

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	R22-17
AMENDMENTS TO 35 ILL. ADM. CODE)	
PART 203: MAJOR STATIONARY SOURCES)	
CONSTRUCTION AND MODIFICATION,)	
35 ILL. ADM. CODE PART 204: PREVENTION)	
OF SIGNIFICANT DETERIORATION, AND)	
PART 232: TOXIC AIR CONTAMINANTS)	

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 SUPPLEMENT TO ITS SECOND SET OF ANSWERS, COMMENTS AND RECOMMENDATIONS FOR ADDITIONAL REVISIONS and ILLINOIS EPA'S SUPPLEMENT TO ITS SECOND SET OF ANSWERS, COMMENTS AND RECOMMENDATIONS FOR ADDITIONAL REVISIONS** a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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

DATED: October 20, 2022

1021 North Grand Avenue East
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217/782-5544

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
) **R22-17**
AMENDMENTS TO 35 ILL. ADM. CODE)
PART 203: MAJOR STATIONARY SOURCES)
CONSTRUCTION AND MODIFICATION,)
35 ILL. ADM. CODE PART 204: PREVENTION)
OF SIGNIFICANT DETERIORATION, AND)
PART 232: TOXIC AIR CONTAMINANTS)

**MOTION FOR LEAVE TO FILE ILLINOIS EPA'S SUPPLEMENT TO ITS
SECOND SET OF ANSWERS, COMMENTS AND RECOMMENDATIONS FOR
ADDITIONAL REVISIONS**

NOW COMES the Illinois Environmental Protection Agency ("Illinois EPA"), by and through its attorneys, pursuant to 35 Ill. Adm. Code 102.402 and 101.522 and moves the Illinois Pollution Control Board ("Board") for leave to file the Illinois EPA's Supplement to Its Second Set of Answers, Comments and Recommendations for Additional Revisions in the above-captioned matter.

1. On August 16, 2021, Illinois Environmental Regulatory Group (IERG) filed a proposal with the Board to revise Part 203, 35 Ill. Adm. Code Part 203, Major Stationary Source Construction and Modification that is applicable to the proposed construction of a major stationary source or major modification at an existing stationary source of air pollutants generally regulated under the Clean Air Act (CAA), except to the extent that Prevention of Significant Deterioration (PSD) is or could be applicable for such proposed project. In this rulemaking proposal, IERG also proposed amendments to 35 Ill. Adm. Code 204, Prevention of Significant Deterioration and 35 Ill. Adm. Code 232, Toxic Air Contaminants.

2. On September 9, 2021, the Board accepted IERG's regulatory proposal for hearing. Two public hearings have been held by the Board. The first hearing was held on February 17, 2022, and the second hearing was held on April 7, 2022. During the second hearing, the Board set a May 16, 2022, deadline for filing post-hearing comments on IERG's regulatory proposal. On May 6, 2022, the Illinois Attorney General's Office (IAGO) filed a Motion to Stay (IAGO's Motion) this rulemaking pending review of the United States Environmental Protection Agency's (USEPA) Project Emissions Accounting Rule by both the USEPA and the United States Court of Appeals for the D.C. Circuit (DC Circuit).

3. On August 11, 2022, the Board set the pre-first notice final comment deadline for September 12, 2022, and specifically requested comment on whether the Project Emissions Accounting Rule should remain in proposed Sections 203.1410 and 204.800. On September 12, 2022, the Illinois EPA filed its Second Set of Answers, Comments and Recommendations for Additional Revisions with the Board. In this filing, the Illinois EPA notified the Board that it would require additional time for further consultation with the USEPA over the substance of IERG's proposed 35 Ill. Adm. Code 203.100. After completing these discussions, the Illinois EPA indicated it would seek leave of the Board to more fully comment on IERG's proposed 35 Ill. Adm. Code 203.100.

4. Since that time, the Illinois EPA further discussed the substance of IERG's proposal with the USEPA. These discussions have shaped the Illinois EPA's filings in this proceeding.

5. Based on the foregoing, the Illinois EPA formally requests leave to file the Illinois EPA's Supplement to Its Second Set of Answers, Comments and Recommendations for Additional Revisions with the Board.

WHEREFORE, the Illinois EPA respectfully requests that the Board grant this Motion for Leave to file the Illinois EPA's Supplement to Its Second Set of Answers, Comments and Recommendations for Additional Revisions.

Respectfully submitted by,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,



Sally A. Carter
Assistant Counsel

Dated: October 20, 2022
Illinois Environmental Protection Agency
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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) **R22-17**
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**ILLINOIS EPA'S SUPPLEMENT TO ITS SECOND SET OF ANSWERS,
COMMENTS AND RECOMMENDATIONS FOR ADDITIONAL REVISIONS**

The Illinois Environmental Protection Agency (Illinois EPA), by its attorney, offers the following Supplement to its Second Set of Answers, Comments and Recommendations for Additional Revisions filed with the Illinois Pollution Control Board (Board) on September 12, 2022. The Illinois EPA reserves the right to offer additional comments and recommendations on Illinois Environmental Regulatory Group's (IERG) proposal at a later date. At this time, the Illinois EPA requests that the Illinois Pollution Control Board (Board) consider this supplement as part of this rulemaking proposal and offers as follows:

Section 203.100 – Effective Dates (Transition)

Proposed Revisions to Sections 203.100

The additional discussion of 35 Ill. Adm. Code 203.100, Effective Dates, by IERG in IERG's Second Post-Hearing Comment of the Illinois Environmental Regulatory Group (Second Comment) prompted the Illinois EPA to further review the transitional language in this section. Applicability of New Source Review (NSR) for a project is based on the provisions in the NSR state implementation plan (SIP) when an air pollution control permit was first issued for or should have been issued for the project. Sources are not entitled to benefit from subsequent revisions to the applicability of the nonattainment (NA) NSR rules or from failure to properly

obtain a permit prior to beginning construction of a project. In other words, the regulatory provisions that are used to determine whether a project is a major project should be the ones that governed when the project was permitted or, in the case of a project that did not receive the proper construction permit, when the project was constructed. For NA NSR, a basic aspect of this principle involves the redesignation of an area from nonattainment to attainment for a pollutant. The redesignation of an area does not excuse a source from compliance with the requirements of NA NSR that applied for a project when the area where the project occurred was nonattainment, as should be addressed in a construction permit for the project issued by the Illinois EPA before construction began.¹

This *principle* is relevant to this rulemaking because of the changes that would be made to the applicability provisions for major modifications for NA NSR in Illinois, i.e., the adoption of New Source Review Reform and Project Emissions Accounting for NA NSR.² Certain limitations or restrictions in existing construction permits for projects that sources are held to so that those projects would not be major modification might not have been needed if new Part 203 had been in effect when the projects were permitted. Certain projects that are now permitted as major modifications for particular pollutants under current Part 203 might not have been major modification for those pollutants if those projects had been permitted under new Part 203. The

¹ There is also a converse to this example. For a project that was properly permitted and timely constructed when an area was designated attainment for a pollutant, the source is not required to “re-permit” the project if the area is redesignated from attainment to nonattainment for a pollutant, to now obtain a NA NSR permit for the project.

² The revisions to Part 203 to include NSR Reform and Project Emissions Accounting would potentially decrease the number of projects at existing major sources that would meet the criteria for a major modification and thereby trigger the applicable substantive requirements of NA NSR. The revisions would also potentially simplify the measures that sources would need to take so that proposed projects would not be considered major modifications.

principle does not allow revisions to these existing construction permits for historic projects that would allow sources to take advantage of new Part 203 for these projects. Given the changes that would be made in this rulemaking to the applicability provisions for major modifications, it is critical that this *principle* be addressed in the language in Section 203.100. As explained further below, the following language would appropriately embody such *principle*.

Section 203.100 Effective Dates

- a) Subparts I through R of this Part do not apply until the effective date of the full approval of all of those Subparts by the United States Environmental Protection Agency (USEPA) as a revision to the Illinois State Implementation Plan.

- b) On the effective date of the full approval of Subparts I through R of this Part by the USEPA as part of Illinois' State Implementation Plan, the permitting and operation of projects that began construction or may begin construction before this date shall continue to be in accordance with Subparts A through H of this Part.

First, this language would ensure that for a project that was subject to Part 203 but the source failed to obtain the requisite Part 203 permit prior to construction, the source would not benefit from the revisions to Part 203. As previously explained, existing Part 203, which is part of Illinois' SIP, differs from revised Part 203 in how emissions are to be determined for purposes of applicability for proposed major modifications. A source that is subject to permitting requirements of existing Part 203 but fails to comply with those requirements should not be afforded the benefit of permitting under revised Part 203 in lieu of existing Part 203.

Second, and similarly, this language would address projects that were subject to and constructed under existing Part 203 but did not obtain the appropriate permit under Part 203, benefiting from the proposed revisions to Part 203. In other words, a source that inappropriately applied for and received a construction permit for a minor project when the source should have

received a construction permit for a major modification would not benefit from subsequently being permitted under revised Part 203 in lieu of existing Part 203.

Third, this language would act to prevent the revision of permits issued by the Illinois EPA under existing Part 203 based on the provisions in Part 203. This language would ensure that any revisions to any existing permit would continue to utilize the applicability provisions of existing Part 203.

Fourth, if a Part 203 permit would happen to be issued after revised Part 203 had been adopted by the Board but had yet-to-be approved by USEPA, any permitting by the Illinois EPA would take place under existing Part 203. Authority would only exist to issue permits pursuant to revised Part 203 once USEPA approves revised Part 203. When a permit is issued pursuant to existing Part 203, the project, if constructed, would be required to comply with the requirements of the permit even if revised Part 203 was SIP-approved in the interval before construction began. If a source were to decide during this period that it did not want to proceed under a permit issued pursuant to existing Part 203, the source could reapply for a new permit under new Part 203, but only if construction had not commenced pursuant to the previously issued Part 203 permit.

Finally, after the date of full approval of Part 203, Subparts I through R, by USEPA as part of Illinois' SIP, the language offered by the Illinois EPA would allow the permitting of new Part 203 projects that had not begun actual construction pursuant to Subparts I through R.

While IERG agrees in IERG's Second Comments that permits historically issued by the Illinois EPA pursuant to existing Part 203, Subparts A through H would continue "to use existing Part 203 when revising conditions of the historically issued permit for that project or when

revisiting a historical NA NSR applicability determination,” IERG proposed to “sunset”³ existing Part 203. IERG’s Second Comment, pages 6-7. The Illinois EPA opposes IERG’s proposal to “sunset” existing Part 203 in proposed Section 203.100(c).⁴ It is not clear what is meant by IERG’s use of the term “sunset” in IERG’s Second Comments. It is not clear if “sunset” means that Subparts A through H are to be removed from Part 203 in their entirety, if Subparts A through H are not applicable for projects after a certain date, or if it has some other meaning. Regardless, it would not make sense to “sunset” Subparts A through H from Part 203 if these provisions would continue to be applicable when revising historically issued permits for projects that were and must continue to be governed by the NA NSR program that was in place when those permits were originally issued, i.e., existing Part 203.

The Illinois EPA also opposes IERG’s proposed removal in Section 203.100(b) of “the full” approval of Subparts I through R of this Part. It is conceivable that the USEPA could elect to approve revised Part 203; could elect to approve, in part, and disapprove, in part, revised Part 203; or could elect to disapprove revised Part 203 in its entirety. If the USEPA were to partially approve and partially disapprove revised Part 203 or were to disapprove revised Part 203, such action could cause a conflict with the statutory definition of “nonattainment new source review (NA NSR) permit” in Section 3.298 of the Illinois Environmental Protection Act (Act), 415

³ The Board has not routinely used the term “sunset” in the body of its regulations but rather, if employed, it has been used as an identifier or as a label for what the section does. *See*, 35 Ill. Adm. Code 205.115, 217.451, 217.751 and 249.120. The Board has only used the word “sunset” in the body of a Board regulation where “sunset” refers to the time of day. *See*, 35 Ill. Adm. Code 215.562, 218.562, 219.562 and 901.109. Meanwhile, the Illinois EPA has used the word “sunset” as an identifier or a label for what the section does. *See*, 35 Ill. Adm. Code 276.105. In one instance, the Illinois EPA has used the word “sunset” in the body of a water regulations referencing sunseting certain allowances under federal regulations.

⁴ While this reference is to IERG’s proposed Section 203.100(c), similar revised language would appear in Section 203.100(b) as most recently suggested by the Illinois EPA. For purposes of this discussion, the Illinois EPA will refer to the language as proposed by the Illinois EPA in Section 203.100(b).

ILCS 5/3.298 (2020). Consistent with the mandate of the Clean Air Act that requires states to develop and submit SIPs to USEPA for its approval, this definition provides that a state NA NSR permit may only be issued once the state NA NSR program has been approved as part of Illinois' SIP. The Clean Air Act's NA NSR requirements are among the requirements that must be addressed in a state SIP. 42 U.S.C. § 7410(a)(2)(C) & (1).

IERG's proposed language suggests that an NA NSR permit could be issued consistent with provisions of Part 203 that had not yet been SIP approved and, yet such permit would meet Illinois' definition of an NA NSR permit. This is not the case. If any part of a construction permit would be issued pursuant to a provision in Part 203 that had not been approved by the USEPA, this permit would not meet the definition of a NA NSR permit in Illinois. As such, the Illinois EPA opposes IERG's proposed removal of "the full" approval of Subparts I through R of this Part in Section 203.100(b).

Finally, IERG expressed concern that the revisions offered by the Illinois EPA hinged on when a project began construction rather than when a final permit issued, suggesting the following language for inclusion in proposed Section 203.100(b):

Projects permitted under construction permits under Subparts A through H of this Part before the date of USEPA's approval of Subparts I through R of this Part as part of Illinois' SIP, shall continue to be subject to Subparts A through H of this Part.

The Illinois EPA opposes IERG's suggested language given it would not address projects subject to existing Part 203 and yet failed to obtain the requisite Part 203 permit prior to construction. According to this language, and as previously discussed, if a source constructed a project without the requisite Part 203 permit, such project would potentially benefit from new Part 203 as it revises the applicability criteria for a major modification. Sources that failed to

comply with existing Part 203 should not be afforded the benefit of the applicability provisions for major modifications under new Part 203 in lieu of existing Part 203.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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Dated: October 20, 2022

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STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)
)

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 SUPPLEMENT TO ITS SECOND SET OF ANSWERS, COMMENTS AND RECOMMENDATIONS FOR ADDITIONAL REVISIONS and ILLINOIS EPA'S SUPPLEMENT TO ITS SECOND SET OF ANSWERS, COMMENTS AND RECOMMENDATIONS FOR ADDITIONAL REVISIONS**, on October 20, 2022, to the following:

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I have electronically served and deposited said document in the United States Mail, proper postage prepaid, in Springfield, and upon:

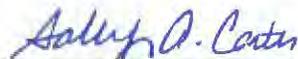
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The number of pages in the e-mail transmission is 13.

The e-mail transmission and depositing said document in the United States Mail took place before 5:00 p.m. on October 20, 2022.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,



Sally Carter
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Dated: October 20, 2022

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