EXHIBITS LIST
February 26, 2019

IN THE MATTER OF:	)	
	)	
PROPOSED NEW 35 ILL. ADM. CODE 204,	)	R19-1
PREVENTION OF SIGNIFICANT	)	(Rulemaking - Air)
DETERIORATION, AMENDMENTS TO 35	)	
ILL. ADM. CODE PARTS 101, 105, 203, 211,	)	
and 215.	)	

Exh. 6. Pre-Filed Questions of Citizens Against Ruining the Environment (CARE) filed on February 15, 2019.

Exh. 7. Pre-Filed Questions of Illinois Environmental Regulatory Group (IERG) filed on February 15, 2019.

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

IN THE MATTER OF:	)	
	)	
PROPOSED NEW 35 ILL. ADM. CODE 204 PREVENTION OF SIGNIFICANT DETERIORATION, AMENDMENTS TO 35 ILL. ADM. CODE PARTS 101, 105, 203, 211, AND 215	)	R19-1 (Rulemaking – Air)

PRE-FILED QUESTIONS OF CITIZENS AGAINST RUINING THE ENVIRONMENT FOR ILLINOIS EPA'S WITNESSES

I, Daryl Grable, on behalf of Citizens Against Ruining the Environment ("CARE"), hereby file the pre-filed questions for the Illinois Environmental Protection Agency's ("IL EPA") witnesses in this matter, as provided by the Hearing Officer Order issued on December 12th, 2018. CARE submits the following questions:

1. 415 ILCS 5/9.1(c) provides that ". . .the Board may adopt more stringent or additional provisions to the extent that it deems appropriate." It further states that, "[n]othing in this subsection shall be construed to limit . . . the authority of the Board to adopt elements of a PSD permit program that are more stringent that those contained in 40 CFR 52.21."[1] Thus, it is abundantly clear that the Board may adopt more stringent or additional provisions to the extent that it deems appropriate.
    a. Does IL EPA agree with the above characterization? If not, could it explain why?
    b. Can IL EPA point to any similarly clear, plain language, statutory authority that directs, or even contemplates, the Board adopting less stringent provisions than contained in 40 CFR 52.21, or omit provisions contained therein entirely, specifically as it pertains to 40 CFR 52.21(o)(3)?
    c. Can IL EPA say with absolute certainty that there will never be a federal Class I area in Illinois?
2. In its answers to questions, IL EPA explained that "40 CFR 51.166(p) does not mandate that each applicable state implementation plan submitted to USEPA for review and approval contain such requirement. . . Consequently, the inclusion of language similar to 40 CFR 52.21(o)(3) in proposed Part 204 is not necessary for USEPA approval of Part 204."
    a. While this statement is accurate, it seems of limited import to the instant proceeding. Does IL EPA understand that States may impose requirements that go beyond that which is required by Federal law?

[1] *Id.*

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b. Does IL EPA contend that the Board is constrained only by the question of whether or not USEPA will approve of proposed Part 204?
c. Does IL EPA recognize that the current proceeding is governed by 415 ILCS 5/9.1(c), 10, 27, and 28? And that through 415 ILCS 5/9.1(c) the Board is required to adopt regulations that, at a minimum meet the respective requirements of Sections 165 and 173 of the Clean Air Act, but can, within its statutory authority, adopt additional or more stringent provisions of law?
d. Does IL EPA stand by its statement that "Section 9.1(c) of the Act provides that the Board establish a PSD program consistent with the requirements of 40 CFR 52.21 except for plan disapproval in 40 CFR 52.21(a)(1), public participation in 40 CFR 52.21(q), environmental impact statements in 40 CFR 52.21(s), disputed permits or redesignations in 40 CFR 52.21(t) and delegation of authority in 40 CFR 52.21(u)?"[2]
e. Is IL EPA of the opinion that they met the plain language, statutory mandate to establish regulations consistent with all requirements of 40 CFR 52.21 except for the five specifically enumerated sections of the 40 CFR 52.21?

3. In its answer to a question about the "costs" of including language parallel to 52.21(o)(3) in proposed Part 204, IL EPA opined that "[t]here would be several costs or impacts from including a parallel provision to 40 CFR 52.21(o)(3) in Part 204. For example, [1] such a provision would be confusing to applicants for PSD permits as it would suggest that Illinois has Class I areas. [2] Such a provision would suggest that the State of Illinois has determined that visibility would be an air quality related value in any area that it would redesignate to Class I. [3] Moreover, such a provision would suggest that an applicant for a PSD permit may be required to conduct visibility monitoring in such an area irrespective of whether the applicant can obtain the necessary permit or approval from the body that actually manages the area in which monitoring must be required. [4] Lastly, it would require the Board to elaborate upon the wording of 40 CFR 52.21(o)(3), as it provides for monitoring for visibility 'for such purposes,' 'by such means' and 'as . . . necessary and appropriate.'"
    a. In the first "cost" pointed out by IL EPA, can IL EPA clarify why it anticipates applicants for PSD permits to be confused when Illinois has been administering the federal PSD program, which includes 20 CFR 52.21(o)(3) in its regulations, under a delegation agreement since 1981?[3]
    b. In fact, couldn't it be argued that altering or removing aspects of the federal program that has been in effect for the past 30+ years in Illinois has the potential to cause just as much confusion?
    c. In the fourth "cost" pointed out by IL EPA, can IL EPA clarify if they were attempting to say that the Board lacks the technical expertise necessary to "elaborate upon" the wording used in 40 CFR 21.21(o)(3)?
    d. In the fourth "cost" pointed out by IL EPA, can IL EPA clarify if they were attempting to say that the Board shouldn't have to take an action because it would require additional effort on their part? That having to "elaborate upon" statutory language is something that the Board should not have to do?

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[2] Statement of Reasons, R19-1 (Rulemaking – Air), at 28-29 (Ill. EPA, July 2, 2018), *available at* https://pcb.illinois.gov/documents/dsweb/Get/Document-98192.
[3] 46 Fed. Reg. 9580 (January 29, 1981).

e. Beyond the aforementioned "costs" of including a parallel provision of 40 CFR 52.21(o)(3) in Part 204, can IL EPA articulate any actual, financial cost of including such a provision in proposed Part 204?

4. Illinois EPA's website contains the following: "The EJ Grievance Procedure defines the procedural and substantive standards utilized by the Illinois EPA to evaluate EJ complaints. Specifically, the EJ Grievance Procedure provides a process for filing a timely complaint to the Illinois EPA and describes the process that is used to investigate and resolve the complaint. However, *the procedures described therein do not apply to administrative actions that are being pursued in another forum* (e.g., *a permit appeal* or a civil rights complaint filed with the United States Environmental Protection Agency Office of Civil Rights)."
    a. Can IL EPA please clarify what the effect of the italicized text is on the opportunity for administrative review of EJ claims?
    b. Is it correct to say, if the regulations at hand were passed exactly as IL EPA has imagined them, that this language would not be applicable to the PSD program because there would no longer be "another forum" to obtain administrative review of IL EPA's handling of EJ considerations in the PSD permitting process?
5. Based largely on its response to question 3(b)(i) from the first public hearing, it appears that IL EPA is of the opinion that EAB's historic interpretation of regulatory requirements is only "directly on point and relevant" to the formation of standards regulating Board PSD appeals when based on statutory language. For example, because statutory language of Section 40.3(a)(2)(iii) addressing standards of review is derived from 40 CFR Part 124, "the EAB's historic interpretation of regulatory language in 40 CFR 124, which largely mirrors the statutory verbiage of Section 40.3(a)(2)(iii) of the Act, is directly on point and relevant."
    a. Is IL EPA still of the opinion that, because statutory language of Section 40.3(a)(2)(iii) is derived from 40 CFR Part 124, "the EAB's historic interpretation of regulatory language in 40 CFR Part 124, which largely mirrors the statutory verbiage of Section 40.3(a)(2)(iii) of the Act, is directly on point and relevant?"
    b. In acknowledging that Executive Order 12898 "precludes judicial review of the Agency's efforts to comply with the [ ] Order," the EAB held that "it does not affect implementation of the Order within an agency. More specifically, it does not preclude the [EAB], in an appropriate circumstance, from reviewing a Region's compliance with the Executive Order as a matter of policy or exercise of discretion to the extent relevant under section 124.19(a)." Is IL EPA of the opinion that the IPCB is not allowed to hear environmental justice concerns under the same logic used by the EAB, that it represents an exercise of discretion or an important policy consideration that the Board, in its discretion, is authorized to review?
6. Historic EAB interpretation of 40 CFR section 124.19(a) has found that "Section 124.19(a) authorizes the [EAB] to review any condition of a permit decision (or [ ] the permit decision in its entirety). Accordingly, the [EAB] can review the Region's efforts to implement the Executive Order in the course of determining the validity and appropriateness of the permit decision at issue."
    a. Although the state of Illinois does not have an Executive Order from which to derive the consideration of environmental justice concerns in a state PSD permit

appeal, it has something more persuasive—legislation. In 2011, the General Assembly passed the Illinois Environmental Justice Act. Through this Act, the State memorialized its legislative finding that "the principle of environmental justice requires that no segment of the population, regardless of race, national origin, age, or income, should bear disproportionately high or adverse effects of environmental pollution;" and that "certain communities in the State may suffer disproportionately from environmental hazards related to facilities with permits approved by the State[.]"

b. Much like Executive Order 12898, the Illinois Environmental Justice Act does not purport to create a cause of action, but rather establishes a state policy that Illinois is to implement state-wide. This is demonstrated through the Act's simultaneous creation of the Environmental Justice Commission, which is charged with evaluating the State's handling of environmental justice issues and recommending improvements. Thus, the state of Illinois has a clear, legislative policy recognizing and promoting environmental justice. Is IL EPA of the opinion that the Board, like the EAB, in its discretion, should be permitted to hear environmental justice-related claims in a PSD permit appeal under the theory that "the implementation of the [environmental justice policy] within an agency" represents an important policy consideration that the Board should review?

c. If IL EPA does not agree with this theory, can IL EPA articulate a reason why we should not rely on the "EAB's historic interpretation of regulatory language in 40 CFR 124, which largely mirrors the statutory verbiage of Section 40.3(a)(2)(iii) of the Act?"

d. Similarly, "[i]n compliance with 40 C.F.R., Parts 5 and 7, Section 7.90(a), [IL EPA] has established a grievance procedure to ensure prompt and fair resolution of complaints alleging violations of Title VI, Section 601 of the 1964 Civil Rights Act and/or the Illinois EPA's Environmental Justice Policy, in the administration of the Illinois EPA's programs and activities." Is IL EPA of the opinion that the implementation of this policy within the agency represents an important policy consideration that the Board, like the EAB, in its discretion, should be permitted to hear pursuant historic EAB precedent? Why or why not?

e. If IL EPA is of the opinion that neither the statutory language from the Illinois Environmental Justice Act nor the established IL EPA Environmental Justice Policy individually rise to the level of creating a state policy, the implementation of which, within the agency, represents an important policy consideration that the Board should have the discretion to review under EAB precedent, does the cumulative impact of these sources do so?

7. In discussing the impact of the federal Executive Order, IL EPA asserted that "[n]o similar state authority, or statutory or regulatory framework recognizing environmental justice in the context of environmental permitting, exists in Illinois."

   a. Given the legislative text found in the Illinois Environmental Justice Act, does IL EPA still stand by its statement that no state authority or statutory framework that recognizes environmental justice in the context of environmental permitting exists in Illinois?

8. Further, in answers to pre-filed questions, IL EPA asserted that it had not been established that environmental justice considerations are "authorized by applicable law in the context of a state-approved PSD program."
    a. Given the explicit statutory authorization that "the Board may adopt more stringent or additional provisions to the extent it deems appropriate," State legislation declaring support for the principles of environmental justice, regulatory mandate to establish a grievance procedure to ensure prompt and fair resolution of complaints alleging discrimination on the basis of race, color, national origin, or income, and the fact that IL EPA has adopted its own Environmental Justice policy, is IL EPA satisfied that it has been established that environmental justice considerations are authorized by applicable law in the context of a state-approved PSD program?
    b. Can IL EPA point to any existing source of law that indicates that it would be unauthorized for the Board to hear environmental justice considerations in PSD permit appeals?
    c. Is IL EPA of the opinion that the Board would be physically, technically, economically or in any other way unable to adjudicate claims relating to IL EPA's implementation of its environmental justice policy or its adherence to the policy established in 415 ILCS 155/5(i), (ii)?
9. As far back as 2000, USEPA issued guidance documents expressing its understanding that environmental justice considerations were properly within the scope of issues to be addressed by a permitting agency, and thus reviewable by an administrative appeals process, for multiple reasons.
    a. First, then-USEPA General Counsel at the Office of General Counsel found that environmental justice issues constituted "other appropriate considerations" that could properly be raised as part of the public hearing process required by Section 165(a)(2), 42 U.S.C. § 7475(a)(2), of the CAA. Does IL EPA agree with the former General Counsel of USEPA that "[t]his authority could allow EPA to take action to address the proper role of environmental justice considerations in PSD/NSR permitting?"
    b. Second, after a 1993 EAB case found that environmental justice considerations were not allowed in CAA permitting decisions, USEPA intervened by filing a motion for clarification. The Office of General Counsel pointed out that "the CAA requirement to consider alternatives to the proposed source, and the broad statutory definition of 'best available control technology' (BACT), provided ample opportunity for consideration of environmental justice in PSD permitting." The EAB was persuaded by the Office's reasoning enough to issue an amended opinion and order that deleted the language declaring environmental justice considerations to be inappropriate. Does IL EPA agree with the Office of General Counsel's determination that the broad statutory definition of BACT provides ample opportunity for consideration of environmental justice in PSD permitting? Why or why not?
    c. Assuming, *arguendo*, that IL EPA agrees with the reasoning offered by USEPA Office of General Counsel and accepted by the EAB, because proposed part 204 based its BACT definition off of federal regulatory, 40 CFR 52.21(b)(12), and statutory, 42 U.S.C. § 7479(3), definition of BACT, is there any reason why a

similarly broad interpretation of BACT shouldn't be given to the term as it applies in the state program, rendering environmental justice considerations relevant to the PSD permitting process and reviewable upon appeal?

Respectfully submitted,

By: _____
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
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PROPOSED NEW 35 ILL. ADM. CODE 204, PREVENTION OF SIGNIFICANT DETERIORATION, AMENDMENTS TO 35 ILL. ADM. CODE PARTS 101, 105, 203, 211, and 215.	)	R19-1 (Rulemaking – Air)

PRE-FILED QUESTIONS OF ILLINOIS EPA WITNESSES

NOW COMES the Illinois Environmental Regulatory Group ("IERG"), by and through its attorneys, HEPLERBROOM, LLC, and pursuant to the Illinois Pollution Control Board's ("Board") Hearing Officer Order of December 12, 2018, submits the following Pre-Filed Questions of Illinois Environmental Protection Agency ("Agency") Witnesses in response to the Agency's Post Hearing Comments ("Comments") filed on January 24, 2019.

Question 1: At page 6 of its Comments in response to Question 2.d-2, the Agency states that "it should be understood that one consequence of a state PSD program is that the Board rulemaking will likely be required in the future to revise the State program. When such changes are *warranted*, the Illinois EPA will *appropriately* initiate a needed rulemaking proceeding." (Emphasis added.) Please provide further information on what specific criteria the Agency will apply when determining when changes to the rules "are warranted" and with what frequency it will conduct reviews.

Question 2: At page 14 of its Comments in response to IERG's Question 6 asking about a separate rulemaking to amend 35 Ill. Adm. Code Part 252, the Agency states that it "intends to propose Agency regulations addressing a state-based PSD program. While a specific

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schedule has not yet been developed, the Illinois EPA tentatively plans to have revisions to Part 252 finalized shortly after the completion of this Board rulemaking."

IERG notes that proposed new Section 105.612, The Agency Record, includes references in proposed new subsection 105.612(b)(v) to 35 Ill. Adm. Code 252.208 and 252.210 which do not currently exist in Part 252. Would it be advisable for the Agency to time the adoption of those particular new Sections in parallel with this proceeding so that the references in new subsection 105.612(b)(v) will be accurate immediately upon promulgation?

Question 3: At page 19 of its Comments in response to Board Question 2.b, the Agency addresses newly proposed Section 204.1310 and states:

> • To address an administrative action by the Agency that is to accompany the processing of PSD permit applications pursuant to Section 165(d)(1) of the CAA and 40 CFR 51.166(p), the Illinois EPA is proposing language in Section 204.1310 requiring the Agency to provide to the USEPA a copy of each application for a PSD permit that it receives. Such a requirement is not present in 40 CFR 52.21.

IERG notes that 40 CFR 51.166(p) is entitled "**Sources impacting Federal Class I areas – additional requirements**". Given that 40 CFR 51.166(p) is applicable only to sources impacting Federal Class I areas, should proposed new Section 204.1310 also be applicable only to permit applications for sources impacting Federal Class I areas?

Question 4: At pages 33-34 of its Comments in response to Board Question 5 wherein the Board asks "what types of benchmarks are used as 'reference levels' if pollutants being assessed do not have air quality standards," the Agency states "[f]or human health impacts, benchmarks can include USEPA's Acute Exposure Guideline Levels, the Agency for Toxic Substances and Disease Registry's (ATSDR) Minimal Risk Levels, and alternatively, occupational exposure standards." The Agency also notes that "[f]or ecological impacts,

benchmarks are screening concentration values for air, surface water, soil, sediment, and vegetation obtained from USEPA publications or reference documents, and/or from the peer-reviewed literature." Please provide further information as to the circumstances in which, and the process(es) by which, those reference levels would be evaluated and applied in the PSD permitting context.

Question 5: At pages 46-48 of its Comments in response to Board Question 15, the Agency provides a detailed assessment of the standard of review and established precedent applied by the USEPA's Environmental Appeals Board ("EAB") when it reviews PSD permit appeals. Is it the Agency's intent that the Board apply the same standard of review and adherence to precedent as the EAB applies in reviewing PSD permit appeals?

Question 6: Also at pages 46-48 of its Comments in response to Board Questions 15, the Agency addresses the Board's question about the meaning of "technical decisions contained therein reflect considered judgment by the Agency" as set forth in proposed new Section 105.614, which reads in part as follows:

> Except as provided in subsections *(a)* and (b), the Board will conduct a public hearing, in accordance with 35 III. Adm. Code 101, Subpart F, upon an appropriately filed petition for review under this Subpart. *The* hearing and *decision of the Board will be based exclusively on the* Agency *record* at the time the permit or decision was issued, *unless the parties agree to supplement the Agency record.* Any PSD permit issued by the Agency shall be upheld by the Board if the technical decisions contained therein reflect considered judgment by the Agency. [415 ILCS/40.3(d)(1)]

IERG notes that the Illinois Environmental Protection Act ("Act"), Section 40.3(d)(1) provides as follows:

> (d)(1) In reviewing the denial or any condition of a PSD permit issued by the Agency pursuant to rules adopted under subsection (c) of Section 9.1 of this Act, the decision of the Board shall be based exclusively on the record before the Agency unless the parties agree to supplement the record.