



ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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July 16, 2020

Vicki Thomas, Executive Director
Joint Committee on Administrative Rules
Illinois General Assembly
700 Stratton Building
Springfield, IL 62706

Subject: Comments regarding Illinois Pollution Control Board Rulemaking, R2019-001.
In the Matter of Proposed New 35 Ill. Adm. Code 204, Prevention of Significant
Deterioration, Amendments to 35 Ill. Adm. Code Parts 101, 105, 203, 211 and
215

Ms. Thomas,

The Illinois Environmental Protection Agency (Illinois EPA) submits these comments regarding rulemaking proposal R2019-001. In the Illinois Pollution Control Board's (Board) Opinion and Order, dated June 18, 2020 (Board's Order), the Board committed to making certain changes to proposed Part 204, Prevention of Significant Deterioration (PSD), to ensure consistency with the federal PSD rules at 40 CFR 52.21. However, not all these changes were made in the Second Notice. In addition, the Illinois EPA now recognizes that in one instance, it could have been clearer in prior comments provided to the Board.

Before providing its specific comments on the Second Notice, the Illinois EPA would like to recognize the effort and resources that the Board has committed to new 35 Ill. Adm. Code Part 204 and the accompanying revisions to the certain existing provisions of 35 Ill. Adm. Code, that together will create a state PSD permitting program in Illinois. This rulemaking addresses a highly nuanced permitting program that includes the federal implementing rules, extensive case authorities and interpretative federal guidance that necessarily guide this state rulemaking. The Board's March 5, 2020, Opinion and Order for the Proposed Rule provides a lengthy and detailed analysis of this rulemaking proposal. It carefully reviews this regulatory proposal in light of the General Assembly's mandate that the Part 204 rules mirror, not merely approximate, the federal PSD rules. This analysis will also assist the Illinois EPA, the regulated community and the public in its future implementation of the state PSD program.

The Illinois EPA's Rulemaking Proposal

The Illinois EPA developed its proposal consistent with the legislative mandate of Section 9.1(c) of the Illinois Environmental Protection Act (Act) which provides that the regulations adopted by the Board to establish a PSD program shall meet the requirements of Section 165 of the Clean Air Act (CAA) and be consistent with 40 CFR 52.21. This necessarily includes not only the federal PSD rules but a forty-year accumulation of case authorities and interpretative guidance that are instructive to the implementation of the federal PSD rules. In

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addition, Section 3.363 of the Act created a definition of “Prevention of Significant Deterioration permit” or “PSD permit” to mean:

a permit or the portion of a permit for a new major source or major modification that is issued by the Illinois Environmental Protection Agency under the construction permit program pursuant to subsection (c) of Section 9.1 that has been approved by the United States Environmental Protection Agency and incorporated into the Illinois State Implementation Plan to implement Section 165 of the Clean Air Act and 40 CFR 51.166.

415 ILCS 5/3.363.

Given the interplay between these federal and state law requirements, and after extensive dialogue with USEPA staff, the Illinois EPA proposed rules for a state PSD program based largely on the language of 40 CFR 52.21 and key elements of the program’s regulatory development but also ensuring that the rules meet the requirements in 40 CFR 51.166 for state PSD rules to be approved by USEPA. If the text of the proposed rules deviates from this framework, it could presumptively result in a determination by USEPA that these state rules are less stringent than the federal rules. To this end, it is important that any departures from the federal rules be a product of careful deliberation. In those areas where the language of proposed Part 204 did not mirror the exact language of 40 CFR 52.21, the legal basis for such changes were justified by the Illinois EPA to the Board. As a general matter, any changes proposed by the Illinois EPA sought to memorialize recent court or administrative decisions or USEPA guidance or regulatory proposals.

The First Notice Version made many grammatical changes to Part 204 as proposed by the Illinois EPA, including replacing “shall” with the term “must,” the removal of parenthetical plural nouns, and the selective removal or insertion of commas. The Illinois EPA subsequently explained to the Board that while these changes might appear inconsequential, many of these changes would substantively alter the proposal in a way that is contradictory to the federal PSD rules as they currently exist at 40 CFR 52.21. In doing so, such changes could threaten approval of Part 204 as part of Illinois’ SIP. As Part 204 is not consistent with the federal PSD rules, confusion in future implementation could also occur especially where the legal basis for the deviation from the federal PSD rules was not elaborated upon by either the Illinois EPA in its proposal or by the Board in its final Order adopting the rule. This could prove challenging for the Illinois EPA and permit applicants during permitting and the Board as the review authority for appeals of permits. Board’s Order at page 3. Responding to the Illinois EPA’s comments, the Board agreed, finding as follows:

IEPA persuasively cites authorities that a proposed PSD permit program must “mirror” the federal program and be approvable by USEPA as a SIP revision. IEPA comments in detail that the first-notice version of Part 204 includes changes that are not consistent with the federal rules and may jeopardize USEPA’s approval of Part 204 as a SIP revision.

These changes include those that the Board may generally propose to clarify or simplify its rules. Others may be changes commonly requested by JCAR. However, the Board agrees with IEPA that Section 9.1(c) obligates the Board to follow the federal PSD rules with the ultimate purpose of adopting a program USEPA will approve as a SIP revision.

Based on the specific statutory authority applicable to this rulemaking, the Board generally agrees with IEPA's comment on changes in its first-notice version of its proposal. See PC at 10-66. . .

Board's Order at pages 5-6.

Use of the Word "Shall" as Found in 40 CFR 52.21

In the following instances, Part 204 would deviate from the federal PSD rules as it would use a word other than "shall." To achieve consistency with the federal PSD rules as required by the Act, the Illinois EPA recommends that the following sections be revised:

- 35 Ill. Adm. Code 204.240(a) – Change "must" to "shall" so the sentence would read, "The Agency shall allow the use of a different time period upon a determination that it is more representative of normal source operation." (emphasis added).
- 35 Ill. Adm. Code 204.240(a)(4) – Change "must" to "shall" so the sentence would read, "The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount if required by subsection (a)(2)." (emphasis added).
- 35 Ill. Adm. Code 204.240(b)(5) – Change "must" to "shall" so the sentence would read, "The average rate shall not be based on any consecutive 24-month period for which there is inadequate information for determining annual emissions, in tons per year, and for adjusting this amount if required by subsections (b)(2) and (b)(3)." (emphasis added).
- 35 Ill. Adm. Code 204.310 – Change "must" to "shall" so the sentence would read, "The federal contribution for a qualifying project shall be at least 20 percent of the total cost of the demonstration project." (emphasis added).
- 35 Ill. Adm. Code 204.490(d) – Change "will" to "shall" so the sentence would read, "Instead, the definition at Section 204.1720 shall apply." (emphasis added).
- 35 Ill. Adm. Code 204.550(g) – Change "does" to "shall" so the sentence would read, "Subsection 204.210(b) shall not apply in determining creditable increases and decreases." (emphasis added).
- 35 Ill. Adm. Code 204.610(a)(1) – Reinsert "shall" so the sentence would read, "PM_{2.5} emissions and PM₁₀ emissions shall include gaseous emissions from a source or activity, that condense to form PM at ambient temperatures." (emphasis added).
- 35 Ill. Adm. Code 204.610(e) – Change "does" to "shall" so the sentence would read, "Notwithstanding subsections (a) through (d), the term 'regulated NSR pollutant' shall not include any or all hazardous air pollutants either listed in section 112(b)(1) of the CAA (42 U.S.C. 7412(b)(1)) or added to the list under CAA section 112(b)(2) or (b)(3), or substances listed under CAA section 112(r)(3) and that have not been delisted under CAA section 112(b)(3) or (r), unless the listed hazardous air pollutant is also regulated as

a constituent or precursor of a pollutant listed under CAA section 108 (42 U.S.C. 7408).” (emphasis added).

- 35 Ill. Adm. Code 204.620(c)(4) – Change “must” to “shall” so the sentence would read, “The owner or operator shall use credible information, such as results of historic maximum capability tests, design information from the manufacturer, or engineering calculations, in establishing the magnitude of the basic design parameter(s) specified in subsection (c)(2) and (c)(3).” (emphasis added).
- 35 Ill. Adm. Code 204.620(c)(5) – Change “must” to “shall” so the sentence would read, “If design information is not available for a process unit, the owner or operator shall determine the process unit’s basic design parameter(s) using the maximum value achieved by the process unit in the five-year period immediately preceding the planned activity.” (emphasis added).
- 35 Ill. Adm. Code 204.1830(c) – Change “will” to “shall” so the sentence would read, “It will remain in effect until a revised PAL permit is issued by the Agency.” (emphasis added).
- 35 Ill. Adm. Code 204.1900 – Change “must” to “shall” so the sentence would read, “The reports shall meet the requirements of this Section.” (emphasis added).

Parenthetical Plural Nouns

Part 204 would not always make use of parenthetical plural nouns where the federal PSD rules use parenthetical plural nouns. To achieve consistency with the federal PSD rules as required by the Act, the Illinois EPA recommends that the following sections be revised to be consistent with the federal PSD rules:

- 35 Ill. Adm. Code 204.1880(h)(1) – change “values” to “value(s)”
- 35 Ill. Adm. Code 204.1880(h)(1) – change “points” to “point(s)”

Commas

In the First Notice, in numerous instances, commas were either inserted or removed from the text of Part 204 as proposed by the Illinois EPA. The Illinois EPA commented to the Board that such changes would alter the substantive provisions of the proposal or create unnecessary ambiguity in provisions copied from the federal PSD rules as they currently exist in 40 CFR 52.21. The Board agreed, finding it was prudent to mirror the language of the federal PSD rules rather than risk contradictions or ambiguities in this rulemaking. This necessarily included the removal of commas around the phrase “or change in the method of operation of” wherever commas had been inserted around these words in the First Notice for Part 204.¹ However, in one

¹ In all other instances, the Board removed the commas that had been inserted around the phrase “or change in the method of operation of,” as it appeared in the First Notice. *See*, Sections 204.490(a), 204.550(a)(1), 204.590, 204.1600(b), 204.1720 and 204.1850(d). Elsewhere, the First Notice had not inserted commas around the phrase “or change in the method of operation” where it appeared in Part 204. *See*, Section 204.340, Section 204.490(c), and Section 204.1100(c).

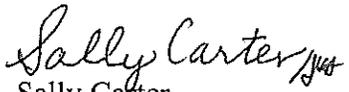
instance, the Board found that commas surround this phrase in the definition of "Project" in the federal PSD rules at 40 CFR 52.21(b)(52). As a result, the Board declined to remove the commas surrounding this phrase, "or change in the method of operation of," in the same definition of "Project" in Section 204.590. Board's Order at page 23.

The Board's decision with regard to Section 204.590 prompted the Illinois EPA to more closely review the federal definition of "Project" as it appears in 40 CFR 52.21(b)(52). The Board is correct; the definition of "Project" in 40 CFR 52.21(b)(52) includes commas around this phrase. While this might necessarily suggest that the definition of "Project" in Part 204 should include commas around this phrase, this is not the case.

At the time that USEPA included a definition of "Project" in the federal PSD rules to read a "physical change in, or change in the method of operation of, an existing major stationary source," it appears that this term was merely added for the convenience of USEPA, to allow USEPA to avoid repeating the phrase "a physical change in or change in the method of operation of" throughout the federal PSD rules. 67 Fed. Reg. 80186. A review of all other sections where "or change in the method of operation" appears in the federal PSD rules shows that commas have not been included around this grouping of words. *See*, 40 CFR 52.21.

In those instances where commas do not exist around the words "or change in the method of operation" in 40 CFR 52.21, the defined term or regulatory provision is appropriately read to include either a "physical change in" or "a change in the method of operation." This is most importantly illustrated in the federal PSD rules by the key definition of "Major modification" in 40 CFR 52.21(b)(2). *Accord.*, 35 Ill. Adm. Code 204.490. However, the insertion of commas around the words, "or change in the method of operation of" indicates that these words do not alter the basic meaning of the words "physical change in." The insertion of commas around these words would not only be inconsistent with all other sections where "or change in the method of operation" has historically appeared in other provisions of federal PSD rules but would be inconsistent with how the federal PSD program has historically been implemented. In this regard, either a "physical change" to a source or a "change in the method of operation" of a source may historically trigger PSD applicability. In order to avoid any confusion, the Illinois EPA is requesting that this discrepancy as it has historically existed in 40 CFR 52.21(b)(52) as compared to other requirements of 40 CFR 52.21 not be carried over into the definition of "Project" in Section 204.590.

Sincerely,


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Division of Legal Counsel

cc: Don Brown, Illinois Pollution Control Board, Clerk
Service List for R2019-001