

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	R 22-17
AMENDMENTS TO 35 ILL. ADM. CODE)	
PART 203: MAJOR STATIONARY)	(Rulemaking - Air)
SOURCES CONSTRUCTION AND)	
MODIFICATION, 35 ILL. ADM. CODE)	
PART 204: PREVENTION OF)	
SIGNIFICANT DETERIORATION, AND)	
PART 232: TOXIC AIR CONTAMINANTS)	

NOTICE OF FILING

To: Persons on Service List
(Via Electronic Filing)

PLEASE TAKEN NOTICE that I have filed today with Clerk of the Illinois Pollution Control Board by electronic filing the following The Illinois Attorney General Office’s Motion for Permission to File Reply Brief in Support of Motion to Stay, a true and correct copy of which is attached hereto and hereby served upon you.

KWAME RAOUL
Attorney General
State of Illinois

/s/ Jason E. James
Jason E. James, AAG

Dated: June 3, 2022

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CERTIFICATE OF SERVICE

I, Jason E. James, an Assistant Attorney General, do certify that on this 3rd day of June, 2022, I caused to be served the foregoing Illinois Attorney General Office's Motion for Permission to File Reply Brief in Support of Motion to Stay and Notice of Filing on the parties named on the attached Service List, by email or electronic filing, as indicated on the attached Service List.

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**The Illinois Attorney General's Office's Motion for Permission to File
Reply Brief in Support of its Motion to Stay**

The Illinois Attorney General's Office, on behalf of the People of the State of Illinois ("People"), moves the Board for permission to file a reply brief in support of its Motion to Stay pursuant to 35 Ill. Adm. Code 101.500(e). The People state:

1. On May 6, 2022, the People filed a Motion to Stay this rulemaking proceeding. The People seek permission to file a reply to prevent material prejudice by addressing two arguments presented by the Illinois Environmental Regulatory Group's ("IERG") response, filed on May 20, 2022. IERG's response sought to convince the Board to adopt air regulations that are based in part on the federal "Project Emissions Accounting Rule", adopted at 85 Fed. Reg. 74,890 (Nov. 24, 2020).

2. IERG's response brief contains new lines of argument raised for the first time in this rulemaking proceeding.

3. Under Board rules, the movant will not have the right to reply, "except as the Board or the hearing officer permits to prevent material prejudice." 35 Ill. Adm. Code 101.500(e). Accordingly, the People should be permitted to reply to IERG's new arguments in order to prevent material prejudice from leaving these arguments unaddressed by the moving party.

WHEREFORE, Illinois Attorney General's Office, on behalf of the People of the State of Illinois, respectfully requests that the Board or this proceeding's hearing officer grant it leave to file a reply brief in support of its Motion to Stay and such other relief as the Board deems proper.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
by KWAME RAOUL,
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THE ILLINOIS ATTORNEY GENERAL OFFICE'S
REPLY IN SUPPORT OF ITS MOTION TO STAY

The Illinois Attorney General's Office, on behalf of the People of the State of Illinois' ("People") filed a Motion to Stay setting forth a compelling rationale for the Board to stay this rulemaking until the U.S. Environmental Protection Agency ("USEPA") further advances its already-initiated rulemaking concerning the Project Emissions Accounting Rule. In its response, the Illinois Environmental Regulatory Group's ("IERG") sets forth two new arguments, neither of which support a contrary conclusion. Accordingly, the Illinois Pollution Control Board (the "Board") should grant the People's Motion to Stay.

First, IERG contends that USEPA has not indicated whether it plans to revise the Project Emissions Accounting Rule. However, USEPA—*on its own volition*—has elected to cease defending the prior administration's regulation in litigation and has also initiated a rulemaking to consider changes, clearly showing an intent to change the rule. As the Board knows, USEPA and most environmental regulators usually must build an administrative record to support a rule revision before it commits to changing a rule. Nevertheless, IERG would have the Board believe that even while USEPA is undoing dozens of other environmental regulations promulgated by the prior administration, the agency is seriously considering leaving this rule in place.

Second, IERG presents several instances of the Board incorporating federal environmental regulations that were at the time subject to litigation. Yet, in doing so, IERG ignores the fact that in the litigation challenge to the Project Emissions Accounting Rule, *USEPA itself* has chosen to abandon defense of the rule and instead has initiated the process to revise it. In the instances that IERG raises, USEPA was strenuously defending its regulations, rather than acting to change them.

In its response, IERG does not present compelling reasons for the Board to immediately move forward with this rulemaking rather than pause until USEPA has provided additional information about its initiated rulemaking. Therefore, the Board should grant the People's Motion and stay this proceeding until February 28, 2023, or, in the alternative, stay further proceedings on those provisions of the proposed regulations that the Board deems related to the Project Emissions Accounting Rule until that same date.

I. IERG Ignores USEPA's Current Policies When Arguing that the Project Emissions Accounting Rule Might Not Be Revised.

IERG argues that there is no reason for the Board to conclude that USEPA intends to revise the Project Emissions Accounting Rule. However, as detailed in the People's Motion to Stay, USEPA has abandoned its defense of the Project Emissions Accounting Rule from a litigation challenge and has initiated a new rulemaking to evaluate the claims by states and environmental groups that the rule will increase air pollution and harm the environment. *See* People's Motion to Stay at 3-4, R22-17 (May 6, 2022). Furthermore, USEPA is taking this action while also reversing dozens of environmental regulations promulgated during the prior presidential administration. This focus on reversing the prior administration's "rollback" rules is in accordance with President Biden's directive to reduce air pollution. *See* People's Motion to Stay at 3-4, R22-17 (May 6, 2022).

IERG argues that at this early stage in the rulemaking process, USEPA is only considering revisions to the rule and that the states and environmental agencies have only identified potential concerns.¹ IERG's Response at 8-9, R22-17 (May 20, 2022). However, the fact that USEPA has not finalized a rule change at this point does not indicate indifference. Rather, USEPA is complying with its obligations under administrative law that require the agency to build an administrative record to support a rule change before it is adopted.

Under the Administrative Procedure Act, USEPA cannot adopt a regulation that is arbitrary or capricious. 5 U.S.C. § 706. To satisfy this requirement, USEPA generally builds an administrative record to support a rule change, allows for an appropriate notice and comment period, and takes other steps to ensure that the public has an opportunity to provide input on the rulemaking process—even when USEPA has a policy direction in mind before it adopts a rule.

The prior administration frequently encountered judicial problems when it rashly advanced environmental rollbacks without allowing for a full and appropriate process. For example, USEPA under the prior administration attempted to delay and ultimately kill a regulation intended to prevent disastrous releases of chemicals into the environment. 82 Fed. Reg. 8499 (Jan. 26, 2017). This attempt at a rulemaking, taken less than a week after President Obama left office, earned USEPA a swift rebuke from the U.S. Court of Appeals for the D.C. Circuit, who ruled that USEPA's cavalier approach "makes a mockery of the [Clean Air Act]." *Air Alliance Houston v. Environmental Protection Agency*, 906 F.3d 1049, 1064 (D.C. Cir. 2018) (ruling under Clean Air Act requirements, not Administrative Procedure Act requirements).

¹ IERG misconstrued USEPA's statements in its response to state and environmental advocates' motion for reconsideration. IERG's Response at 8-9. The People's Motion to Stay noted that by initiating a new rulemaking on its own volition, USEPA has recognized the state and environmental advocates' arguments against the serious flaws in the Project Emissions Accounting Rule. *See* People's Motion to Stay at 7-8.

Like the current USEPA, the Board is also well aware that regulatory bodies generally must build an administrative record before committing to a particular action, so as to show appellate courts that its decisions are not arbitrary or capricious. *See County of Will v. Pollution Control Board*, 2019 IL 122798, ¶ 43. IERG's reliance on USEPA's early statements that it will consider changing the Project Emissions Accounting Rule is misplaced.

II. IERG Raises Prior Board Rulemakings that Do Not Provide Useful Guidance.

As detailed in the People's Motion to Stay, USEPA has abandoned its defense of the Project Emissions Rule. Instead, it has asked the D.C. Circuit to keep the case in abeyance while USEPA continues work on a new rulemaking to address the issues raised by the states and environmental groups. *See Motion to Stay* at 4. IERG argues that this litigation and regulatory posture should not impede the Board from moving immediately to adopt its proposal, because there is a "history of Illinois EPA proposing, and the Board adopting, regulatory provisions that were based on federal rules being challenged or being reconsidered by USEPA at the time of adoption." IERG's Response at 6.

However, in each instance that IERG raises, USEPA was *actively defending* its regulations. First, IERG raises New Source Review regulations that the Board adopted in R19-1. This context is completely opposite to that of the Project Emissions Accounting Rule. IERG cites a D.C. Circuit decision concerning federal air regulations that was issued on March 5, 2021, shortly after the Board adopted corresponding state regulations on August 27, 2020. In the cited decision, USEPA actively argued in support of its regulations, adverse to the petitioner state. *New Jersey v. Env't'l Prot. Agency*, 989 F.3d 1038 (D.C. Cir. 2021).

IERG next raises a Board rulemaking and a related D.C. Circuit case concerning a different set of environmental regulations at 40 C.F.R. Part 257. In that Board rulemaking, Section 22.59(g)

of the Illinois Environmental Protection Act (415 ILCS 5/29(g)) required Illinois EPA to file a draft rule and required the Board to adopt a rule by a certain deadline. *See* Illinois EPA Statement of Reasons at 1-2, R20-19 (Mar. 30, 2020). Although this rulemaking proceeded in the context of ongoing litigation and pending regulatory proposals at USEPA, the Board's urgency here was clearly motivated by Illinois' statutory requirements.

Lastly, IERG raises a National Ambient Air Quality Standards ("NAAQS") case that was litigated while the Board adopted corresponding state air standards. Specifically, the Board adopted its regulations in 2016 (*see* R16-2, Board Order (Mar. 9, 2016)), while the case IERG cites was decided over three years later. *Murray Energy v. Env'tl Prot. Agency*, 936 F.3d 597 (D.C. Cir. 2019). In the *Murray Energy* case, unlike with the Project Emissions Accounting Rule matter, USEPA actively fought against the petitioners in litigation to defend its regulations.

In these cases raised by IERG, USEPA took a very different approach than its current approach to its Project Emissions Accounting Rule. Instead of fighting to defend the rule, USEPA has repeatedly joined the state and environmental petitioners in requesting that the D.C. Circuit keep the case in abeyance while USEPA advances a new rulemaking on the subject. Far from wishing to keep this regulation in place, USEPA is instead actively moving to revise it. The instances that IERG raises where the Board adopted regulations that were subject to litigation are completely dissimilar.

III. Conclusion

In the Motion to Stay, the People argued that the Board should pause this proceeding because of the litigation challenge and initiated USEPA rulemaking concerning a federal rule that forms the basis of core parts of IERG's proposed rule. IERG's new arguments in its response do not support a contrary result. Therefore, the People request that the Board stay this proceeding in

its entirety until February 28, 2023, or, in the alternative, stay further proceedings on those provisions of the proposed regulations that the Board deems related to the Project Emissions Accounting Rule until that same date. In addition, the People would welcome the opportunity provide the Board with status updates on the USEPA rulemaking every 90 days, or at any interval the Board deems appropriate.

Respectfully submitted,

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