy the Subpart U requirements

> to hold NO_x SIP Call allowances. Nor, even if sufficient, could we demonstrate compliance with the requirement, due to our inability to obtain CAIR compliance accounts from the USEPA Clean Air Markets Division ("CAMD"), absent a federally approved trading program in Illinois. *Id*.

Duke Energy requests that the Board grant IERG's motion for an emergency rule "in order to require that 2009 NO_x allowances be distributed to impacted sources." PC 8 at 2. Duke Energy also requests that the Board grant IERG's motion for expedited review of its alternate proposal "in order to bring NO_x SIP Call budget units into the CAIR NO_x Ozone Season Trading Program for the 2010 control period and beyond." *Id*. Duke Energy argues that "it is in the best interest of business in Illinois to adopt rules" of this kind and require distribution of NO_x allowances. *Id*. at 1.

Bunge (PC 9)

Bunge states that it is "an owner/operator of a facility in Danville, IL that is potentially subject to proposed Subpart U." PC 9 at 1, citing 35 Ill. Adm. Code Part 217.Subpart U. It expresses the concern, however, that, "through no fault of its own, potential legal liability may exist for Bunge." PC 9 at 2.

Specifically, Bunge states that the Agency "inadvertently excluded the Bunge facility from the NO_x SIP Call budget trading program when Subpart U was originally established." PC 9 at 1. Bunge further states that the Agency has petitioned USEPA for additional allowances for it and has indicated that, on receiving those allowances, it would amend Subpart U to reflect them. *Id*. Bunge argues that it has "upgraded it continuous emissions monitoring system (CEMS) and its data acquisition and handling system (DAHS) to Part 75 standards in preparation of being included in the NO_x SIP Call budget trading program." *Id*. at 2; *see* 40 C.F.R. 75. Bunge further argues that USEPA has not awarded the requested allowances, and the Agency has not amended Subpart U. PC 9 at 2.

Bunge claims that, although it has received no NO_x allowances for 2009 or any subsequent year, it "is included in the rule proposed by IERG and would receive NO_x allowances under the proposed rule." PC 9 at 2. Accordingly, Bunge requests that the Board grant IERG's motion for an emergency rule "in order to require that 2009 NO_x allowances be distributed to impacted sources." *Id*. Bunge also requests that the Board grant IERG's motion for expedited review of its alternate proposal "in order to bring NO_x SIP Call budget units into the CAIR NO_x Ozone Season Trading Program for the 2010 control period and beyond." *Id*. Bunge argues that "it is in the best interest of business in Illinois to adopt rules" of this kind. *Id*. at 1.

CITGO (PC 10)

CITGO states that it is "an owner/operator of a budget unit subject to the current Subpart U." PC 10 at 1, citing 35 Ill. Adm. Code Part 217.Subpart U. CITGO further states that it has "not received allocations of NO_x allowances for the 2009 ozone season, nor for any subsequent years." PC 10 at 1. However, it expresses the understanding "that the current version of Subpart

U is a valid and enforceable regulation in Illinois that requires subject sources to hold NO_x allowances for each ton of NO_x emitted during the ozone season by November 30 of the applicable year." *Id*. CITGO believes that "USEPA is no longer issuing allowances for the NO_x Budget Trading Program, as would be required to satisfy" that requirement under Subpart U. *Id*. It also expresses the understanding

> that NO_x allowances could potentially be obtained through the purchase of Clean Air Interstate Rule ("CAIR") NO_x allowances, although we are uncertain whether those allowances would be legally sufficient to satisfy the Subpart U requirements to hold NO_x SIP Call allowances. Nor, even if sufficient, could we demonstrate compliance with the requirement, due to our inability to obtain CAIR compliance accounts from the USEPA Clean Air Markets Division ("CAMD"), absent a federally approved trading program in Illinois. *Id*. at 2.

CITGO requests that the Board grant IERG's motion for an emergency rule "in order to require that 2009 NO_x allowances be distributed to impacted sources." PC 10 at 2. CITGO also requests that the Board grant IERG's motion for expedited review of its alternate proposal "in order to bring NO_x SIP Call budget units into the CAIR NO_x Ozone Season Trading Program for the 2010 control period and beyond." *Id*. CITGO argues that "it is in the best interest of business in Illinois to adopt rules" of this kind and require distribution of NO_x allowances. *Id*. at 1.

ADM (PC 11)

ADM states that its "Decatur and Peoria Plants are subject to the NO_x Budget Rule, 35 Ill. Admin. Code Part 217, Subpart U." PC 11 at 1. ADM states that, "[a]mong the non-EGUs affected by IERG's Motions, ADM's Decatur Cogeneration Plant alone has historically been allocated 1666 allowances out of a total of 4882 allowances. As a result, ADM is the largest single entity affected by this rule." *Id*. ADM further states that, "[a]s part of a federal consent decree, ADM agreed to install Selective non-Catalytic Reduction (SNCR) equipment to reduce nitrogen oxides (NO_x) on six boilers at its Decatur Cogeneration Plant. The consent decree did not require this installation to be accomplished until 2012." *Id*. at 1-2. ADM argues that, "due largely to the provisions of the NO_x Budget Rule, ADM opted to install SNCR on the boilers at its Decatur plant in 2006." *Id*. at 2.

ADM states that it "has not received NO_x allowances for the 2009 ozone season, nor for any subsequent years." PC 11 at 2. ADM argues that the current version of Subpart U "is a valid and enforceable regulation in Illinois that requires subject sources to hold NO_x allowances for each ton of NO_x emitted during the ozone season by November 30 of the applicable year." *Id*. ADM further argues that, without issuance of allowances by USEPA under the NO_x Budget Trading Program, "affected entities including ADM are left with no visible means of compliance." *Id*. As a result, ADM claims that it "is subject to potential enforcement due to Illinois EPA's failure to adopt an approvable SIP to allow USEPA to issue such allowances." *Id*. ADM also claims that, even if it could purchase CAIR allowances in order to comply, it would be very expensive for it to do so. *Id*.

ADM argues that, aside from the risk of legal liability, the absence of a valid rule prevents affected entities from trading excess allowances. PC 11 at 2. ADM further argues that this inability removes the incentive to over-control emissions "and penalizes entities, such as ADM, that have already done so." *Id.* ADM claims that, "[u]nder the market incentives of the NO_x Budget Rule, affected non-EGU's have reduced their collective ozone season emissions to approximately 53% of their allocations. Absent such incentives, it is questionable whether this degree of emission control will be maintained." *Id.*

ADM requests that the Board grant IERG's motion for an emergency rule "in order to require that 2009 NO_x allowances be distributed to impacted sources." PC 11at 3. ADM also requests that the Board grant IERG's motion for expedited review of its alternate proposal "in order to bring NO_x SIP Call budget units into the CAIR NO_x Ozone Season Trading Program for the 2010 control period and beyond." *Id.*

IPC (PC 12)

IPC states that its "membership includes companies that are owners or operators of budget units subject to the current Subpart U." PC 12 at 1, citing 35 Ill. Adm. Code Part 217.Subpart U. It expresses the concern, however, that its members may soon be in violation of Subpart U and their CAAPP permits if the Board does not take immediate action. PC 12 at 2. IPC argues that the risk of violation could subject its members "to federal, state, or third-party enforcement actions, in addition to being required to disclose the potential liability on Securities and Exchange Commission filings." *Id.*

Specifically, IPC expresses the understanding that "no sources subject to the current Subpart U have received allocations of NO_x allowances for the 2009 ozone season, nor for any subsequent years." PC 12 at 1. However, it also expresses the understanding "that the current version of Subpart U is a valid and enforceable regulation in Illinois that requires subject sources to hold NO_x allowances for each ton of NO_x emitted during the ozone season by November 30 of the applicable year." *Id.* IPC believes that "USEPA is no longer issuing allowances for the NO_x Budget Trading Program, as would be required to satisfy" that requirement under Subpart U. *Id.* It also indicates

> that NO_x allowances could potentially be obtained through the purchase of Clean Air Interstate Rule ("CAIR") NO_x allowances, although we are uncertain whether those allowances would be legally sufficient to satisfy the Subpart U requirements to hold NO_x SIP Call allowances. Nor, even if sufficient, could our members demonstrate compliance with the requirement, due to our inability to obtain CAIR compliance accounts from the USEPA Clean Air Markets Division ("CAMD"), absent a federally approved trading program in Illinois. *Id.* at 2.

IPC requests that the Board grant IERG's motion for an emergency rule "in order to require that 2009 NO_x allowances be distributed to impacted sources." PC 12 at 2. IPC also requests that the Board grant IERG's motion for expedited review of its alternate proposal "in

order to bring NO_x SIP Call budget units into the CAIR NO_x Ozone Season Trading Program for the 2010 control period and beyond." *Id*. IPC argues that "it is in the best interest of business in Illinois to adopt rules" of this kind. *Id*. at 1.

Marathon (PC 13)

Marathon states that it is "an owner/operator of budget unit(s) subject to the current Subpart U." PC 13 at 1, citing 35 Ill. Adm. Code Part 217.Subpart U. It expresses the concern, however, that it may soon be in violation of Subpart U and its CAAPP permits if the Board does not take immediate action. PC 13 at 2.

Specifically, Marathon states that it has "not received allocations of NO_x allowances for the 2009 ozone season, nor for any subsequent years." PC 13 at 2. However, it also expresses the understanding "that the current version of Subpart U is a valid and enforceable regulation in Illinois that requires subject sources to hold NO_x allowances for each ton of NO_x emitted during the ozone season by November 30 of the applicable year." *Id*. Marathon believes that "USEPA is no longer issuing allowances for the NO_x Budget Trading Program, as would be required to satisfy" that requirement under Subpart U. *Id*. It also indicates

> that NO_x allowances could potentially be obtained through the purchase of Clean Air Interstate Rule ("CAIR") NO_x allowances, although we are uncertain whether those allowances would be legally sufficient to satisfy the Subpart U requirements to hold NO_x SIP Call allowances. Nor, even if sufficient, could our members demonstrate compliance with the requirement, due to our inability to obtain CAIR compliance accounts from the USEPA Clean Air Markets Division ("CAMD"), absent a federally approved trading program in Illinois. *Id*.

Marathon requests that the Board grant IERG's motion for an emergency rule "in order to require that 2009 NO_x allowances be distributed to impacted sources." PC 12 at 2. Marathon also requests that the Board grant IERG's motion for expedited review of its alternate proposal "in order to bring NO_x SIP Call budget units into the CAIR NO_x Ozone Season Trading Program for the 2010 control period and beyond." *Id*. at 2-3. Marathon argues that "it is in the best interest of business in Illinois to adopt rules" of this kind. *Id*. at 1.

Agency (PC 14)

The Agency notes that USEPA promulgated CAIR on May 12, 2005. PC 14 at 1, citing 70 Fed. Reg. 25162 (May 12, 2005). The Agency argues that CAIR "sunsets" the NO_x SIP Call Trading program but provides "that states have a continuing obligation to meet the NO_x Budget for Non-EGUs." PC 14 at 1. The Agency claims that CAIR does not specify the manner in which states are to meet that obligation. *Id*. The Agency argues that, in an appeal challenging CAIR, the United State Court of Appeals for the District of Columbia on December 23, 2008, "remanded CAIR without *vacatur*." PC 14 at 2, citing North Carolina v. EPA, 550 F.3d 1176 (D.C. Cir. 2008). The Agency further argues that [t]he appellate court left intact the state's obligation to meet the NO_x SIP Call Budget." PC 14 at 2.

The Agency states that it responded to this ruling beginning in early 2009 by starting the process of developing regulations. PC 14 at 2. This process included "discussions with USEPA regarding its concerns with the short time-frames available for adoption of a NO_x Budget rule for Non-EGUs," particularly since USEPA must approve any adopted rule an allocation of allowances to subject units. *See id*. The Agency notes that IERG filed its motions for an emergency rule and for expedited review of its alternate proposal on August 3, 2009. *Id*.

Procedural Issues

The Agency argues that the Board should deny both of IERG's motions on the basis that they do not satisfy the Board's procedural requirements. PC 14 at 5. The Board summarizes the Agency's arguments regarding the two motions separately in the following subsections.

Motion for Emergency Rule. The Agency argues that IERG's motion for emergency rule "fails to satisfy the content requirements for adoption of Board emergency regulatory proposals." PC 14 at 4, citing 35 Ill. Adm. Code 102.612; *see* 415 ILCS 5/27(c) (2008). The Agency further argues that, under those requirements, "the Board must find that a situation exists which reasonably constitutes a threat to the public interest safety, or welfare in order to adopt an emergency rulemaking." PC 14 at 4. The Agency claims that IERG's motion "makes the wholly unfounded allegation that the Illinois EPA has violated Section 9.9 of the Act by virtue of failing to address the NO_x SIP Call Trading Program for Non-EGUs." *Id*. Although the Agency acknowledges that IERG has cited "more firmly grounded" emergency rules, it claims that IERG's proposal fails to claim persuasively "that there is in fact any such violation or that there is any real threat as described." *Id*. The Agency further claims that, "even if the Board should find that an emergency situation exists, the proposed approach does not appropriately address the issue and is not federally approvable." *Id*. at 2; *see* PC 14, Att. A (proposing alternative regulatory proposal).

The Agency also claims that IERG omitted any "acknowledgement that an emergency rule, even if allowed, is only effective for up to 150 days." PC 14 at 3, citing 5 ILCS 100/5-45(c) (2008) (Illinois Administrative Procedure Act). The Agency argues that IERG has failed to provide for "any regulatory amendment that would be in place following the expiration of 150 days." PC 14 at 3.

In addition, the Agency claims that IERG pursues a "flawed" procedural course. PC 14 at 3. The Agency states that it filed this rulemaking proposal regarding the NO_x Trading Program in order "to address minor clean-up issues." *Id*. at 1; *see* NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217, R06-22 (Jan. 19, 2006). The Agency argues that IERG's motions should not be considered in this rulemaking docket. PC 14 at 3. The Agency further argues that "IERG should have submitted its proposal as a separate stand-alone rulemaking" and that "the Board should not allow IERG to shoehorn its Motions onto the current proceedings." *Id*.

Motion for Expedited Review of Alternate Proposal. The Agency argues that, in the absence of a statutory emergency, the motion for expedited review is likewise "unfounded." PC

14 at 2. The Agency claims that, "even if [the] Board finds that an emergency situation exists and that there is reason to expedite action on IERG's proposal, that proposed alternative does not appropriately address the issue and is not federally approvable." *Id*. at 2-3; *see id*, Att. A (proposing alternative regulatory proposal).

The Agency continues by arguing that the motion for expedited review is marred by shortcomings. First, it "contains no environmental, technical, or economic support for a regulatory proposal addressing the federal CAIR requirements for Non-EGUs." PC 14 at 3. Second, the Agency notes that it "also does not include the required petition of 200 signatures." *Id*. at 3, 4, citing 415 ILCS 5/28 (2008); 35 Ill. Adm. Code 102.202(g), 102.410(b). Third, the Agency claims that the proposal does not include a complete statement of reasons. PC 14 at 4, citing 35 Ill. Adm. Code 102.202(b). Fourth, the Agency claims that "the proposal is not accompanied by any justification for the inapplicability or unavailability of inapplicable or unavailable information." PC 14 at 4, citing 35 Ill. Adm. Code 102.202(k).

As it did regarding IERG's motion for an emergency rule, the Agency states that it filed this rulemaking proposal regarding the NO_x Trading Program in order "to address minor clean-up issues." PC 14 at 1; *see* NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217, R06-22 (Jan. 19, 2006). The Agency claims that IERG's alternate proposal is not a true alternative to its own and argues that "it must be seen and treated as an attempt to establish a new regulatory proposal. PC 14 at 4-5. The Agency further argues that, to address CAIR for sources identified by IERG, it would need to file "a new and separate regulatory proposal that complies with the Board's procedural rules." *Id*. at 5. The Agency also claims that such a new rulemaking "should seek to amend Part 225" in order to be consistent with other provisions related to CAIR. *Id*.

Existence of an Emergency

Budget Requirement for 2009 Ozone Season. The Agency states that, when USEPA adopted CAIR, it amended the NO_x SIP Call in two ways regarding Non-EGUs. "First, USEPA stated that it would no longer carry out any of the functions set forth for USEPA under the NO_x SIP Call." PC 14 at 6, citing 40 C.F.R. 51.121(r)(1). "Second, USEPA required that states satisfy the same portion of the State's NO_x emission reduction requirements under the NO_x SIP Call for Non-EGUs." PC 14 at 6, citing 40 C.F.R. 51.121(r)(2). The Agency claims that "[t]he CAIR amendments to the NO_x SIP Call did not, however, require that Non-EGUs be included in the CAIR NO_x Ozone Season Trading Program." PC 14 at 6.

The Agency states that it has discussed with USEPA how to meet the outstanding NO_x SIP Call budget requirement for the 2009 ozone season. PC 14 at 6. The Agency reports that "USEPA has indicated that a demonstration using reported emissions from the applicable sources demonstrating that the budget has been met would suffice in lieu of having adopted measures." *Id*. The Agency states that, when that emissions data is available at the end ozone season, it "will prepare and submit this documentation." *Id*.

The Agency acknowledges its responsibility to determine how to meet Clean Air Act (CAA) requirements in the state. PC 14 at 6-7, citing 415 ILCS 5/4 (2008). The Agency argues that, ""[i]f USEPA finds that a state has failed to act on an obligation under the federal Clean Air Act, it sends a SIP Call or notification to the state identifying the deficiency and starting a sanctions clock or imposing a federal implementation plan ("FIP")." PC 14 at 7. The Agency claims to have received no such notification. *Id*. at 7, citing 40 C.F.R. 51.121(r)(2). The Agency states that it "has received from USEPA every indication that a demonstration using reported emissions from the applicable sources demonstrating that the budget has been met would suffice." PC 14 at 7. In addition, the Agency emphasizes that "USEPA does not prosecute individual companies when a state has failed to adopt an applicable program." *Id*. The Agency concludes that, "on the federal level there is no emergency either to the State or to individual companies for failure to address this requirement through rulemaking." *Id*.; *see* 5 ICLS 100/5-45(a) (2008); 415 ILCS 5/27(c) (2008).

Section 9.9 of the Act. The Agency also disputes IERG's claim that a trading program is required by Section 9.9 of the Act. PC 14 at 7, citing 415 ILCS 5/9.9 (2008). The Agency argues that it satisfied its obligations under Section 9.9 when the Board adopted NO_x SIP Call rules for engines, kilns, Non-EGUs, and EGUs. PC 14 at 7, citing 35 Ill. Adm. Code Subparts Q, T, U, W. The Agency also claims that the General Assembly could not have foreseen the sunset of the NO_x SIP Call Trading Program or the adoption of the CAIR program. PC 14 at 7. The Agency suggests that IERG thus has no firm basis on which to interpret Section 9.9 as requiring adoption of a trading program. *Id*.; *see* 415 ILCS 5/9.9 (2008). The Agency argues hypothetically that, if Section 9.9 does require adoption of a trading program to satisfy the budget obligation, the burden of proposing that program falls on the Agency. PC 14 at 7. The Agency further argues that "[i]ndividual sources cannot be sued for lack of compliance with the NO_x SIP Call Trading Program because there is no longer a NO_x SIP Call Trading Program." *Id*. at 7-8. The Agency also claims that "IERG has provided no evidence that any of its members have been subject to a lawsuit pursuant to the provisions of Section 9.9 of the Act or provided any legal support for the hypothetical proposition that a penalty of $10,000 per day could be collected based on the existence of a program that is obsolete." *Id*. at 8. The Agency concludes by stating that "there is no emergency under Section 9.9 of the Act." *Id*.

Section 217.464 of the Board's Regulations. The Agency also dismisses IERG's claim that its members may be subject to an enforcement action under Section 217.464 of the Board's regulations, which "requires sources to hold allowances equal to their emissions." PC 14 at 8, citing 35 Ill. Adm. Code 217.464. The Agency emphasizes that USEPA no longer administers the NO_x SIP Call program and that the program therefore generated no allowances that the Agency could allot to sources for the 2009 control period. PC 14 at 8. The Agency argues that, "[e]ven if such allowances were allotted, USEPA has stated that the Administrator will no longer carry out any of the functions set forth under the NO_x SIP Call." *Id*., citing 40 C.F.R. 51.121(r)(1); 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. The Agency concludes by claiming that the requirement under Section 217.464 "has been rendered moot." PC 14 at 8.

The Agency also disputes IERG's claim that the regulation may require a report to the Securities and Exchange Commission as a potential liability. PC 14 at 8. The Agency expresses doubt that federal regulations require "the reporting of minimally impacting and arguably immaterial uncertainties be they deemed off-balance sheet or non-off-balance sheet arrangements (liabilities arising out of regulatory actions) that are as of yet merely speculative in nature and thus not settled, binding or even reasonably likely to result." *Id*., citing 17 C.F.R. 229.303.

Summary. The Agency argues that, because the NO_x SIP Call Trading Program is obsolete, no risk of sanctions or liability any longer threatens affected sources. PC 14 at 9. The Agency continues by suggesting that a threat to source does not constitute an emergency. *Id*, citing 5 ILCS 100/5-45 (2008); 415 ILCS 5/27(c) (2008). The Agency further argues that alleviating a financial hardship, which it compares to administrative need, does not jeopardize the public interest, safety, or welfare and does not constitute an emergency. *Id*., citing Citizens for a Better Environment v. PCB, 152 Ill.App.3d 105, 504 N.E.2d 166 (1st Dist. 1987). The Agency acknowledges that the Board has "allowed that a financial hardship for a particular industry did constitute an emergency in the adoption of an Emergency Rule." PC 14 at 9-10, citing Emergency Rule Amending 7.2 psi Reid Vapor Pressure Requirement in the Metro-East Area, 35 Ill. Adm. Code 219.585(a), R95-10 (Feb. 23, 1995). Nonetheless, the Agency agrees with a dissenting opinion in that case stating that "there is a danger created when classifying a rulemaking as an emergency based on economic hardship. The purpose of emergency rulemaking is no to offset economic hardship to business, but to protect public interest, welfare, and safety." PC 14 at 10, citing Emergency Rule Amending 7.2 psi Reid Vapor Pressure Requirement in the Metro-East Area, 35 Ill. Adm. Code 219.585(a), R95-10 (Feb. 23, 1995) (Meyer, diss.). The Agency concludes by claiming that "IERG presents no dollar amount in support of a potential financial outlay and more importantly the facts demonstrate that there is no existing situation of financial hardship or threat of possible financial hardship as the program is obsolete and thusly the potential for sanctions or liability to the affected sources is obsolete as well." PC 14 at 10.

USEPA Approval

The Agency states that CAIR provides in pertinent part "that States may include Non-EGUs in the CAIR program only if the program is substantially identical to 40 C.F.R. Subparts AAAA through IIII." PC 14 at 10, citing 40 C.F.R. 51.123(aa)(1). However, the Agency argues that, although the USEPA has allocated 4,856 NO_x allowances to Illinois for Non-EGUs, IERG's alternate proposal includes 4,948 allowances. PC 14 at 10. The Agency further argues that the CAIR rule does not allow the State's allocation of allowances to exceed the budget provided. *Id*. The Agency claims that "IERG's proposal does that by revising the allowances listed in Appendix E." *Id*., citing Mot. Emer., Exh. 11 (calculations). The Agency states that, although IERG suggests that the state's budget may increase, "USEPA has not provided any statements or direction contrary to its past indications that it will not increase Illinois NO_x budget for Non-EGUs." PC 14 at 10.

Although the Agency acknowledges that it has not completely analyzed IERG's August 3, 2009 filings or submitted them to USEPA for its review, it identifies three areas in which IERG's

language is "not substantially identical to USEPA's model CAIR rule: inclusion of low emitter exemption, permitting requirements and definitions." PC 14 at 10-11. The Agency emphasizes that USEPA will not allocate allowances to Illinois until it approves amendments in the form of a SIP revisions. *Id*. at 11, citing 72 Fed. Reg. 58528 (Oct. 16, 2007). The Agency argues that, because IERG's proposed emergency amendment goes beyond the Agency's own proposal, "USEPA would not approve it." PC 14 at 11; *see id*., Att. A.

The Agency suggests that the *status quo* is "a rule that USEPA has formally declared obsolete." PC 14 at 11, citing 70 Fed. Reg. 25162, 25275 (May, 12, 2005). In the absence of USEPA approval of IERG's proposal, the Agency argues that the proposal "would create a state rule which would be inherently incompatible with the federal rule." PC 14 at 11. The Agency elaborates that "there would be a state regulation requiring compliance with a federal program where compliance would be impossible, due to the fact that federal approval would not be forthcoming and thus the requirements would not be moot." *Id*. Claiming that IERG's proposal is not approvable by USEPA, the Agency requests that the Board deny the motion for emergency rulemaking. *Id*.

Expedited Review of IERG's Alternate Proposal

Addressing IERG's motion for expedited review, the Agency incorporates its previous arguments responding to the motion for emergency rulemaking. PC 14 at 11. The Agency notes IERG's statement "that it represents a majority of the companies affected by Subpart U." *Id*. at 12. The Agency argues, however, that IERG does not represent all of the affected companies, members of the general public or environmental groups." *Id*. The Agency claims that these participants "would be consulted if a CAIR type rulemaking had been proposed and developed by the Illinois EPA, as would be appropriate for a regulatory proposal of this scope and effect." *Id*.

The Agency also argues that IERG's proposal relies on an "outdated allocation methodology contained in Subpart U." PC 14 at 12. The Agency claims that IERG "allocates significantly more allowances than are needed by existing sources for compliance, allocates allowances to some sources that do not exist, and penalizes new sources (erects a barrier) by requiring them to buy allowances from existing sources." *Id*. The Agency further claims that these allowances far exceed any liability to which IERG's members may be subject "and does not comport with public policy and protection of the environment." *Id*. In addition, the Agency states that both the NO_x SIP Call and CAIR rules provide that "allowance allocations do not establish a property rights for the source receiving the allocations." *Id*., citing 40 C.F.R. 96.6(c)(7), 96.106(c)(6). The Agency requests that the Board deny the motion for expedited review, as there exists no emergency with respect to liability or that would reduce public participation. PC 14 at 11-12.

Agency's Proposed Alternative Emergency Rulemaking

The Agency submits, in the event that the Board finds that an emergency exists with regard to the 2009 ozone season, an alternative proposal "sunsetting the paper requirement to

hold allowances." PC 14 at 12, citing 35 Ill. Adm. Code 217.454(d); *see* PC 14, Att. A. The Agency states that its proposal "preserves the requirements to have appropriate permitting, recordkeeping and reporting conditions to support the compliance demonstration that is being developed." PC 14 at 12.

The Agency continues by arguing that, if the Board concludes that an emergency exists, it must necessarily agree with IERG that Section 9.9 of the Act requires the NO_x budget requirement to be met through the CAIR trading program. PC 14 at 13, citing 415 ILCS 5/9.9 (2008). The Agency restates its argument that Act preserves some discretion in meeting this requirement and does not concur that the Act requires this result. PC 14 at 13.

In the event that the Board does conclude that an emergency exists, the Agency argues that the Board should open a new rulemaking docket in which to consider such a proposal. PC 14 at 13. The Agency also states that the Board should require the filing of a "proposal that comports with the requirements of Section 102.202." *Id.*, citing 35 Ill. Adm. Code 102.202. The Agency also claims that the Board should consider such a proposal as a revision of Part 225, "which addresses other CAIR units." PC 14 at 13, citing 35 Ill. Adm. Code 225.

Substantively, the Agency states that it "does not support a full repeal of Subpart U." PC 14 at 13. The Agency notes that the Board is considering a proposal to amend Subpart W so that "obsolete requirements have been sunsetted but maintained in case prior non-compliance comes to light." PC 14 at 13, citing Nitrogen Oxide (NOx) Trading Program Sunset Provisions for Electric Generating Units (EGU's): New 35 Ill. Adm. Code 217.751, R09-20; *see* PC 14, Att. A. The Agency favors treating Subpart U units in the same fashion. *See* PC 14 at 13. The Agency further argues that any rulemaking proposal should be limited in terms of both scope and time. *Id*. Specifically, the Agency suggests that it favors only a budget no greater than actual emissions and extending no longer than the 2011 control period. *Id*. The Agency stresses that CAIR remains in flux and that USEPA has promulgated new air quality standards. *Id*., citing North Carolina v. EPA, 531 F.3d 896 (D.C. Cir. 2008).

Summary

The Agency states that denying IERG's motions will not jeopardize air quality, as "Illinois sources are easily meeting the NO_x Budgets provided by the NO_x SIP Call." PC 14 at 14. The Agency also notes that IERG has based its two motions on "potential legal/financial liability which the Illinois EPA does not believe exists and which has not been adequately justified or supported by IERG in its Motions." *Id*. The Agency requests that the Board deny both the motion for emergency rulemaking and the motion for expedited review. *Id*. at 1.

IERG REPLY (PC 15)

IERG reasserts the position that, by relying on Section 9.9 of the Act, its motion for emergency rulemaking "provides sufficient justification and support" for the Board to grant the motion. PC 15 at 2, citing 415 ILCS 5/9.9 (2008). Specifically, IERG argues that the Agency has failed to implement those statutory requirements. PC 15 at 2. IERG requests that the Board

grant the motion in order "to ensure the allocation of [NO_x] allowances for the 2009 ozone season." *Id*.

IERG also reasserts the position that Section 9.9 of the Act supports its motion for expedited review of its alternate proposal. PC 15 at 2. IERG offers that, if requested to do so, it will provide additional information to the Board in support of that motion. *Id*. IERG also states that it will "work with the Illinois EPA to develop a 'permanent rule that is mutually acceptable." *Id*.

Trading Programs Generally

IERG states that "Section 9.9 of the Act requires a NO_x trading program." PC 15 at 3, citing 415 ILCS 5/9.9 (2008). In addition, IERG cites Section 9.9(b), which provides in pertinent part that "[t]he Agency shall propose and the Board shall adopt regulations to implement an interstate NO_x trading program. . . ." 415 ILCS 5/9.9(b) (2008); *see* PC 15 at 3. IERG argues that Section 9.9 explicitly addresses allocation of NO_x allowances to both EGUs and Non-EGUs. PC 15 at 3; *see* 415 ILCS 5/9.9(c) (2008). IERG emphasizes that legislative findings at Section 9.9(a)(1) refer specifically to the reduce NO_x emissions pursuant to the NO_x SIP Call. PC 15 at 3, citing 415 ILCS 5/9.9(a)(1) (2008). IERG argues that, in adopting CAIR, USEPA has stated that the NO_x SIP Call "is still applicable." PC 15 at 3.

IERG states that Part 225 of the Board's regulations now addresses NO_x trading requirements for EGUs through CAIR. PC 15 at 3; *see* 35 Ill. Adm. Code 225. IERG argues, however, that the Agency has proposed no similar regulations for Non-EGUs. PC 15 at 3. IERG further argues that "[t]he Agency tries to declare as obsolete Section 9.9's NO_x trading requirements for non-EGUs by stating that the Section 9.9 obligations for non-EGUs were met when the Board adopted Subpart U." PC 15 at 3, citing PC 14 at 7. IERG claims that the Agency is effectively arguing that USEPA has voided Section 9.9 by placing NO_x trading under CAIR. PC 15 at 3. IERG further claims that, since the Agency provides no support for this argument, "Section 9.9's mandate for non-EGU NO_x trading stands, especially since the NO_x SIP Call obligation for affected sources remains in full force and effect." *Id*.

IERG acknowledges and expresses no disagreement with the Agency's view that the "General Assembly could not have foreseen the sunset to the NO_x SIP Call Trading Program and the adoption of the CAIR program." PC 15 at 4, citing PC 14 at 7. IERG argues however, that this view provides no basis "to circumvent Section 9.9's trading requirements for non-EGUs." PC 15 at 4. IERG further argues that the Agency has not proposed and the General Assembly has not adopted legislation eliminating "the requirement for NO_x trading for non-EGUs." *Id*. IERG claims that this requirement "must be fulfilled by the Board." *Id*.; *see* 415 ILCS 5/9.9(b) (2008). IERG argues that adopting the CAIR ozone season model rule effectively fulfills this requirement. PC 15 at 4, citing 70 Fed. Reg. 25275 (May 12, 2005).

IERG notes the Agency's statement that "it has had discussions with USEPA on 'how the outstanding NO_x SIP Call budget for [the] 2009 ozone control period can be met.'" PC 15 at 5, citing PC 14 at 6. Based on the Agency's statement about these discussions, IERG surmises

"that an emission report showing that the NO_x budget is met 'would suffice in lieu of having adopted measures.'" PC 15 at 5. IERG argues that the Agency provides no documentation for any agreement of this nature. *Id*.

IERG claims that, even if the Agency did document such an agreement, it would violate federal regulations, which require SIP revisions showing adoption of enforceable control measures producing emission reductions that meet the NO_x budget. PC 15 at 5, citing 40 C.F.R. 51.121(r)(2). IERG disputes the Agency's claim that complied with these federal regulations by adopting various RACT regulations. PC 15 at 5, citing PC 14 at 7. IERG notes that some of these RACT regulations have not been adopted by the Board and have compliance dates as late as 2012. PC 15 at 5. IERG also argues that USEPA regulations "allow a state to adopt the CAIR ozone season emissions trading program for non-EGUs in lieu of having to adopt specific emission control measures under Section 51.121. *Id*., citing 40 C.F.R. 51.121, 51.123(e), 51.123(bb).

IERG notes the Agency's claim that "it has not received notification from the USEPA that it is deficient in demonstrating that the NO_x SIP Call budget will be met." PC 15 at 5 IERG also notes the Agency's statement that "it has received 'every indication' that it can meet the requirements of 40 C.F.R. 51.121(r)(2) by submitting a 'demonstration using reported emissions from applicable sources' to show that 'the budget has been met.'" *Id*. at 5-6, citing PC 14 at 7. IERG argues that the Agency has provided no support for these indications. PC 15 at 6. IERG emphasizes that "USEPA did provide notice to the Illinois EPA that the State's CAIR submittal to USEPA did not address non-EGUs." *Id*., citing 72 Fed. Reg. 58528, 58531 (Oct. 16, 2007).

IERG also addresses the Agency's claim that the burden of proposing a NO_x trading program rests with the Agency. PC 15 at 6, citing PC 14 at 7. IERG notes that the Agency, in various filings, has expressed its intention to address non-EGUs. PC 15 at 6 (citations omitted). IERG states that it and its members have "waited patiently" for the Agency to propose regulations of this nature. *Id*. at 6-7. IERG claims that, when the Agency failed to do so, "IERG was compelled to step in on behalf of the owners and operators subject to obligations under Subpart U." *Id*. at 7.

IERG states that the Agency has responded to its motions not by addressing non-EGUs but instead by proposing "to eliminate the requirement for non-EGUs to hold NO_x allowances." PC 15 at 7; *see* PC 14 at 12-13, Att. A (proposed Section 217.451). Although IERG states that the Agency supports this proposal by arguing that CAIR is "still in flux" and that USEPA has promulgated new air quality standards, IERG argues that the proposal is inconsistent with the legislative findings in Section 9.9. PC 15 at 7, citing PC 14 at 13; *see* 415 ILCS 5/9.9(a) (2008). IERG argues that the Agency actually intends to repeal NO_x trading for non-EGUs. PC 15 at 7. IERG argues that this would be inconsistent with Section 9.9 and urges the Board to reject the Agency's proposal. *Id*., at 7-8.

Motion for Emergency Rule

Existence of Threat to Public Interest

IERG notes that Agency's argument that no emergency exists "because individual sources cannot be sued for lack of compliance with the NO_x SIP Call Trading Program because such program no longer exists." PC 15 at 8. However, IERG cats the dispositive issue in a different light. IERG states that sources subject to Subpart U must hold sufficient NO_x SIP Call allowances to cover emissions in the 2009 and subsequent ozone seasons. PC 15 at 8. IERG further argues that several facilities' CAAPP permits include a substantially similar provision. *Id*., citing Mot. Exp. at 14. IERG states that, "while it is true that there is no longer a NO_x SIP Call Trading Program, the requirement that non-EGUs comply with the provisions of the NO_x SIP Call remains fully intact." PC 15 at 8, citing 35 Ill. Adm. Code 217; Mot. Exp. at 11-12. IERG claims that, if the Board does not adopt its alternate proposal, source subject to Subpart U cannot comply with it. PC 15 at 8.

IERG discounts the Agency's claim that IERG members have not been subject to a lawsuit. PC 15 at 8, citing PC 14 at 8. IERG stresses that, since budget units need not hold NO_x allowances until November 30, any enforcement action is now premature. *Id.* IERG argues that affected sources face a risk of penalties that is both "real" and "substantial." *Id*. at 9, citing 415 ILCS 5/42 (2008) (civil penalties). IERG further argues that affected sources also face significant economic hardship in the event that they are required to purchase NO_x allowances. PC 15 at 10. IERG also argues that any obligation to file a report with the SEC "is not one to be taken lightly." *Id*.

IERG expresses uncertainty, now that USEPA has discontinued implementation of the NO_x SIP Call program, whether the requirements of the Board's regulations and related CAAPP permit conditions are moot. PC 15 at 9. IERG argues that, "[a]bsent some binding indication that such is the case, thereby absolving all sources subject to the current Subpart U from potential liability stemming from the requirements of Subpart U and their CAAPP permits, adoption of the emergency rule and alternative proposal are necessary in order to shield impacted facilities from liability. . . ." *Id*.

Caselaw

IERG seeks to distinguish its circumstances from those in the case of Citizens for a Better Environment v. PCB, 152 Ill.App.3d 105, 504 N.E.2d 166 (1st. Dist. 1987). *See* PC 15 at 10. IERG states that, in that case, "the Court determined that an emergency situation did not exist under the APA because the basis for the adoption of the emergency rule was administrative in nature." *Id*., citing Citizens for a Better Environment, 152 Ill.App.3d at 109-10. IERG further states that the Court characterized the administrative problem as "self-created." PC 15 at 10, citing Citizens for a Better Environment, 152 Ill.App.3d at 110. Citizens for a Better Environment, 152 Ill.App.3d at 109-10. IERG argues that affected sources face the risk of legal liability and financial hardship, which are neither administrative in nature nor self-created. PC 15 at 11. IERG further argues that the emergency circumstances stem from the failure "to take action to establish a rule that provides for the allocation of allowances to budget units for the 2009 control period. . . ." *Id*.

IERG emphasizes that the Board adopted an emergency rule in Emergency Rule Amending 7.2 psi Reid Vapor Pressure Requirement in the Metro-East Area, 35 Ill. Adm. Code 219.585(a), R95-10 (Feb. 23, 1995) in order "to address inconsistency between federal and state annual compliance dates for supplying lower RVP gasoline. . . ." PC 15 at 12. IERG argues that the Board in that case determined "that economic hardship constituted a threat to the public interest warranting an emergency rule." *Id*. Finally, while the Agency expressed agreement with a dissenting opinion in R, IERG discounts it as "a mere two paragraphs" joined by no other Board member. *Id*.

IERG argues that the Board also found that economic hardship warranted an emergency rule in Emergency Rule Amending the Stage II Gasoline Vapor Recovery Rule in the Metro-East Area, 35 Ill. Adm. Code 219.586(d), R 93-12 (May 20, 1993). PC 15 at 12. IERG notes the Board's statement that "the affected facilities have been placed in a position where they are subject to legal action by the Agency, or any citizen, if they fail to comply with Stage II requirements which should have taken effect May 1, 1993." *Id*. (emphasis in original), citing Emergency Rule Amending the Stage II Gasoline Vapor Recovery Rule in the Metro-East Area, 35 Ill. Adm. Code 219.586(d), R 93-12 (May 20, 1993). IERG further argues that the Board attributed the need for an emergency rule in part to "untimely actions" by the Agency. PC 15 at 16, citing Emergency Rule Amending the Stage II Gasoline Vapor Recovery Rule in the Metro-East Area, 35 Ill. Adm. Code 219.586(d), R 93-12 (May 20, 1993). IERG claims that the Agency has failed to take timely steps to establish a trading program for non-EGUs and "requests that the Board duly consider the Illinois EPA's inaction in this matter." PC 15 at 17.

IERG likens the affected entities in these two proceedings to its own members, claiming that they too face economic hardship and "potential liability for violation of Board regulations and CAAPP permit conditions," as well as SEC disclosure issues. PC 15 at 13. IERG also stresses that, like these two earlier proceedings, many entities "filed comments explaining why the emergency rule and adoption of the alternative proposal are necessary." *Id*. at 15; *see* PC 2-13. "IERG requests that the Board give due consideration to the comments submitted in this proceeding in support of the emergency rule and alternative proposal." PC 15 at 16; *see supra* at 10-18 (summarizing Public Comments 2-13).

CAAPP Permits

While IERG claims that affected sources may face liability for violations of CAAPP permit conditions, it argues that the Agency's response fails to address this issue. PC 15 at 18. IERG acknowledges that the Agency's proposed sunset language "may relieve impacted facilities from compliance with the regulatory requirement to hold NO_x allowances, but it does not address the CAAPP permit conditions requiring that facilities hold NO_x allowances." *Id*. IERG recognizes that permits can be modified but claims that public notice requirements would prevent modification from being completed before November 30. *Id*., citing 415 ILCS 5/39.5(14)(c)(iii). IERG thus concludes that permit conditions could trigger liability and enforcement by either USEPA, the Agency, the Illinois Attorney General's Office, or citizens. PC 15 at 18.

IERG notes the Agency's statement that "USEPA has indicated that a demonstration using reported emissions from the applicable sources demonstrating that the budget has been met would suffice in lieu of having adopted measures." PC 15 at 19, citing PC 14 at 6. Although IERG does not specifically dispute this statement, it argues that neither the Agency's response nor the record of this proceeding supports it. *See* PC 15 at 19. IERG further argues that "[i]mpacted facilities cannot rely on the Illinois EPA's recitation of discussions with USEPA regarding how to meet the NO_x SIP Call budget requirement without additional evidence of USEPA's position." *Id*.

SEC Disclosure

IERG restates its position that "publicly held companies must disclose potential liability in SEC filings." PC 15 at 19, citing Mot. Exp. at 5. Noting the Agency's response, IERG "disputes that the Illinois EPA, as a state governmental agency charged with protecting environmental quality, has the ability to determine what are 'minimally impacting and arguably immaterial uncertainties' for purposes of the requirement of a publicly held corporation to report to the SEC. . . ." PC 15 at 19.

Motion for Expedited Review of Alternative Proposal

Introduction

IERG renews the request that the Board grants its motion for expedited review of the alternate proposal, stating that "the Agency has not presented any indication of material prejudice that would result from the Motion being granted." PC 15 at 20. While IERG notes the Agency takes issue with the proposed allocation of allowances, IERG claims that it intends only "to extend the current trading program by amending Subpart U with the necessary changes to comport with the federal CAIR trading system." *Id*., citing PC 14 at 12.

IERG also disagrees with the Agency's position opposing a budget great than actual emissions. PC 15 at 21; *see* PC 14 at 13. IERG argues that this position is contrary to the basic economics of a trading program, under which sources reduce emissions through pollution control technology or operating practices in order to realize a return on investment. PC 15 at 20, 21. IERG also disagrees with the Agency's position favoring a limited duration for any adopted rule. *Id*. at 21. IERG fears that the expiration of such a rule would soon place its members in the same situation as they now face. *See id*. IERG also expresses doubt that USEPA would approve a SIP revision based on a rule with a limited duration. *Id*. Finally, IERG notes that the Board general rulemaking provisions allow the Agency to propose the revision or replacement of rules. *Id*.

Federal Approval

IERG doubts the Agency's view that the alternate proposal "is not federally approvable." PC 15 at 22, citing PC 14 at 2-3, 11. IERG argues that its proposal meets USEPA requirements "for bringing budget units into the CAIR NO_x Ozone Season Trading Program because the alternative proposal adopts the CAIR model rule." PC 15 at 22, citing 40 C.F.R. 96 Subparts

AAAA - IIII. In addition, IERG questions whether, if the Agency has not submitted IERG's proposal to USEPA, it can emphatically state that it is not approvable. PC 15 at 22. IERG questions whether the Agency has submitted its own proposal to USEPA to determine its approvability. *Id*. at 23-24. IERG concludes that its own proposal is not only approvable but may be automatically approvable under federal regulations. *Id*. at 24-25, citing 40 C.F.R. 51.123(aa)(1).

Procedural Issues

IERG disagrees with the Agency's claim that the alternate proposal is separate in subject and scope from the Agency's own proposal in this docket. PC 15 at 25. IERG argues that the Agency has acknowledged the need to amend this proposal to replace the NO_x SIP Call trading program with CAIR's. *Id.*, citing Mot. Exp. at 5-8. IERG also disputes the Agency's claim that IERG's alternate proposal fails to meet procedural requirements. PC 15 at 25. IERG claims that the Agency refers to requirements for an original proposal and not for the introduction of an alternative. *Id*. IERG states, however, that, if the Board determines that it requires additional information, IERG will produce it. *Id*. at 26.

Acknowledging that emergency rules are effective for 150 days, IERG notes the Agency's statement that "[t]here is no provision for any regulatory amendment that would be in place following the expiration of the 150 days." PC 15 at 26, citing PC 14 at 3. IERG suggests that this 150-day duration is sufficient, stating that "the emergency rule will no longer be necessary after November 30, 2009 since compliance requirements will have passed." PC 15 at 26. IERG argues that, "[i]f a permanent rule is not adopted prior to the expiration of the emergency rule, the rule existing prior to the adoption of the emergency rule will once again become effective." *Id*., n.2, citing Emergency Rule Amending the Stage II Gasoline Vapor Recovery Rule in the Metro-East Area, 35 Ill. Adm. Code 219.586(d), R 93-12 (May 20, 1993). However, IERG states that, when the emergency rules expires, the permanent rule "should be in place" for control periods in 2010 and beyond. PC 15 at 26.

Finally, IERG acknowledges the Agency's claim that IERG's alternate proposal "should seek to amend Part 225." PC 15 at 27. IERG states that it could propose to amend Part 225 but suggests that it is more appropriate to maintain a continuation of the trading program where it has existed. *See id*. IERG also notes that Part 225 appears to apply only to EGUS. *Id*.

Additional Comments

IERG notes the Agency's suggestion that IERG did not adequately notify stakeholders of its alternate proposal. PC 15 at 29, citing PC 14 at 12. IERG acknowledges that its membership does not include every entity that may be interested in its proposal. PC 15 at 29. IERG states that it "does not question whether or not the Agency would have consulted stakeholders if it had proposed and developed a rule." *Id*. (emphasis in original). IERG further states that, since the Agency failed to do so, IERG was forced to offer its own proposal. *Id*. IERG suggests that, because it proposes only to extend an existing program, "any interest expressed by stakeholders regarding the current trading program are reflected in the alternative proposal." *Id*. at 29-30.

IERG also notes the Agency's statement that "allowance allocations do not establish a property right." PC 15 at 20, citing PC 14 at 12. IERG responds that it "has never asserted that the need for a NO_x trading program is based on allowances as property." PC 15 at 30. IERG further states that "the issue of allowances as property is not a central tenet of the trading program." *Id.*

STATUTORY AUTHORITIES

Section 5-45 of the Illinois Administrative Procedure Act provides in pertinent part that

> (a) "Emergency" means the existence of any situation that any agency finds reasonably constitutes a threat to the public interest, safety, or welfare.
>
> (b) If any agency finds that an emergency exists that requires adoption of a rule upon fewer days than is required by Section 5-40 [General rulemaking] and states in writing its reasons for that finding, the agency may adopt an emergency rule without prior notice or hearing upon filing a notice of emergency rulemaking with the Secretary of State under Section 5-70. The notice shall include the text of the emergency rule and shall be published in the Illinois Register. . . . Subject to applicable constitutional or statutory provisions, an emergency rule becomes effective immediately upon filing under Section 5-65 [Filing of rules] or at a stated date less than 10 days thereafter. The agency's finding and a statement of the specific reasons for the finding shall be filed with the rule. The agency shall take reasonable and appropriate measures to make emergency rules known to the persons who may be affected by them.
>
> (c) An emergency rule may be effective for a period of not longer than 150 days, but the agency's authority to adopt an identical rule under Section 5-40 is not precluded. . . . 5 ILCS 100/5-45 (2008).

Section 27(c) of the Act provides in pertinent part that, "[w]hen the Board finds that a situation exists which reasonably constitutes a threat to the public interest, safety or welfare, the Board may adopt regulations pursuant to and in accordance with Section 5-45 of the Illinois Administrative Procedure Act." 415 ILCS 5/27(c) (2008).

DISCUSSION

Motion for Emergency Rulemaking

Under the Illinois Administrative Procedure Act (5 ILCS 100/1-1 *et seq*. (2008)) (IAPA), the Board is authorized to adopt emergency rules in the event that it finds that a situation exists that "reasonably constitutes a threat to the public interest, safety, or welfare." 5 ILCS 100/5-45(a) (2008); *see also* 415 ILCS 5/27(c) (2008). IERG argues that the Board has adopted

emergency rules upon finding that the threat of economic hardship and liability constituted such a threat. In this case, IERG claims that the Agency's failure to propose regulations bringing non-EGU NO_x SIP Call budget units into the CAIR NO_x Ozone Season Trading Program subjects those sources to liability for violation of Subpart U and, in some cases, their CAAPP permits. In addition, IERG claims that these non-EGU sources may face the financial hardship of having to purchase CAIR allowances in an effort to substitute them for NO_x SIP Call allowances. IERG also cites the risk of consequences from having to report potential liabilities to the SEC. Finally, IERG claims that the Agency's failure to maintain a NO_x trading program is inconsistent with Section 9.9 of the Environmental Protection Act (Act) (415 ILCS 5/9.9 (2008)), which is contrary to the public interest.

On the issue of the risk of liability, the Board notes that Section 217.456(d) of Subpart U requires NO_x SIP Call budget units to hold NO_x SIP Call allowances by November 30, 2009, for the preceding ozone control period. The Agency has plainly stated that USEPA no longer administers the NO_x SIP Call program. The Agency has acknowledged that, under the NO_x SIP Call program, the Agency did not allocate allowances to non-EGU sources in Illinois for the 2009 ozone control period. The Agency has further clarified that, even if it had allocated such allowances, the USEPA Administrator no longer carries out any of the administrative functions under the NO_x SIP Call program. The Agency states that those administrative functions include populating accounts with allowances, comparing allowances to emissions, and deducting allowances from accounts. On the basis of these statements, the Agency has explicitly concluded that the requirement to hold allowances "has been rendered moot." Characterizing the program as "obsolete," the Agency has clearly stated that "affected sources are no longer subject to sanctions or liability." On the basis of these representations by the Agency, which are supported by affidavit, the Board finds that the risk of liability to IERG's members and other affected sources for violating the regulation or a permit condition based upon it does not support a finding that an emergency exists.

Next, the Board turns to the possibility that sources may feel compelled to purchase CAIR NO_x allowances in an effort to comply with this requirement. The Board received a number of comments submitted by sources subject to Subpart U or from associations of those sources. Almost all of those comments indicated that these sources might potentially obtain NO_x allowances by purchasing them through the CAIR program. However, the comments expressed uncertainty "whether those allowances would be legally sufficient to satisfy the Subpart U requirement to hold NO_x SIP Call allowances." *E.g.*, PC 5 at 2. Comments also expressed doubt that those CAIR NO_x allowances could be used to demonstrate compliance when sources have not been able to obtain CAIR compliance accounts. Based on the uncertainty stated in these comments, the Board can only conclude that affected sources do not regard CAIR allowances as a likely means for complying. The Board believes that, in the face of these doubts, it is improbable that sources will expend financial resources to purchase these CAIR NO_x allowances. Accordingly, the Board finds that this factor does not support a finding that an emergency exists.

IERG has also raised the possibility that publicly-held sources may be required to disclose potential liabilities in filings with the SEC. After the Agency's response sought to minimize this risk, IERG doubted that the Agency had the capability to make determinations about such risks

or about SEC requirements more generally. The Board professes to have no expertise with regard to those issues. However, the Board above has found that the risk of liability and the improbability that sources would purchase CAIR NO_x allowances do not support a finding of an emergency. Accordingly, the Board also concludes that the possibility of an SEC filing reporting either of these circumstances does not support a finding an emergency.

Finally, IERG has generally argued that the Agency's failure to propose a NO_x trading program for non-EGUs is inconsistent with the requirements of Section 9.9 of the Act. IERG and the Agency have expressed strenuous disagreement about the Agency's obligations under Section 9.9. Nonetheless, the Board need not decide that issue in resolving IERG's motions. Section 9.9(b) of the Act provides in pertinent part that "[t]he Agency shall propose and the Board shall adopt regulations to implement an interstate NO_x trading program. . . ." 415 ILCS 5/9.9(b) (2008) (emphasis added). IERG has not persuasively argued that Section 9.9 authorizes IERG to propose trading program regulations, although IERG states that it has "waited patiently" for such an Agency proposal and was "compelled" to offer one after the Agency failed to do so. PC 16 at 6-7. The Board concludes that the requirements of Section 9.9 do not support a finding that an emergency exists.

After carefully considering all of the filings, the Board finds that the factors raised by IERG in support of its motion do not support a conclusion that an emergency exists. *Cf.* Emergency Rule Amending 7.2 psi Reid Vapor Pressure Requirement in the Metro-Est Area, 35 Ill. Adm. Code 219.585(a), R95-10 (Feb. 23, 1995) (adopting emergency rule); Emergency Rule Amending the Stage II Gasoline Vapor Recovery Rule in the Metro-East Area, 35 Ill. Adm. Code 219.586(d), R93-12 (May 20, 1993) (same). The Board therefore denies IERG's motion for emergency rulemaking. As the Board does not find that an emergency exists, the Board concludes that there is no basis on which to consider the Agency's proposed alternative language, through which the Agency sought to sunset the Section 217.456(d) requirement to hold NO_x SIP Call allowances. In this regard, the Board notes that IERG had generally described the Agency's proposed alternative as inadequate to address IERG's concerns.

However, the Board does not discount the interests raised by IERG in its motion and reply. In its most recent status report to the Board, the Agency plainly indicated that, in the spring of 2009, it expected to replace Subpart U by proposing a rule that would integrate non-EGUs into the CAIR rule. The Board directs the Agency within 60 days of the date of this order, on or before Monday, October 19, 2009, to file a status report indicating whether and when it intends to file such a separate rulemaking proposal, if it has not already done so. In that same status report, the Agency must address whether it is prepared to schedule hearings in this docket, R06-22, or whether the docket should be dismissed.

Motion for Expedited Review of Alternate Proposal

IERG indicates that it seeks expedited review of its alternative proposal "in order to bring budget units into the CAIR NO_x Ozone Season Trading Program for the 2010 control period and beyond." PC 16 at 26. In this regard, the Board notes the Agency's claim that, in this rulemaking docket, R06-22, the Agency proposed to address minor clean-up issues and not to

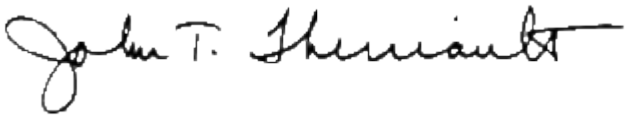
establish a new program. The Board agrees that IERG's proposed language would require a new and separate rulemaking proposal complying with all applicable procedural requirements, which the Board would consider in a separate docket. As the Board will not consider IERG's alternate proposal in this docket, R06-22, the Board denies the motion for expedited review.

CONCLUSION

For the reasons set forth above, the Board denies IERG's motion for emergency rulemaking and IERG's motion for expedited review of the alternate rulemaking proposal. The Board directs the Agency within 60 days of the date of this order, on or before Monday, October 19, 2009, to file a status report as described above.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on August 20, 2009, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board