

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 Attached Service List

PLEASE TAKE NOTICE THAT I have caused to be filed today with the Clerk of the Illinois Pollution Control Board by electronic filing The Illinois Attorney General’s Office’s Renewed 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: April 17, 2023

Jason E. James
Environmental Bureau
Illinois Attorney General’s Office
201 W. Pointe Dr., Suite 7
Belleville, IL 62226
(872) 276-3583
Primary e-mail address: jason.james@ilag.gov

SERVICE LIST

Via Electronic Filing and Email

Don Brown
Clerk of the Board
Illinois Pollution Control Board
60 E. Van Buren Street, Suite 630
Chicago, IL 60605
Don.brown@illinois.gov

Via Email

N. LaDonna Driver
Melissa S. Brown
HEPLERBROOM LLC
4340 Acer Grove Drive
Springfield, IL 62711
ldriver@heplerbroom.com
Melissa.brown@heplerbroom.com

Via Email

Daniel Pauley
Hearing Officer
Illinois Pollution Control Board
60 E. Van Buren Street, Suite 630
Chicago, IL 60605
Daniel.Pauley@illinois.gov

Via Email

Renee Snow
General Counsel
Illinois Department of Natural Resources
One Natural Resources Way
Springfield, IL 62702-1271
Renee.Snow@illinois.gov

Via Email

Deborah Williams
City of Springfield
Regulatory Affairs Director
800 E. Monroe
Office of Public Utilities
Springfield, IL 62757
deborah.williams@cwlp.com

Via Email

Sally A. Carter
Assistant Counsel
Illinois Environmental Protection Agency
1021 N. Grand Avenue East
Springfield, IL 62794
Sally.Carter@illinois.gov

CERTIFICATE OF SERVICE

I, Jason E. James, an Assistant Attorney General, do certify that on this 17th day of April, 2023, I caused to be served the foregoing Notice of Filing and Illinois Attorney General's Office's Renewed Motion to Stay on the parties named on the attached Service List via electronic filing and/or email, as indicated on such Service List.

/s/ Jason E. James

Jason E. James
Assistant Attorney General
Illinois Attorney General's Office
201 W. Pointe Dr., Suite 7
Belleville, IL 62226
(872) 276-3583
Jason.James@ilag.gov

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THE ILLINOIS ATTORNEY GENERAL’S OFFICE’S RENEWED MOTION TO STAY

The Illinois Attorney General’s Office, on behalf of the People of the State of Illinois (“People”), renews its request that the Illinois Pollution Control Board (“Board”) grant a stay of this rulemaking, R22-17, pursuant to 35 Ill. Adm. Code 101.514. As described in the original Motion to Stay filed on May 6, 2022, the proposal before the Board in this rulemaking is directly related to a federal regulation currently undergoing review by both the United States Environmental Protection Agency (“USEPA” or the “Agency”) and the United States Court of Appeals for the D.C. Circuit (“D.C. Circuit”).

As discussed more fully below, the D.C. Circuit has ordered USEPA to file a motion by August 28, 2023, detailing whether further proceedings before the court will be necessary. *New Jersey v. U.S. Env’tl Prot. Agency*, No. 21-1033 (D.C. Cir.). USEPA’s motion will provide information about the nature and expected timing of USEPA’s active federal rulemaking.

Accordingly, in the interest of conserving State resources, including the resources of the Board and the Illinois Environmental Protection Agency (“Illinois EPA”), and ensuring that Illinois’ air pollution regulations remain in accord with, and at least as stringent as, the

corresponding federal regulations, the People request that this rulemaking proceeding be stayed until August 28, 2023.¹

I. Background

To avoid repetition, the People provide here an abbreviated background of this rulemaking.² This rulemaking is based on a rule promulgated by USEPA under the prior presidential administration called the “Project Emissions Accounting Rule” (“PEA Rule”). 85 Fed. Reg. 74,890 (Nov. 24, 2020). This regulation was immediately challenged in the D.C. Circuit by a coalition of state Attorneys General (not including Illinois). Under the current administration, USEPA quickly recognized that the PEA Rule could conflict with President Biden’s policy to reduce air pollution. The Agency had the D.C. Circuit case put into abeyance to allow the time to determine whether it would be necessary to revise the PEA rule.

On March 31, 2023, the Illinois Environmental Regulatory Group (“IERG”) submitted a comment into this rulemaking docket. R22-17, “IERG Comment” (Mar. 31, 2023). IERG’s comment asked the Board to move this rulemaking to First Notice. *Id.* at 1. In support, IERG reiterated arguments that it made in response to the People’s original motion to stay. First, it argued that due to “uncertainty as to when USEPA will initiate the [rulemaking to revise the PEA Rule] . . . there is no benefit to staying this proceeding.” *Id.* at 2-3. Second, IERG discussed a recent proposal from USEPA to approve revisions to Texas’ State Implementation Plan (“SIP”) related to the PEA Rule. Neither of these arguments support moving this rulemaking to First Notice.

¹ If granted, the People will provide the Board with regular status reports on the federal litigation and rulemaking during the pendency of the stay.

² For a full description of the Project Emissions Accounting Rule’s background, please see the People’s original Motion to Stay filed on May 6, 2022.

II. Argument

The People's original Motion to Stay pending before the Board argued that immediate action was wasteful and unnecessary because in the likely event that USEPA changes the PEA Rule, the Board would be required to conduct an entirely new rulemaking simply to undo the changes that IERG now seeks. R22-17, People's Motion to Stay (May 6, 2022); *see also* People's Reply (June 3, 2022), People's Status Update (July 6, 2022), and People's Pre-First Notice Comment (Sept. 12, 2022). Those arguments continue to apply today, and IERG's request for First Notice does not argue that the intervening time has undermined them. This renewed motion to stay incorporates the People's arguments in support in earlier filings by reference. This motion will focus on why IERG's arguments in its newest comment asking the Board to proceed to First Notice are unavailing.

A. *IERG Ignores the PEA Rule Revisions Listed on USEPA's Regulatory Agenda*

IERG's comment misconstrues or ignores important context for USEPA's upcoming PEA Rule revisions and the associated litigation. IERG says "USEPA has not announced . . . a proposed rule addressing the PEA Rule" and that there "has been no indication as to when USEPA may initiate the rule . . ." IERG Comment at 2.

However, USEPA clearly intends to revise the PEA Rule, as shown both in litigation filings and recently released updates to its Regulatory Agenda. In earlier filings, the People outlined how the course of litigation against the PEA Rule shows USEPA plans to make revisions, and those conditions continue to exist today. *See* People's original Motion to Stay at 3-4.

IERG also fails to address USEPA's Regulatory Agenda. In earlier filings, the People cited USEPA's Spring 2022 Regulatory Agenda, which showed that the Agency intended to publish a proposal to revise the PEA Rule in February of this year. R22-17, People's Status Update (July 6,

2022) and R22-17, People's Pre-First Notice Comment (Sept. 12, 2022) (both citing USEPA's Spring 2022 Regulatory Agenda). Since then, USEPA has released its Fall 2022 Regulatory Agenda, showing that it now anticipates publishing a Notice of Proposed Rulemaking to revise the PEA Rule in September 2023. *USEPA Semiannual Regulatory Agenda* (Fall 2022), available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=2060-AV62>.

Through this publication, USEPA has again announced its intention to revise the PEA Rule this year.

B. IERG Overstates the Significance of USEPA's Proposal to Approve Texas' SIP Revisions

IERG's comment also cites a proposed USEPA regulation to imply that USEPA does not intend to revise the PEA Rule.³ 88 Fed. Reg. 13,752 (Mar. 6, 2023), available at <https://www.govinfo.gov/content/pkg/FR-2023-03-06/pdf/2023-04488.pdf>. The proposal, if adopted, would incorporate Texas regulations generally implementing the PEA Rule into its State Implementation Plan ("SIP").

IERG states that USEPA "did not express any hesitancy in proposing to" approve Texas' SIP revisions. But this act has no bearing on whether USEPA intends to change the rule in the future because—though IERG fails to provide this important context—USEPA has a *non-discretionary statutory duty* under the Clean Air Act to approve SIP provisions that meet federal requirements. ("[T]he Administrator *shall* approve [a] submittal as a whole if it meets all the applicable requirements of this chapter [of the Clean Air Act]." 42 U.S.C. § 7410(k)(3) (emphasis added).) As USEPA states in its proposal: "Under the CAA, the Administrator is *required to*

³ IERG's claim that USEPA "continues to propose approval of PEA provisions in other states' SIPs"—multiple proposals for multiple state SIP revisions—is unsupported by its comment. IERG only cites to the individual Texas proposal. IERG Comment at 3. IERG does not cite to any other state's SIP revisions, and the People are unaware of any outside of Texas' revisions.

approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations.” 88 Fed. Reg. at 13,754 (emphasis added).

Nor could the Agency choose to put off acting on Texas’ submission until after it revises the PEA Rule. Under the CAA, USEPA must approve a compliant SIP provision within a specific period after it is submitted. 42 U.S.C. § 7410(k). Despite what IERG attempts to imply, USEPA’s proposal does not support any claim that the Agency will leave the PEA Rule in place.

The People’s concern that the PEA Rule, if implemented in Illinois, will harm the environment is borne out by Texas’ track record of weak environmental regulations. For example, USEPA recently released a set of regulations intended to reduce pollution that travels across states called the “Good Neighbor Plan.” *See* USEPA, Good Neighbor Plan for 2015 Ozone NAAQS (March 15, 2023), *available at* <https://www.epa.gov/csapr/good-neighbor-plan-2015-ozone-naaqs>. Among other things, the Biden administration’s USEPA adopted these regulations to reduce pollution created in Texas that harms the environment in Illinois.⁴ Rather than implement limits on the pollution that Texas sends to Illinois, they decided to sue USEPA. Texas’ Attorney General’s Office, *Paxton Sues Biden Administration to Prevent it from Blocking Texas’s Management of its Own Environment* (Feb. 14, 2023), *available at* <https://www.texasattorneygeneral.gov/news/releases/paxton-sues-biden-administration-prevent-it-blocking-texas-management-its-own-environment>. Illinois should not follow Texas’ example to hastily adopt regulations that USEPA is in the process of revising.

⁴ This linkage between pollution from Texas and harms to Illinois’ environment are demonstrated in the graphic on USEPA’s website titled “Interstate Pollution Linkages Under the Good Neighbor Plan” and further supported by other regulatory documents, found at <https://www.epa.gov/csapr/good-neighbor-plan-2015-ozone-naaqs>.

III. Conclusion

USEPA is currently evaluating the legality of the PEA Rule within its own federal rulemaking and has repeatedly asked the D.C. Circuit to wait before passing judgment on a rule that will likely change in the future. Rather than adopting a rulemaking proposal that relates to a federal rule in a tenuous position, the Board should stay this rulemaking until the federal rulemaking process has further proceeded. At that point, the Board will have additional information to consider how to manage this rulemaking.

The D.C. Circuit has granted USEPA until August 28, 2023, to advance its rulemaking and to detail whether further proceedings before the court will be necessary. Accordingly, the People request that the Board stay the above-captioned rulemaking until that date and require the filing of a status report at the close of the stay, or at such intervals that the Board deems appropriate. Doing so will ensure that Illinois' air pollution regulations provide Illinois citizens their constitutional right to a healthful environment and do not run afoul of their federal counterpart, and will preserve valuable State resources.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
by KWAME RAOUL,
Attorney General of the State of Illinois

By: /s/ Jason E. James
Jason E. James
Assistant Attorney General
Illinois Attorney General's Office
201 W. Pointe Dr., Suite 7
Belleville, IL 62226
(872) 276-3583
jason.james@ilag.gov

Status Report Required by 35 Ill. Adm. Code 101.514

The People provide the following status report for this rulemaking, as required by 35 Ill. Adm. Code 101.514 to accompany a motion for stay.

The Board has held two public hearings to discuss IERG's proposal: one on February 17, 2022 and another on April 7, 2022. On January 18, 2022 and March 21, 2022, the Illinois EPA filed its initial Comments and Recommendations relating to IERG's proposal; on January 4, 2022 and March 16, 2022, the Illinois Attorney General's Office filed a pre-hearing and post-hearing comment, respectively; and on February 24, 2022 and April 4, 2022, IERG filed a post-hearing comment and second post-hearing comment, respectively.

On May 6, 2022, the Illinois Attorney General's Office filed its original Motion to Stay. On May 20, 2022, IERG filed its response. On June 3, 2022, the Illinois Attorney General's Office filed its Motion for Permission to File Reply Brief in Support of its Motion to Stay. The Board's August 11, 2022 order stated, among other things, that "the Board and [sic] will rule on the motion to stay, as well as the Project Emissions Accounting Rule language when deciding whether to proceed to first notice. The Board grants the AG's motion for leave to file a reply and accepts the attached reply."

Thereafter, on September 12, 2022, both IERG and the Illinois Attorney General's Office filed their respective Pre-First Notice Comment, and the Illinois EPA filed its Second Set of Answers, Comments and Recommendations for Additional Revisions. On November 14, 2022, IERG filed its Updated Proposed Rule Language for Parts 201, 202, 203, 204 and 232.

The following motions/requests are pending: (a) the Illinois Attorney General's Office's original Motion to Stay filed on May 6, 2022; (b) Illinois EPA's 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 filed on October 20, 2022; (c) IERG's Motion for Leave to File, Instantly, its Response to Illinois EPA's Second Set of Answers, Comments and Recommendations and Illinois EPA's Supplement filed on October 31, 2022; (d) Illinois EPA's Motion for Leave to File Instantly the Illinois EPA's Reply to IERG's Response to Illinois EPA's Second Set of Answers, Comments and Recommendations for Additional Revisions and Supplement and Illinois EPA's Reply to IERG's Response to Illinois EPA's Second Set of Answers, Comments and Recommendations for Additional Revisions and Supplement filed on December 13, 2022; (e) IERG's Request to Move to First Notice filed on March 31, 2023; and (f) the Illinois Attorney General's Office's Renewed Motion to Stay filed concurrently with this Status Report.