BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

NOTICE OF FILING

To: Don Brown, Clerk
Illinois Pollution Control Board
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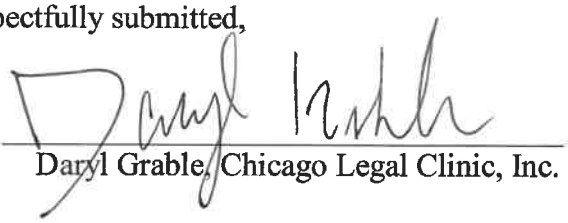
Chicago, IL 60601

And Attached Service List

Please take notice that on the 5th day of April, 2019, I filed electronically Post Hearing Comments on behalf of Citizens Against Ruining the Environment with the Office of the Clerk of the Illinois Pollution Control Board.

A copy of this filing is hereby served upon you.

Respectfully submitted,

By: 
Daryl Grable, Chicago Legal Clinic, Inc.

Dated: April 5, 2019

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Citizens Against Ruining the Environment's Post Hearing Comments

Now comes Daryl Grable of the Chicago Legal Clinic, Inc., on behalf of their client, Citizens Against Ruining the Environment, and respectfully submits the following post hearing comments.

Citizens Against Ruining the Environment ("CARE") is a not-for-profit environmental justice organization based in Will County, representing the interests of, primarily, Will County residents. As the oldest environmental non-profit in Will County, CARE has a longstanding commitment to ensuring that corporate profits do not take precedent over equal access to clean air, clean water, clean soil, and clean food for its members and the public and large. These comments focus on evidence now before the Illinois Pollution Control Board ("Board") establishing that the Board may properly adjudicate environmental justice claims arising in the Clean Air Act Prevention of Significant Deterioration permitting process, and that the possibility of a Federal class I designation transpiring in or around Illinois necessitates the inclusion of a provision parallel to 40 CFR § 52.21(o)(3) in the current rulemaking.

By way of summary, CARE asserts that evidence now before the Board clearly establishes that Illinois residents have been allowed to raise environmental justice concerns during a PSD permitting appeal before the Environmental Appeals Board ("EAB") for over 25 years now. This

was proper due to Executive Order 12898 ("EO 12898"), the EAB's expansive reading of 40 CFR § 124.19, and the expansive definition of Best Available Control Technology ("BACT") that exists in the Clean Air Act ("CAA"). Not only would eliminating this avenue of accountability eliminate a layer of protection afforded to Illinois residents for approximately a quarter of century, but it would go against the evidence now before the Board. The Illinois Environmental Justice Act, persuasive EAB interpretative precedent for both BACT and 40 CFR § 124.19, and Illinois Environmental Protection Agency ("IL EPA") all now provide for the Board to make its own determination as to whether it will hear environmental justice concerns during PSD permitting appeals. CARE requests that the Board make the decision to protect the residents of Illinois and promote a government that is transparent and accountable to its constituency.

Further, the newly designated Indiana Dunes National Park a mere 50 miles from the nation's third-largest city demonstrates just how real the possibility of a new Federal class I area designation is for the state. CARE believes that pro-active legislating is far preferable to reactive legislating, and respectfully requests the Board to have IL EPA draft proposed language for a provision similar to 40 CFR § 52.21(o)(3).

I. The Board has the authority to review environmental justice claims that arise in the State PSD permitting process.

A. Reviewing environmental justice considerations in the PSD permitting appeals process has been available to Illinois residents for over 20 years at the Environmental Appeals Board.

IL EPA has historically implemented the federal PSD program on behalf of US EPA pursuant to a delegation agreement since 1981. Statement of Reasons, R19-1, Ill. EPA, 2 (IPCB,

July 2, 2018)(citing to 46 Fed. Reg. 9580). "In this capacity, a PSD permit issued by [ ] Illinois EPA has been and is currently subject to review by USEPA's [Environmental Appeals Board] in accordance with 40 CFR § 124.19." *Id.* at 85. 40 CFR § 124.19 is the federal regulation governing appeals of RCRA, UIC, NPDES, and PSD permits, and that, along with EAB caselaw, formed the basis of Illinois' legislation governing the review process of PSD permits found in 415 ILCS 5/40.3(a)(2). *Id.* at 89. These regulations establish that administrative review is warranted where the permit decision involves "an exercise of discretion or an important policy consideration that the Board should, in its discretion, review." *Id.* at 89-90. This same language is mirrored in the proposed amendments to 35 Ill. Adm. Code Part 105, which would govern the new Board review process created if the current IL EPA regulatory proposal is approved.

Following the issuance of EO 12898 in 1994, the EAB interpreted 40 CFR § 124.19's expansive grant of authority to permit it to hear environmental justice claims arising during the PSD permitting process. "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 [ ] efforts to implement the Executive Order in the course of determining the validity and appropriateness of the permit decision at issue." CARE Exhibit A, 76, Feb. 26, 2019, R19-1. In other words, since at least 1995, the EAB has held that "a permit issuer should exercise its discretion to examine any 'superficially plausible' claim that a minority or low-income population may be disproportionately affected by a particular facility that is the subject of a PSD permit proceeding." Pre-Filed Questions of CARE for Illinois EPA's Witnesses, Ill. Pollution Control Board, 2-3 (IPCB, Nov. 19, 2018)(citing *In re Avenal Power Center, LLC*, 15 E.A.D. 384, 398 (EAB 2011)(quoting *In re EcoEléctronica, L.P.*, 7 E.A.D. 56, 69 n. 17 (EAB 1997)).

This is important because, as provided by IL EPA, the "statutory language of Section 40.3(a)(2)(iii) addressing standard of review derives from 40 CFR Part 124. As such, 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." Ill. EPA Post Hearing Comments, P.C. #1, Ill. EPA, 9: Question 3(b)(i) (IPCB, Jan. 24, 2019)(emphasis original). As a result, following the Agency's own logic, the EAB's determination that environmental justice claims arising during PSD permitting represent "an important policy consideration that the Board should, in its discretion, review" is "directly on point and relevant" to how the Board should interpret its identical statutory grant of authority. 40 CFR § 124.19(4)(B); *see also* 415 ILCS 40.3(a)(2)(iii); P.C. #1, Ill. EPA, 9: Question 3(b)(i) (IPCB, Jan. 24, 2019).

Thus, evidence before the Board clearly establishes that the EAB has been adjudicating claims about environmental justice in PSD permitting appeals through its interpretation of 40 CFR § 124.19's broad grant of authority, in conjunction with the policy established in EO 12898, for more than twenty years now. Should the Board choose not follow the precedent established by the EAB in interpreting 40 CFR § 124.19's language broadly, language directly mirrored in both 415 ILCS 5/40.3(a)(2) and proposed 35 Ill. Adm. Code § 105.608(a)(5)(B), the effect would be to deny Illinois residents a layer of protection and accountability that has existed for approximately a quarter of a century.

B. As it is within the Board's discretion to hear environmental justice considerations arising during state PSD permitting processes, the Board should affirm that authority.

The one distinguishing factor from the above interpretation is that the EAB was subjected to EO 12898. Here, the Board is a state entity and is not governed by EO 12898. Although the state of Illinois does not have an executive order from which to derive the consideration of environmental justice issues in the state PSD permitting process, it does have state legislation. The Illinois Environmental Justice Act, passed by the Illinois General Assembly in 2011, memorialized legislative findings 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[.]" Tr. of Proceedings 41:9-18, Feb. 26, 2019 (quoting 415 ILCS 155/5(i), (ii)).

Much like EO 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 statewide. It is from this legislation that the IPCB finds the environmental justice policy that represents "an important policy consideration that the Board should, in its discretion, review" in accordance with 40 CFR § 124.19. Although IL EPA has asserted, on multiple occasions, that "the approach currently undertaken in Illinois[,] which involves the EJ grievance procedure and the [US EPA] Office of Civil Rights" is sufficiently protective against environmental injustice, the evidence before the Board clearly establishes otherwise. Tr. 44:21-23; *see also* P.C. #1, Ill. EPA, 11-12:Question 3(d)(IPCB, Jan. 24, 2019).

IL EPA's 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 US

EPA's Office of Civil Rights." Tr. 47:10-16. US EPA's Office of Civil Rights is notoriously lacking in its fight against environmental injustice in the country, however. US "EPA has a history of being unable to meet its regulatory deadlines and experiences extreme delays in responding to Title VI complaints in the area of environmental justice," for instance. CARE Exhibit C, 5, Feb. 26, 2019, R19-1. The Chairman of the U.S. Commission on Civil Rights further found that, as of 2016: "EPA's Office of Civil Rights has *never made a formal finding of discrimination* and has never denied or withdrawn financial assistance from a recipient in its entire history, and has no mandate to demand accountability within the EPA." *Id.* (emphasis added). Thus, either the United States has eradicated environmental injustice throughout the country, or, contrary to IL EPA's opinion, US EPA's Office of Civil Rights should not be relied upon to protect Illinois residents from environmental justice issues.

Further, as far back as 2000 the General Counsel of US EPA's Office of General Counsel believed there was an implicit authorization in the CAA to incorporate environmental justice considerations in the PSD permitting process separate and apart from EO 12898. In 1993, prior to the issuance of EO 12898, the EAB issued a decision stating that "the CAA did not allow for consideration of environmental justice . . . in air permitting decisions." CARE Exhibit B, 12, Feb. 26, 2019, R19-1. "OGC pointed out, among other things, that the CAA requirement to consider alternatives to the proposed source, and the broad definition of 'best available control technology' (BACT), provided ample opportunity for consideration of environmental justice in PSD permitting." *Id.* In response to this, the EAB issued an amended opinion and order in which it deleted the contested language, although it did not officially rule on whether environmental justice considerations were permissible or not. *Id.* The definition of BACT in the regulatory proposal now before the Board is similarly broad and derived from both the regulatory, 40 CFR

§ 52.21(b)(12), and statutory, 42 U.S.C. § 7479(3), definition of BACT at issue in that case. Unlike the issue between OGC and the EAB, however, here there exists no uncertainty about whether environmental justice considerations are permissible or not; IL EPA has acknowledged they are.

One thing IL EPA made clear during the February public hearing was that "as reflected in the applicable state law, there is currently no state provision mandating" the Board adjudicate environmental justice-related claims in the PSD permitting process. *See* Tr. 39:7-9; Tr. 45:4-6; Tr. 49:14-17. Beyond that, when asked to point to "any existing source of law that indicates it would be *unauthorized* for the Board to hear environmental justice considerations in PSD permitting appeals," Tr. 54:6-9 (emphasis added), IL EPA instead repeated that it is not aware of state law that specifically indicates the Board would have such authority, which is not the same thing. *See* Tr. 54:13-18. Upon suggestion that the Board could use its authority to review IL EPA's implementation of its EJ grievance procedure in addition to general environmental justice claims that arose during permitting, IL EPA provided its most direct statement on the question: "In other words, *it would be appropriate* for the Board to review the program it created, emphasizing created, PSD permits . . .." Tr.48:14-17.

As it stands, evidence before the Board clearly establishes that: 1) Illinois residents have been able to raise environmental justice concerns in PSD permitting appeals since at least 1993; 2) the state of Illinois has, in no uncertain terms, legislatively acknowledged and enshrined the principles of environmental justice in 2011; 3) EAB's expansive interpretation of 40 CFR § 124.19's language, which is mirrored in proposed 35 Ill. Adm. Code § 105.608(a)(5)(B), is directly on point and relevant to the current proceeding, and; 4) US EPA's General Counsel believed that the expansive definition of BACT, again mirrored in proposed 35 Ill. Adm. Code §

204.280, allowed for environmental justice considerations by US EPA. IL EPA has also acknowledged that, the question of "whether implementation of environmental justice is an important policy consideration that the Board should review, it's the decision that the Board must ultimately make." Tr. 44:24 to 45:1-3. For the foregoing reasons, on behalf of its members and for low-income, minority residents throughout the state, CARE urges the Board to uphold the status quo and help protect the citizens of Illinois from the systemic oppression that is environmental injustice. To do this, CARE respectfully requests the Board to affirm that environmental justice considerations may properly be raised during state-issued PSD permitting appeals.

II. Failure to include a parallel provision of 40 CFR § 52.21(o)(3) in the regulatory proposal goes against the plain language of the Illinois Environmental Protection Act and is short-sighted in nature.

The rulemaking proceeding at issue was initiated when the Illinois General Assembly amended the Illinois Environmental Protection Act to require the Board "adopt regulations establishing a PSD permit program meeting the requirements of Section 165 of the Clean Air Act (CAA), 42 U.S.C. § 7475." Statement of Reasons, R19-1 at 2 (citing 415 ILCS 5/9.1(c)). Beyond that, however, "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 than those contained in 40 CFR 52.21.'" Pre-Filed Questions of CARE, 1 (IPCB, Nov. 19, 2018). From this, a plain language reading of the implementing legislation suggests that the proposed regulations must, at a minimum, meet the

requirements of Section 165 of the CAA, but that the Board may adopt provisions more stringent than those in 40 CFR § 52.21 if desired.

CARE takes issue with IL EPA's decision to exclude a parallel provision of 40 CFR § 52.21(o)(3) in the current rulemaking proposal. "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 as is necessary and appropriate." Statement of Reasons, R19-1 at 76. The original reasons provided for excluding this provision from the current regulatory proposal was that "40 CFR 51.166(p) does not mandate" the inclusion of such a provision in order to be approved by US EPA, and that "no Class I area exists in Illinois, or in close proximity to Illinois," thus rendering the purpose of the provision to be presently inapplicable. *Id.*

CARE's issue with IL EPA's decision to exclude such a provision was that, although there are currently no Federal class I areas in, or in close enough proximity to, Illinois, that does not mean that will always be true; there is always the potential of Federal class I areas being designated in the future, and it short-sighted to foreclose the State from being able to impose additional monitoring requirements. In other words, both CARE and IL EPA felt as though "[t]he relevant question before the Pollution Control Board in the current proceeding is whether the inclusion of a similar provision in Illinois' PSD program is warranted now." Tr. 27:23-14 to 28:1-3. Though both parties asked the same question, they arrived at conflicting conclusions.

Although IL EPA believes that costs of including a provision parallel to 40 CFR § 52.21(o)(3) currently outweigh the benefits, it did not say that such a provision would never be warranted. In fact, IL EPA specifically provided that, "in the event that air 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" to determine whether adding such a provision was necessary. Tr. 17:2-6. On February 15, 2019, less than two weeks prior to the second public hearing, the President signed a spending bill that included a provision that re-designated the Indiana Dunes National Lakeshore as the Indiana Dunes National Park. *See* National Park Service, *National Lakeshore Renamed Indiana Dunes National Park*, nps.gov, https://www.nps.gov/indu/learn/news/renamed-national-park.htm (last visited April 5, 2019). Although it was not yet established as a Federal class I area, the 15,000 acres national park meets the regulatory requirement for redesignation. *See* 40 CFR § 52.21(e)(4)(ii)(limiting the potential redesignation of a national park established after August 7, 1977 which exceeds 10,000 acres in size to only Class I or Class II).

Further, one of the largest critiques IL EPA had about including a provision parallel to 40 CFR § 52.21(o)(3) was the potential financial cost of doing so. In response to an inquiry about the potential financial costs, IL EPA provided the following:

> "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 [IPCB] 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 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."

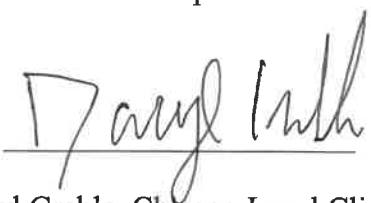
Tr. 30:14-24 to 31:1-2. Given the fact that this newly designated national park, which meets the regulatory minimum acreage to be redesignated to Class I, is just 50 miles from Chicago, Illinois, the nation's third-largest city, IL EPA's above hypothetical seems much more likely to come to fruition. CARE believes that proactive legislating is far preferable to reactive legislating.

Thus, the plain text of the implementing legislation explicitly permitting more, not less, stringent regulations, combined with the very real possibility of Federal class I areas being established in or near Illinois weigh heavily in favor of including a provision similar to 40 CFR §

52.21(o)(3) in the proposed regulations. As a result, CARE respectfully requests the Board utilize its authority to "request proposed language and supporting information from Illinois EPA and other parties in this rulemaking as needed to accomplish this." Tr. 28:23-24 to 29:1-3.

III. Conclusion

For the foregoing reasons, Citizens Against Ruining the Environment respectfully urges the Illinois Pollution Control Board to formally recognize its authority to adjudicate environmental justice claims in PSD permitting appeals, and to request the Illinois Environmental Protection Agency draft language for a state provision of 40 CFR § 52.21(o)(3). Citizens Against Ruining the Environment respectfully asserts that this is the only way the Illinois Pollution Control Board can act consistently with the evidence presented in the record, in accordance with legal requirements, and in the best interests of the Illinois residents it protects.

By: 

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Dated: April 5, 2019

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CERTIFICATE OF SERVICE

I, Daryl Grable, the undersigned attorney, hereby certify that I served upon the individuals named on the attached Service List a true and correct copy of the fourteen page document-

Citizens Against Ruining the Environment's Post Hearing Comments

-by email on April 5th, 2019, before the hour of 5:00 p.m., from my email address (dgrable@clclaw.org) at the email address provided on the attached Service List.

Daryl Grable, Chicago Legal Clinic, Inc.

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