

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE

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

SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Pollution Control Board the **MOTION FOR LEAVE TO FILE ILLINOIS EPA'S REPLY TO CITIZENS AGAINST RUINING THE ENVIRONMENT'S REPLY COMMENTS** and **ILLINOIS EPA'S REPLY TO CITIZENS AGAINST RUINING THE ENVIRONMENT'S REPLY COMMENTS**, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: *Sally D. Carter*
Sally Carter
Assistant Counsel
Division of Legal Counsel

DATED: May 2, 2019

1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
217/782-5544

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

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PREVENTION OF SIGNIFICANT)	R19-1
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AND 215)	

**MOTION FOR LEAVE TO FILE ILLINOIS EPA’S REPLY TO CITIZENS
AGAINST RUINING THE ENVIRONMENT’S REPLY COMMENTS**

The Illinois Environmental Protection Agency (“Illinois EPA” or “Agency”), by and through its attorney and pursuant to 35 Ill. Adm. Code 101.500, hereby files with the Illinois Pollution Control Board (“Board”) this Motion for Leave to File Reply to Citizens Against Ruining the Environment’s” (“CARE”) Reply Comments (“CARE’s Reply Comments”) in this cause.

1. On July 2, 2018, the Illinois EPA filed a regulatory proposal with the Board to establish a state Prevention of Significant Deterioration (“PSD”) permitting program in Illinois consistent with the requirements of Section 9.1(c) of the Act, 415 ILCS 5/9.1(c). The Illinois EPA’s proposal included adding new Part 204, Prevention of Significant Deterioration. In addition, to provide for appeals of any PSD permit decisions to the Board, the Illinois proposed amending the Board’s procedural rules in 35 Ill. Adm, Code Parts 101 and 105. Finally, the Illinois EPA also proposed amending three parts of the Board’s current regulations to include the language necessary to address both the federal PSD program and new proposed Part 204. These proposed changes would include amendments to Parts 203, 211 and 215.

2. On August 23, 2018, the Board accepted the Illinois EPA’s proposal for public comment.

3. On November 27, 2018, the Board held its first hearing in this proceeding and on

January 24, 2019, the Illinois EPA filed its Post Hearing Comments.

4. On February 6, 2019, the Board held its second hearing in this proceeding.

5. On February 28, 2019, Board Hearing Officer Rabzak issued a Hearing Officer Order stating that all post hearing comments were due on April 5, 2019. All reply comments were due on April 19, 2019.

6. On April 4, 2019, the Illinois EPA filed its Second Post Hearing Comments.

7. On April 5, 2019, Citizens Against Ruining the Environment (CARE) filed its Post Hearing Comments.

8. On April 19, 2019, CARE filed Reply Comments with the Board. In CARE's Reply Comments, CARE stated that the source of the Illinois EPA's authority to act during permitting to address environmental justice is the Illinois Environmental Justice Act and a statement made by USEPA's Office of General Counsel concerning the Clean Air Act and the definition of Best Available Control Technology ("BACT").

9. The Illinois EPA would be materially prejudiced if the Board were to find that Illinois EPA can consider environmental justice concerns during processing of PSD permit applications due to either provision offered by CARE. The Illinois EPA's obligation to consider environmental justice issues during permitting derives from 40 CFR Part 7, Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency.

10. The granting of this Motion for Leave to File Illinois EPA's Reply will ensure that this legal issue regarding the Illinois EPA's authority to consider environmental justice in permitting is appropriately before the Board.

WHEREFORE, the Illinois EPA respectfully requests that the Board grant this Motion for Leave to File Illinois EPA's Reply to Citizen's Against Ruining the Environment's Reply Comments.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: *Sally A. Carter*
Sally Carter
Assistant Counsel
Division of Legal Counsel

Dated: May 2, 2019

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ILL. ADM. CODE PARTS 101, 105, 203, 211)	
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**ILLINOIS EPA’S REPLY TO CITIZENS AGAINST RUINING
THE ENVIRONMENT’S REPLY COMMENTS**

The Illinois Environmental Protection Agency (“Illinois EPA” or “Agency”), by and through its attorney and pursuant to 35 Ill. Adm. Code 101.500, hereby files with the Illinois Pollution Control Board (“Board”) this Reply to Citizens Against Ruining the Environment’s (“CARE”) Reply Comments (“CARE’s Reply Comments”) in this proceeding.

In CARE’s Reply Comments, CARE stated that the Illinois EPA can take environmental justice concerns into consideration during PSD permitting due to the Illinois Environmental Justice Act and a statement made by USEPA’s Office of General Counsel concerning the Clean Air Act and the statutory definition of Best Available Control Technology (“BACT”). The Illinois EPA would be materially prejudiced if the Board were to find that Illinois EPA may consider environmental justice concerns during processing of PSD permit applications under proposed Part 204 due to either of these provisions.

CARE stated as follows in CARE’s Reply Comments:

Thus, IL EPA can take environmental justice concerns into consideration during the PSD permitting process as a result [of] the state-wide adoption of the Illinois Environmental Justice Act and, according to U.S. EPA’s Office of General Counsel OGC, through the CAA requirements and the broad statutory definition of BACT. *See* CARE Exhibit B, 12, Feb. 26, 2019, R19-1 (declaring that “the CAA requirement to consider alternatives to the proposed source, and the board statutory definition [] of BACT, provided *ample opportunity for consideration of environmental justice in PSD permitting*”)(emphasis added).

CARE's Reply Comments at page 4. This statement is inaccurate. The Illinois EPA's obligation to consider environmental justice during permitting derives from 40 CFR Part 7, Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency. Specifically, as a recipient of federal assistance from the USEPA, Section 7.90 mandates the adoption of a grievance procedure to provide for prompt and fair resolution of complaints which allege violations of 40 CFR Part 7. Section 7.95 mandates that the Illinois EPA provide initial and continuing notice that it will not discriminate in programs for activities for which the Illinois EPA receives assistance from the USEPA. As previously discussed in its Section Post Hearing Comments, it is in response to the federal mandates that apply to the Illinois EPA as it is a recipient of federal assistance from USEPA that the Illinois EPA adopted its own Environmental Justice policy and associated Environmental Justice Grievance Procedure.¹²

While the Illinois EPA stated in its Second Post Hearing Comments that the source of its authority is derived from 40 CFR Part 7, CARE continues to wrongly cite to the Illinois Environmental Justice Act and a document penned by USEPA's Office of General Counsel in 2000. Given CARE's continued confusion concerning the mandate, if any, offered by the

¹ If a person wanted to contest the outcome of any Illinois EPA grievance procedure, a complaint could be filed with USEPA's Office of Civil Rights. Part 7, Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, dictates such review is to be undertaken by USEPA's Office of Civil Rights. 40 CFR Part 7. Any administrative review of the Illinois EPA's implementation of its EJ Grievance Procedure by USEPA's Office of Civil Rights is separate and distinct from any administrative review contemplated by the Board.

² In the event that CARE would seek leave to file a subsequent reply on this issue and to errantly insist that the Illinois EPA's authority to address environmental justice in PSD permitting is found in the Illinois Environmental Justice Act and a statement made by OGC concerning the Clean Air Act and the statutory definition of Best Available Control Technology, the Illinois EPA will not continue to engage in such filings with the Board. However, the Illinois EPA would ask that the Board take note that the Illinois EPA ardently maintains that its obligation to consider environmental justice during permitting derives from 40 CFR Part 7.

Illinois Environmental Justice Act, and to avoid any question on what is prescribed by the Illinois Environmental Justice Act, the full text of the Illinois Environmental Justice Act is provided below.

Sec. 1. Short title. This Act may be cited as the Environmental Justice Act.

Sec. 5. Legislative findings. The General Assembly finds that:

- (i) 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;
- (ii) certain communities in the State may suffer disproportionately from environmental hazards related to facilities with permits approved by the State; and
- (iii) these environmental hazards can cause long-term health effects.

Sec. 10. Commission on Environmental Justice.

- (a) The Commission on Environmental Justice is established and consists of the following 24 voting members:
 - (1) 2 members of the Senate, one appointed by the President of the Senate and the other by the Minority Leader of the Senate, each to serve at the pleasure of the appointing officer;
 - (2) 2 members of the House of Representatives, one appointed by the Speaker of the House of Representatives and the other by the Minority Leader of the House of Representatives, each to serve at the pleasure of the appointing officer;
 - (3) the following ex officio members: the Director of Commerce and Economic Opportunity or his or her designee, the Director of the Environmental Protection Agency or his or her designee, the Director of Natural Resources or his or her designee, the Director of Public Health or his or her designee, the Secretary of Transportation or his or her designee, and a representative of the housing office of the Department of Human Services appointed by the Secretary of Human Services; and
 - (4) 14 members appointed by the Governor who represent the following interests:
 - (i) at least 4 members of affected communities concerned with environmental justice;

- (ii) at least 2 members of business organizations including one member representing a statewide organization representing manufacturers and one member representing an organization representing the energy sector;
 - (iii) environmental organizations;
 - (iv) experts on environmental health and environmental justice;
 - (v) units of local government;
 - (vi) members of the general public who have an interest or expertise in environmental justice; and
 - (vii) at least 2 members of labor organizations including one member from a statewide labor federation representing more than one international union and one member from an organization representing workers in the energy sector.
- (b) Of the initial members of the Commission appointed by the Governor, 5 shall serve for a 2-year term and 5 shall serve for a 1-year term, as designated by the Governor at the time of appointment. Thereafter, the members appointed by the Governor shall serve 2-year terms. Vacancies shall be filled in the same manner as appointments. Members of the Commission appointed by the Governor may not receive compensation for their service on the Commission and are not entitled to reimbursement for expenses.
- (c) The Governor shall designate a Chairperson from among the Commission's members. The Commission shall meet at the call of the Chairperson, but no later than 90 days after the effective date of this Act and at least quarterly thereafter.
- (d) The Commission shall:
 - (1) advise State entities on environmental justice and related community issues;
 - (2) review and analyze the impact of current State laws and policies on the issue of environmental justice and sustainable communities;
 - (3) assess the adequacy of State and local laws to address the issue of environmental justice and sustainable communities;
 - (4) develop criteria to assess whether communities in the State may be experiencing environmental justice issues; and

- (5) recommend options to the Governor for addressing issues, concerns, or problems related to environmental justice that surface after reviewing State laws and policies, including prioritizing areas of the State that need immediate attention.
- (e) On or before October 1, 2011 and each October 1 thereafter, the Commission shall report its findings and recommendations to the Governor and General Assembly.
- (f) The Environmental Protection Agency shall provide administrative and other support to the Commission.

Sec. 99. Effective date. This Act takes effect upon becoming law.

In summary, in the Illinois Environmental Justice Act, the legislature found that the principle of environmental justice requires that no segment of the population should bear disproportionately high or adverse effects of environmental pollution and established the Commission on Environmental Justice in Illinois. The Illinois Environmental Justice Act did *not* mandate certain responsibilities on state agencies and, as such, provides no authority for the Illinois EPA to address environmental justice during permitting.³ Moreover, if the Board were to make such a finding, such a finding could be improperly construed to also provide instruction that is applicable to other state agencies other than the Illinois EPA.

Nor does the Illinois EPA's ability to take action during permitting to address environmental justice derive from the requirements of the Clean Air Act or the definition of Best Available Control Technology ("BACT"). The Illinois EPA previously addressed the Office of General Counsel's ("OGC") 2000 Memorandum in its Second Post Hearing Comments and would direct the Board to these earlier responses especially the Illinois EPA's response to CARE Question 9. Perhaps most significantly, it is not clear that the Environmental Appeals Board ("EAB") ever accepted the reasoning offered by OGC when originally proffered by OGC in

³ The only exception to this statement is the requirement for the Illinois EPA to perform administrative support for the Commission on Environmental Justice.

Genesee Power as the EAB merely deleted the controversial language as suggested by the permit applicant in that case. The EAB did not decide whether it was permissible to address environmental justice under the federal definition of BACT at 40 CFR 52.21(b)(12). *In re Genesee Power Station Limited Partnership*, 4 E.A.D. 832 (October 22, 1993). Nor has the EAB been required to consider this matter further given shortly thereafter President William J. Clinton issued Executive Order 12898 on February 11, 1994, mandating action with regard to environmental justice by each federal agency including USEPA. Again, subsequent decisions by the EAB all address EJ in the context of Executive Order 12898. No similar Executive Order or state law exists mandating such action by the Illinois EPA with regard to environmental justice in permitting.

Finally, CARE cites the *Chemical Waste Management* decision to suggest that the Illinois EPA does not understand “how 40 CFR 124.19 operates within both the RCRA and PSD permitting scheme.” CARE’s Reply Comments at page 3. While the Illinois EPA did indicate in its Second Post Hearing Comments that this decision represented a nearly 25-year old EAB decision made in the context of a permit issued pursuant to the Resource Conservation and Recovery Act (RCRA) during the infancy of Executive Order 12898 and that this decision did not address the role of environmental justice in PSD permitting, the Illinois EPA did not address 40 CFR Part 124.19 in its discussion of *Chemical Waste Management* in its Second Post Hearing Comments. *In re Chemical Waste Management of Indiana Inc.*, RCRA Appeal Nos. 95-2 & 95-3, 6 E.A.D. 66 (EAB June 29, 1995).

In retrospect, the Illinois EPA might have more clearly distinguished the *Chemical Waste Management* decision from the issues raised in the pending rulemaking. However, given the Illinois EPA has consistently recognized EAB review is generally appropriate where the permit

decision involves a “finding of fact or conclusion of law which is clearly erroneous” or where it involves “an exercise of discretion or an important policy consideration” and similarly, Board review is appropriate when “the Agency’s previous response, if any, to those issues is . . . clearly erroneous or . . . an exercise of discretion or an important policy consideration that the Board should, in its discretion, review,” the Illinois EPA did not think it necessary to repeat its earlier statements on the matter. *See*, Post Hearing Comments, Chicago Legal Clinic, Question 3.b.i; *see also*, 40 CFR §124.19(a)(1) & (2) and 415 ILCS 5/40.3(a)(2).

Likewise, given that the *Chemical Waste Management* decision addressed at length the Region’s discretion, within the constraints of RCRA, to implement the mandates of the Executive Order 12898, there was little for the Illinois EPA to discuss. In this vein, the EAB’s holding clearly states that its decision considered Executive Order 12898 in the context of RCRA permitting:

Held: (1) While the Executive Order does not purport to, and does not have the effect of, changing the substantive requirement for reviewing a permit under RCRA and its implementing regulations, the RCRA permitting process nevertheless offers certain opportunities for the Region to exercise discretion, *within the constraints of that process, to implement the Executive Order*, and as a matter of policy, the Region should exercise those opportunities to the greatest extent practicable; (2) The Board will review the Region’s *efforts to implement the Executive Order* insofar as those efforts have an effect on the permit decision;

Id. at pages 66-67 (*emphasis added*).

In fact, the EAB recently made a similar decision involving environmental justice, again considering Executive Order 12898, but this time in the context of an Underground Injection Control (“UIC”) permit issued by USEPA Region V. *In re Muskegon Development Company*, UIC Appeal No. 18-05 (April 29, 2019). The EAB again recognized that “the Executive Order on Environmental Justice gives permitting authorities discretion to determine how best to implements its mandate within the confines of existing law” and again stated “that there are two

areas where a Region has the discretion to implement the Executive Order on Environmental Justice: the 'public participation' procedures at 40 C.F.R. part 124 and the UIC regulatory 'omnibus authority.' [*In re Envotech, L.P.*] 6 E.A. D. [260] at 281." *Muskegon*, slip op. at 15.⁴

Important for this discussion as related to proposed Part 204 is that the Illinois Environmental Justice Act did not mandate certain responsibilities on state agencies as Executive Order 12898 did on federal agencies. As such, the *Chemical Waste Management* or the *Muskegon Development Company* discussion of the Region's discretion to implement a federal mandate means little in any discussion of the Board's discretion to review environmental justice where no similar state mandate exists.

CARE also cites *Chemical Waste Management* for the proposition that "the regulations represented a broad grant of authority, allowing [the EAB] to 'review any condition of a permit decision (or [], the permit decision in its entirety).' CARE Exhibit A, 76, Feb. 26, 2019, R19-1." See, CARE Reply Comments at page 3. However, in *Chemical Waste Management*, this statement was made by the EAB in the context of an argument made by the USEPA Regional Office that claims relating to its implementation of the Executive Order were not subject to review due to § 6-609 of Executive Order 12898 precluding judicial review of the USEPA's efforts to comply with this order. It is in this context that the EAB stated as follows:

More specifically, it does not preclude the *Board*, in an appropriate circumstance, from reviewing a Region's compliance with the Executive Order as a matter of policy or exercise of discretion to the extent relevant under section 124.19(a). Section 124.19(a) authorizes the Board to review any condition of a permit decision (or as here, the permit decision in its entirety). Accordingly, the Board can review the Region's efforts to implement the Executive Order in the course of determining the validity or appropriateness of the permit decision at issue.

⁴ In this decision as well, the EAB reiterated that the "Region cannot deny or condition a UIC permit based on environmental justice considerations where the permittee has demonstrated full compliance with the statutory and regulatory requirements." *Muskegon*, slip op. at 17

Chemical Waste Management of Indiana Inc. at page 76. The fact that EJ may be involved in permit appeals before the EAB does not justify consideration of EJ by the Board in PSD permit appeals. Consideration of matters related to environmental justice may be warranted by the EAB in a federal PSD permit appeal or a federal RCRA or UIC permit appeal because of Executive Order 12898. However, this does not mean that such considerations are likewise authorized by applicable law in the context of a state-approved PSD program when language similar to that found in Executive Order 12898 does not currently exist in 415 ILCS 155/5 or elsewhere. Given any EAB consideration of environmental justice is based, in part, on Executive Order 12898 and no similar requirement exists in state law, the Board should not afford any deference to EAB decisions in this respect. Again, the question of whether actions to address environmental justice during permitting are an important policy consideration that the Board has discretion to review under the Act is a matter that will have to be decided by the Board, because there is no specific provision of state law currently mandating its consideration.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: 
Sally Carter
Assistant Counsel
Division of Legal Counsel

Dated: May 2, 2019

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STATE OF ILLINOIS)
)
COUNTY OF SANGAMON) SS
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CERTIFICATE OF SERVICE

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

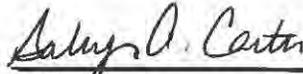
I have electronically served the attached **MOTION FOR LEAVE TO FILE ILLINOIS EPA'S REPLY TO CITIZENS AGAINST RUINING THE ENVIRONMENT'S REPLY COMMENTS** and **ILLINOIS EPA'S REPLY TO CITIZENS AGAINST RUINING THE ENVIRONMENT'S REPLY COMMENTS** upon the persons on the attached Service List.

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

The number of pages in the e-mail transmission is 15.

The e-mail transmission took place before 5:00 p.m. on May 2, 2019.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,



Sally Carter
Assistant Counsel
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Dated: May 2, 2019

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