ILLINOIS POLLUTION CONTROL BOARD
May 19, 2011

IN THE MATTER OF:	)	
	)	
NITROGEN OXIDES EMISSIONS, AMENDMENTS TO 35 ILL. ADM. CODE 217	)	R11-24
	)	
IN THE MATTER OF:	)	
	)	
ILLINOIS ENVIRONMENTAL REGULATORY GROUP'S EMERGENCY RULEMAKING, NITROGEN OXIDES EMISSIONS: AMENDMENTS TO 35 ILL. ADM. CODE PART 217	)	R11-26 (Rulemaking - Air) (Cons.)

ORDER OF THE BOARD (by G.L. Blankenship)

On April 21, 2011, the Illinois Environmental Regulatory Group (IERG) filed a motion for emergency rule (Mot.) accompanied by the proposed rule language. The motion was filed pursuant to the Board's authority to adopt emergency regulations as provided in Section 27(c) of the Illinois Environmental Protection Act (Act), 415 ILCS 5/27(c), Section 5-45 of the Illinois Administrative Procedure Act (IAPA), 5 ILCS 100/5-45 and 35 Ill. Adm. Code 102.612. IERG is requesting that the Board amend its Nitrogen Oxides (NO_x) Emissions rules at 35 Ill. Adm. Code Part 217. No response to the motion was received.

For the reasons set forth below, the Board denies the motion for emergency rule. In the interest of administrative efficiency, the Board on its own motion consolidates this rulemaking with another open docket involving the exact same subject matter, proposed by the Illinois Environmental Protection Agency (IEPA or Agency): R11-24, In the Matter of: Amendments to 35 Ill. Adm. Code 217, Nitrogen Oxides Emissions. In denying the motion for emergency rule in R11-26, the Board acknowledges the importance of this proposal to IERG and its individual members. The Board notes that it continues to give high priority to the identical proposal in R11-24. R11-24 is currently in the first notice stage of rulemaking under the IAPA, and the scheduled hearings will be completed next month. With the cooperation of all participants, the Board expects to be able to complete rulemaking this summer or early fall.

In this opinion, the Board first describes the IERG motion in detail. Next, the Board provides the applicable legal framework and rules on IERG's motion.

MOTION FOR EMERGENCY RULE

Introduction

IERG states that, in 2009, the Board finalized amendments to 35 Ill. Adm. Code Part 217, Subparts D, E, F, G, H, I and M. Mot. at 1. The rules impose limitations on emissions of NO_x on various categories of major stationary sources of NO_x located in the Chicago and Metro-East geographic areas designated as nonattainment for the 1997 8-hour ozone and 1997 24-hour fine-particulate ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS) (hereafter referred to as the "Illinois NO_x RACT Rules"). *Id.*, citing 33 Ill. Reg. 13345 (Sept. 25, 2009).

IERG notes that the Board used a four point rationale to support the need for the rules: (1) the Clean Air Act (CAA) requirement for NO_x Reasonably Available Control Technology (RACT) requirements for major sources located in areas designated as nonattainment under the 1997 8-hour ozone NAAQS, (2) the CAA requirement for Reasonably Available Control Measures (RACM), including RACT, for areas designated as nonattainment under the 1997 $PM_{2.5}$ NAAQS, (3) future RACT requirements for areas designated nonattainment under the 2006 $PM_{2.5}$ NAAQS and (4) future RACT requirements for areas designated nonattainment under the 2008 ozone NAAQS. *Id.*, citing In the Matter of: Nitrogen Oxides Emissions from Various Source Categories: Amendments to 35 Ill. Adm. Code Parts 211 and 217, R08-9, pages 6-7 (Aug. 20, 2009) (rulemaking herein referred to as the "NO_x RACT Rulemaking").

IERG deems the rationale relied upon by the Board in 2009 in adopting the Illinois NO_x RACT Rules no longer applicable in light of three factors: air quality improvements, the issuance of a waiver to Illinois by the United States Environmental Protection Agency (USEPA) from the CAA requirement to have NO_x RACT rules in place for the 1997 8-hour ozone nonattainment areas, and the delay in issuing a final revised ozone NAAQS. Mot. at 2. IERG states that a result of this is that there is "neither a programmatic purpose nor regulatory need, *at this time,* for Illinois to have NO_x RACT rules in place." *Id.*

IERG believes that any future NO_x RACT requirements that may be applicable to Illinois pursuant to final revised ozone NAAQS may not be satisfied by the current Illinois NO_x RACT Rules "due to the fact that approval of such rules in the future will depend upon technological capabilities available at that point in the future as well as federal criteria that are subject to change." Mot. at 2-3. IERG states that this uncertainty means that any changes to units subject to Illinois' NO_x RACT Rules and the costs incurred to make such changes may be a waste if additional changes are necessitated by future RACT requirements of the USEPA's boiler rules. *Id.* at 3.

IERG states that Illinois industry "will be affected by the fact that compliance with the Illinois NO_x RACT Rules requires an outlay of capital and commencement of projects well in advance of the compliance date." Mot. at 3. IERG goes further to say that "[r]equiring immediate compliance does not further the aims under which the rules were promulgated, may not be sufficient to meet the future NO_x RACT requirements, and yet carries the threat of liability for non-compliance." *Id.*

IERG believes these reasons amount to a threat to the public interest and that the Board is therefore justified in adopting an emergency rule extending the compliance dates. Mot. at 3. IERG requests that the emergency rule language be identical to the amendments proposed by the IEPA in In the Matter of: Amendments to 35 Ill. Adm. Code Part 217, Nitrogen Oxides

Emissions, R11-24 (Apr. 4, 2011) (rulemaking hereafter referred to as "IEPA NO_x Compliance Date Rulemaking"). Mot. at 3-4. IERG supports the IEPA's rulemaking proposal but believes "immediate action is necessary to alleviate the capital costs being accrued now and to ensure that the threat of liability for noncompliance is eliminated." *Id.* at 4.

Background on Regulation of NO_x Emissions

IERG states that it was an active participant in the Illinois NO_x RACT Rules. Mot. at 4. IERG quotes the Board's order in that rulemaking to describe the rationale underlying the regulation of NO_x emissions, which are summarized in the four separate bases in the introduction above . *Id.* at 5-7.

IERG notes that, on February 22, 2011, the USEPA granted the IEPA's request to exempt sources of NO_x in the Illinois portions of the Chicago-Gary-Lake County, Illinois-Indiana and St. Louis, Missouri-Illinois 8-hour ozone nonattainment areas from CAA requirements for NO_x RACT for purposes of attaining the 1997 8-hour ozone NAAQS (herein referred to as "NO_x RACT Waiver"). Mot. at 8, citing 76 Fed. Reg. 9665 (Feb. 22, 2011). As the NO_x RACT Waiver describes, additional NO_x emission reductions required by Section 182(f) of the CAA were not necessary for attainment of the ozone standard because Illinois attained the 1997 8-hour ozone standard without the implementation of additional controls. Mot. at 8. IERG states that, because the Illinois NO_x RACT Rules were adopted in part to satisfy the CAA Section 182 NO_x RACT requirements for areas designated nonattainment for the 1997 8-hour ozone standard, the NO_x RACT Waiver nullifies that basis for the rules. *Id.*

IERG does not believe that the requirement that nonattainment areas under the 1997 $PM_{2.5}$ NAAQS implement Reasonably Available Control Measures (RACM), including RACT under Section 172(c)(1) of the CAA, provides a sound basis for retention of the Illinois NO_x RACT Rules. Mot. at 8. IERG states that the Federal Implementation Rule (FIP) accompanying the 1997 $PM_{2.5}$ NAAQS makes it clear that RACT/RACM is not required where those controls would not advance the attainment date by one year or more. *Id.* IERG notes that both nonattainment areas in Illinois have measured attainment of the standard. *Id.*, citing Approval and Promulgation of Air Quality Implementation Plans; Illinois; Indiana; Chicago and Evansville Nonattainment Areas; Determination of Attainment of the Fine Particle Standards, 74 Fed. Reg. 62243 (Nov. 27, 2009); and Approval and Promulgation of Air Quality Implementation Plans; Illinois; Missouri; Saint Louis Nonattainment Area; Determination of Attainment of the Fine Particle Standard, 76 Fed. Reg. 12302 (Mar. 7, 2011). Mot. at 8-9. IERG contends that implementation of the Illinois NO_x RACT Rules are not required under the 1997 $PM_{2.5}$ NAAQS since Illinois cannot possibly advance the attainment dates of areas that are already attained. *Id*. at 9. IERG also notes that the cited Determinations of Attainment "explicitly suspend the [State Implementation Plan, or]SIP requirement for the Chicago nonattainment area, including the RACT/RACM requirement, and propose to do the same for the Metro-East area." *Id.*

The third basis for adopting the NO_x RACT Rules was to satisfy future SIP requirements for areas designated as nonattainment under the 2006 $PM_{2.5}$ NAAQS. Mot. at 9. IERG states that at the time of the Illinois NO_x RACT Rules, it seemed apparent that the geographic areas

covered by the Illinois NO_x RACT Rules would be designated as nonattainment under that standard. *Id.*, citing Final Rule, Air Quality Designations for the 2006 24-Hour Fine Particle ($PM_{2.5}$) NAAQS.[1] IERG notes, however, that the USEPA pre-publication notice never became effective and that no areas in Illinois were designated as nonattainment subsequent to the USEPA taking action to finalize area designations under the 2006 $PM_{2.5}$ NAAQS. Mot. at 9. IERG contends this means that no SIP requirements to have NO_x RACT rules stems from the 2006 $PM_{2.5}$ NAAQS. *Id.*

According to IERG, the final basis for adopting the Illinois NO_x RACT Rules was a future NO_x RACT requirement for areas designated as nonattainment under the 2008 8-hour ozone NAAQS. Mot. at 10. IERG notes that, at the date of filing, the USEPA "continues to reconsider the 2008 standard, having proposed a revised standard in January 2010, and is expected to finalize that reconsideration in the summer of 2011." *Id.*, citing 75 Fed. Reg. 2938 (Jan. 19, 2010); and EPA's Revised Motion Requesting a Continued Abeyance and Response to the State-Petitioner's Cross-Motion, Mississippi, et al., v. US Environmental Protection Agency, No. 08-1200 (D.C. Cir. Dec. 8, 2010). IERG states that "[t]he RACT requirements for whatever new standard is eventually promulgated will not be triggered for a number of years after the designation of nonattainment areas, and certainly do not call for the imposition of RACT requirements as immediately as do the Illinois NO_x RACT Rules." Mot. at 10.

IERG states that the Illinois NO_x RACT Rules reflect the level of controls that are deemed reasonably available at the time of their adoption. Mot. at 10. IERG believes "[i]t is uncertain whether the existing rules would satisfy some future RACT requirement based upon revised ozone or future PM standards if advances in equipment and techniques impact what is deemed to be "reasonably available." *Id.* at 10-11.

IERG contends that the Illinois NO_x RACT Rules and the USEPA's Maximum Achievable Control Technology (MACT) for boilers (which involves a similar process but different criteria for establishing emission limitations) impact many of the same units in Illinois and that businesses have been struggling to devise a plan to meet both standards. Mot. at 11, citing 76 Fed. Reg. at 15608, Section IA. IERG states:

> Since the NO_x RACT rules are no longer relevant for air quality purposes, and the [USEPA] rule that has just recently been published is already subject to reconsideration, it is prudent to reconsider the necessity of proceeding with the implementation of a NO_x RACT rule that is now devoid of any specific programmatic purpose. Mot. at 11., citing 76 Fed. Reg. 15266 (Mar. 21, 2011).

IERG agrees with the IEPA's contention that there "exists a situation where the existing NO_x RACT regulations, absent an underlying federal requirement to implement these rules at this time, impose compliance requirements upon the regulated community prior to when they will be necessary under the CAA." Mot. at 11, citing Motion for Expedited Review, IEPA NO_x

[1] This publication is available at: http://www.epa.gov/pmdesignations/2006standards/documents/2008-12-22/FR_Final_24hr_PM2.5_Designations_010609.pdf (last visited Apr. 7, 2011).

Compliance Date Rulemaking, R11-24 at ¶ 14 (Apr. 4, 2011) (herein IEPA Motion for Expedited Review).

IERG supports the IEPA's R11-24 rulemaking proposal currently before the Board and believes that the aim to "avoid compliance requirements and unreasonable and unnecessary expenditures upon the regulated community" requires the Board to grant IERG's motion. Mot. at 12, citing IEPA Motion for Expedited Review at 15.

IERG's Reasons Why the Board Must Adopt an Emergency Rule Amending the Compliance Deadlines in the Illinois NO_x RACT Rules

IERG cites Section 27(c) of the Environmental Protection Act (Act), which reads in part:

> When 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 [5 ILCS 100/5-45]. 415 ILCS 5/27(c).

IERG also cites Section 102.612 of the Board's regulations, which states:

> a) When 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 IAPA [415 ILCS 27(c)].
>
> b) When the Board finds that a severe public health emergency exists, the Board may, in relation to any proposed regulation, order that such regulation shall take effect without delay [415 ILCS 5/27(c)]. The Board will proceed with any required hearings while the regulation continues in effect. 35 Ill. Adm. Code § 102.612.

IERG lastly cites Section 5-45 of the IAPA which provides in part:

> 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 [5 ILCS 100/5-40] 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 [5 ILCS 100/5-70]. The notice shall include the text of the emergency rule and shall be published in the Illinois Register. . . . Subject to applicable and constitutional or statutory provisions, an emergency rule becomes effective immediately upon filing under Section 5-65 [5 ILCS 100/5-65] 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 [5 ILCS 100/5-40] is not precluded. 5 ILCS 100/5-45.

Mot. at 12-13.

IERG states that the Board has previously 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. Mot. at 13. IERG notes one such case where the Board 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 if the USEPA promulgated onboard vapor recovery rules. *Id.*, citing In the Matter of: Emergency Rule Amending the Stage II Gasoline Vapor Recovery Rule in the Metro-East Area, 35 Ill. Adm. Code 219.586(d), R93-12, page 5 (May 20, 1993). IERG quotes the Board as saying there:

> Emergency rulemaking by the Board is justified when there is a threat to the public interest. The record in this case demonstrates that facilities in the Metro-East area that should have complied with the Stage II vapor recovery requirements by May 1, 1993, would *suffer extreme economic hardship* if forced to comply at this time. The court mandate for USEPA to promulgate onboard controls, which potentially may eliminate the need for Metro-East facilities to comply with Stage II requirements, creates intolerable uncertainty until the USEPA provides guidance. *Moreover, 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 the Stage II requirements which should have taken effect on May 1, 1993*. Mot. at 13-14, citing In the Matter of: Emergency Rule Amending the Stage II Gasoline Vapor Recovery Rule in the Metro East Area, R93-12 at 8 (May 20, 1993) (emphasis added by IERG).

IERG cites a second Board docket where the Board granted an emergency rule to address inconsistency between federal and state annual compliance dates for supplying lower Reid Vapor Pressure gasoline and alleviated the hardships to refiners, distributors and bulk gasoline terminals resulting from the inconsistency in compliance dates. Mot. at 14, citing In the Matter of: Emergency Rule Amending 7.2 psi Reid Vapor Pressure Requirement in the Metro-East Area, 35 Ill. Adm. Code 219.585(a), R95-10, pages 3-5 (Feb. 23, 1995).

IERG believes that the current case before the Board is similar to the two emergency rulemakings cited above, *i.e.*, extreme economic hardship and potential for liability experienced by industrial facilities is a threat to the public interest. Mot. at 14. IERG notes that the costs of complying with the Illinois NO_x RACT Rules "amount to millions of dollars" and are being incurred now (through large capital outlays and entering into engineering, purchasing and

construction contracts) in order to ensure that subject sources will be able to comply with the rules by the current compliance date of January 1, 2012. *Id.* IERG believes that the opportunity to avoid unnecessary harm by extending the compliance dates will be lost if sources must wait for the NO_x Compliance Date Rulemaking to run its course. *Id.*

IERG states that the threat to the public interest "is also recognizable in the potential liability sources subject to the Illinois NO_x RACT Rules face if they choose to not make the requisite large capital expenditures." Mot. at 15. Sources who defer making the expenditures will find themselves in violation of the Illinois NO_x RACT Rules if the NO_x Compliance Date Rulemaking is not finalized before the current 2012 compliance deadline. *Id.*

IERG cites Attachment C to its motion, which details the expenditures required of CITGO Petroleum Corporation (CITGO) Lemont Refinery to comply with the Illinois NO_x RACT Rules. Mot. at 15. As noted by IERG, the costs faced by CITGO cumulatively total over four million dollars, with expenditures beginning in May 2010 and increasing rapidly in April 2011. *Id.* IERG states CITGO can only take advantage of the extension to a compliance deadline in the Illinois NO_x RACT Rules and avoid economic harm if it has assurances that it can rely upon as soon as possible before the costs are incurred, such as the assurances provided by the Board granting this emergency rulemaking motion. *Id.* IERG states that, absent the Board granting this motion, CITGO is left with two alternatives: (1) continue to incur the four million dollars in unnecessary costs for compliance or (2) stop incurring the costs and potentially put CITGO in a position of noncompliance. *Id.*

Attachment D to IERG's motion describes the actions being taken by U.S. Steel – Granite City Works (US Steel) to ensure compliance with the Illinois NO_x RACT Rules. Mot. at 16. US Steel describes its total costs as "several million dollars" and emphasizes the need for swift action to be taken to minimize the additional unnecessary capital expenditures. *Id.* US Steel identifies April 2011 as the "critical" date for finalizing a compliance date extension, which IERG believes can only be effectuated immediately through an emergency rulemaking. *Id.*

IERG again compares this current situation to that in R93-12, in that industries in this case have "been put into this situation not through some affirmative action of their own doing, but rather due to unforeseen federal actions that call into question the underlying rules." Mot. at 16. IERG states that improved air quality, issuance of the NO_x RACT Waiver and continued extension of the promulgation of new ozone NAAQS "has left no basis for having NO_x RACT rules in place in Illinois *at this time*." *Id.* (emphasis in original). IERG also contends that the NO_x RACT requirements that may come to exist stemming from a revised ozone NAAQS or new PM NAAQS can be dealt with at a later date through a separate rulemaking. *Id.*

IERG states that, as in R93-12, "the uncertainty created by numerous federal requirements being revised and reconsidered has placed subject sources in a position where they are making large capital expenditures that may become unnecessary or insufficient to meet some later requirement." Mot. at 16. IERG believes that "these unnecessary expenditures are an economic hardship that businesses in Illinois should not be forced to bear." *Id.*

IERG notes that, pursuant to the IAPA, an emergency rule adopted by the Board would expire after a period of 150 days. Mot. at 16. IERG further notes that, if this emergency rulemaking is adopted, that period of time is likely to elapse prior to the current compliance date of January 1, 2012, causing the compliance date to revert back to its original form. *Id.* at 16-17. IERG nonetheless believes that an emergency rulemaking is the only appropriate administrative remedy available. *Id.* at 17. IERG states that costs are being incurred now, and an immediately effective remedy is required to provide the subject sources with the assurance that they can forgo making expenditures without the risk of facing liability for noncompliance. *Id.* IERG contends that even an expedited rulemaking "will take far too long for sources to make decisions to cancel planned projects, as substantial costs will have been incurred." *Id.* IERG is hopeful that the NO_x Compliance Date Rulemaking will be adopted prior to the expiration of the emergency rule. *Id.*

IERG states that "the threat of liability, in addition to the unreasonable and unnecessary imposition of millions of dollars of capital expenditures, are a threat to the public interest warranting immediate action." Mot. at 17. IERG contends this provides an adequate basis for adopting the emergency rule extending the compliance dates in the Illinois NO_x RACT Rules as set forth in the proposed amendments. IERG believes that such immediate action will alleviate the threat until permanent amendments extending the compliance deadlines can be adopted. *Id.*

LEGAL FRAMEWORK

Section 27(c) of the Act reads in part:

> When 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 [5 ILCS 100/5-45]. 415 ILCS 5/27(c).

Section 102.612 of the Board's regulations states:

> a) When 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 IAPA [415 ILCS 27(c)].
>
> b) When the Board finds that a severe public health emergency exists, the Board may, in relation to any proposed regulation, order that such regulation shall take effect without delay [415 ILCS 5/27(c)]. The Board will proceed with any required hearings while the regulation continues in effect. 35 Ill. Adm. Code § 102.612.

Section 5-45 of the IAPA provides in part:

> 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 [5 ILCS 100/5-40] 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 [5 ILCS 100/5-70]. The notice shall include the text of the emergency rule and shall be published in the Illinois Register. . . . Subject to applicable and constitutional or statutory provisions, an emergency rule becomes effective immediately upon filing under Section 5-65 [5 ILCS 100/5-65] 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 [5 ILCS 100/5-40] is not precluded. 5 ILCS 100/5-45.

BOARD DISCUSSION

While the Board acknowledges the decisions cited by IERG in its motion, the Board believes the situation presented to it in this case more closely compares to that in Citizens for a Better Environment v. PCB, 152 Ill. App. 3d 105, 505 N.E.2d 166 (1st Dist., 1987) (hereinafter CBE). In that case, a citizen's group and the state appealed a Board order adopting emergency rules that the Board found were necessary to guide the implementation of Section 39(h) of the Act (415 ILCS 5/39(h)). Effective January 1, 1987, Section 39(h) prohibited deposit of hazardous waste streams in permitted hazardous waste sites unless the waste generators and site owners and operators obtained specific authorization from the Agency. In the absence of a rulemaking proposal from the Agency or any other person, the Board initiated a rulemaking in June of 1986 and held hearings. The Agency, for its part, at that time issued a set of implementation guidelines. CBE, 152 Ill. 2d at 168.

In October of 1986, the Board issued emergency rules to implement Section 39(h).Among other reasons, the Board justified its actions by stating the emergency rules would reduce the number of appeals from its determinations and ease the transition period when the final rules would be adopted. The Board also noted that rulemaking should have been completed at least a year prior to the effective date. CBE, 152 Ill. App. 3d at 109. The Court found these reasons insufficient to support the determination that an emergency existed, stating:

> [A]n "emergency" is present, which would justify the employment of the emergency rulemaking procedures under section 5.02, when there *exists* a situation which reasonably constitutes a *threat* to the public interest, safety, or welfare. Stated differently, the need to adopt emergency rules in order to alleviate an administrative need, which, by itself, does not threaten the public interest, safety, or welfare, does not constitute an "emergency." *Id.* at 109.

The CBE Court noted that the administrative problem faced by the Board could have been prevented. CBE, 152 Ill. App. 3d at 110. The Court stated that, similar to a previous case, the situation presented "an administrative problem that was self-created and an attempt to remedy the situation was made at the eleventh hour." *Id.*, citing Senn Park Nursing Center v. Miller, 118 Ill. App. 3d 733, 455 N.E.2d 162 (1st Dist. 1983). Similarly, the Board here is faced with an "eleventh hour" emergency proposal that appears to be agency created and which could have been remedied sooner by an IEPA proposal. As stated by the Court in CBE, "the emergency rulemaking powers . . . cannot be utilized [in all instances of delay.] Rather, only when delay has resulted in a situation that threatens the public interest, safety, or welfare is the use of [the emergency rulemaking powers] proper." CBE, 152 Ill. App. 3d at 110. As discussed below, the delay in this case has not resulted in a situation that threatens the public interest, safety or welfare and therefore an emergency rulemaking is not proper.

The CBE Court stated that the Board's position that section 39(h) needed clarification "so as to reduce uncertainty within the industry" did not amount to a threat to the public. CBE, 152 Ill. App. 3d at 110. The Court further noted that "the Board's argument as to potential appeals to the Board and courts [does not] reflect the existence of a threat to the public." *Id.* Similarly in this case, the Board is unable to find that the potential for future liability faced by the regulated industry, in light of a lack of any supporting facts, amounts to a threat to the public. This differs from the situation in R93-12, In the Matter of: Emergency Rule Amending the Stage II Gasoline Vapor Recovery Rule in the Metro East Area, in which the affected facilities were placed in a position where they were subject to immediate action if they failed to comply with requirements which had already taken effect. For these reasons, the Board disagrees with IERG's position that the threat of liability faced by the regulated industry constitutes a threat to the public interest, safety or welfare.

The Citizens Court went on to state that the Court "[does] not believe that easing the transition period before final rules are adopted satisfies the requirements of section 5.02, as helpfulness in administering regulatory statutes is not the standard contemplated by that section." *Id.* In this case, IERG hopes "that the full [IEPA NO_x Compliance Date Rulemaking] . . . will be adopted prior to the expiration of the emergency rule." Mot. at 17. Applying the reasoning of the CBE court, the Board does not believe that alleviating concerns in the interim while the IEPA NO_x Compliance Date Rulemaking continues to run its course was a standard contemplated by the IAPA.

Even if the proposals in R11-24 or R11-26 had been eligible for filing under the "fast track" rulemaking provisions of Section 28.5 of the Act, the Board notes that its authority to initiate such a proceeding is limited. Furthermore, the basis for the proposals appears to have arisen some time before they were submitted to the Board. To that extent, the claimed "emergency" is due to delay by the IEPA and the regulated community, in similar fashion to that in CBE and Senn Park.

The last argument raised by IERG is that the regulated industry faces extreme financial hardship and that this hardship in addition to the threat of liability is a threat to the public interest, safety or welfare. Mot. at 13-14. IERG has not cited any authority that financial hardship alone is sufficient to support an emergency rulemaking. In light of a lack of authority

stating the contrary, the Board holds that the financial hardship imposed on the industry does not on its own constitute a threat to the public interest, safety or welfare.

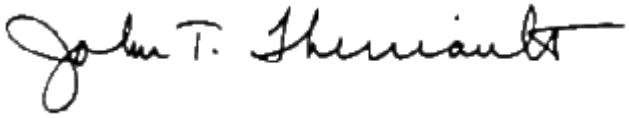
In denying the motion for emergency rule, the Board acknowledges the importance of this proposal to IERG and its individual members. The Board notes that it continues to give high priority to completion of the rulemaking concerning the identical proposal in R11-24, In the Matter of: Amendments to 35 Ill. Adm. Code 217, Nitrogen Oxides Emissions. The proposal in R11-24 was published for first notice in the *Illinois Register* on April 22, 2011. *See* 35 Ill. Reg. 6770 (Apr. 22, 2011). R11-24 hearings have been set for the month of June on the earliest dates practically available. At the conclusion of those hearings, the Board will continue to proceed with both rulemaking as swiftly as possible. With cooperation of the Agency and the participants, the Board may be able to complete rulemaking this summer or early fall.

CONCLUSION

For the reasons stated above, the Board denies the Illinois Environmental Regulatory Group's motion for emergency rule. In the interests of administrative efficiency, the Board will consolidate this rulemaking to the similar rulemaking currently proceeding before the Board, R11-24, In the Matter of: Amendments to 35 Ill. Adm. Code 217, Nitrogen Oxides Emissions.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 19, 2011, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board