BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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)

NOTICE

TO: Don Brown
Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph St., Suite 11-500
Chicago, IL 60601-3218

SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Pollution Control Board the **SECOND POST HEARING COMMENTS**, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: Sally A. Carter

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DATED: April 4, 2019

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BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

SECOND POST HEARING COMMENTS

CHICAGO LEGAL CLINIC

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 the Illinois EPA agree with the above characterization? If not, could it explain why?

      The Illinois EPA already addressed this issue in the Agency's Post Hearing Comments filed on January 24, 2019 ("Agency's First Comments"). The Agency would direct the parties to its response to CARE's Question 2(f-2) where the Agency previously stated that "The Board is also authorized to adopt more stringent or additional provisions to the extent that it deems appropriate."

   b. Can the Illinois 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)?

      As discussed in the Agency's First Comments, the appropriate interpretation of Section 9.1(c) of the Act is that the Board rules must be modeled on 40 CFR 52.21. Section 3.363 of the Act established a new definition of "PSD permit" to mean a permit or a portion of a permit for a new major source or major modification that is issued by the Illinois EPA under Section 9.1(c)

[1] *Id.*

that has been approved by the USEPA and incorporated into the Illinois SIP to implement Section 165 of the Clean Air Act and 40 CFR 51.166. Given the nature of these two sets of federal rules, the Illinois EPA proposed a state PSD program based largely on the language of 40 CFR 52.21 but also ensuring that this program meets the requirements for a SIP submittal to USEPA in 40 CFR 51.166. Moreover, as a practical matter, implementation of the PSD permitting program by means of an incorporated rule would be challenging. At a basic level, 40 CFR 52.21 was not developed by USEPA so that it could be readily incorporated by a state or local governmental body. The difficulties incumbent in such an approach were previously explored by the Illinois EPA in its response to Board Question 2(a) in the Agency's First Comments. The consequences of circumstances such as these is that even if Illinois incorporated provisions of 40 CFR 52.21 by reference, a detailed state rule would still have to be adopted setting forth the various adjustments to the text of 40 CFR 52.21 necessary for a USEPA-approved state PSD program.

More specifically, 40 CFR 52.21(o)(3) provides the Administrator with the option of requiring visibility monitoring in any *federal* Class I area near a proposed new stationary source or major modification for such purposes and by such means as is *necessary and appropriate.* (Emphasis added). This provision addresses an action that USEPA may have the authority to take as it is the federal agency. 40 CFR 51.166(p) does not mandate that each applicable state implementation plan submitted to USEPA for review and approval contains such requirement. The provision is not accompanied by provisions explaining the circumstances in which such monitoring would be appropriate. Given no Class I area exists in Illinois, or in close proximity to Illinois, such monitoring would not be needed. Moreover, in the event that the State of Illinois were to redesignate an area to Class I, 40 CFR 52.21(o)(3) would have no relevance for such an area as it would not be a *federal* Class I area. Finally, in the event that an area in Illinois, or in close proximity to Illinois, were to become a federal Class I Area the Illinois EPA would review the adequacy of the state PSD program at that time.

Incidentally, the Illinois EPA does want to correct a misstatement related to Class I areas in its Agency's First Comments on page 51. While the Forest County Potawatomi Community Reservation in Wisconsin is a Class I Area under the PSD program, it was not redesignated to Class I by the State of Wisconsin. Rather, the redesignation of this area to Class I was actually undertaken by the Forest County Potawatomi Community, the Indian Governing Body for this Indian Reservation, in accordance with 40 CFR 52.21(g)(4). The USEPA then approved the Forest County Potawatomi Community's proposed redesignation of its reservation to a Class I area as part of Wisconsin's SIP.

c. Can Illinois EPA say with absolute certainty that there will never be a

federal Class I area in Illinois?

No. Of course the Illinois EPA cannot state with absolute certainty that the United States Congress will never adopt legislation that creates a federal Class I Area under the PSD program in Illinois.

2. In its answers to questions, Illinois 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 Illinois EPA understand that States may impose requirements that go beyond that which is required by Federal law?

Of course, the Illinois EPA understands that States may impose requirements that go beyond that which is required by federal law. The Illinois EPA already addressed this matter in the Agency's First Comments. The Agency would direct the parties to its response to Board's Question 3(a-1) where the Agency set forth in detail those requirements proposed by the Illinois EPA that are more stringent, admittedly only superficially, than the corresponding federal requirement.

b. Does Illinois EPA contend that the Board is constrained only by the question of whether or not USEPA will approve of proposed Part 204?

A key constraint on the Board is whether USEPA will approve Part 204. In addition, as touched upon in the Agency's First Comments, the Board's authority includes "the power to do all that is reasonably necessary to perform the duty conferred by the statute." *Oak Liquors, Inc., v. Zagel,* 90 Ill.App.3d 379, (1st Dist. 1980). In performing its duty to promulgate the rules, the Board possesses a "wide latitude" to accomplish this objective, *Freedom Oil Co. v. Pollution Control Board,* 275 Ill.App.3d 508, 514 (4th Dist. 1995). However, the Board is constrained because the rules that it adopts must be "reasonable, within the agency's statutory authority, and adequately related to the purpose of the underlying act." *Strube v. Pollution Control Board,* 242 Ill.App.3d 832, 852 (3rd Dist. 1993), citing *People ex rel. Charles v. Telford,* 48 Ill.App.3d 928, 931 (Ill. 1977). Any rules promulgated by the Board should be adequately related to the purpose of the underlying act.

c. Does Illinois 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?

The Illinois EPA submitted this rulemaking to the Board pursuant to Sections 9.1(c), 10, 27, and 28 of the Illinois Environmental Protection Act (Act). The Illinois EPA specifically indicated in its Statement of Reasons that this rulemaking proposal is intended to meet Section 9.1(c) of the Act as it requires the Board to adopt regulations establishing a PSD program meeting the requirements of Section 165 of the Clean Air Act. As such, the Illinois EPA certainly recognizes the cited provisions of the Act govern the pending rulemaking. The Illinois EPA would not only direct the participants to its previously filed Statement of Reasons but to earlier responses in these Post Hearing Comments.

It should also be clearly understood that the Agency's rulemaking proposal is not intended to address the permit program required by Section 173 of the Clean Air Act, as is also addressed in Section 9.1(c) of the Act and is mentioned in passing in this question. The Board has already adopted rules at 35 IAC Part 203 to fulfill this obligation. *See,* 40 CFR 52.736. The Illinois EPA's proposal would add two references to Part 204 in Section 203.207, Major Modification of a Source, given certain provisions in this Section currently refer to permits issued pursuant to 40 CFR 52.21. The Illinois EPA is proposing revisions to update these provisions so that they address permits issued under either 40 CFR 52.21, which the Illinois EPA currently implements, or new Part 204.

d. Does Illinois 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)(l), 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]

Concerning the Illinois EPA's regulatory proposal, the Illinois EPA stands by its statements on pages 28 *through* 30 of its Statement of Reasons filed on July 2, 2018 and as further discussed in the Agency's First Comments.

e. Is Illinois 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?

The Illinois EPA's opinion is that its rulemaking proposal, if adopted by the Board, would satisfy Section 9.1(c) of the Act. This issue has been discussed

[2] Statement of Reasons, R19-1 (Rulemaking -Air), at 28-29 (111. EPA, July 2, 2018), *available at* https://pcb.iIlinois.gov/documents/dsweb/Get/Document-98192.

at length in the Illinois EPA's Statement of Reasons and in the Agency's First Comments. The Illinois EPA would direct the parties to these earlier discussions. Section 9.1(c) of the Act cannot be read in isolation but rather must be read in light of other provisions of the Act. Given the interplay between these federal and state law requirements, the Illinois EPA proposed a state PSD program based largely on the language of 40 CFR 52.21 but also ensuring that this program meets the requirements for a SIP submittal to USEPA in 40 CFR 51.166.

3. In its answer to a question about the "costs" of including language parallel to 52.21(o)(3) in proposed Part 204, Illinois 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 Illinois EPA, can Illinois 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]

      It is appropriate to consider that the federal PSD program has always applied in Illinois. In this regard, the USEPA's rules at 40 CFR 52.21 address a federal program that initially applied in 50 states, the District of Columbia, United States Territories and Indian Reservations. As already explained in this proceeding, 40 CFR 52.21 continues to apply in various jurisdictions in the United Sates, including Illinois. As such, a person that recognizes the federal or national nature of 40 CFR 52.21, or even only that 40 CFR 52.21 is a federal rule, would not expect 40 CFR 52.21 to be tailored to the specific circumstances of Illinois. However, it is reasonable when considering requirements under a state PSD program, established through state rulemaking, such as proposed Part 204, to expect that those rules were developed to consider the specific circumstances in that state.

   b. In fact, couldn't it be argued that altering or removing aspects of the federal

[3] 46 Fed. Reg. 9580 (January 29, 1981).

program that has been in effect for the past 30+ years in Illinois has the potential to cause just as much confusion?

A person could certainly argue that the fact that a state PSD program, like proposed Part 204, is not identical to the federal PSD program in certain respects may create some confusion. However, what that argument would overlook is that the appropriate basis of comparison is not just the language of the various provisions of the federal program. In this regard, 40 CFR 52.21(o)(3) was initially adopted by USEPA over 40 years ago and has never been invoked for a major project in Illinois. The relevant question before the Pollution Control Board in the current rulemaking proceeding is whether inclusion of a similar provision in Illinois' PSD program is warranted now. This is a decision that the Board must make because, as reflected in 40 CFR 51.166, the USEPA does not require that a State PSD program include such a provision.

c. In the fourth "cost" pointed out by Illinois EPA, can Illinois 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 52.21(o)(3)?

The Illinois EPA was not suggesting that the Board lacks the technical expertise to elaborate on the language in 40 CFR 52.21(o)(3). The Illinois EPA was simply stating that if a provision similar to 40 CFR 52.21(o)(3) were found to be appropriate in Part 204, the Board would have to elaborate on the language of 40 CFR 52.21(o)(3) as part of this rulemaking. For this purpose, the Board could certainly request proposed language and supporting information from the Illinois EPA and other parties in this rulemaking as needed to accomplish this. In requesting such assistance, the Board could instruct the parties to consider the various aspects of 40 CFR 52.21(o)(3) for which elaboration would be needed to address the legal, policy and technical issues posed by the language of 40 CFR 52.21(o)(3).

d. In the fourth "cost" pointed out by Illinois EPA, can Illinois 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?

The Illinois EPA was not suggesting that the Board should not take an action because it would require additional effort on its part or require elaboration upon statutory language. As already explained above, the Illinois EPA was only explaining that the language of 40 CFR 52.21(o)(3) cannot simply be transferred into Part 204.

e. Beyond the aforementioned "costs" of including a parallel provision of 40 CFR

52.21(o)(3) in Part 204, can Illinois EPA articulate any actual, financial cost of including such a provision in proposed Part 204?

In addition to the concerns that would be presented with inclusion of a provision based on 40 CFR 52.21(o)(3) in Part 204, as discussed above, the inclusions of such a provision in Part 204 would present real financial costs. However, the amount of these financial costs cannot be estimated at this time. Such a provision would impose financial costs as it would be implicit from the presence of such a provision in Part 204 that its requirements would be applied. That is, the Board when adopting Part 204 would have to assume that there will be a person that would be subject to that provision. In other words, there will be a person that constructs a major new stationary source or a major modification in Illinois that is near a federal Class I Area that would be required to conduct visibility monitoring for such area as provided for by Part 204. That person would have costs for conducting such visibility monitoring. However, the amounts of those costs cannot be estimated at this time because the language of 40 CFR 52.21(o)(3) does not provide any specificity or definition for the nature of the visibility monitoring that such person might be required to conduct.

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 Illinois EPA please clarify what the effect of the italicized text is on the opportunity for administrative review of EJ claims?

The italicized text has no effect on the opportunity for administrative review of EJ claims. It merely indicates that the Illinois EPA's Environmental Justice (EJ) grievance procedure, as presented on the Illinois EPA's website, is not relevant to any administrative appeal of an action by the Illinois EPA that may be available in another forum before a different administrative body than the Illinois EPA.

b-1. Is it correct to say, if the regulations at hand were passed exactly as Illinois 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 Illinois EPA's handling of EJ considerations in the PSD permitting process?

The Illinois EPA's proposal would not alter the Illinois EPA's Environmental Justice Policy or its Environmental Justice Grievance Procedure, as presented on the Illinois EPA's website. In the event that a person wanted to contest the outcome of any Illinois EPA grievance procedure, a complaint could continue to be filed with USEPA's Office of Civil Rights. Part 7, Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, provides all persons with the right to file complaints against recipients of federal financial assistance. 40 CFR 7.100.

b-2. So I just wanted to clarify that what you were referring to in the other administrative forum that was available was the US EPA's Office of Civil Rights, which has never, as of 2016, made a formal finding of discrimination and has never denied or withdrawn financial assistance from a recipient in its entire history, which is coming from a letter of transmittal from the Chair of the U.S. Commission on Civil Rights to President Obama in 2016? (Tr. at 35).

As indicated at hearing, the Illinois EPA will only be responding to that portion of this statement that is a question and not that portion of this statement that is testimony by counsel for CARE. The Illinois EPA would direct participants and the Board to the Illinois EPA's prior response; in this response, the Illinois EPA clearly articulated that individuals could continue to file complaints with USEPA's Office of Civil Rights consistent with 40 CFR Part 7, Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency. Given these regulations direct environmental justice complaints against recipients of federal financial assistance be filed with USEPA's Office of Civil Rights and the general complexity of environmental justice complaints, any review by the Illinois EPA of historic actions before the Office of Civil Rights is not appropriate.

5. Based largely on its response to question 3(b)(i) from the first public hearing, it appears that Illinois 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 Illinois 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?"

Yes. The Illinois EPA refers participants to its responses in the Agency's First Comments.

b-1. 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 Illinois 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?

Without an appropriate citation to the relevant Environmental Appeals Board (EAB) decision, the necessary context to appropriately respond to this question has not been given. However, the question of whether actions to address environmental justice during permitting are an important policy consideration that the Board has discretion to review under the Act is a matter that will have to be decided by the Board, because there is currently no specific state provision of state law mandating its' consideration.

b-2. At hearing, counsel for CARE modified question 5(b) as originally set forth in Exhibit 6 by providing a citation to the EAB's decision *In re Chemical Waste Management of Indiana, Inc.*, RCRA Appeal Nos. 95-2 & 95-3, 6 E.A.D. 66 (EAB June 29, 1995). (Tr. at 37-38).

Concerning CARE's citation to a nearly 25-year-old EAB decision in *Chemical Waste Management of Indiana*, this decision was made in the context of the EAB's review of a permit issued pursuant to the Resource Conservation and Recovery Act (RCRA), 42 USC § 6901 *et seq.*, during the infancy of USEPA's implementation of Executive Order 12898. In fact, during the pendency of RCRA Permitting in Chemical Waste Management, President William J. Clinton issued Executive Order 12898. The *Chemical Waste Management* decision, involving a RCRA matter and issued during a time of transition in USEPA's and EAB's consideration of environmental justice issues, is not relevant for this rulemaking as this decision does not address the role of environmental justice in PSD permitting and, in fact, makes absolutely no reference to PSD permitting.

6-i. 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."

This statement does not pose a question to the Illinois EPA. Nor does this statement provide an appropriate citation to the relevant EAB decision. Consequently, this statement does not afford the Illinois EPA with the necessary context to assess the validity of this statement.

6-ii. At hearing, counsel for CARE modified question 6-i as originally set forth in Exhibit 6 by providing a citation to the EAB's decision *In re Chemical Waste Management of Indiana, Inc.*, RCRA Appeal Nos. 95-2 & 95-3, 6 E.A.D. 66 (EAB June 29, 1995). (Tr. at 39).

The Illinois EPA would again refer the participants and the Board to its response in 5b-2 above.

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[.]"

This statement does not pose a question to the Illinois EPA.

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 Illinois 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?

While the legislature did find in the Illinois Environmental Justice Act that the principle of environmental justice requires that no segment of the population should bear disproportionately high or adverse effects of environmental pollution and established the Commission on Environmental Justice in Illinois, the Illinois Environmental Justice Act did not mandate

certain responsibilities on state agencies as Executive Order 12898 did on federal agencies. Executive Order 12898 expressly provided as follows:

> **1-101. *Agency Responsibilities.* To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental just part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands.**

Review of environmental justice considerations are clearly warranted in a federal PSD permit appeal because of language such as this in Executive Order 12898; however, this does not mean that review of environmental justice considerations are likewise authorized by applicable law in the context of a state-approved PSD program when similar language does not currently exist in 415 ILCS 155/5 or elsewhere. The question also does not support a conclusion that addressing implementation of environmental justice through a state-based permit appeal process, where it lacks a basis in applicable state law, is more practical than the approach currently undertaken in Illinois, which involves the EJ Grievance Procedure and the Office of Civil Rights. Regardless, whether implementation of environmental justice is an important policy consideration that the Board should review is a decision that the Board must ultimately make because, as reflected in applicable state law, there is currently no state provision mandating such obligation.

c. If Illinois EPA does not agree with this theory, can Illinois 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?"

The Illinois EPA already addressed this issue in the Agency's First Comments, notably its response to CARE's question 3(b). This is because the rationale offered by the commenter for the proposed standard of review is distinctly different from the rationale relied upon by the EAB concerning EJ namely, USEPA's mandate to implement federal Executive Order 12898. As just explained, this does not mean that review of environmental justice considerations are likewise authorized by applicable state law in the context of a state-approved PSD program where similar language does not currently exist in 415 ILCS 155/5 or elsewhere in state law.

d. Similarly, "[i]n compliance with 40 C.F.R., Parts 5 and 7, Section 7.90(a),

[Illinois 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 Illinois 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?

As clearly articulated by the Illinois EPA's EJ Grievance Procedure, this 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." In the event that a person wants to contest the outcome, a separate complaint could be filed with USEPA's Office of Civil Rights. Part 7, Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, provides all persons with the right to file complaints against recipients of federal financial assistance. 40 CFR 7.100. Any administrative review of the Illinois EPA's implementation of its EJ Grievance Procedure by USEPA's Office of Civil Rights is separate and distinct from any administrative review of a permit action by the Board. Any potential failure by the Illinois EPA to implement its Environmental Justice Policy should not then be presented as an important policy consideration that the Board, in its discretion, should review given Part 7, Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, dictates such review is to be undertaken by USEPA's Office of Civil Rights. In other words, it would be appropriate for the Board to review the program it "created," i.e., PSD permits, but it would not be appropriate for the Board to review the program it did not "create," i.e., Environmental Justice Policy.

e. If Illinois EPA is of the opinion that neither the statutory language from the Illinois Environmental Justice Act nor the established Illinois 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?

As previously discussed, whether environmental justice is an important policy consideration that the Board should review is a decision that the Board must make because, as reflected in applicable state law, there is currently no state provision mandating such actions by agencies of the State of Illinois. Again, the language from the Illinois Environmental Justice Act did not mandate certain responsibilities on state agencies as Executive Order

12898 did on federal agencies. Rather the Illinois Environmental Justice Act merely recognized that the principle of environmental justice requires that no segment of the population should bear disproportionately high or adverse effects of environmental pollution and established the Commission on Environmental Justice in Illinois. Finally, the right of review of Illinois EPA's Environmental Justice Policy does not rest with the Board. A separate grievance procedure exists and has been disseminated on the Illinois EPA's website. In the event that a person wanted to contest the outcome of any grievance filed with the Illinois EPA, a complaint could be filed with USEPA's Office of Civil Rights.

7. In discussing the impact of the federal Executive Order, Illinois 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 Illinois 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?

   The Illinois EPA directs the participants to its earlier response to CARE's question 6(b).

8. Further, in answers to pre-filed questions, Illinois 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 Illinois EPA has adopted its own Environmental Justice policy, is Illinois 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?

   Yes. The Illinois EPA is satisfied that it may take actions during permitting to address environmental justice, as discussed in its EJ policy.

   However, the provisions cited in this question are generally not relevant to whether it is appropriate for the Board to review EJ concerns in the context of a state-approved PSD program. While the Illinois Environmental Justice Act did find that the principle of environmental justice requires that no segment of the population should bear disproportionately high or adverse

effects of environmental pollution and established the Commission on Environmental Justice in Illinois, this Act did not impose substantive obligations on state agencies. Second, 40 CFR Section 7.90 does require a grievance procedure for programs or activities receiving federal assistance from the USEPA, and in response to this mandate, the Illinois EPA adopted its own EJ policy. However, this federal mandate is a distinct federal requirement and has no bearing on whether environmental justice considerations are authorized by state law. The Illinois EPA's EJ policy is a formal statement, as required by 40 CFR Part 7, concerning the agency's internal management (i.e., directing resources towards achieving recognized goals of nondiscrimination and environmental justice). The EJ Policy is not a rule developed from a statutory or regulatory enactment that, as related to air quality, establishes additional emission standards or requirements for control of emissions. Finally, while Section 9.1(c) of the Act provides that "the Board may adopt more stringent or additional provisions to the extent that it deems appropriate" the Illinois EPA is not aware of statutory authority supporting the Board's review of environmental justice in the context of a state-approved PSD program.

b-1. Can Illinois 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?

As previously discussed, the Illinois EPA can not point to any existing source of state law that indicates that the Board would currently have the authority to hear appeals related to environmental justice as part of PSD permit appeals.

b-2. So can you point to any source of law that indicates that it would be – the Board would be unauthorized to hear environmental justice considerations, rather than what you, I feel, was point to that you can't find anything that it would be authorized? (Tr. at 54-55)

Again, the Illinois EPA would direct the participants and the Board to its earlier responses. Given no state law exists authorizing such consideration by the Board, the Board is not authorized by state law to hear environmental justice issues in the context of a PSD permit appeal.

c. Is Illinois EPA of the opinion that the Board would be physically, technically, economically or in any other way unable to adjudicate claims relating to Illinois EPA's implementation of its environmental justice policy or its adherence to the policy established in 415 ILCS 155/5(i),(ii)?

Currently, the Board would not have the legal authority to adjudicate claims relating to Illinois EPA's implementation of its Environmental Justice Policy.

Again, the Illinois EPA has a grievance procedure as required under 40 CFR Section 7.90. This procedure can address claims of discrimination or disparate impact as a result of Agency action in the context of Agency decision making that necessarily includes PSD permitting decisions. In the event that a person wanted to contest the outcome of any Illinois EPA grievance procedure, a complaint could be filed with USEPA's Office of Civil Rights. Part 7, Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, dictates such review is to be undertaken by USEPA's Office of Civil Rights. 40 CFR Part 7. Any administrative review of the Illinois EPA's implementation of its EJ Grievance Procedure by USEPA's Office of Civil Rights is separate and distinct from any administrative review contemplated by the Board.

Nor would the Board currently have the legal authority to review any claims relating to the Illinois EPA's adherence to the "policy established in 415 ILCS 155/5(i) and (ii)." As previously indicated, Section 5(i) and (ii) did not mandate any action by State agencies rather the General Assembly found that the principle of environmental justice requires that no segment of the population 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 State-issued permits.

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 Illinois 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?"

Consistent with Executive Order 12898, the Illinois EPA is satisfied that USEPA may take action during permitting to address environmental justice. Concerning the guidance document referenced in this question, USEPA stated as follows:

> **Section 165(a)(2) provides that a PSD permit may be issued only after an opportunity for a public hearing at which the public can appear and provide comment on the proposed source, including 'alternatives thereto' and 'other appropriate considerations.' This authority *could allow* EPA to take action to address the proper role of environmental**

justice considerations in PSD/NSR permitting.

Memorandum from Gary S. Guzy, General Counsel, Office of General Counsel, USEPA to Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assistant, USEPA, et al., regarding EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May Be Addressed in Permitting, (*emphasis added*). In fact, counsel cautioned that "[t]he use of EPA's statutory authorities, as discussed herein, may in some cases involve new legal and policy interpretations that could require further Agency regulatory or interpretive action . . . [this memorandum] does not suggest . . . that there are not important considerations of legal risk that would need to be evaluated." *Id.*

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 Illinois 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?

In a September 1993 decision in Genesee Power, the EAB stated that the Clean Air Act did not allow for consideration of environmental justice and siting issues in PSD permitting decisions. In response, the Office of General Counsel (OGC) filed a Motion for Clarification. While USEPA summarized OGC's arguments in its 2000 guidance document discussed above, the Illinois EPA has not been able to locate a copy of OGC's Motion for Clarification. However, the EAB's Order on Motion for Clarification makes clear that OGC merely requested that the EAB amend its reasoning but not the outcome of its decision. *In the Matter of Genesee Power Station Limited Partnership,* 1993 EPA App. LEXIS 23; 4 E.A.D. 832 (October 22, 1993), Order on Motion for Clarification. In fact, it was Genesee that proposed "that the Motion be resolved by simply excising the appropriate portions of the decision." *Id.* The EAB went onto find as follows:

> **That said, we are adopting Genesee's recommendation because we agree that the Motion for Clarification raises issues of national importance that need not be decided now and because the Motion for Clarification provides a poor vehicle for giving such issues the attention they deserve. We therefore believe that rather than deciding**

> **such issues now in this context the better course is simply to delete the challenged rationales from the Genesee opinion. Accordingly, we are reissuing the Genesee opinion to reflect such deletions and to make minor rhetorical changes necessitated by such deletions.** ***In doing so we take no position on the merits of the rationales proffered by OGC in the Motion for Clarification.***

Id. (emphasis added). **Consistent with the EAB's Order on Motion for Clarification, in its October 22, 1993 Opinion and Order, the EAB deleted the language at issue but did not address whether it was permissible to address environmental justice in the PSD permitting program.** ***In re Genesee Power Station Limited Partnership,*** **4 E.A.D. 832 (October 22, 1993). To the best of the Illinois EPA's knowledge, these issues have not yet been considered by the EAB given shortly thereafter President William J. Clinton issued Executive Order 12898 on February 11, 1994, mandating action with regard to environmental justice by each federal agency including USEPA. Subsequent decisions by the EAB discuss EJ in the context of this Executive Order.** ***See, In re Puerto Rico Electric Power Authority (Cambalache Combustion Turbine Project),*** **6 E.A.D. 253 (December 11, 1995);** ***In re Ecoelectrica, L.P.,*** **7 E.A.D. 56 (April 8, 1997);** ***In re Knauf Fiber Glass, GmbH,*** **8 E.A.D. 121 (February 4, 1999);** ***In re Knauf Fiber Glass, GmbH,*** **9 E.A.D. 1, (March 14, 2000);** ***In re Pio Pico Energy Center,*** **16 E.A.D. 56 (August 2, 2013).**

c. Assuming, *arguendo,* that Illinois 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 whya 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?

The Illinois EPA would direct participants and the Board to its earlier responses. It is not clear to the Illinois EPA that the EAB accepted the reasoning of the Office of General Counsel in *Genesee Power* as the EAB merely deleted the controversial language as suggested by the permit applicant in that case. The EAB did not decide whether it was permissible to address environmental justice concerns under the federal definition of BACT at 40 CFR 52.21(b)(12). ***In re Genesee Power Station Limited Partnership,*** **4 E.A.D. 832 (October 22, 1993).**

ILLINOIS POLLUTION CONTROL BOARD FOLLOW-UP QUESTIONS

1. I would like to just clarify. So what is Agency's position as to when the environmental justice concerns would be considered under the proposed Illinois PSD program by IEPA

and the Board? What I heard today is that there is no real procedure for EPA to consider that, but there is a grievance procedure at IEPA level. Could you please clarify how that would work in terms of PSD permitting? And then the second part will be for the Board.

Would you please provide details in your answer how it routinely works? How it would work with PSD and how you do it in other procedures. Do I understand that correctly?

So as you just answered it, you do have a process in other permitting procedures that you would apply to PSD permitting, do I understand that correctly?

Okay, if you can detail how that usually works and how that would work in PSD permitting. (Tr. at 67-68)

As an initial matter, the Illinois EPA must make clear that the Illinois EPA appropriately implements its environmental justice program. (Again, this environmental justice program is required because the Illinois EPA is a recipient of federal funds from USEPA). In the context of permitting, the Illinois EPA follows its Environmental Justice Policy and its Environmental Justice Public Participation Policy. The Illinois EPA also has a procedure in place to address circumstances in which a person or entity believes these policies have not been appropriately followed by a Bureau and consistent with the Illinois Environmental Justice Grievance Procedure may file a grievance with the Director of the Illinois EPA. These documents have been attached as Exhibits A through C to these Agency's Post Hearing Comments. These policies and procedures would be applicable during PSD permitting under Part 204 as these policies and procedures are currently applicable to the Bureau of Air's permit program including PSD permitting under 40 CFR 52.21.

As set forth in the attached Illinois EPA Environmental Justice Public Participation Policy, this policy generally requires the Bureau of Air to review air pollution control permit applications to ascertain whether the proposed action will take place in or involve an area of concern for EJ. For those proposed actions located in an area of concern for EJ, the Illinois EPA's Environmental Justice Officer will recommend the appropriate outreach, if any, based on a number of considerations. Outreach may take the form of either community outreach by the permit applicant or by the Illinois EPA. If outreach is initiated by the Illinois EPA, the Illinois EPA will provide the community with information regarding the proposed action by means of an EJ notification letter. Depending on any response by the public to the Illinois EPA's EJ notification letter, the Illinois EPA may hold an informational meeting or availability session to inform residents in an area of concern for EJ of the scope and nature of the proposed action and to explain the permitting process. In addition, to further facilitate any informational meeting or availability session, the Illinois EPA will provide the public with a plain language summary of the major aspects of any proposed action.

Further, in compliance with 40 CFR, Parts 5 and 7, the Illinois EPA has established

a grievance procedure to ensure the fair resolution of complaints alleging a violation of Title VI, Section 601 of the 1964 Civil Rights Act and/or the Illinois EPA's Environmental Justice Policy in the Illinois EPA's administration of its programs and activities. In the event that a person believes he or she or a class of persons has been discriminated against, he or she may file a complaint with the Illinois EPA typically within 60 days of any alleged violation. Within 10 days of receipt of a written complaint, the Illinois EPA will provide the complainant with written notice of receipt and, as necessary, request any necessary information for the complainant to fulfill requirements to file a complaint. Based on information provided in the complaint and other available information, the Illinois EPA will determine if it has jurisdiction to pursue the matter and whether the complaint has sufficient merit to warrant an investigation. Within 120 days of acceptance, the Illinois EPA will respond in writing to the complainant with its resolution.

Again, in the event that the person wants to contest the outcome of the Illinois EPA grievance procedure, a complaint could be filed with USEPA's Office of Civil Rights. Part 7, Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, dictates that any such review of the outcome of the Illinois EPA Environmental Justice Grievance Procedure is to be undertaken by USEPA's Office of Civil Rights. 40 CFR Part 7.

2. And the second part of my question, how does IEPA see the Board taking the EJ considerations into context? I heard you say discretion of the Board might allow the Board to decide how to address it, those concerns. But it would be helpful to see what the Agency thinks properly in terms of what consideration and how the Board can take into account when the Board hears the case under the PSD permitting.

   Second part of my question is it would be helpful to say the Agency's position on how the Board should take into consideration the EJ concerns while hearing the PSD permit appeals. (Tr. at 68-69).

   As previously explained, the Illinois EPA may take actions during permitting to address environmental justice, as set forth in the Illinois EPA's Environmental Justice Policy but any actions taken by the Illinois EPA would be pursuant to its EJ policy and would not be pursuant to Part 204. *Accord.*, 40 CFR Section 7.90 requires a grievance procedure for programs or activities receiving federal assistance from the USEPA, and in response to this mandate, the Illinois EPA adopted an EJ policy.

   Whether implementation of environmental justice is an important policy consideration that the Board should review is a decision that the Board must ultimately make because, as reflected in applicable state law, there is currently no state law provision mandating such obligation. If the Board were to elect to exercise any discretion that the Board might possess, its review would need to relate to the substance of the PSD permit decision. Any consideration of environmental justice that is not in the context of the Board's review of the PSD permit decision would

clearly be beyond the Board's authority.

3. Another follow-up from that, could you also explain how the grievance procedure would - - the EJ grievance procedure worked in that regard, if that's a second layer for EJ concerns? As far as I understand – and I'm sorry if I'm incorrect, that after the decision is made, after the PSD decision is made, then there is a second layer of EJ consideration through the grievance procedure. (Tr. at 70).

The Illinois EPA would direct the Board to its earlier response concerning the Illinois EPA's Environmental Justice Grievance Procedure. Again, the Illinois EPA is required to have a Grievance Procedure pursuant to 40 CFR, Parts 5 and 7, Section 7.90(a). This procedure must provide that in the event a person believes he or she or a class of persons has been discriminated against by the Illinois EPA in the administration of its program or authority, he or she may file a complaint with the Illinois EPA. This complaint must be filed within 60 days of any alleged violation provided, however, that this requirement may be waived to address allegations of potential discrimination caused by pending actions, in order to address these actions at the earliest appropriate and feasible juncture, or for good cause. A person could believe that an action taken by the Illinois EPA entailed discrimination and, consistent with the Grievance Procedure, file a complaint with the Illinois EPA. Any such complaint filed with the Illinois EPA related to a permit action would necessarily be separate from any petition for review of a permit action under Part 204 that is filed with the Board consistent with Section 40.3 of the Act.

4. And another question I have is, what does the Agency see appropriate in terms of the Board taking into account the Environmental Appeals Board decisions when making the Board's decision, how should the Board take into account the EAB past decisions and what weight, if any, it should give to any precedential decision that the EAB made under the federal rules, 40 CFR 52.21 and 40 CFR 51.166. (Tr. at 70).

As an initial point of clarification, while the USEPA has two sets of federal regulations addressing PSD, the regulations addressing state PSD programs established pursuant to state law and submitted to USEPA for approval and inclusion into State Implementation Plans (SIPs) are codified at 40 CFR 51.166. State PSD SIPs based on the provisions at 40 CFR 51.166 have never been subject to EAB review. Meanwhile, the regulations governing the federal PSD program are set forth at 40 CFR 52.21 and apply in those states and other jurisdictions without a USEPA-approved SIP PSD program. Delegated "states" are those states and local permitting authorities that have yet to adopt a PSD program approved as part of the state's SIP, but rather are states that have been delegated the authority to issue PSD permits on behalf of the USEPA, relying instead on USEPA's PSD regulations at 40 CFR 52.21. Again, this has been the historic approach in Illinois. It has been in this context that the EAB has historically performed its review of certain PSD permits issued by the Illinois EPA.

As related to the role of EAB precedents in appeals of PSD permits before the

Board, it is important to remember that Section 9.1(d)(1) of the Act provides that "No person shall: (1) violate any provisions of Sections 111, 112, 165 and 173 of the Clean Air Act, as now or hereafter amended, or federal regulations adopted pursuant thereto. . ." Given this statutory mandate, the Board would necessarily have to consider EAB precedents as they are linked to Section 165 of the Clean Air Act when hearing appeals that involve the related provision in Part 204.

5. And a similar question is, what weight should the Board give to the USEPA's interpretation of 40 CFR 52.21 and 40 CFR 51.166? And the second part of that question, what level of decision should the Agency - - should the Board take into account, should that be USEPA guidance USEPA general counsel decisions? What kind of - - what type of documents should the Board pay attention to when interpreting the federal rules?

So those questions with respect to the Environmental Appeals Board and the USEPA's interpretation the rules. They are more general. (Tr. at 71).

As a general matter, the weight that should be given to a particular decision by the EAB or piece of guidance by USEPA or other statement by USEPA is a decision that the Board will need to make in the context of the specific appeal of a PSD permit. In this regard, the Board will likely need to consider the extent to which the fact pattern addressed by such past declaration applies to the matter before the Board. It will also need to consider the source of the declaration and the context in which it was made. The Board may have to review the Illinois EPA's consideration (or lack of consideration) of USEPA guidance interpreting 40 CFR 52.21 in any PSD permit decision pending Board review. In this regard, the Illinois EPA is not aware of the USEPA issuing "general counsel decisions." Rather the USEPA issues guidance documents that, at times, are prepared by general counsel at USEPA.

The Illinois EPA again refers the Board to its prior response. As a general matter, if the Board were to relax the applicable requirements of Part 204 by way of a Board decision, the USEPA could take the position that the decision was contrary to the SIP and find Illinois PSD SIP deficient.

6. In EJ and outside of EJ, when the Board hears an appeal, what weight should the Board give to Environmental Appeal Board decisions and USEPA interpretations of those. And, for instance, in paying attention to the USEPA, whether it should be just USEPA guidance, official documents issued by USEPA or documents referenced today like general counsel statement or motions or decisions made by some part of the USEPA. (Tr. at 71-72).

As discussed, the weight given to EAB decisions is a matter that the Board will need to decide in the context of a specific appeal of a PSD permit. As a general matter given that the EAB functions as a judicial tribunal, the Illinois EPA would expect significant weight to be given to relevant EAB decisions. More weight should obviously be afforded to USEPA guidance documents that were developed to apply

as national guidance even though they were not subject to formal notice and comment. Less weight should be given to determinations of USEPA Regional Offices for particular projects.

Again, concerning environmental justice, the fact that the EAB considers EJ in PSD permit appeals does not directly justify consideration of EJ by the Board in PSD permit appeals. Any review of environmental justice considerations are clearly warranted by the EAB in a federal PSD permit appeal because of the language found in Executive Order 12898. However, this does not mean that review of environmental justice considerations are likewise authorized by applicable law in the context of a state-approved PSD program when similar language does not currently exist in 415 ILCS 155/5 or elsewhere. Given any EAB review of environmental justice is based, in part, on its review of Executive Order 12898 and no similar requirement exists in state law, the Board should not afford any deference to EAB decisions in this respect.

ILLINOIS ENVIRONMENTAL REGULATORY GROUP

1-i. 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.

To the extent that USEPA were to adopt changes to the PSD program to update the federal program to appropriately address recent court decisions regarding this program, as have already been memorialized in this regulatory proposal submitted by the Illinois EPA, the Illinois EPA would not need to initiate a rulemaking before the Board. For instance, this could include the changes already proposed by the Illinois EPA to appropriately address recent court decisions regarding the permitting of greenhouse gases under the PSD program or how the term "federally enforceable" should be read in the context of the definition of "potential to emit." This could also include any federal changes to remove definitions that are currently subject to a federal stay (i.e., functionally equivalent component, fixed capital costs, and total capital investment). Nor would the Illinois EPA necessarily initiate a rulemaking proceeding if USEPA adopted transitional provisions to the federal PSD program that were not relevant to Illinois.

The Illinois EPA would necessarily have to conduct reviews as to the adequacy of the state PSD program whenever changes were made to 40 CFR 51.166 and/or 52.21. Finally, to the extent that any other party believed changes to the state PSD program were appropriate, such parties would be able to propose such changes to the Board to the extent that the Illinois EPA did not.

1-ii. As a follow-up to that, what – when the Agency is evaluating proposing to update the rule to reflect federal revisions, what kind of criteria will the Agency be looking at? (Tr. at 75).

As discussed at hearing, the Illinois EPA can certainly envision future changes to 40 CFR 51.166 and 52.21 to address aspects of those rules that have already been dealt with in Part 204, as proposed by the Agency. For example, the federal rules could be revised in the future to remove provisions that are currently stayed. In these circumstances, "updates" to Part 204 to reflect the revisions to the federal rules would not be necessary because Part 204 would already reflect the revised federal rules.

Beyond this, in the context of this proposed rulemaking before the Board, it is only appropriate for the Illinois EPA to state that it will propose any changes to Part 204 that are necessary for the State of Illinois to maintain its USEPA-approved state PSD program. In this regard, this question generally asks the Illinois EPA to

further speculate on the type of changes that might be made to the federal PSD program, both by the USEPA and by the courts. It also asks for speculation on the future policy of the Illinois EPA and its decision making with respect to any such changes to the federal PSD program. Moreover, as explained at hearing, if 40 CFR 51.166 and 52.21 are revised and the Illinois EPA does not initiate a rulemaking before the Board to address those revisions, other parties my initiate such rulemakings if they believe that Part 204 should likewise be revised.

1-iii. And just one other follow-up on this question, does the Agency envision that if a new federal Class I area is designated that would impact permitting in Illinois, that the Agency would need to propose a revision to Part 204 to address that? (Tr. at 75).

If a Class I area is created in Illinois or in a nearby state such that this area could be potentially impacted by a proposed major project in Illinois, the Illinois EPA expects that Part 204 would need to be revised so that it would address this new area. It should be understood that the Clean Air Act currently does not provide for federal Class I areas to be created simply by "designation" by the federal agency that is responsible for such area or by the USEPA. As a general matter, the federal Class I areas that now exist under the PSD program were directly created by the United States Congress, by means of Section 162 of the Clean Air Act.

In any case, if a new federal Class I area were created such that Part 204 needed to be revised to address this area, the revision to Part 204 could be as simple as updating Section 204.100, Incorporations by Reference, so that it refers to a new edition of 40 CFR Part 81. This is because most federal Class I areas are listed in 40 CFR 80 Subpart D, Identification of Mandatory Class I Federal Areas Where Visibility Is an Important Value. The revision to Part 204 would certainly be more involved if USEPA does not update 40 CFR 81 Subpart D or if visibility is not an important value in the new federal Class I area, so that it would not be included in the listing in 40 CFR 81 Subpart D. The rulemaking proceeding would also be more involved if the Board or others believe that Part 204 should be revised to include language derived from 40 CFR 52.21(o)(3).

2-i. 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 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?

The Illinois EPA has taken this comment under advisement in the related Agency proceeding pertaining to revisions to the existing Agency regulations at 35 Ill. Adm. Code Part 252, Public Participation in the Air Pollution Control Permit Program.

2-ii. **Question by the Board:** Just clarify whether this proceeding is currently under some stages close to completion or is it at the very early stage. (Tr. at 77).

The proposed revisions to Part 252, Public Participation in the Air Pollution Control Program, will be proceeding to First Notice this spring. While the Agency rulemaking is not as far along as the pending rulemaking before the Board, an Agency rulemaking is typically a much shorter process than a Board rulemaking.

2-iii. **Question by the Board:** If you have a draft of these two sections, Section 252.208, 252.210, would you please file them into this record so we have at least an understanding of what these sections envision. (Tr. at 77-78).

As recognized at hearing, these provisions are the subject of a separate Agency rulemaking that is not before the Board. The Agency is merely providing these two sections to aide the Board in its understanding of what these provisions would envision.

Section 252.208 Reopening of the Public Comment Period for PSD Permits

a) The Agency may order the public comment period reopened. The public notice of any comment period under this paragraph shall be issued under Section 252.201, and shall define the scope of the reopening including an identification of those issues to which the requirements of this Section apply.

b) Comments filed during the reopened comment period shall be limited to the issues that are the subject of the reopened public comment period as set forth in the notice that caused its reopening. When the public comment period is reopened under this Section, all persons, including the applicant, who believe any relevant condition of a draft permit is inappropriate or that the Agency's decision to prepare a draft permit is inappropriate, shall submit all reasonably available factual grounds supporting their position, including all supporting material, by the close of the public comment period.

(Source: Added at 42 Ill. Reg. , effective)

Section 252.210 Response to Comments for a Final PSD Permit Decision

a) By the date that any final PSD permit decision is issued, the Agency shall consider all written comments submitted by the close of the public comment period and all comments formally made at any public hearing. The Agency shall issue a response to comments that shall briefly describe and respond to all significant comments on the draft permit raised during the public

comment period, or during any hearing. The Agency may group related comments together and provide one unified response for each issue raised; and

b) Any documents, excluding statutory or regulatory references, cited in the response to comments shall be included in the administrative record for the final permit decision. If new points are raised or new material supplied during the public comment period, the Agency may, in addition to formally providing a written response to comments, document its response to those matters by adding new materials to the administrative record.

(Source: Added at 42 Ill. Reg. , effective)

3-i. 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?

The further scrutiny of 40 CFR 51.166(p) triggered by this question has confirmed that Section 51.166(p) is, in fact, entitled "Sources impacting Federal Class I areas – additional requirements." Based on this heading, the requirement that a permitting authority submit a copy of each PSD permit application to the USEPA is only applicable to sources impacting federal Class I areas. While SIP approval would potentially only require mirroring 40 CFR 51.166(p) in proposed Section 2014.1310, USEPA/Region V has explained that its position is that the Illinois EPA should provide it with a copy of each application for a PSD permit regardless of whether the proposed project would impact a federal Class I area. The Illinois EPA is prepared to continue this practice which it currently carries out under the delegation agreement with copies of PSD applications typically provided at the start of the public comment period. Accordingly, the Illinois EPA is not proposing to change this aspect of its original proposal.

3-ii. As a follow-up answer to that question regarding the request that Region 5 has given to Illinois EPA to provide each PSD application to them, are you aware, is this the practice with other Region 5 states as well? Can you address that in post-hearing? (Tr. at 80).

The following provides a short summary of what the Illinois EPA understands that other Region 5 states do with respect to submitting PSD applications to the USEPA.

Indiana – Indiana Department of Environmental Manages (IDEM) provides USEPA with electronic access to all PSD applications. Indiana's PSD rule requires the state to "transmit to the USEPA a copy of each permit application relating to a major stationary source or major modification and provide notice to the USEPA ...." See 326 IAC 2-2-14(i). This requirement is derived from the language of 40 CFR § 51.166(p).

Michigan – Michigan electronically sends USEPA copies of all PSD and NaNSR applications. Michigan's PSD rule requires the state to send USEPA copies of all PSD applications. See R 336.2816(1).

Minnesota – Minnesota submits to USEPA an electronic copy of each PSD application. Minnesota's PSD application rules are found at: https://www.revisor.mn.gov/rules/7007.3000/. The requirement to submit PSD applications to USEPA is found at 7007.0950 (A)(2).

Ohio – Ohio's PSD rules require the state to send PSD applications to USEPA "upon request." See OAC 3745-31-19(B): https://www.epa.state.oh.us/portals/27/regs/3745-31/3745-31-19f.pdf. In practice, Ohio sends SEPA copies of all PSD permit applications.

Wisconsin – Wisconsin Department of Natural Resources (WDNR) posts all of its PSD applications on its public website so that USEPA and the public can access them. This meets the requirement in Wisconsin's rules to "make available... a copy of all materials the applicant submitted..." See NR 405.15.2.b.

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.

Under the PSD program, as has been discussed, "reference levels" for acceptable or unacceptable concentrations of pollutant(s) in the ambient air must generally be evaluated when conducting air quality impact analyses for certain regulated NSR pollutants for which NAAQS are not available to identify unacceptable ambient concentrations. Examples of these pollutants for which there are no NAAQS

include reduced sulfur compounds (including hydrogen sulfide), fluorides and sulfuric acid mist. In addition, reference levels for concentrations and depositional loading of pollutants must be evaluated when conducting additional impact analyses, as potential impacts of emissions on vegetation and soils must specifically be addressed.

The evaluation of reference levels entails review of publicly available documents (including published literature) to identify available benchmarks that are appropriate for the specific pollutant and type of impact (impact on human health, vegetation or soil). Benchmarks that reflect newer work by more authoritative sources are preferred to those that are older and from less authoritative sources. Benchmarks that better address the conditions in the area in which a proposed project will be constructed also garner preference over more generic benchmarks. Preference is also generally given, at least initially, to more conservative values.

Once appropriate reference levels are identified, the relevant maximum concentrations or rates of deposition of pollutants predicted by the air quality impact or additional impacts analyses are compared with those reference levels. If the impacts that are initially predicted from a proposed project are higher than the reference levels, further analysis or evaluation would be conducted to determine if the predicted impacts are truly excessive.

For consideration as an example, hydrogen sulfide (H_2S) is a regulated NSR pollutant for which there is not a NAAQS. There are a variety of reference levels that can be considered for human health impacts due to H_2S in air and a few are identified here. The United States Agency for Toxic Substances and Disease Registry's acute (1 to 14 days) inhalation Minimal Risk Level for H_2S is currently 0.07 ppm. This is an estimate of the daily exposure that is likely to be without appreciable risk of adverse health effects. USEPA has published Acute Exposure Guideline Levels for pollutants, including H_2S, which reflect levels of exposure above which it is predicted that the general population, including susceptible individuals, could experience irreversible or other serious, long-lasting adverse health effects or be incapacitated due to a single, non-repetitive exposure. For H_2S, these levels are 41 ppm (10 minute exposure), 32 ppm (30 minute exposure), 27 ppm (1 hour exposure), 20 ppm (4 hour exposure), and 17 ppm (8 hour exposure). The National Institute for Occupational Safety and Health has a recommended exposure limit of 10 ppm over a 10-minute period. It is generally not necessary to address all reference levels and their associated averaging times in air quality impact analysis. The evaluation of reference levels for H_2S would focus on selection of reference levels to address both acute and chronic impacts (i.e., impacts due to short-term and long-term exposures), favoring those reference levels that best serve to protect human and ecosystem health from ambient exposures due to emissions from a proposed project.

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?

It is the Illinois EPA's position that Section 40.3 of the Act, 415 ILCS 5/40.3, embodies the same standard of review and adherence to precedence as the EAB currently applies in reviewing PSD permit appeals.

6-i. 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.

The final sentence in proposed Section 105.614 ("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") is in addition to Section 40.3(d)(1) of the Act. Please provide further information regarding the type of technical decisions that would be subject to the Agency's considered judgement under this provision; including but not limited to, the following:

- Single stationary source
- Potential to emit
- Legally and practicably enforceable limits
- Assessment of fugitive emissions
- RMRR exclusion
- Replacement unit
- Baseline actual emissions and projected actual emissions
- Net emissions increase calculation

- Physical change and BACT applicability
- Determining BACT
- Air quality impacts demonstration and the preconstruction ambient air quality analysis
- Additional impacts analysis

When acting on a PSD permit application, the types of technical decisions of the Agency would include these and any others that the EAB has historically upheld if the actual decisions that were made by the USEPA or the permitting authority and are being challenged reflected considered judgment by the USEPA or permitting authority as demonstrated in the permit record.

6-ii. Just as a follow-up then to that, Mr. Romaine, you stated that the list we had in our question would be things that would be considered technical considered judgment and then you referenced other items that the EAB has historically upheld in the same vein. In your post-hearing comments, can you address what those other topics would be? That's understood. We simply want to understand the difference that's being proposed in the regulatory language for the Agency's considered judgment. (Tr. at 91-92).

There are several types of technical decisions beyond those listed by IERG in its prefiled Question 6 that might be involved in the issuance of a PSD permit. For example, other technical decisions could involve the definition of an emission unit for purposes of application of BACT, the enforceability of limits established as BACT, requirements for site-specific pre-application ambient air quality monitoring, requirements for post construction monitoring, the reference level(s) used in air quality impact analyses for pollutant(s) for which there are not a NAAQS, the reference levels for impacts on vegetation and soils used in additional impact analyses, and whether the land manager for a federal Class I area has demonstrated that a proposed project would have an adverse impact on visibility in or other air quality related values of such lands. However, even after adding these types of technical decisions to the listing of decisions that may be involved in the issuance of a PSD permit and that might be challenged in an appeal of a PSD permit to the Board, the listing of the technical decisions in the Board's record for this rulemaking may still not be complete. This is because there may be technical decisions involved in the issuance of PSD permits that cannot be foreseen at this time. Moreover, the Board's record for this rulemaking does not need to include nor should it purport to include a comprehensive list of the technical decisions that may be involved in the issuance of a PSD permit. In this regard, if a PSD permit issued under Part 204 is appealed, unless the parties agree to supplement the Board's record for the appeal proceeding, it is appropriate that any technical decisions by the Illinois EPA involved in the issuance of that PSD permit be upheld by the Board if the decisions reflect the considered judgment of the Illinois EPA, as reflected in the Illinois's EPA record for that permit proceeding.

ADDITIONAL MISCELLANEOUS FOLLOW-UP QUESTIONS

1. **Board** – On page 39 and 45 of the PC-1, the Agency's response to the first hearing questions.

Page 39. Agency's response to questions from the first hearing document PC-1, page 39, Question 13, the Agency in this – in response to this question, and I refer to Questions A through P, so that would be pages 39 through 45.

The Agency acknowledged that records with respect to PSD proceeding is broad – it's much broader than record during the public commentary; is that correct?

So the question I have is that the way the proposed rule is phased in Section 105.608(b)(4), the Board proposed deleting the phrase where the participant – well, the applicant, -- sorry, petitioner was required to cite to any relevant page numbers in the public comments submitted to the Agency record, the Board was suggesting to delete– sorry.

Once again, Section 105.608(b)(4), the Board suggested deleting the public comments period from requirement to, quote, to the issues phrased in the record. The reason for that was because the Act in Section 40.3(a)(2) requires the participant to cite to the record, not to the record during public comments period. And the question the Board asked was, does Agency consider that requiring the petitioner to cite to the record during the public comment period is narrowing the requirements of the Act because the Act requires to cite to the record. And the Agency admitted that record is broader than the record during public comment period.

So the questions that is raised is, if the participant wants to raise issues that were raised during the record – I mean, they are in the record but no during the public comment period, would that not be appropriate? (Tr. at 93-94).

The change suggested by the Board would be improper. The change is <u>not</u> appropriate given it would suggest that a petitioner could cite to *any* document in the Agency record to support its assertion that the issue was raised during the public comment period. Such an interpretation would negate the purpose of the public comment period before the Illinois EPA in its consideration of any PSD permit application and would not give effect to relevant statutory language in Section 40.3 of the Act. Relevant to this discussion is the following language of Section 40.3(a)(2):

> **Any person who participated in the public comment process and is either aggrieved or has an interest that is or may be adversely affected by the PSD permit may, within 35 days after final action, petition for a hearing before the Board to contest the decision of the Agency. If the petitioner failed to participate in the public comment process, the person may still petition for a hearing, but only upon *issues* where the final permit conditions reflect changes from the proposed draft permit.**

> **The petition shall: (i) include such facts as necessary to demonstrate that the petitioner is aggrieved or has an interest that is or may be adversely affected; (ii) state the *issues* proposed for review, citing to the record where those *issues* were raised or explaining why such *issues* were not required to be raised *during the public comment process;* and (iii) explain why the Agency's previous response, if any, to those *issues* is (A) clearly erroneous or (B) an exercise of discretion of an important policy consideration that the Board should, in its discretion, review.**
>
> **(*emphasis added*).**

As previously discussed, the Agency record for a PSD permit action will necessarily include the initial application submitted by the applicant, supplements and revisions to that submittal by the applicant and correspondence with the Agency that will all precede the public comment period (that is typically not going to relate to the public comment period unless the documents were submitted to the Agency during the public comment period as a public comment). The Agency record will also necessarily include public comments and supporting information submitted during the public comment period. The Agency record may also include documents assembled after the public comment period, notably the issued permit or denial and written response to public comments. Except for material actually submitted during the public comment period, the material would not involve material supplied by the public. Rather this material involves the application and other material assembled by the permitting authority, information that the permitting authority relies upon to make its ultimate permitting decision.

While this question by the Board focuses on the use of the term record in Section 40.3, this question ignores the legislature's repeated use of the term *issues* and the recognition that any *issues* raised on appeal necessarily must have been raised during the public comment period if it was possible to do so. (The only *issues* that do not have to be raised during the public comment period are ones that an individual could not anticipate because the final permit conditions reflect changes from the proposed draft permit). It is during the public comment period that a member of the public may raise issues about a proposed action. For example, an individual may express concern over a proposal to use one control technology over another control technology, a proposal to set BACT for a given piece of equipment that might not be as stringent as a BACT limit set elsewhere for a similar piece of equipment or the failure of an air quality impact analysis to employ a certain reference level. It is in this context that a member of the public would express an *issue* with these aspects of the Agency's proposed PSD determination.

It would not be appropriate for petitioner on appeal to be able to refer to any piece of the broader permit record especially when those documents, by themselves, could not have notified the permit authority of any potential issues with the proposed draft permit. As a practical matter, this would arguably allow a petitioner to cite to pieces of the record that have been rendered irrelevant by a revision or supplement

to the application. More importantly, such an approach would essentially negate a key function of the public comment period. Further supporting this interpretation is the requirement that the petition must identify where in the record the *issues* were raised or why the *issues* were not required to be raised during the public comment process. As Section 40.3(a)(2)(ii) provides that an explanation is required as to why an *issue* had not been raised during the public comment period, it necessarily means that the *issue* would have to be raised during the public comment period if it were possible to do so. Any citation to the record to show that the *issues* had been raised before the Agency would necessarily refer to comments made during the public comment period.

Finally, the requirement at Section 40.3(a)(2)(iii) for the petition to explain why the Agency's previous response to those *issues* is clearly erroneous (or an exercise of discretion or an important policy consideration that the Board should, in its discretion, review) again relates to the public comment period. In this regard, following a public comment period, the Illinois EPA prepares a written response to *issues* that were raised by the public during the comment period in a document typically entitled Responsiveness Summary. The Illinois EPA is only in a position to respond to *issues* if those *issues* were raised by a participant in the public comment period. To somehow suggest that it would be appropriate for a petitioner to refer back to any piece of the record not only ignores the repeated use of the term *issues* in Section 40.3 of the Act but that the petitioner is required to explain why the Agency's previous response to those *issues* is clearly erroneous.

The Agency's proposal is consistent with the language of Section 40.3. The suggestion offered by this comment would inappropriately expand upon the language of Section 40.3 by allowing a petitioner to rely upon a piece of the potentially voluminous broader record that could either not have suggested an *issue* to the permitting authority in the first instance or could have suggested a potential issue that was appropriately resolved, e.g., by further material submitted by the applicant or further investigated by the permitting authority.

While the Illinois EPA has previously discussed this point before the Board, it bears repeating given the significance of the language in this section. The standard in Sections 40.3(a)(2)(ii) and (iii) of the Act (requiring the petition to "state the issues proposed for review, citing to the record where those issues were raised . . . and explain why the Agency's previous response, if any, to those issues is . . . clearly erroneous") was modeled on the EAB's historic federal administrative review of PSD permitting decisions. *Accord., In re City of Palmdale* 15 E.A.D. 700, 705 (EAB 2012) (A "petitioner must not only specify objections to the permit but also must explain why the permit issuer's previous response to those objections is clearly erroneous otherwise warrants review."). The EAB best explained it as follows:

> **The regulatory requirement that a petitioner must raise issues during the public comment period "is not an arbitrary hurdle, placed in the path of potential petitioners simply to make the process of review more difficult;**

rather, it serves an important function related to the efficiency and integrity of the overall administrative scheme. As we have explained in the past, '[t]he intent of these rules is to ensure that the permitting authority * * * has the first opportunity to address any objections to the permit, and that the permit process will have some finality.'" *BP Cherry Point,* 12 E.A.D. at 219 (quoting *In re Sutter Power Plant,* 8 E.A.D. 680. 687 (EAB 1999)). "The effective, efficient, and predictable administration of the permitting process demands that the permit issuer be given the opportunity address potential problems with draft permits before they become final." *In re Encogen Cogeneration Facility,* 8 E.A.D. 244, 250 (EAB 1999). The Board and the Administrator have explained that the PSD permitting process requires a specific time for public comment so that issues may be raised and "the permit issuer can make timely and appropriate adjustments to the permit determination, or, if no adjustments are made, the permit issuer can include an explanation of why none are necessary." *In re Union County Res. Recovery Facility,* 3 E.A.D. 455, 456 (Adm'r 1990); *accord Sutter Power*, 8 E.A.D. at 687. Accordingly, the requirement to raise all reasonably ascertainable issues and reasonably available arguments during the public comment period has an important role in establishing the proper staging of the permit decision process. We have explained as follows:

> **If an issue is not raised during the notice and comment process, * * * the permitting authority is provided no opportunity to address the issue specifically prior to permit issuance. In such instances, if the Board were to exercise jurisdiction, it would become the first-level decisionmaker as to such newly raised issues, contrary to the expectation that "most permit conditions should be finally determined at the [permit authority] level.'" *Knauf I*, 8 E.A.D. at 127 (quoting 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)). Alternatively, the Board might remand such issues back to the permitting authority for initial determination at that level, potentially resulting in an unnecessarily protracted permitting process, where each time a final permit is issued and a new issue is raised on review, the permit must be sent back to the permit issuer for further consideration, Such an approach would undermine the efficiency, predictability and finality of the permitting process.**

***BP Cherry Point*, 12 E.A.D at 219-20.**

***In re Christian County Generation, LLC* 13 E.A.D. 49, 459-460 (EAB 2008).**

Again, only those issues that were appropriately raised during the public comment period (and for which the Agency's previous response to those issues was clearly erroneous or which involve an exercise of discretion or an important policy consideration that the Board should, in its discretion, review) are appropriately before the Board for review. *See,* 415 ILCS 5/40.3(a)(2). Allowing a petitioner to

rely upon any document in the record would inappropriately expand the statutory language of Sections 40.3(a)(2)(ii) and (iii) of the Act (requiring the petition to "state the issues proposed for review, *citing to the record where those issues were raised* . . . and explain why the Agency's previous response, if any, to those issues is . . . clearly erroneous").

2. **Board** - And another part of that question, if the petitioner raises the question in the petition that was raised by someone else during the public comment period or before or after public comment period that wasn't raise by the petitioner itself, would that still be appropriate? (Tr. at 95).

While this question by the Board is presented as if a petitioner raised a "question" in a petition that was raised by someone else during the public comment period, the Illinois EPA will respond to this question by the Board as if it was an "issue" raised by someone else during the public comment period. To the extent that an issue was raised by a participant in the public comment process and another participant in the public comment process filed a Petition for Review with the Board explaining how the Agency's previous response, if any, to that issue (raised by the other participant) is clearly erroneous or an exercise of discretion or an important policy consideration that the Board should, in its discretion, review, nothing in Section 40(a)(3) would prohibit the Board from accepting such a Petition for Review.

However, public comments must be provided and/or submitted during the public comment period. To the extent that this question by the Board is asking whether a participant during the public comment period could rely upon "comments" filed by either a participant or nonparticipant after the public comment period, this would not be appropriate as public comments must be submitted during the period of time designated as the public comment period. Again, the Illinois EPA is under no obligation to consider any "comments" submitted after the close of the public comment period. If the Illinois EPA were to do so, it could necessarily make it impossible for the Illinois EPA to comply with another requirement of Part 204, the requirement to make a decision on a permit application within one year of the submittal of a complete application.

3. **Board** – Page 58, Question Number 26. The Agency – I'm sorry, the Board was asking if in Section 204.560 it would be appropriate to replace "by a state or lawful air pollution agency" with "agency." And the Agency's response pretty much was that it's not appropriate to make such replacement.

Could you please clarify what other state or local air pollution control agencies would be included except for the Agency?

That's when you mentioned the City of Chicago example. Can you please list who else you think would be covered by this statement? (Tr. at 95-96).

The Illinois EPA is the only state air pollution control agency in Illinois. To the

best of the Illinois EPA's knowledge, two local governmental entities in Illinois currently have departments that routinely address emission units and could be covered by this term. As previously identified by the Agency, these entities could include the City of Chicago and the Cook County Department of Environmental Control. In the event other governmental entities adopt ordinances or take other actions restricting operation and emissions of sources within their jurisdiction, this could extend to those authorities in the future as well.

Again, the subject of local air pollution control agencies is only relevant to the definition of "Potential to Emit" in Section 204.560. The presence of "local air pollution control agencies" in this definition would appropriately allow, consistent with applicable guidance from USEPA, a limitation to restrict a source's "potential to emit" so long as the limitation is legally and practicably enforceable by a state or local air pollution control agency. As such, it provides for enforceable limitations that restrict a source's potential to emit to be established by governmental entities other than the USEPA and state air pollution control authorities.

Accordingly, in Section 204.560, the phrase "by the "Agency" should not be substituted for the phrase "by a state or local air pollution control agency." Nor should additional references to the City of Chicago or Cook County be added to this definition. The current phrase is consistent with relevant USEPA guidance. ***See, Release of Interim Policy an Federal Enforceability of Limitations on Potential to Emit from John S. Seitz, Director, Office of Air Quality Planning and Standards, to Regional Office Addressees,*** **dated January 22, 1996. ("The term 'federally enforceable' should now be read to mean 'federally enforceable or legally and practicably enforceable by a state or local air pollution control agency.' ")**

4. **Board** – Page 69, Question 38.b.1-2, so during the first hearing, the question I was asking is when the Agency makes – uses its discretion to help grant the PAL, could the Agency identify some reasons or some criteria it will take into account to not grant the PAL. And the Agency point in the response to that, to the response to previous question. And in that question, which is i-1, the Agency did not provide any additional criteria it may use while exercising its discretion not to use PAL.

So I will just ask the Agency to update that question one more time.

The question is, again, as was established through the answers that Agency does have a discretion to not grant PAL even when the applicant complies with all the requirements, The question I have is, while exercising the discretion not grant, are there any criteria that the Agency knows of, any reasoning that the Agency has in mind at this point that it will be used to not grant PALs while exercising its discretion, (Tr. at 98-99).

While the discretion afforded in proposed Section 204.1800 is consistent with the discretion afforded in 40 CFR 52.21(aa) and 51.166(w), no additional criteria exist beyond those identified in Subpart K of proposed Part 204. ***See,*** **proposed Section**

204.1800(a) ("The Illinois EPA is allowed to establish a PAL at a major stationary source, provided that at a minimum, the requirements in this Section are met."). *See also*, proposed Section 204.1600(a) ("The Illinois EPA may approve the use of an actuals PAL for any existing major stationary source if the PAL meets the requirements in this Subpart."). As previously indicated in the Agency's First Comments, the last paragraph in the Agency's response to Question 38b i-1, the Illinois EPA would not object to alternative wording that would require action on an application for a PAL permit. This change could be so simple as changing proposed Section 204.1600(a) as follows:

> **The Illinois EPA ~~may~~ shall approve the use of an actuals PAL for any existing major stationary source if the PAL meets the requirements in this Subpart.**

A similar change would need to be made to proposed Section 204.1800(a) as follows:

> **The Illinois EPA ~~is allowed to~~ shall establish a PAL at a major stationary source, provided that at a minimum, the requirements in this Section are met.**

The Illinois EPA does not expect that this would prevent SIP approval, as any PAL permit that would be issued would be required to comply with the relevant requirements for PAL permits.

5. **IERG** – Madam Hearing Officer, just one follow-up to the question that you raised about the completeness notification, the Agency has talked about Section 204.1300, which is the notification of completeness or of deficiency and then 204.1330 which states "that within one year after receipt of a complete application a permit shall be granted or denied by the Illinois EPA."

If the Agency does not issue a completeness determination or notification of deficiency within 30 days of submittal, what is the Agency's position on the start date for the one-year clock in 204.1330?

HRO – You're talking about Question 34, correct, on page 61?

IERG – Correct. (Tr. at 99-100).

IERG – And, Ms. Carter, I see the answer to Question 49 addresses the absence of a notification if the application is patently incomplete. I guess my questions is also considering the opposite circumstance where there is no such obvious incompleteness. (Tr. at 100-101).

Under Section 204.1330, as proposed by the Illinois EPA, if within 30 days of the date of receipt of an application for a PSD permit, the Illinois EPA does not notify the permit applicant that its application is deficient, the applicant could, of course,

presume that the one-year clock in Section 204.1330 by which the Agency is to take action on the application is based on the date on which that application was received.

However, if the submitted application is patently incomplete, this presumption would be flawed. As discussed in the Agency's response to Question 49 in the Agency's First Comments, based on the Illinois EPA's years of experience in processing PSD applications, applications are commonly submitted in pieces. As a practical matter, if an applicant initially submits a partial application or an application that is patently incomplete, the applicant should not expect action by the Illinois EPA within one year of the date of initial submittal.

Moreover, even if the submitted application is not patently incomplete, an applicant should not presume that the application is actually complete so as to allow favorable action to be taken on the application, much less favorable action to be taken within one year. As a general matter, this is because the technical decisions that may be entailed when acting on applications for PSD permits are such that the existence of certain deficiencies in PSD applications cannot be determined without conducting the technical review of the applications. For example, the evaluation by permitting authorities of BACT demonstrations in PSD applications routinely entails review of and comparison to information that is not in the submitted application. Review of air quality analyses is often most effectively conducted by the permitting authority by performing audit modeling for selected model runs in the air quality analysis in the PSD application. At best, an applicant for a PSD permit should expect that the initial 30-day review of an application for a PSD permit will serve only to identify gross deficiencies in the application. For most proposed PSD projects, even if the application for a PSD permit is nominally complete based on a "30-day completeness review" by the permitting authority, it will be necessary for the applicant to clarify, supplement or revise its application as the permitting authority carries out the technical review of the application. If favorable action on a PSD application is to be possible within one-year, as specified by the CAA, the applicant for the PSD permit must be prepared to expeditiously supplement or revise its applications as the permitting authority identifies the need for this to occur.[4]

6. **Board** – Question 49, I just want to clarify, when the Agency receives an application whether it's patently complete or patently incomplete, doesn't that trigger a 30-day response requirement? (Tr. at 101).

The Illinois EPA will appropriately notify applicants within 30 days of receipt of an application when the submittal is considered to be patently incomplete or to be a

[4] In this regard, it may be noteworthy that the CAA does not set deadlines by which permitting authorities must determine whether applications for PSD permits are complete. Section 165(c) of the CAA provides a deadline for action by a permitting authority based on the date that an application submitted for a PSD permit actually becomes complete. "Any completed permit application under Section 110 [of the CAA] for a major emitting facility in any area to which this part applies shall be granted or denied not later than one year after the date of filling of such completed application."

partial application, as well as when the submittal contains material fully addressing the applicable requirements of the PSD rules that apply for a proposed project.

7. **Board** – And that – why wouldn't that be addressed by the notice indicating the deficiencies? Can't you just note the deficiencies in your response for the 30 days saying the essential part is missing? (Tr. at 102).

Again, as previously stated in response to Question 6, the Illinois EPA will appropriately notify applicants when submittals are considered to be patently incomplete or to be partial applications. In such notifications, the Illinois EPA will identify the material that is missing.

8. **Board** – Wouldn't you agree that the applicant 30 days not receiving any information from the Agency would consider that to be a violation of Agency obligations to respond and provide notice? (Tr. at 103).

As the Illinois EPA previously stated, the Illinois EPA will appropriately notify applicants when submittals are incomplete. Accordingly, the situation described in this question should not arise. However, if the Illinois EPA were to fail to notify the applicant within 30 days of receipt as to the completeness of an application for a PSD permit or any deficiency in the application or information submitted in such an application, the Illinois EPA's inaction would not be consistent with proposed Section 204.1300. As previously discussed, the applicant would have recourse if the Agency failed to take action within one year after receipt of a complete application. Proposed Section 105.604(b) would address the appeal rights of the applicant to the Board if the Illinois EPA fails to act on an application for a PSD permit within one year of submittal of a complete PSD application. *Accord.*, 415 ILCS 5/40/3(a)(1) ("If the Agency fails to act on an application for a PSD permit within the time frame specified in paragraph (3) of subsection (f) of Section 39 of this Act, the applicant may, before the Agency denies or issues the final permit, petition for a hearing before the Board to compel the Agency to act on the application in a time that is deemed reasonable."). This approach is generally consistent with principles of administrative law that provide that provisions such as Section 204.1330 be accompanied by means by which an aggrieved party can seek action by an administrative agency. By way of analogy, if the Board were to fail to take final action on a petition for review of an Agency final action pending before it within 120 days after receipt, the petitioner is entitled to an Appellate Court order. 415 ILCS 5/40(a)(3) and 40.2(c).

9. **Board** – Would the Agency like to propose any additional language to address this particular circumstance when the application is patently incomplete and provide some criteria for that? (Tr. at 103).

The Illinois EPA would direct the participants to its responses above. Accordingly, additional language is not being proposed to specifically address patently

incomplete applications.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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EXHIBIT
A

Environmental Justice (EJ) Policy

Léalo en Español (/epa/topics/environmental-justice/es/Pages/ej-policy.aspx)

Introduction

The Illinois Environmental Protection Agency (Illinois EPA) is committed to protecting the health of the citizens of Illinois and its environment, and to promoting environmental equity in the administration of its programs to the extent it may do so legally and practicably. The Illinois EPA supports the objectives of achieving environmental equity for all of the citizens of Illinois.

This document carries out that belief in written policy and provides specific parameters for the Illinois EPA's bureaus, divisions and offices to implement the policy to reduce environmental inequities, and to prevent and reduce pollution overall.

The assumption of this policy is that it is evolutionary. Environmental Justice or EJ (also known as Environmental Equity or EE) policies and activities will continue to develop, as appropriate, through the normal course of the Illinois EPA's regulatory and programmatic duties. Illinois EPA recognizes that this policy will not alone achieve environmental equity in all instances. Moreover, public and private commitment to the implementation of this policy is needed to achieve the goals of this policy and to promote environmental equity in this State.

Key goals of this policy are as follows:

- to ensure that communities are not disproportionately impacted by degradation of the environment or receive a less than equitable share of environmental protection and benefits;
- to strengthen the public's involvement in environmental decision-making, including permitting and regulation, and where practicable, enforcement matters;
- to ensure that Illinois EPA personnel use a common approach to addressing EJ issues; and
- to ensure that the Illinois EPA continues to refine its environmental justice strategy to ensure that it continues to protect the health of the citizens of Illinois and its

environment, promotes environmental equity in the administration of its programs, and is responsive to the communities it serves.

Definition

The Illinois EPA defines the term "environmental justice " as follows:

> "Environmental Justice" is based on the principle that all people should be protected from environmental pollution and have the right to a clean and healthy environment. Environmental justice is the protection of the health of the people of Illinois and its environment, equity in the administration of the State's environmental programs, and the provision of adequate opportunities for meaningful involvement of all people with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.

Elements Of The Policy

1. Defining Responsible Persons

The Illinois EPA will identify the persons responsible for coordinating various EJ activities, including an Illinois EPA EJ Officer responsible for coordinating all of the EJ activities for the Illinois EPA, and a work group including a representative from each of the Bureaus of Air (BOA), Water (BOW) and Land (BOL), the Division of Legal Counsel and the Office of Community Relations (collectively, IEPA EJ Work Group).

The EJ Officer shall have primary responsibility for coordinating all EJ efforts on the behalf of the Illinois EPA, acting as the spokesperson for the Illinois EPA on EJ, remaining current on all national developments on EJ, and coordinating, reviewing and signing off on responses to EJ complaints involving the Illinois EPA. The EJ Officer may review proposed permits, plans, and policies for consistency with this policy.

The EJ Officer is also the contact person for citizens and communities who believe their health or surrounding environment is at a significant risk. The EJ Officer will serve as a liaison between the citizen or community and the relevant Illinois EPA personnel to seek resolution of the action.

The EJ Officer will also facilitate and coordinate the continued development of the Illinois EPA's approach to EJ, addressing the areas of public notice and hearing process with respect to bilingual notice or any form of "special" notice or hearing, complaint response, permitting response, and planning and analysis. This approach should be developed based on separate analyses and recommendations developed by the BOA, BOW and BOL (collectively, the Bureaus), the Division of Legal Counsel, and the Office of Community Relations for these areas. The approach will include an analysis by the Illinois EPA of the tools it possesses to address EJ in these areas, and a list of employees who could be assigned to handle various tasks identified in its recommendations.

2. Defining EJ Activities

The EJ Officer will coordinate the following EJ activities on behalf of the Illinois EPA, with the advice of the IEPA EJ Work Group:

- Arrangements for bilingual publication of notice, where appropriate, on proposed Illinois EPA permitting actions or informational hearings, or any form of "special" public notice;
- Arrangements for bilingual or multi-lingual hearings, where appropriate, on proposed Illinois EPA permitting actions or informational hearings, or any form of "special" public hearings or meetings;
- Response to public comments received on proposed permitting actions raising EJ concerns, including the preparation of environmental justice assessments as needed to support responses;
- Response to EJ complaints challenging the Illinois EPA's permitting actions;
- Response to EJ concerns raised about the Illinois EPA's enforcement program or a specific enforcement matter;
- Response to EJ concerns raised in implementation of emissions trading programs (e.g., the BOA's Emission Reduction Market System or ERMS program;
- Public participation to address or mitigate, if possible, EJ concerns, and
- Response to general inquiries concerning EJ.

3. Preparing for Avenues of Entry for EJ Concerns or Inquiries

When an EJ issue or concern is raised or inquiry is made anywhere within the Illinois EPA, the EJ Officer will be promptly advised by e-mail and voice mail and will meet with the appropriate IEPA EJ Work Group member(s) to formulate the Illinois EPA's actions and responses.

EJ Policy

Once a response or action plan has been developed to address a specific inquiry or activity, the EJ Officer will assemble the IEPA EJ Work Group to review and comment on the proposed action plan. The EJ Officer will then revise the Action Plan as he/she deems appropriate and take the Action Plan to the Director or his or her designee for approval.

Approaches/Strategies To Address And Coordinate EJ Activities

1. Public Notice and Hearing and Receipt of Public Comments

Community Outreach

The Illinois EPA has developed and implemented a public participation strategy for permits, programs and actions in potential EJ communities [1]. The Illinois EPA's Office of Community Relations (Community Relations) works with host communities to identify and address environmental concerns regarding proposed facilities and projects of significant interest and to identify environmental issues affecting communities in Illinois prior to the permitting or action stage. After identifying environmental matters and any Illinois EPA actions of concern to communities, Community Relations holds regional meetings in and around the potentially affected communities. The number and scope of these meetings has varied from year to year depending on site activities and the level of community interest.

[1] A "potential" EJ community is a community with a low-income and/or minority population greater than twice the statewide average. In addition, a community may be considered a potential EJ community if the low-income and/or minority population is less than twice the state-wide average but greater than the statewide average and that has identified itself as

an EJ community. If the low-income and/or minority population percentage is equal to or less than the statewide average, the community should not be considered a potential EJ community.

Community Relations is charged with the following tasks:

- Preparing and Issuing Public Hearing Notices
- Identifying Community Questions and Concerns
- Preparing and Distributing Fact Sheets
- Responding to Questions from the Public and the News Media
- Establishing Local Repositories
- Conducting Small Group Meetings
- Assisting Illinois EPA Staff in preparing answers before public hearings
- Assisting with Public Hearings
- Preparing Responsiveness Summaries

The Illinois EPA has found that where it conducts a dialogue with interested and potentially affected citizens, the permit application process tends to function more smoothly for the applicant, the Illinois EPA, and the public. Many of the questions from the public seek information within the following categories: the permit process, the nature and operation of the facility, technical aspects of pollution control, legal requirements, and public input. Risks to public health and the environment, monitoring the facility's operation, and opposition to a proposed facility are issues that often involve the coordinated participation of other organizations in developing a response.

Community Relations has also developed "Mailing Lists of Interested and Potentially Affected Citizens." Individuals may request to be added to these lists or, based on prior contact, the Illinois EPA may add these individuals or groups to a list. These individuals or groups receive notices of hearings on regulations, permit applications, or any other significant Agency action likely to impact the community in which the individual lives, or in which the group has expressed an interest.

Small Group Meetings

For any permit action requiring public notice and for which the Illinois EPA receives a request for public hearing, Community Relations often holds "small group" or "living room" meetings in the affected community. Community Relations maintains a list of all "smaller" environmental groups (i.e., grass root organizations formed to address local environmental issues), and contacts the affected group(s) to participate in the small group meetings. (Note: This list generally contains between 120 and 180 organizations.) A

smaller, more intimate forum is generally selected to hold these meetings, such as the mayor's office or the public library. This type of forum is selected because it encourages greater participation and candid dialogue, and more time can be spent addressing the issues of concern. Through these efforts, the Illinois EPA attempts to encourage public participation and awareness of environmental concerns and of Illinois EPA actions affecting local communities.

Informational Hearings

In addition, the State of Illinois has regulations that allow for public participation in the permitting process, beyond those hearings otherwise required by law or regulation. (See: 35 Ill. Adm. Code 166.) That category of hearings is termed "informational hearings"; i.e., a hearing that is not required by law to be held, but which is held for the purpose of informing the public of a proposed Illinois EPA action or when the Illinois EPA wishes to gather information or comments from the public prior to making a final decision on a matter. (See: 35 Ill. Adm. Code 166.120(b).) Under Illinois law, the Director of the Illinois EPA may determine whether the construction of an emission unit (or the revision to a permit for such a unit) is of public interest, and allow for public participation in the permitting process where such participation is not otherwise required. (See: 35 Ill. Adm. Code 252.102(a)(6) & (a)(8)). The criteria that the Director may consider in determining whether an emission unit is of public interest include:

- The type of permit for which the application is made;
- The nature and amount of pollutants that will be emitted by the source;
- Possible effects of the emissions on health and the environment;
- The location of the source;
- The interest in the source exhibited by the public, based on comments and inquiries received by the Illinois EPA;
- Other factors that are distinctive to the source; and
- The proposed action by the Illinois EPA.

The public participation process includes: providing the public with notice of its intent to issue a permit; providing the public with a copy of the proposed permit and supporting documentation for comment; electing to hold a public hearing on the proposed permitting action without waiting for a request to do so in matters where a hearing is not statutorily required and providing for a written comment period following the hearing; and preparing a detailed responsiveness summary addressing all significant public comments on the proposed permitting action. (See: 35 Ill. Adm. Code 166)

Local Siting Approval

The State of Illinois is somewhat unique compared to many other states in that there is also a local siting approval process under the Illinois Environmental Protection Act (Act) (415 ILCS 5/1 et seq.) for "Pollution Control Facilities" or "PCFs." PCFs include landfills, commercial incineration facilities, wastewater treatment plants, and similar waste treatment, storage or disposal facilities.

The local siting approval process requires that the developer of a new PCF demonstrate to the satisfaction of the governing body of a municipality or the county board of a county in which the proposed PCF is to be located that the project will meet nine specific criteria set forth in the statute. In addition, the application is subject to a public participation process that requires providing written notice of the application to certain adjacent property owners and members of Illinois' General Assembly from the legislative district in which the facility is to be located, and notice to the general public by newspaper publication. At least one public hearing must be held and any person may comment on the proposed facility. The decision of the governing body must be in writing, must state its bases and may be appealed to the Pollution Control Board. The Illinois EPA is not a participant in this process, other than to ensure that a project that is a new PCF has the requisite siting approval prior to the issuance of a construction or development permit. (See: 415 ILCS 5/39.2).

These efforts ensure that there is an appropriate level and quality of outreach for all significant new and existing Illinois EPA programs, regulations, permitting actions and community listening sessions.

Bi- and Multi-Lingual Efforts

As part of the Illinois EPA's EJ Policy, the EJ Officer will determine when public notices should be bi- or multi-lingual, where these notices should be published, and when translators should attend hearings. The EJ Officer will also review and approve the proposed response to EJ comments raised at hearing or in written comments, and coordinate this response among the Bureaus, Division of Legal Counsel and the Office of Community Relations.

Exploring New Avenues for Public Participation

Increased and alternative approaches to public participation are the areas in which most states are focusing their EJ efforts. The EJ Officer and the EJ Advisory Work Group will explore better opportunities for increased public participation in sensitive rulemakings and permitting actions. The EJ Officer and EJ Advisory Work Group will also explore opportunities for public participation in the resolution of enforcement actions.

2. Receipt of EJ Complaint

The Illinois EPA has developed, implemented and published an EJ Grievance Procedure (/epa/topics/environmental-justice/Pages/grievance-procedure.aspx). 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).

3. Permitting Actions

When concern is expressed or identified regarding potential environmental impacts in an environmental justice area, the Illinois EPA will look at the information provided and other available information to assess whether there are potential significant adverse environmental impacts. If there are any such potential adverse impacts, the Illinois EPA will either request an assessment or assess these impacts using the information and tools reasonably available, and within the time constraints allowed by applicable state and federal law. The Illinois EPA will make such assessments available to the public and other affected persons or entities. An appropriate response will be made based on these assessments.

However, these assessments raise feasibility and resource issues. The Illinois EPA notes that the task of addressing EJ is exacerbated by the absence of a consensus on the validity of cumulative risk assessment tools and clear direction at the federal level. There are significant uncertainties regarding the availability and effectiveness of cumulative risk assessment tools, the availability of emissions data and emissions inventories, and these uncertainties increase as the scope of cumulative impact analysis increases. The

availability of resources to make such assessments is also a major concern. However, the Illinois EPA will continue to commit appropriate staff time and other resources to become familiar with developments in risk assessment models and methodologies.

4. Training / Policy Handbook

The EJ Advisory Work Group will develop internal procedures for addressing EJ complaints, including specific concerns about permitting actions. The EJ Advisory Workgroup will also develop a policy handbook for distribution among Illinois EPA personnel to keep them apprised of developments in the Illinois EPA's EJ Policy.

ENVIRONMENTAL JUSTICE (/EPA/TOPICS/ENVIRONMENTAL-JUSTICE/PAGES/DEFAULT.ASPX)

EJ Policy (/epa/topics/environmental-justice/Pages/ej-policy.aspx)

Outreach (/epa/topics/environmental-justice/Pages/outreach.aspx)

Contact EJ Officer (/epa/topics/environmental-justice/Pages/officer.aspx)

Notice of Nondiscrimination (/epa/topics/environmental-justice/Pages/notice-of-nondiscrimination.aspx)

Grievance Procedure (/epa/topics/environmental-justice/Pages/grievance-procedure.aspx)

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East St. Louis Lead Paint Outreach (/epa/topics/environmental-justice/Pages/lead-paint.aspx)

Commission on Environmental Justice (/epa/topics/environmental-justice/commission/Pages/default.aspx)

Justicia Ambiental (/epa/topics/environmental-justice/es/Pages/default.aspx)

Permit Tracking System (http://epadata.epa.state.il.us/TieFileData/index.asp)

EJ Mapping (http://illinois-epa.maps.arcgis.com/apps/webappviewer/index.html?id=f154845da68a4a3f837cd3b880b0233c)

BOL Database Search (/epa/topics/cleanup-programs/bol-database/Pages/default.aspx)

Document Explorer (https://external.epa.illinois.gov/DocumentExplorer)

RECENT

Policies

Policies and Disclaimers (/epa/Pages/policies-and-disclaimers.aspx)
Notice of Nondiscrimination (/epa/topics/environmental-justice/Pages/notice-of-nondiscrimination.aspx)
Notificación Sobre Actos Discriminatorios (/epa/topics/environmental-justice/es/Pages/notice-of-non-discrimination.aspx)

Contact Us

1021 North Grand Ave. East
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Springfield, IL 62794-9276
(217) 782-3397 (tel:2177823397)

State Government

State of Illinois (http://www.illinois.gov/)
Office of the Governor (http://www.illinois.gov/Gov)
Inspector General (http://www.illinois.gov/oeig/Pages/default.aspx)
Illinois Business Portal (http://www.illinois.gov/business/Pages/default.aspx)
Get Covered Illinois (https://getcoveredillinois.gov/)

(/)
Web Accessibility (http://www.dhs.state.il.us/page.aspx?item=32765)
State Phone Directory (https://cmsapps.illinois.gov/TeleDirectory)

State Agencies (/_layouts/15/FIXUPREDIRECT.ASPX?WebId=e0993042-42f2-4a0b-804e-6d1788289ff8&TermSetId=24819a58-6d26-4b89-ac19-a52b67bba01e&TermId=a8242ede-ac69-430d-a889-83152be52c50)
Illinois Privacy Info (/Pages/About/Privacy.aspx)

Governor JB Pritzker (/sites/gov)

EXHIBIT
B

ILLINIOS EPA
ENVIRONMENTAL JUSTICE
PUBLIC PARTICIPATION POLICY
APRIL 20, 2018

I. TITLE: Illinois EPA Environmental Justice Public Participation Policy

II. PURPOSE: This policy explains the methods by which the Illinois Environmental Protection Agency (Illinois EPA or Agency) will engage with the public in communities located in identified areas of Environmental Justice (EJ) concern by the Illinois EPA

Illinois EPA defines "area of EJ concern" as a census block group or areas within one mile of a census block group with income below poverty and/or minority population greater than twice the statewide average.

The Illinois EPA has developed a Geographic Information System (GIS) mapping tool call EJ START to identify census block groups and areas within one mile of census block groups meeting the EJ demographic screening criteria. EJ START is publicly available and can be found on the Illinois EPA's EJ webpage (http://www.epa.illinois.gov/topics/environmental-justice/index).

The Illinois EPA's EJ public participation policy focuses on public outreach in the context of permitting transactions but may be applied to additional Illinois EPA matters.

III. RESPONSIBLE PERSON: The Environmental Justice Officer (EJO) has primary responsibility for coordinating all EJ efforts on behalf of the Illinois EPA and will act as the spokesperson for the Illinois EPA on EJ.

The Office of Community Relations will have a lead role in preparing the public participation plans, establishing local information repositories and conducting community meetings. The Bureaus and the Office of Community Relations will coordinate on the preparation and issuance of public notices and fact sheets.

The EJO is the contact person for citizens and communities in areas of EJ concern. The EJO will serve as a liaison between the citizen or community and the relevant Illinois EPA personnel to seek resolution of any issues raising EJ concerns.

IV. ACTIVITIES SUPPORTED BY THE EJO:

A. Permitting transactions.

1. Illinois EPA's EJ public participation policy applies to permitting transactions likely to generate significant public interest.

2. If the source involved in the permitting transaction is a High Priority Violator per USEPA guidance or is the subject of an enforcement action (i.e., has been referred to a prosecutorial agency such as the Illinois Attorney General's Office), Illinois EPA will take additional outreach measures as discussed below.

B. Complaint Investigations

1. Illinois EPA will timely respond to complaints from areas of EJ concern received by the EJO.

2. EJO will apprise complainants of the results of the investigations.

C. Enforcement

1. The EJO will act as liaison for citizens and community groups located in areas of EJ concern to keep communities apprised of an enforcement action's status.
2. Illinois EPA will continue to solicit ideas for the Supplemental Environmental Project Bank.
3. Enforcement Orders may be viewed at: www.epa.state.il.us/enforcement/orders/.

V. COMMUNITY OUTREACH PROCEDURES

A. An effective public participation strategy emphasizes early and meaningful public involvement throughout the permitting process or other Illinois EPA activities.

B. Each Bureau will review permit applications and other actions identified herein to determine whether the action will take place in an area of EJ concern as determined by the Illinois EPA EJ Start tool.

C. For areas of EJ concern, the EJO will recommend the appropriate outreach, if any, based on, among other considerations, the type of permit, potential impact of the project or Agency action, type of source and level of interest.

D. Public participation options in areas of EJ concern

1. Community Outreach by Regulated Entity/Source/Permit Applicant

a. Illinois EPA will encourage the permit applicant to meet with community stakeholders to promote open dialogue early in the permitting process for permitting actions likely to be of significant public interest. Meaningful public outreach often occurs prior to the submission of a permit application to the Agency.

i. The applicant is encouraged to provide notice to residents located in an area of EJ concern of the proposed project and provide basic information about the project to interested community members.

ii. The applicant is also encouraged to develop a Community Relations Plan to structure ongoing dialogue with neighboring communities. Information concerning Community Relations Plans, including examples, may be found at 35 Ill. Adm. Code Part 1600, Appendix A.

2. Community Outreach by Illinois EPA

a. Notifications

i. Illinois EPA will provide the community with information regarding proposed projects via EJ notifications, which are mailed to community leaders, public officials, environmental groups, concerned citizens and the permit applicant.

ii. Public Notices will be written in terminology and languages easily understood by the majority of readers, except where specific public notice language is otherwise required. When required, notices will be placed in legal notice sections or other sections of local publications.

b. Public Meetings and Hearings

i. Informational meetings – The Illinois EPA and/or the source may hold an informational meeting or availability session.

ii. For permitting transactions, the purpose of the meeting is to inform the residents in areas of EJ concern of the scope and nature of the project in a timely, interactive manner and to explain the permitting process. Informational meetings may be held prior to a public hearing or may be held when a public hearing is not required.

iii. Informational meetings may also be held to explain enforcement related matters or other Illinois EPA activities that are of concern to the public.

iv. The Illinois EPA will make a good faith effort to provide a translator when it is known that residents do not speak English very well or when the Illinois EPA receives a request for a translator within two weeks of any public hearing or meeting

and when the need for a translator is adequately justified.

c. Fact Sheet and Project Summary

i. Illinois EPA will provide a plain language summary of the major aspects of the proposed project, including the purpose and location of the proposed activity and facility, any anticipated environmental impacts, and any controls or work practices that will limit those impacts.

ii. Illinois EPA will make fact sheets available on the Agency's webpage. Written fact sheets and other available information will be made available for persons without internet access when requested.

iii. As appropriate, the Illinois EPA will translate fact sheets into the predominate language of the community if it is not English.

d. Document Availability

i. Information is available from the Illinois EPA through document repositories, the Illinois EPA's webpage and the Illinois Freedom of Information Act (FOIA) (http://www.epa.illinois.gov/foia/index)

ii. The EJO will assist citizens and groups in identifying available information relevant to EJ concerns.

EXHIBIT
C

Grievance Procedure

Léalo en Español (/epa/topics/environmental-justice/es/Pages/grievance-procedure.aspx)

Purpose

In compliance with 40 C.F.R., Parts 5 and 7, Section 7.90(a), the Illinois Environmental Protection Agency 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.

The grievance procedure is intended to address allegations of discrimination on the basis of:

- Race;
- Color;
- National origin;
- Religion;
- Disability;
- Income;
- Age; or
- Gender.

The grievance procedure provides a process for filing a timely complaint to the proper authority and describes the process that will be used to investigate and resolve the complaint. However, the procedures do not apply to administrative actions that are being pursued in another forum.

Submission of a Complaint

1. Filing of Complaint

A person (or the authorized representative of a person) who believes that he or she or a class of persons has been discriminated against may file a complaint with the Illinois EPA. The complaint should:

1. be in writing;
2. be filed within 60 days of an alleged violation (except as otherwise indicated in the following paragraph);
3. describe with specificity the action(s) by Illinois EPA that allegedly result in discrimination in violation of 40 C.F.R. Parts 5 and 7;
4. describe with specificity the discrimination that allegedly has occurred or will occur as the result of such action(s); and
5. identify the parties impacted or potentially impacted by the alleged discrimination.

The Illinois EPA may request additional information from the complainant, if this information is needed to meet the complaint requirements described above. The Illinois EPA may waive requirement two (2) in its discretion, in order to address allegations of potential discrimination caused by pending actions at the earliest appropriate and feasible juncture; or, for good cause, to address complaints filed more than 60 days after an alleged violation.

All written complaints shall be addressed to the following address:

Illinois Environmental Protection Agency
Environmental Justice Officer
1021 North Grand Avenue East
Post Office Box 19276
Springfield, Illinois 62794
(217) 524-1284 (tel:2175241284)

Within 10 days of receiving a written complaint, Illinois EPA will provide the complainant with written notice of receipt. At this time, Illinois EPA may request any additional information needed to meet the complaint requirements above. Within 10 days of receiving any additional information, Illinois EPA will provide the complainant with written notice that the complaint is complete.

2. Determination of Jurisdiction and Investigative Merit

The Illinois EPA, based on information in the complaint and other information available, will determine if it has jurisdiction to pursue the matter and whether the complaint has sufficient merit to warrant an investigation. A complaint shall be regarded as meriting investigation unless:

1. It clearly appears on its face to be frivolous or trivial;
2. Within the time allotted for making the determination of jurisdiction and investigative merit, Illinois EPA voluntarily concedes noncompliance and agrees to take appropriate remedial action or reaches an informal resolution with the complainant;
3. Within the time allotted for making the determination of jurisdiction and investigative merit, the complainant withdraws the complaint; or
4. It is not timely and good cause does not exist for waiving the timing requirement under section A.2.

Disposition of Complaints

Within 120 days of accepting a written complaint, Illinois EPA will respond in writing to the complainant with resolution.

ENVIRONMENTAL JUSTICE (/EPA/TOPICS/ENVIRONMENTAL-JUSTICE/PAGES/DEFAULT.ASPX)

EJ Policy (/epa/topics/environmental-justice/Pages/ej-policy.aspx)

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BOL Database Search (/epa/topics/cleanup-programs/bol-database/Pages/default.aspx)

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Contact Us

1021 North Grand Ave. East
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Springfield, IL 62794-9276
(217) 782-3397 (tel:2177823397)

State Government

State of Illinois (http://www.illinois.gov/)
Office of the Governor (http://www.illinois.gov/Gov)
Inspector General (http://www.illinois.gov/oeig/Pages/default.aspx)
Illinois Business Portal (http://www.illinois.gov/business/Pages/default.aspx)
Get Covered Illinois (https://getcoveredillinois.gov/)

STATE OF ILLINOIS)
) **SS**
COUNTY OF SANGAMON)
)

CERTIFICATE OF SERVICE

I, the undersigned, an attorney, state the following:

I have electronically served the attached **SECOND POST HEARING COMMENTS** upon the persons on the attached Service List.

My e-mail address is sally.carter@illinois.gov.

The number of pages in the e-mail transmission is 69.

The e-mail transmission took place before 5:00 p.m. on April 4, 2019.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Sally O. Carter

Sally Carter
Assistant Counsel
Division of Legal Counsel

Dated: April 4, 2019

1021 North Grand Avenue East
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