



ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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JB PRITZKER, GOVERNOR

JOHN J. KIM, DIRECTOR

February 23, 2021

Lilian S. Dorka
Director
External Civil Rights Compliance Office
Office of General Counsel
United States Environmental Protection Agency
Washington, D.C. 20460

Re: EPA Complaint No. 01RNO-21-R5

Dear Director Dorka:

The Illinois Environmental Protection Agency (Illinois EPA) is in receipt of your recent letter, dated January 25, 2021, indicating that the External Civil Rights Compliance Office (ECRCO) of the Office of General Counsel at the United States Environmental Protection Agency (USEPA) has accepted for purposes of investigation an administrative complaint (complaint) that was filed on or about December 17, 2020. The letter indicates that the complaint was filed by attorneys for two environmental advocacy groups, Southeast Environmental Task Force and the Chicago Southeast Coalition to Ban Petcoke (hereinafter referred to as Complainants), alleging discrimination under Title VI of the Civil Rights Act of 1964 and the nondiscrimination regulations promulgated by the United States Environmental Protection Agency at 40 C.F.R. Part 7.

The Complainants filed a formal grievance with the Illinois EPA on August 20, 2020, in accordance with procedures implemented under Illinois EPA's Environmental Justice (EJ) Policy to address allegations of discrimination attributed to agency decision-making in the administration of state environmental programs. The grievance alleged several purported acts of discrimination by the Illinois EPA as part of its review of a permit application filed in September 2019 by General III, who was seeking to construct a scrap metal recycling facility to be located within an industrial corridor in Southeast Chicago. More specifically, the document alleged eight different areas of decision-making involving the Illinois EPA's purported discrimination against residents of the Chicago's Southeast side, comprised mainly of Latinx and African Americans. The administrative complaint filed with the ECRCO substantially mirrors the allegations set forth in the grievance.

As an initial matter, the Illinois EPA strongly denies the allegations of discrimination set forth in the complaint and believes the facts in the matter and actions taken by its staff during the course of the subject permitting action bear this out. Whether viewed in an individual context or collectively, the alleged acts of discrimination set forth in the document are unfounded and fail to show that any aspect of permit review with respect to the General III permit application was imbued with discriminatory

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intent or effect on account of race or national origin. A copy of the December 18, 2020, letter containing the Illinois EPA's formal response to the grievance is attached to this letter. For ease and practicality, the Illinois EPA wishes to incorporate by reference the responses to the earlier grievance as part of its comprehensive response to the complaint.¹

The allegations and the Illinois EPA responses to them can be briefly summarized as follows:

Claim One

Allegations of Discrimination:

The complaint chiefly contends that the Illinois EPA did not perform an EJ analysis as part of its review of the proposed General III construction project.

Summary Response:

The Illinois EPA performed thorough examinations of air quality impacts, demographical information from the affected EJ community, public comments, and other matters relating to the proposed construction project necessary to fulfill its federal recipient obligation under federal law to consider EJ-related concerns and the affected EJ community. The Illinois EPA's efforts included, among other things: an initial demographic screening analysis of the proposed location of the planned project; a request of the permit applicant for, and agency auditing of, an air dispersion modeling analysis of predicted impacts of heavy metals pollutants of concern posed by the project's construction; a later estimation of added metals' impact posed by existing metal recycling facilities operating at the site of the planned relocation; agency advocacy for, and the applicant's acquiescence to, permit conditions relating to a Fugitive Particulate Operating Plan reflecting operating requirements aimed at minimizing fugitive dust; and extensive revisions to the permit in response to public comments submitted at hearing and during the comment period.

Claim Two

Allegations of Discrimination:

The complaint contends that the Illinois EPA failed to consider emissions from the South Chicago Property Management (SCPM) related facilities located at the same address in conjunction with General III's proposed construction of the metal recycling facility.

Summary Response:

The Illinois EPA's evaluation of the single source status for the General III construction project was consistent with the requirements of the Illinois Environmental Protection Act (Act) and relevant USEPA guidance. In particular, the permit application and the final permit make clear

¹ For additional references concerning the underlying permit proceeding, a link to the issued construction permit is at <https://external.epa.illinois.gov/WebSiteApi/api/PublicNotices/GetAirPermitDocument/6380>. A link to the Illinois EPA response to comments is at <https://external.epa.illinois.gov/WebSiteApi/api/PublicNotices/GetAirPermitDocument/6381>. Other materials are available at <https://www2.illinois.gov/epa/public-notices/boa-notices/Pages/archive.aspx>.

that the combined facilities will be treated as a single source for purposes of permitting. The complaint conflates this issue with the separate issue of whether the resulting single source permit issued to affected facilities is contained within a single, comprehensive document or separate documents. Under both USEPA guidance and Illinois EPA practice, separate permits are routinely issued for companies operating a single stationary source. While the issued construction permit acknowledges that the separate facilities comprise a single stationary source, there was no need to address the existing facilities operating at the General III site as part of the permit because General III was the sole applicant seeking a permit to construct.

Claim Three

Allegations of Discrimination:

The complaint alleges that in failing to consider the compliance history of the former General II facility as part of the review of the proposed construction of the General III project, the Illinois EPA overlooked provisions of the Act that allowed, if not required, such consideration. Additionally, the complaint contends that the agency hearing panel made confusing or misleading statements at the hearing regarding permitting and enforcement matters, which they contend resulted in an unfair hearing process.

Summary Response:

The Illinois EPA's review of General III's proposed project adhered to governing law in Illinois regarding the consideration of compliance and enforcement-related matters in permit proceedings, reflecting a long-standing agency adherence to the legal tenet that permitting is not a substitute for enforcement and avoiding improper due process implications in the administration of permit programs. Similarly, the Illinois EPA's hearing panel did not create or contribute to an unfair hearing process in describing various attributes of existing law under the Act.

Claim Four

Allegations of Discrimination:

The complaint contends that the construction permit for the General III project was issued without accounting for the potential consequences of an earlier incident in May 2020 involving an explosion that damaged certain control equipment (i.e., a Regenerative Thermal Oxidizer and Roll Media Filter system) at the former General II facility.

Summary Response:

The Illinois EPA properly addressed additional monitoring and safety measures in its issuance of the construction permit to account for the reported incident, and there is nothing to suggest that the review of the application overlooked operational considerations that are best left to the review of a future operating permit. Importantly, the complaint does not acknowledge that in the aftermath of the explosion and before the construction permit issued, the applicant conveyed a preliminary expectation to the Illinois EPA that: the damaged control equipment could be repaired; results of an on-going investigation, including a root-cause analysis, would be made available to the Illinois EPA upon completion; and additional monitoring and safety measures had been identified. The issued construction permit contained requirements for additional monitoring and installation of a safety release valve in response to this

this information. Later reports stemming from separate investigations by the company and City of Chicago regarding the May 2020 incident indicated that the incident was likely caused by flammable gases from the shredder and not from the operation of control equipment, as urged by the Complainants.

Claim Five

Allegations of Discrimination:

Underscoring public health concerns from the Spring of 2020 regarding the COVID-19 pandemic and public unrest stemming from civil rights protests in Chicago and other metropolitan areas, the complaint challenges the Illinois EPA's decision to hold a "virtual" public hearing to facilitate public participation in the permit proceeding. The Complainants also claim that the virtual hearing violated the Illinois EPA's EJ policy and failed to consider the need for translation services in a community that is largely comprised of Spanish-speaking residents.

Summary Response:

The Illinois EPA appropriately balanced public health considerations in its decision to hold a virtual public hearing with, among other things, its legal obligation under the Act to take final action on an application within a statutory decision deadline. The Illinois EPA explained that its actions were consistent with a statutory obligation to issue a permit in a timely manner and thereby avoid a default issuance of a permit that would have unquestionably left community residents with far fewer environmental protections. In addition, the Illinois EPA observed that the COVID-19 pandemic and resulting public health measures to control its spread prevented a traditional public hearing. Given no other options at its disposal, the Illinois EPA proceeded with a virtual hearing that was accessible to the public in the most convenient and practicable ways possible, implementing numerous measures going beyond agency rules and the typical practice for in-person hearings.

The Illinois EPA's decision to hold the virtual hearing was not inconsistent with its EJ Policy and did not disadvantage Spanish-speaking residents of the EJ community. On the latter issue, the Illinois EPA's Office of Community Relations routinely acts on requests for translation or oral interpretation services whenever public officials, advocacy groups or members of the public raise them in the context of a given project. When such a request is made, the Illinois EPA considers the appropriate means for addressing language needs relative to the affected community, the anticipated interest in the permit action, or other relevant factors. Once the Illinois EPA adopts an approach for addressing language needs in that initial instance, the same approach is often applied to a subsequent project in the community.²

² For example, in the case of Midwest Generation's most recent Clean Air Act Permit Program (CAAPP) permit actions in Waukegan, simultaneous oral interpretation of an informational hearing was initially provided for a Significant Modification proceeding following a request presented by an advocacy group. A later CAAPP Reopening proceeding involving the source was conducted in the same manner.

In this instance, no previous requests for language translation or oral interpretation are known to have been made for projects in the Southeast Side in the past. The issue of translation of the public notice was only brought to the Illinois EPA's attention at the hearing and in later written comments, which was too late to allow for the issuance of another notice because of the impending decision deadline that the applicant declined to waive.

Similarly, the issue of oral interpretation for the hearing was not raised at any time prior to the hearing, either in communications with environmental advocacy groups concerning the scheduling of a virtual hearing or in the aftermath of the notice's issuance, including the pre-hearing registration process for individuals who contacted the Hearing Officer to arrange for their presentation of comments at the hearing sessions. It can be noted that the Office of Community Relations did anticipate the possibility that someone involved in the hearing might require interpretation assistance, as a community relations coordinator was introduced during the hearing sessions as the Illinois EPA's Spanish translator and was available to lend such assistance. As with the public notice issue, the impending decision deadline did not allow the Illinois EPA the option of scheduling a new hearing providing for simultaneous or other interpretation services.

Claim Six

Allegations of Discrimination:

The complaint contends that the Illinois EPA failed to evaluate the impact on air quality from mobile source emissions on the EJ community attributable to the construction of the General III facility.

Summary Response:

The Illinois EPA does not evaluate tailpipe emissions in a construction permit review for a minor emissions source but, rather, relies upon the traditional State Implementation Plan (SIP) process and other programmatic measures to monitor compliance with the National Ambient Air Quality Standards (NAAQS). The Illinois EPA also explained in its response to comments that Illinois is designated attainment for purposes of particulate matter (PM) and existing monitoring data demonstrates that the area is in compliance with the NAAQS for PM. Additionally, because ambient monitoring is indirectly capturing emissions from stationary sources and mobile sources alike, the existing ambient air monitoring network provides an additional assurance that air quality impacts in the area can be detected if they occur.

Claim Seven

Allegations of Discrimination:

The complaint asserts that the Act's narrative air pollution standard and the nearly identical language found in the Illinois Pollution Control Board's Part 201 regulations apply to odors, and that public concerns with the former General II facility located in Lincoln Park, whose pollution control equipment could transfer to the new site, demanded that the Illinois EPA impose an odor management plan in the issued construction permit.

Summary Response:

The Illinois EPA properly declined to consider odor allegations from the existing General II facility in its consideration of the permit. This is because mere allegations of odors are not proof of air pollution and are not routinely addressed through a permitting venue. Moreover, the Illinois EPA did not find that the odor allegations at an existing facility warranted imposition of an odor study for the proposed construction of the General III facility given that odors are commonly dependent upon site-specific factors. Such factors could easily cause odors at the proposed location of General III's planned project to differ from conditions that existed at the former General II facility.

Claim Eight

Allegations of Discrimination:

The complaint contends that the air quality modeling performed by General III and audited by the Illinois EPA was deficient, citing to exceedance(s) above the 24-hour NAAQS concentration limit for PM10 of 150 ug/m³ and, additionally, exceedances of an 8-hour reference exposure level (REL) used in California for manganese.

Summary Response:

The Illinois EPA's reliance upon the air quality modeling developed as part of the permit review was appropriate. The Complainants' notion that PM10 emissions are exceedances apparently stems from an extrapolation of PM10 emissions from the modeling files. The approach urged by the Complainants is not persuasive to show the presence of PM10 emissions in the concentrations alleged for the simple reason that PM10 was not the targeted pollutant for the modeling conducted. Additionally, the Illinois EPA's reliance on the air quality modeling was not misplaced because of an alleged failure in assessing the cited REL in the manganese modeling. The Illinois EPA explained why the selected benchmarks were chosen, and although Illinois EPA downplayed the significance of the cited REL, it was because the relevant California agency's website explains that the guideline is not considered harmful at exposure levels and is only used in the development of administrative rulemakings and not as actual emission standard.

None of the allegations involving the underlying permit proceeding are well-founded or factually supported, and the Illinois EPA emphatically repudiates the notion that its review of the permit application sought to disadvantage the residents of Chicago's Southeast side. The allegations also fail to show the existence of discriminatory effects to the community as a result of the project's construction. While the Illinois EPA can appreciate that many residents believe that Southeast Chicago is already overburdened by environmental impacts from industrial pollution in the region, the Illinois EPA's review of the permit application indicated that no significant impacts to local air quality are anticipated from the project's construction. Other expressed concerns regarding potential impacts of harmful odors, fugitive emissions of particulate matter, or the presence of uncontrolled automotive shredder residue cannot be presumed to occur at the new site, as such impacts are heavily dependent upon site-specific factors that may differ significantly from the former site of operations.

The Illinois EPA recognizes that the Complainants and residents alike are passionate in their belief that the General III facility should not be relocated to the Southeast side of Chicago. But the question of relocation is largely a matter of local zoning discretion and is distinct from the objective evaluation of engineering and legal requirements conducted by the Illinois EPA in accordance with the State's environmental protection laws. Other concerns raised by the administrative complaint, such as the implied abuses of discretion relating to agency enforcement programs or to legal authorities relating to the imposition of permit conditions, may understandably be matters of public concern. However, the issue here is whether the Illinois EPA's actions taken to assure its obligations under Title VI demonstrated discriminatory treatment or effects.

In general, the Illinois EPA finds that many of the claims raised in the complaint, and particularly those highlighted areas of the document challenging the exercise of agency discretion, reflect broader policy disagreements between the Complainants and the State's permit authority, rather than discriminatory actions prohibited by Title VI and the USEPA's regulations. Additionally, in the one claim that touches on a frequent EJ-related issue in licensing proceedings, the nature and extent of public participation in the proceeding was sufficiently tailored to satisfy the Illinois EPA's obligations under Title VI. As conveyed in the written response to the grievance, the Illinois EPA recognizes that improvements can be made to existing policies to enhance public participation with regards to language translation or interpretation needs in future permitting actions. In view of potential timing issues that might be occasioned by ECRCO's investigation and/or possible settlement avenues made available in these matters, the Illinois EPA plans to evaluate options and conduct outreach to the State's Environmental Justice Commission and other interested parties regarding potential refinements to existing policies in the near future. Anticipated permitting actions by the Illinois EPA affecting areas of EJ concern in Illinois will potentially stand to benefit from such refinements sooner rather than later.

The Illinois EPA's broader approach to its federal recipient obligation to address EJ was appropriately accomplished through the implementation of its EJ policy and the broad invocation of its general state permit authority to impose conditions in the issued construction permit. Moreover, given the lack of clear guidance and training at the national level on issues such as cumulative impacts analyses and their role in the EJ analysis, it seems more appropriate for clarity in this area to come through legislation or rulemaking rather than ad-hoc outcomes stemming from an administrative process. As to the other procedural safeguards required by a recipient of federal assistance, as mentioned in your January 25, 2021, letter, the Illinois EPA is confident that policies and procedures are in place to assure compliance with the general nondiscrimination requirements of 40 CFR Parts 5 and 7. Such safeguards include implementation of grievance procedures, notice of nondiscrimination and collection of compliance-related information in the administration of programs, as well as policies undertaken to assure public participation in licensing proceedings by individuals with disabilities or limited English proficiencies.

The Illinois EPA welcomes ECRCO's investigation into this matter, as we are confident that an examination of the record and agency practices will demonstrate the actions of our staff in implementing our programs were appropriate and did not result in the alleged discrimination. However, the Illinois EPA is also mindful that the investigation process implemented by your office in these cases encourages informal resolutions and that ECRCO's Case Resolution Manual addresses several paths for achieving such ends. The case manager has recently briefed the Illinois EPA on the available options, and I can report that the Illinois EPA is prepared to engage with ECRCO to facilitate discussions within

Lilian S. Dorka, Director
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the framework of the informal resolution agreement process to explore potential avenues for informally resolving the complaint. While we believe that our arguments refuting the allegations raised in the Complaint are unassailable, we believe that your office can play an important role in helping guide the parties through this recommended part of the process.

The Illinois EPA further wishes to note that should an investigation ultimately be pursued to completion by your office, it may be appropriate for ECRCO to reconsider whether allegations of discrimination raised with respect to the adequacy of the public hearing notice can be treated as being timely filed under USEPA's regulations. This is because the discrete action identified by the Complainants as causing the alleged discrimination (i.e., a public notice of hearing and public comment lacking Spanish language translation) was posted to the agency's website on March 30, 2020, almost three months before the construction permit was issued. Because the filing requirement set forth in USEPA's regulations is a jurisdictional requirement, this allegation may be outside of the purview of administrative review.

If there are any additional resource needs required by your office in its investigation, please let us know accordingly. The Illinois EPA wishes to reserve the right to supplement the responses set forth in this document and attachments, to the extent additional information is requested by your office or as needed to otherwise assist in the investigation.

If you have any questions or concerns regarding these matters, please contact our Chief Legal Counsel, Mr. Charles W. Gunnarson, by phone at 217-785-8592 or by email at charles.gunnarson@illinois.gov. Thank you for your attention to this matter.

Sincerely,



John J. Kim
Director

Attachment

Attachment 1
Merits of Alleged Permit Deficiencies

Claim One:

The complaint chiefly contends that the Illinois EPA did not perform an EJ analysis as part of its review of the proposed GIII construction project.

Summary Response:

The Illinois EPA performed thorough examinations of air quality impacts, demographical information from the affected EJ community, public comments and other matters relating to the proposed construction project so as to fulfill its federal recipient obligation under federal law to consider EJ-related concerns and the affected EJ community.

Illinois EPA Investigation and Response:

The Illinois EPA exerted considerable effort, in resources and time, in evaluating EJ-concerns in the review of the proposed project, beginning with the initial review of the permit application, a screening of the location of the proposed project utilizing a Geographic Information System mapping tool called EJ Start, and culminating in substantial changes to the draft construction permit as an outgrowth of public comments. In the initial undertaking, a joint evaluation of heavy metal pollutants of concern by the permit applicant and the Illinois EPA was undertaken, first with respect to air quality modeling of GIII's predicted air quality impacts from construction of a new metals recycling facility and, later, regarding the estimation of added metals impact from the metal recycling facilities operated at the existing South Chicago Property Management (SCPM) facilities.

Contemporaneous with the metals evaluation was a separate evaluation, focusing on agency review and recommendations to a draft Fugitive Particulate Operating Program (FPOP). As noted in the RS, the Illinois EPA advocated for, and the company acquiesced to, permit conditions in the construction permit imposing FPOP operating requirements. These requirements will assure that the company will implement measures practiced by other emissions sources in the region to minimize fugitive dust, even though such measures are not mandated in existing rules established by the Pollution Control Board for the type of operations conducted by General III.¹

The Illinois EPA also made extensive revisions to the draft construction permit based on comments received at the public hearing and in written comments. An evaluation of the list of changes to the permit, shown as an attachment to the RS,² include twenty revisions to the permit document. These permit revisions are hardly insignificant, ranging from addition of a fugitive sources category in the equipment listing, incorporating requirements for a feedstock management plan and an operation and

¹ See, RS at pages 53-56.

² See, RS at page 73.

maintenance (OM) plan, and adding or clarifying requirements for emission testing, record-keeping and opacity observations, many of which are of a largely substantive nature.

The notion advanced in the NGO's discussion of this Claim is that the Illinois EPA did not consider EJ matters in hardly any capacity. This argument is unfounded. The air quality modeling, parallel review and negotiated revisions to the FPOP, and revisions to the draft permit demonstrate a well-reasoned and substantive approach to identifying and assessing impacts to the EJ community affected by the proposed project. The air quality modeling reflected a quantitative, impacts-based analysis that was calibrated to address the specific pollutants of concern (i.e., lead, manganese, and other heavy metals) that have been documented from other nearby industrial sources and which have been the subject of intense compliance and enforcement-related scrutiny by regulatory agencies, the Illinois EPA included, in the past. The resulting air quality modeling evaluated by the Illinois EPA was a months-long undertaking that ultimately did not show exceedances of the National Ambient Air Quality Standards (NAAQS) or comparable standards stemming from the project's proposed construction.

The implementation of both the EJ Policy and the public participation process provided for certain permitting projects was similarly focused on EJ-related matters. As already known by some of the NGOs who have collaborated closely with the Illinois EPA, the EJ Policy provides for a demographics-based approach to evaluating EJ areas impacted by projects, applied through a mapping tool, EJ Start, that is available on the Illinois EPA's website. The EJ Officer and the Office of Community Relations, on behalf of the Illinois EPA, also administer an EJ Notification process for fostering public outreach at the outset of permit review for projects of concern.

The Director's decision granting a public hearing in the matter, which is not mandated but, rather, a matter of discretion under existing rules, accounted for various concerns of the EJ community. More fundamentally, the review and incorporation of public comments to the draft permit is a type of facility-specific, qualitative assessment that frequently looks at EJ considerations. Many of the added terms in the issued construction permit address conditions aimed at assuring prospective compliance (i.e., emissions testing, record-keeping and opacity requirements), while other existing and added conditions focused on potential air quality-related impacts (i.e., hours of operation, and development of feedstock and O&M plans). Implementation of these measures, as well as other communication efforts by the EJ Officer and Office of Community Affairs before, during and after the virtual hearing and the public comment period, demonstrates that the Illinois EPA considered various aspects of EJ and the EJ community during the permit review.

The Illinois EPA recognizes that the NGOs desire a broader assessment of EJ for this project in Southeast Chicago. While differences of opinion may remain, it is important to acknowledge that the nature of any EJ assessment under the limited laws that currently exist is varied and open-ended. An EJ analysis is not a requirement of Illinois EPA law, and to the extent that the Illinois EPA has a federal recipient obligation to address EJ, it is accomplished through its EJ policy and general permit authority. Additional clarity regarding these matters should be entrusted to Congress or state legislatures to consider, rather than litigated in administrative appeals.

Claim Two:

The complaint contends that the Illinois EPA failed to consider emissions from the SCPM-related facilities located at the same address in conjunction with GIII's proposed construction of the metal recycling facility.

Summary Response:

The Illinois EPA's evaluation of the single source status for the General III construction project was consistent with the requirements of the Environmental Protection Act and relevant guidance from the United States Environmental Protection Agency (USEPA).

Illinois EPA Investigation and Response:

As an initial matter, the NGOs raise several questions within a broader single source issue but do not discuss the justifications identified by the Illinois EPA in the RS for its single-source determination.³ The Illinois EPA's responses from the RS make clear that the approach to the single source issue was reasonable and consistent with applicable law.

The single source criteria used by Illinois EPA to guide its permitting programs are derived from applicable law and regulations, not agency permitting standards or conditions. Such requirements are found in the Clean Air Act Permit Program and the Pollution Control Board's regulations,⁴ though considerable guidance can be found in New Source Review and Title V single source determinations made by USEPA since the 1980s. In this instance, the permit application submitted by GIII proposed that the newly constructed metal recycling facility would be permitted as a single source for purposes of a Federally Enforceable State Operating Permit (FESOP), together with the nearby facilities owned by Reserve Management Group and managed by SCPM at the same address. The Illinois EPA did not dispute GIII's contention that the two facilities are a single stationary source, and the issued construction permit acknowledges the same in Condition 1e.

The principal assertion in this Claim is that the Illinois EPA did not combine the SCPM-related facilities into the construction permit for General III. However, this notion appears to be conflated with the separate assertion, made by the NGOs, that the sources must be treated as a single stationary source under applicable law. In determining that the combined GIII and SCPM-related facilities will comprise a single stationary source once the General III facility is constructed and becomes operational, the Illinois EPA fulfilled its obligation to ascertain whether the legal criteria set forth in the Environmental Protection Act are met.⁵ In this instance, there is no dispute that the combined facilities will be treated as a single source for purposes of permitting. The effect of this determination is a substantive one, in that the combined emissions from all the facilities will be used to assess future rule and major source applicability governing the source at large.

³ See generally, RS at pages 38-40.

⁴ See generally, 415 ILCS 5/39.5 and 35 Ill. Adm. Code Part 211.

⁵ See, RS at page 38, Response No. 99.

Once a single source determination is made, whether the resulting single source permit issued to affected facilities is contained within a single, comprehensive document or separate documents is a matter of form, not substance. In USEPA's long-standing role of overseeing single source issues in three major source permitting programs, they generally leave the issue to the discretion of the permit authority.⁶ For its part in implementing those programs, the Illinois EPA frequently issues separate permits for companies operating a single stationary source, often times to avoid logistical issues created by having separate responsible officials addressing applicable requirements set forth in the same permitting document.⁷

As also explained in the RS, GIII is seeking to construct an emissions source requiring a permit under the Environmental Protection Act and the Pollution Control Board's Part 201 regulations, whereas the SCPM-related facilities are operating under the Registration of Smaller Sources (ROSS) program and are not seeking permit authority to construct anew or modify existing equipment. While the issued construction permit acknowledges that the separate facilities comprise a single stationary source, the purpose of the construction permit is to address aspects of emissions units and control equipment that are owned and/or operated under the control of General III. Once the General III facility is constructed, both General III and the SCPM-related facilities must obtain a Federally Enforceable State Operating Permit for the source, which the Illinois EPA has indicated will likely be processed in parallel permit proceedings.⁸

Claim Three:

The complaint alleges that in failing to consider the compliance history of the existing GII facility as part of the review of the proposed construction of the GIII facility, the Illinois EPA overlooked provisions of the Environmental Protection Act that allowed, if not required, such consideration. Further, the NGOs fault the agency for not documenting a record of enforcement activities and recent permitting actions at the existing General II facility and contend that the agency hearing panel made confusing or misleading statements at the hearing regarding permitting and enforcement matters, which they contend resulted in an unfair hearing process.

Summary Response:

The Illinois EPA's review of General III's proposed project adhered to governing law in Illinois regarding the consideration of compliance and enforcement-related matters in permit proceedings, reflecting a long-standing interpretation recognizing that permitting is not a substitute for enforcement and avoiding due process implications in the administration of permit programs. Similarly, the Illinois EPA's

⁶ See, RS at page 39, citing to a USEPA Title V petition response involving U.S. Steel Corporation issued December 3, 2012 (Petition No. V-2011-2)(illustrating that Title V permit authorities may issue "multiple title V permits to a single Title V source" provided that the compliance obligations for each facility are clear and that all applicable requirements are contained in a Title V permit).

⁷ See, RS at page 39, Response No. 100.

⁸ See, RS at page 39, Response Nos. 100 and 101.

hearing panel did not create or contribute to an unfair hearing process in describing various attributes of existing law under the Environmental Protection Act.

Illinois EPA Investigation and Response:

This inquiry primarily concerns a statutory provision in the Act that serves as the Illinois EPA's enabling authority for administering basic permitting programs under the Act. Two of the three passages of Section 39(a) cited by the NGOs relate to compliance and enforcement-related matters.⁹ The background was described at length in the RS.¹⁰ Formal adjudications in Illinois are not common¹¹ and compliance history (past or on-going) will more frequently arise concurrent with a permitting action. Reliance on mere allegations as a basis to impose permitting conditions is problematic.¹² As acknowledged in the RS, there are due process concerns that are prevalent in a licensing program, and there is a long-standing interpretation by Illinois courts and the Pollution Control Board regarding the Act's traditional separation of enforcement and permitting functions.

The RS also explained that municipal ordinance violations cited by the NGOs are not within the scope of permit review, as they were not contemplated by the General Assembly when addressing the actions brought under the States' sovereign capacity. The Act's provisions plainly refer to adjudications and/or compliance history "with this Act," not with municipal ordinances. The NGOs claim there was a "categorical refusal" by Illinois EPA to evaluate other compliance history. However, an explicit consideration was given to the Administrative Consent Order entered between the former General Iron and USEPA, as mentioned in the RS.¹³ The RS also explained that the legal authorities cited by the NGOs are not expressed in terms of agency duty or obligation but, rather, committed to agency discretion.¹⁴

While the NGOs may be unmoved by the distinctions offered by the Illinois EPA between permitting and enforcement, their complaint that there was no documentation of agency enforcement or permitting initiatives regarding the General II is misplaced. In the RS, the Illinois EPA maintained that its exercise of

⁹ The RS acknowledged that the catch-all authority found under Section 39(a) is the basis for most permit conditions found in a construction permit. RS at Response No. 89, page 36.

¹⁰ See, RS at Response No. 78, pages 30-31; Response No. 79, page 31; and Response No. 83, page 33.

¹¹ Most environmental enforcement cases are resolved through negotiated settlements as compared to judicial (or quasi-judicial) rulings on the merits of a controversy.

¹² In practice, this legal authority is used only sparingly, such as in the case of addressing settlement agreements or other matters that offer a more demonstrative proof of noncompliance as compared to unproven allegations. The RS explained that this approach is consistent with the structure of the Act and avoids the constitutional issues raised in court and Pollution Control Board rulings. See, RS at Response No. 33, page 85-86.

¹³ See, RS at Response No. 86, pages 34-35. The Illinois EPA declined to impose conditions in the issued construction permit because the facility had complied with the federal order (i.e., installed controls and completed emissions testing) and the order applied only to the existing GII facility and not a new facility at different location. In addition, the order did not meet the definition of an adjudication because it did not reflect a determination as to the merits of the controversy.

¹⁴ See, RS at Response No. 77, pages 28-30.

past enforcement discretion, here relating to a separate legal entity and not the permit applicant, is not at issue in a permit proceeding.¹⁵ Enforcement discretion can involve a multitude of considerations, but that does not mean that a permit proceeding is an appropriate venue for such considerations to be examined. Moreover, the Illinois EPA's approach in implementing Section 39(a) is based on the rule of law, as reflected in its understanding of existing case authorities.

The NGOs assertions about an unfair process caused by statements made by the hearing panel are mistaken.¹⁶ No one was interrupted at the hearing,¹⁷ no one was prevented from presenting comments or evidence, and there was nothing that suppressed additional comments on the issues. The statements themselves were neither plainly erroneous nor arbitrary.¹⁸ An informational hearing frequently elicits only a general or brief response from a hearing panel in response to many comments, with the understanding, conveyed to participants at the hearing's start,¹⁹ that a more comprehensive response to comments is reserved for the RS. Impromptu statements about technical or legal issues may not contain an exactness or nuance that the law may sometimes harbor, or perhaps they bring other questions to mind by the commenter or other participants. But the hearing process does not contemplate otherwise.

¹⁵ See, RS, Response No. 92, page 37.

¹⁶ One statement involved a brief response to a comment regarding the extent to which past violations at the GII facility were taken in account by the Illinois EPA in its permit review. In their Claim, the NGOs dispute the adequacy of the speaker's response suggesting it conflated three separate legal authorities under the Act, failed to cite to specific legal cases, failed to distinguish earlier cases from cases arising after amending authority to the Act, and incorrectly stated that the Illinois EPA could not consider testimony concerning compliance/enforcement matters.

The other statement observed that the Illinois EPA was legally obliged to issue a permit to a source upon a showing that there would be no violations of the Act or other applicable requirements. The NGOs contend that the hearing statement was inconsistent with the Illinois EPA's catch-all authority under the Act for imposing conditions "necessary" to accomplish the purposes of the statute.

¹⁷ The NGOs allege that a panel member inappropriately intervened to discount the testimony of a speaker. Rather, the panel member responded to a question posed by the speaker at the end of his remarks concerning whether the Agency would review violations by an applicant during a permit review. While the NGOs may disagree with the substance of the panel member's response, his response did not in any way discount the testimony offered by the speaker. See, RS at Response No. 24, pages 12 and 13.

¹⁸ As noted in the RS, that the hearing speaker did not elaborate on the question of alleged violations in great detail, and did not cite or distinguish caselaw authorities, was not prejudicial error. The question, asked by a layperson, was a general one. In addition, there are no known caselaw authorities addressing the amendments to the statute or their effect upon prior court or Pollution Control Board rulings in this area. And although the NGOs may believe that the speaker implied that the Agency cannot consider violations in its permit review, he expressed his answer generally and stated that limited exceptions to the rule existed. See, RS at Response No. 24 and 25, pages 12 and 13.

As to an opening statement from a panel member concerning the standard of permit issuance, it generally restates the duty requirement set forth in Section 39(a) of the Act. The NGOs somehow view the statement as being at odds with agency authority to impose permit conditions but, in fact, the argument appears to confuse separate legal concepts. The standard of permit issuance does not inform the Illinois EPA's ability to craft special permit conditions.

¹⁹ See, Hearing Officer Opening Statement (Hearing Record, Exhibit 1, page 4); see also, Session 1 Hearing Recording at 7:30 – 8:15 generally, and Session 2 Hearing Recording at 7:35 to 8:15 generally.

The informational hearing process in this case worked as intended, as several questions and opinions were raised in written comments on the relevant issues. These comments and the Illinois EPA's thorough responses to them are contained in several pages to the RS. While the NGOs may disagree with the legal interpretations that lie at the heart of the issues, it cannot be said that the hearing process was unfair.

Claim Four:

The complaint contends that the construction permit for the GIII facility was issued without accounting for the potential consequences of the earlier incident in May 2020 involving an explosion that damaged certain control equipment (i.e., a Regenerative Thermal Oxidizer and Roll Media Filter system) at the existing GII facility.

Summary Response:

The Illinois EPA properly addressed additional monitoring and safety measures in its issuance of the construction permit to account for the reported incident, and there is nothing to suggest that the review of the application overlooked operational considerations that are best left to the review of a future operating permit.

Illinois EPA Investigation and Response:

The NGOs do not mention the Illinois EPA's responses to earlier public comments mirroring this claim. As stated in the RS, the construction permit does not distinguish between new or pre-existing control equipment.²⁰ Although GIII may indeed transfer the RTO and other control equipment to the new site, the permittee may elect to purchase brand new equipment or procure used equipment from elsewhere.²¹

The RS also noted that in the aftermath of the incident, GIII indicated a preliminary expectation that the damaged control equipment could be repaired, that results of an on-going investigation, including a root-cause analysis, would be made available to the Illinois EPA upon completion, and that additional monitoring and safety measures had been identified. At the request of the Illinois EPA, and in response to comments raised during the public comment period, GIII provided supporting materials to the Illinois EPA identifying plans for measuring combustion gases of the capture and control systems through a Lower Explosive Limit (LEL) monitor and installing an emergency bypass valve.²² Both measures are designed to monitor and prevent combustible gases from posing a future threat to the control equipment and worker safety.

²⁰ See, RS at Response No. 67, page 25.

²¹ This approach reflects a common agency practice to leave procurement matters to a permittee as a business decision and avoids a need for a permitting revision if last-minute procurement decisions are made by the source.

²² The submission also addressed estimated emissions of volatile organic materials anticipated from future releases.

The NGOs also do not acknowledge that after the construction permit issued, but before the complaint was filed with the Illinois EPA, reports from separate investigations regarding the May 2020 incident were released.²³ Both reports indicated that the incident was likely caused by flammable gases from the shredder and not from the operation of control equipment, as urged by the NGOs. Further, both reports recommended engineering controls, including the use of an LEL monitor and emergency bypass valve already addressed by the construction permit, and administrative controls (additional signs and notices) promoting removal of flammable materials from discarded scrap by General III's customers. The City's Department of Public Health hosted a community town hall to highlight findings of the reports on August 3, 2020 and posted the reports on their website.

The findings and recommendations of the incident reports belie the narrative that operational concerns with the affected control equipment required additional pre-construction review. In addition, it can be noted that there are two phases of permitting, consistent with the Act's structure distinguishing between construction and operating permits. This framework allows for an applicant to be given an opportunity to implement crucial elements of the issued construction permit, such as the commissioning of the equipment and emissions testing. The emissions testing results, as well as the review of a feedstock management and the O&M plans, and additional air quality modeling, will facilitate the subsequent development and review of an application for operating permit. The Illinois EPA mentioned these elements in different parts of the RS.²⁴

The NGOs arguments regarding the legal standards for permit review appear mistaken as well. The standard for issuance of a construction permit, as set forth in the Board's Part 201 rules, simply does not apply to the operational concerns addressed by the NGOs. As noted elsewhere, these concerns find their place in the operating phase of environmental permitting. Additionally, it is doubtful that the NGOs can reconcile their arguments presented in the Claim with either the Board's regulations limiting the time-period in which a permit application can be deemed incomplete by the Illinois EPA²⁵ or judicial recognition that deficiencies in a permit application do not deprive the Illinois EPA of its ability to act on a permit application.²⁶

Claim Five:

Underscoring public health concerns from earlier this Spring regarding the COVID-19 pandemic and public unrest stemming from civil rights protests in Chicago and other metropolitan areas, the complaint challenges the Illinois EPA's decision to hold a "virtual" public hearing to facilitate public participation in the permit proceeding. The NGOs also claim that the virtual hearing violated the Illinois EPA's EJ policy

²³ One report was finalized by Exponent, a consulting firm hired by Reserve Management Group, on or about July 16, 2020, and another report was completed by the Project Performance Group, a consulting firm hired by the City of Chicago, was finalized on or about July 28, 2020.

²⁴ See RS, Response No. 134, page 48.

²⁵ See, 35 Ill. Adm. Code 201.158.

²⁶ See, *White Fence Farm, Inc., v. Land of Lakes Company*, 99 Ill. App. 3d 234 (4th Dist. Ct. App. 1981).

and failed to consider the need for translation services in a community that is largely comprised of Spanish-speaking residents.

Summary Response:

The Illinois EPA appropriately balanced public health considerations in its decision to hold a virtual public hearing with, among other things, its legal obligation under the Environmental Protection Act to take final action on an application within a statutory decision deadline. In addition, the Illinois EPA's decision to hold the virtual hearing was not inconsistent with its EJ Policy and did not disadvantage Spanish-speaking residents of the EJ community.

Illinois EPA Investigation and Response:

At the public hearing, the Illinois EPA generally explained why a virtual public hearing was undertaken in this proceeding. A further elaboration of the reasons for this decision was set forth in the RS.²⁷ The other issues cited in this Claim regarding the EJ policy and translation needs were also addressed at length in the RS. The Illinois EPA explained that its actions were consistent with a statutory obligation to issue a permit in a timely manner and the duty to assure compliance with applicable law. In addition, the Illinois EPA observed that the COVID-19 pandemic and resulting public health measures to control its spread prevented a traditional public hearing. The Illinois EPA noted that the virtual hearing was undertaken consistent with agency rules promulgated for informational permit hearings, thus fulfilling the basic goal of gathering information from the public as an in-person hearing.

Paramount to the Illinois EPA's deliberation of this issue was the statutory decision deadline that accompanied agency review of the permit application. Under the Environmental Protection Act, the Illinois EPA's failure to meet the decision deadline would have resulted in a permit default and afforded GIII a broad shield to lawfully construct its project without the normal safeguards of a construction permit. Given the enhanced requirements added to the permit as an outgrowth of public comments, a permit default would have unquestionably left community residents from Southeast Chicago with far fewer environmental protections and perhaps a more legitimate claim of agency misconduct. And despite what some commenters desired, no procedural short-cuts under existing laws could moot either the hearing or the Illinois EPA's decision to issue the permit. Alternative approaches identified in comments, such as a permit denial or a moratorium, lacked either factual or legal support.²⁸

Given no other options at its disposal, the Illinois EPA made the most of a difficult situation by scheduling a virtual hearing that was accessible to the public in the most convenient and practicable ways possible.²⁹ Indeed, as noted in the RS, the Illinois EPA went beyond the rules and typical practice

²⁷ See generally, pages 1 and 2; and pages 4-13.

²⁸ See, Response Nos. 69-70, page 26; Response No. 88, page 34; and Response No. 91, page 36-37.

²⁹ As explained at hearing and in the written RS, the Illinois EPA is hardly alone in transitioning to this type of audio-conferencing format for conducting official government business. This development is not limited to governmental agencies, as professional video-conferencing services like Zoom and others are flourishing with a rise in corporate and consumer demands in the wake of the COVID-19 pandemic. The video-conferencing platform is a necessary part of how our society has adjusted to the current public health crisis and will remain so for the foreseeable future. As this Investigation and Response is being assembled, many of the public health measures

for in-person hearings by offering two modes of log-in (computer or phone call-in), two forms of participation (registration for oral comments or listening in) and the convenience of two hearing sessions (afternoon and evening). The public notice provided contact information for anyone who had concerns regarding translation needs or accessibility issues. Additionally, the Office of Community Relations provided separate, detailed instructions to assist interested persons in logging into and participating in the hearing. They assisted several people in advance of and during the hearing and, to the Illinois EPA's knowledge, there was no one who contacted them about various accessibility or technology questions that was deprived of the opportunity to access the hearing.³⁰ In addition to the various other means, the Illinois EPA also publicized the hearing by sending the notice to a large, diverse group of interested parties, including the NGOs.

Regardless of circumstances, the public hearing was only one part of the process. Anyone who was unable to attend a hearing could submit, with relative ease, written comments to the permit authority by email or regular mail. Written comments can be as important to the process as a hearing, if only because non-hearing attendees are afforded an avenue for their voices to be heard. That elected officials and NGOs typically speak in a representative capacity, either for their constituencies or for others of like-mindedness, is another attribute of the process that is worth noting too. Viewed in its entirety, the permit record contains a voluminous number of comments, oral and written, covering broad and wide-ranging concerns. This aptly demonstrates a strong measure of public interest and tends to belie the notion that public participation was suppressed.

As to other arguments, the Illinois EPA's hearing decision was not at odds with its EJ Policy. Perhaps this contention presumes that anything short of an in-person hearing during a public health crisis (or other exigency) cannot assure that the goals of "meaningful public involvement" or "appropriate outreach" will be met. But neither the EJ policy nor the practical considerations of administering a permit program warrant this conclusion. Public involvement was plainly "meaningful" given the turnout of hearing participants and a nearly over-whelming submission of written comments, as mentioned. Outreach to the public was similarly "appropriate," reflecting not only the hearing attendance and public comment submissions,³¹ but also earlier communications between the Office of Community Relations and

instituted in the Spring by Governor J.B. Pritzker's administration have been renewed this Fall because of a resurgence of the pandemic.

³⁰ Similarly, for both the hearing commenters and written comments, the Hearing Officer went to extraordinary lengths to assure that comments were received and entered into the record. To the extent practicable, the Hearing Officer accommodated all requests relating to the hearing, including late requests to make oral comments at the hearing.

³¹ As noted in the RS, the number of participants in the two hearing sessions "far exceeded" the attendees to other recent informational hearings held by the Illinois EPA and the submission of written comments were nearly overwhelming. To illustrate: two recent, pre-pandemic hearings in the Chicagoland area for Clean Air Act Permit Program permits for BWAY, located in the Little Village neighborhood of Chicago, and Midwest Generation's Waukegan coal-fired power plant, drew attendance of approximately 40 people and 35 people respectively. Both "in-person" hearings were for controversial sources located in EJ areas. It is worth noting that at each of these hearings, language translation services were requested, and the Illinois EPA provided such services at the hearings.

interested persons during the EJ Policy's notification process, which reached a considerable number of officials, NGOs and individuals.³²

The Illinois EPA has also justly defended its approach to addressing hearing-related translation needs, explaining in the RS that the Office of Community Relations routinely acts on such needs whenever either public officials, advocacy groups or members of the public express a simple desire for them. The RS also observed that despite working extensively in past years with local officials and groups from Southeast Chicago, no previous requests for Spanish-language translation are known to have been made until this proceeding. In this proceeding, the issue was only brought to the Illinois EPA's attention at the hearing. A translator was, in fact, available at the hearing. He was introduced at the beginning of the hearing and was prepared to utilize his services to accommodate the acceptance of comments into the record had a request or need arisen.

In this instance, the Illinois EPA is assured that the public participation process was not prejudicial to Spanish-speaking residents of Southeast Chicago. This is because GIII's construction project generated enormous interest in the media, and wide-spread attention was given to it by various elected officials and advocacy groups, including the NGOs. As observed in the RS, the diligence in which environmental advocacy groups frequently communicate with, and organize in, affected communities on environmental issues complements the Illinois EPA's goal of promoting public participation in its programs.³³ The Illinois EPA's past and continuing relationship with elected officials and environmental advocacy groups representing Southeast Chicago, including the NGOs, leaves little reason to doubt that they actively promoted the virtual hearing amongst residents of the community. Media reports of these efforts support this belief, as evidenced by several stories posted before the hearing, and generally confirm the publicized nature of the project.³⁴

³² Advocacy groups like SETF, Chicago Legal Clinic and others are very much aware that the EJ policy was developed to remedy past deficiencies by the Illinois EPA in raising public awareness of permits affecting EJ communities and has proven effective in recent years in identifying areas of public concern at the outset of a permit review.

³³ Additionally, that the Illinois EPA places considerable reliance upon those efforts is manifest in the EJ Policy's notification process.

³⁴ See, "This Earth Day, Fight to Save the Southeast Side from Pollution, Advocates Urge: This Neighborhood is a Sacrifice Zone," Block Club Chicago, April 22, 2020 (citing to Friends of the Parks and the Southeast Side Coalition to Ban Petcoke organizing efforts to block GIII's move to the area); "Virtual Hearing Set for General Iron Permit, Activists Mobilizing Opposition," WTTW at news.wttw.com (May 12, 2020) (noting hearing session times and efforts by Clean the North Branch encouraging residents to register); "Resident activists and environmental groups advocate more oversight for the Southeast Side," South Side Weekly at southsideweekly.com, May 12, 2020 (noting hearing date, deadline for hearing registration and deadline for close of public comment period, and observing that activists "like Clean the North Branch have used Facebook as a tool to organize against General Iron").

Claim Six:

The complaint contends that the Illinois EPA failed to evaluate the impact on air quality from mobile source emissions on the EJ community attributable to the construction of the General III facility.

Summary Response:

The Illinois EPA does not evaluate tailpipe emissions in a construction permit review for a minor emissions source but, rather, relies upon the traditional State Implementation Plan (SIP) revision process and other programmatic measures to monitor compliance with the National Ambient Air Quality Standards (NAAQS).

Illinois EPA Investigation and Response:

Broadly stated, the premise of this Claim is that the Illinois EPA failed to meet a requirement of the Clean Air Act to assess air quality impacts from mobile sources relating to the General III construction project. As an initial matter, the NGOs correctly discern that mobile source emissions are not within the regulatory ambit of a State permit authority. It is widely accepted that USEPA retains the authority under the federal Clean Air Act to regulate tailpipe emissions from motorized and nonroad vehicles.³⁵ This dichotomy is the result of congressional intent expressed in Title II of the CAA, in contrast to the regulation of stationary sources, indirect sources and some transport regions under Title I.

In the RS, the Illinois EPA responded to a similar comment about diesel emissions from trucks being drawn to the area from the project, stating that while the permit review considered roadway emissions, there was no legal authority to address other mobile source emissions, thus mirroring the lack of regulatory involvement by States with setting and enforcing mobile source emissions standards noted above. A closer examination of the legal authorities cited by the NGOs at 40 C.F.R. Part 51 does not rebut this earlier response.³⁶ And certainly there is nothing to indicate that USEPA is encouraging States, whether through the NAAQS' implementing regulations of Part 51 or elsewhere, to examine the impact of mobile source emissions in their review of construction permitting under Title I.³⁷

³⁵ See, 42 U.S.C. §7543(a) and (b).

³⁶ The NGOs may misread the definitional language found in Section 51.100. They read the definition of "control strategy" as a requirement that States "must assess" certain transportation-related matters, including schedules or methods of operation of "transportation systems." In fact, the definition makes clear that the list of things identified by the definition, including the transportation systems language cited by NGOs, is illustrative only. The language cited by the NGOs from Section 51.160(c)(1) is perhaps also being read out of context. The NGOs construe the term "associated mobile sources" as though every State will or must have control measures addressing mobile sources as part of their SIP's control strategy, when, in fact, States are afforded broad latitude in selecting the mix of control measures that they may choose to achieve the NAAQS through their individual SIPs. The language of Section 51.160(c) generally tracks with the rest of the section, which broadly outlines a range of things that can be addressed by a construction permit review depending upon the extent of a State's control strategy.

³⁷ No interpretative rulings or guidance have been located suggesting that USEPA intended the Section 51.160 language to be applied in the proposed manner.

The essence of the argument appears to be that the Illinois EPA could have evaluated the impact from mobile sources using its permitting discretion in the same way, for example, that air quality modeling of metal emissions from the project was evaluated. The Illinois EPA's information-gathering ability is broad under the Environmental Protection Act.³⁸ However, the Illinois EPA does not undertake an examination of a project's tailpipe emissions to evaluate NAAQS compliance in construction permitting review. To do otherwise, as envisioned by this Claim, would not play to the agency's strengths given the traditional role of the federal government and the more circumspect involvement of many States under Title I.³⁹ As stated in the RS, the Illinois EPA's emphasis in the General III construction project has been to address its potential impacts from certain heavy metals (i.e., manganese and lead), which have been a documented concern in this EJ community in the past, and with assuring that the facility would be capable of minimizing fugitive emissions of the same pollutants in its future operations.⁴⁰

The Illinois EPA appreciates that the NGOs and community residents are concerned about truck traffic associated with the project causing potential PM violations of the NAAQS, although there is nothing presented in the way of empirical data to support this concern. The Illinois EPA implements the NAAQS through the requirements set forth in the Clean Air Act, monitoring and reporting air quality data to USEPA consistent with Part 51, Subpart A, and revising the SIP, as needed, to address changes to air quality designations by USEPA based on their reviews of the primary and secondary standards. As mentioned in the RS, Illinois is designated attainment for purposes of PM and existing monitoring data demonstrates that the area is in compliance with the NAAQS for PM.⁴¹ It can be noted that because ambient monitoring is indirectly capturing emissions from stationary sources and mobile sources alike, the existing ambient air monitoring network provides an additional assurance that air quality impacts in the area can be detected if they occur.

Claim Seven:

The complaint asserts that the Act's narrative air pollution standard⁴² and the nearly identical language found in the Board's Part 201 regulations⁴³ apply to odors, and that public concerns with the General II facility located in Lincoln Park, and whose pollution control equipment could transfer to the new site, demanded that the Illinois EPA impose an odor management plan in the issued construction permit.

³⁸ 415 ILCS 5/4(b)(2018).

³⁹ Illinois' SIP generally only addresses mobile source emissions through various smoke emission standards and vehicle emissions testing standards.

⁴⁰ See generally, RS at pages 53-56 (FPOP) and pages 59-66 (Modeling).

⁴¹ See, RS at Nos. 169, 170 and 171, page 57.

⁴² 415 ILCS 5/9(a)(2018).

⁴³ 35 Ill. Adm. Code 201.141.

Summary Response:

The Illinois EPA properly declined to address odor emissions in the issued construction permit on the grounds that allegations of odors from an existing facility did not warrant imposition of an odor study for the proposed construction of the General III facility, especially given that odors are commonly dependent upon site-specific factors.

Illinois EPA Investigation and Response:

It is not disputed that certain types of odors are within the purview of the statutory and regulatory language cited by the NGOs. However, not all odors that emanate from contaminants will cause, or tend to cause, "air pollution" as defined by the Act. This is because odors are only actionable under the Act if they are injurious to human health or the environment or, alternatively, if they result in an unreasonable interference with life or property.⁴⁴ The legal standard for air pollution plainly does not encompass odors that are merely "unpleasant" or that involve pollutants revealed as fugitive emissions, both mentioned in the NGOs' arguments. It is also not abundantly clear that the smell of odors detected during a transitory site inspection will always constitute injurious harm or substantial interference with life or property.

More significantly, the odors cited by the complaint and in the comments to the draft construction permit are allegations and not violations. For purposes of the Environmental Protection Act, such allegations do not constitute proof of injury, unreasonable interference, or air pollution in general. Although odors historically have been alleged by residents of the Lincoln Park community where the General II facility currently operates, and reportedly experienced by city inspectors in their prosecution of city ordinances, such observations do not, in and of themselves, amount to proof of violation of the Act's air pollution standard. A courtroom that can weigh objective facts and apply those facts to the law is the appropriate venue for sorting out allegations from actual violations. A permit proceeding, in contrast, may often be too unwieldy of a process to effectively resolve compliance disputes, as it lacks many of the tools that facilitate the prosecution of an enforcement case (i.e., formal discovery, subpoena power, different burdens of proof).⁴⁵ This is particularly true given that the consideration of such matters is occurring within a licensing context, where due process concerns frequently operate as a constraint to government action, and under a statutory framework that traditionally separates enforcement from permitting functions.⁴⁶

Moreover, the arguments from this Claim advocating for odor-related measures in the construction permit do not consider legal causation or the scope of the Illinois EPA's general permit authority under Section 39(a). Even if some or all the control equipment from the General II facility is transferred and made operational at the new General III site, it cannot be presumed, either as a practical matter or as a

⁴⁴ See, 425 ILCS 5/9(a); 415 ILCS 5/3.115 (definition of "air pollution").

⁴⁵ As related to odors generally, a permit proceeding is an appropriate venue to address emission standards or limitations required by the Pollution Control Board which may indirectly reduce odors, and to incorporate measures voluntarily sought by an applicant or that are required by an adjudication or appropriate settlement agreement.

⁴⁶ See generally, Investigation and Response to Claim Three.

matter of law, that odors will be present at the new facility in amounts or concentrations that will cause air pollution.

Factors that cause or contribute to the presence of odors are varied, often depending upon proximity of the impacted area to the source of the odors, chemical characteristics of the offending contaminants, meteorological conditions, air dispersion and the presence of other nearby industrial sources that could also be culpable. Such site-specific factors could easily diminish the prevalence of odors at the proposed location of General III's planned project, as compared to conditions that exist at the General II facility in Lincoln Park. Notably, such factors would obviously affect record support for a permit condition imposed by the Illinois EPA in a construction permit issued months or years before any odor impacts from the source could be evaluated first-hand. In short, whether a construction permit term imposing an odor study would pass muster under the Act's general permit authority is dubious; a requirement to show that the condition is "necessary" would be entirely dependent upon site-specific factors that are as-yet undetermined.⁴⁷

Claim Eight:

The complaint contends that the air quality modeling performed by General III and audited by the Illinois EPA was deficient, citing to exceedance(s) above the 24-hour NAAQS concentration limit for PM₁₀ of 150 ug/m³ and, additionally, exceedances of an 8-hour reference exposure level (REL) standard used in California for manganese.

Summary Response:

The Illinois EPA's reliance upon the air quality modeling developed as part of the permit review was appropriate, given that the alleged deficiencies do not correlate with the modeling that was performed or otherwise rise to the level of an exceedance of an emissions standard.

Illinois EPA Investigation and Response:

The NGOs chiefly argue that the Illinois EPA did not respond to the modeling extrapolation showing that "high levels of PM₁₀" would result from the project. The notion that PM₁₀ emissions will be elevated apparently stems from the Natural Resources Defense Council's (NRDC) extrapolation of PM₁₀ emissions from the AERMOD modeling files by changing modeling inputs (or "assumptions adjusted for PM₁₀") to create a contour map of PM₁₀ impacts at the site.⁴⁸ In the RS, the Illinois EPA explained that the project constituted a minor source construction project in an area designated attainment for PM₁₀.⁴⁹ These

⁴⁷ See, 415 ILCS 5/39(a).

⁴⁸ This conclusion is not easily discernable from the language used in the Claim or in the original comments. In both instances, the relevant discussions read as though the exceedances are present in the emission calculations and modeling from General III's submission. Only by referring to the supporting exhibits highlighting modeling files used by the NRDC's modeling expert does it become apparent that the argument is buttressed by the expert's selected changes to inputs in the modeling files. The contour map developed from the exercise purports to show PM₁₀ exceedances from a small area located on the General III site.

⁴⁹ See, RS at Nos. 184 and 191, pages 60 and 63 respectively.

twin considerations, based on long-standing experience and the fact that they are embodied in the structure of permitting programs at both federal and state levels, provided confidence that modeling for PM10 was not a regulatory requirement. Although the Illinois EPA did not respond directly to the NRDC's revisions to the modeling,⁵⁰ the approach is not persuasive to show the presence of PM10 emissions in the concentrations alleged for the simple reason that PM10 was not the targeted pollutant for the modeling conducted.⁵¹

The NGOs cite to similar levels of PM10 emissions and related health dangers that were referenced in an unrelated Notice of Violation (NOV) issued by USEPA in 2015, implying that the PM10 data extrapolated from the modeling files should be given equal weight. First, the NOV was cited in a footnote to NRDC's comments but not for the proposition advanced in this Claim and, in any event, it is not known whether modeling provided the evidentiary grounds for the lawsuit. Similar to the discussion in the response to Claim 6, the Illinois EPA's discussion of modeling issues in its RS relied upon both its institutional knowledge concerning past and current ambient air quality networks and the efficacy of such an approach.⁵² Moreover, reliance upon changes to the modeling inputs to claim a violation of the NAAQS overlooks the fact that GIII's modeling results were potentially based on conservative assumptions.⁵³

In addressing the selection of benchmarks for the manganese modeling, the Illinois EPA explained that the modeling had used 24-hour and annual averaging periods for correlation purposes rather than the 8-

⁵⁰ That the Illinois EPA did not respond specifically to the comment is an unfortunate consequence of facing voluminous comments at the close of the public comment period and a fixed timeframe in which to respond to comments before the end of the statutory decision deadline. It can be noted that aside from the somewhat vague wording used both in this Claim and in the underlying comment, the single-paged exhibit relied upon was barely discussed in the NRDC's roughly 80 pages of comments and mainly only referenced in 1 of 96 separate attachments. The submission from NRDC totaled 4,333 pages in all. Generally speaking, a permit authority is obligated to respond to all significant comments in a permit proceeding, but it should not be required to examine or decipher every data point put before it in comments. Commenters bear some responsibility for highlighting the things that matter to them in their comments. In this instance, the Illinois EPA responses to the generalized concerns about air quality was more than sufficient to inform readers as to why PM10 emissions did not need to be modeled for the project.

⁵¹ As mentioned, there was no opportunity to evaluate the revised modeling inputs due to the press of responding to the voluminous comments. In any event, such an opportunity would have required an additional modeling exercise to evaluate the appropriateness of those inputs and the resulting outputs, for which the statutory decision deadline also did not allow.

⁵² See generally, Nos. 160-171 at page 57; No. 175 at page 58; and No. 182 at page 59-60.

⁵³ This conservatism may be reflected in the proximity of a nearby ambient monitoring station, such that nearby modeled sources would also be contributing to the monitored background value, leading to a double-counting of emissions in the modeling analyses.

Separately, the NGOs also argue that the Illinois EPA did not address the relevance of the SCPM-related facilities regarding this PM10 issue. The reasoning behind the response that no modeling was similarly required is supported by the fact that the combined SCPM facilities are currently permitted as a ROSS with actual emissions less than the regulatory threshold requiring a lifetime operating permit.

hour period, thus allowing a ready comparison to two different values.⁵⁴ The Illinois EPA also admittedly downplayed the significance of the cited REL by noting that it is used by California officials as a “guideline” level for manganese by the California EPA’s Office of Environmental Health Hazard Assessment, observing that the agency website explains that the value is not considered harmful at exposure levels. It is also telling that the office is the lead agency for scientific studies that “inform, support and guide” regulatory actions. Such actions commonly make use of reference values (or guidelines) in the development of administrative rulemakings, which, in turn, lead to the creation of legally enforceable standards. In treating the REL as analogous to promulgated emission standards, the NGOs blur this important distinction.

⁵⁴ The Illinois EPA explained that the averaging period was selected to correlate with a Wisconsin air quality standard and an Agency for Toxic Substances and Disease Registry’s Minimal Risk Level (MRL), both of which the Illinois EPA’s modeling analysts are familiar with from prior comparisons.