BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN MATTER OF:	)	
	)	
	)	R 23-18(A)
AMENDMENTS TO 35 ILL. ADMIN. CODE	)	(Rulemaking-Air)
PARTS 201, 202 AND 212	)	

NOTICE OF FILING

TO: Don Brown
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Persons on Attached Service List

PLEASE TAKE NOTICE THAT on the 22nd day of May 2024, I caused to be electronically filed with the Clerk of the Illinois Pollution Control Board, via the "COOL" System, the Illinois Attorney General's Post-Hearing Comments on behalf of the People of the State of Illinois, true and correct copies of which are attached hereto and hereby served upon you.

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

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CERTIFICATE OF SERVICE

I, Jason E. James, an Assistant Attorney General, caused to be served on this 22nd day of May 2024, a true and correct copy of the Illinois Attorney General's Post-Hearing Comments on behalf of the People of the State of Illinois, true and correct copies of which are attached hereto and hereby served upon the persons listed on the Service List via electronic mail or electronic filing, as indicated.

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Post-Hearing Comments of the Illinois Attorney General

The Illinois Attorney General's Office, on behalf of the People of the State of Illinois, provides these comments on the record developed by the Illinois Pollution Control Board (the "Board") in this rulemaking docket. The People appreciate the Board's action to set a third hearing to allow consideration of additional information submitted by the rules' proponents in response to the Illinois Environmental Protection Agency's ("IEPA") requests. While the additional information provided by proponents addressed many of the People's concerns, these comments identify several remaining gaps and address a question from the Board concerning a recent federal appellate decision.

I. April 8, 2024 Question from the Board

On April 8, 2024, the Board asked rulemaking participants to comment on the March 1, 2024 decision from the U.S. Court of Appeals for the D.C. Circuit ("D.C. Circuit") concerning the U.S. Environmental Protection Agency's ("USEPA") 2015 Startup, Shutdown, or Malfunction ("SSM") State Implementation Plan ("SIP") Call.[1] Specifically, the Board requested comments on "any implications of that court order on the Board rules adopted in the main docket as well as the proposed rules in the Subdocket A."[2]

A. *The D.C. Circuit's Partial Vacatur of 2015 SIP Call*

In 2015, USEPA reviewed the SIPs of Illinois and 34 states that, USEPA claimed, contained provisions that were inconsistent with the Clean Air Act with respect to how they addressed SSM events. In particular, USEPA took issue with automatic exemptions, director's discretion provisions, overbroad enforcement discretion provisions, and affirmative defense provisions. A group of petitioners challenged this USEPA decision and after lengthy periods of abeyance, the D.C. Circuit granted the petitions in part and denied them in part.

In particular, the D.C. Circuit vacated the parts of the 2015 SIP call with respect to automatic exemptions, director's discretion provisions, and affirmative defenses that are functionally exemptions, holding that these SIP provisions were compatible with the Clean Air Act. The Court denied the petitions with respect to the enforcement-discretion provision and affirmative defenses against specific relief, meaning these exemptions violate the Clean Air Act. USEPA has yet to take any regulatory action in response to this ruling.

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[1] *Envt'l Comm. of the Fla. Elec. Power Coordinating Gp., Inc. v. U.S. Envt'l Prot. Agency*, No. 15-1239 (Mar. 1, 2024), *available at* https://www.cadc.uscourts.gov/internet/opinions.nsf/ED1C5CA17B6004BC85258AD30057A53E/$file/15-1239-2043030.pdf (last accessed May 22, 2024).

[2] R23-18(A), April 8 Hearing Officer Order.

B. *Effect of Ruling on Regulations Adopted in R23-18 and Proposed in R23-18(A)*

The Board adopted new air regulations on July 20, 2023 that removed regulatory provisions providing "a 'prima facie' defense to emission limit exceedances during a startup, malfunction, or breakdown event."[3] Upon adoption of the rules, Illinois' regulations contained no defenses or exemptions to generally applicable air regulations during SSM events. Therefore the D.C. Circuit's recent ruling has no effect on current Board regulations. The D.C. Circuit ruled that some types of SSM exemptions were lawful, whereas other types were not— it certainly did not opine that any SSM exemptions are required by the Clean Air Act. Therefore, the Board's current regulations, containing no exemptions of any kind, are consistent with the D.C. Circuit's order.

Whether the Board's prior rules contained the type of SSM exemption that the D.C. Circuit approved of or disapproved of is of no consequence to the current Board rulemaking in this docket. It is well-established that Illinois may adopt environmental laws that are more stringent than allowed under federal law. For example, the Board has adopted air regulations on the control of mercury emissions that were more stringent than federally required.[4]

This approach is also recognized by federal law: the Clean Air Act allows states to set standards that exceed the federal National Ambient Air Quality Standards, stating that "nothing in this chapter [entitled 'Retention of State Authority'] shall preclude or deny the right of any State . . . to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution[.]"[5] In other words, even if some SSM exemptions are permissible under the Clean Air Act, the Board is under no obligation to adopt them

Similarly, the D.C. Circuit ruling has no bearing on the proposed regulations in this docket, because none of the proposals would introduce a form of relief for SSM events in a manner discussed by the D.C. Circuit. Instead, the proposed regulations constitute alternative emission limitations, which, when "properly developed," are a "replacement" for unlawful SSM exemptions.[6]

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[3] R23-18, July 20, 2023 Board order.

[4] *See* R06-25, Illinois Pollution Control Board Order (Apr. 20, 2006) (Fast track rulemaking involving mercury emissions, where the Board held that it "further believes that this would allow for a proposal more stringent than the federal requirements." Order at 18.). Upon adoption of the Illinois law that would lead to these Board rules, the IEPA director stated that "The federal rules just don't go far enough. Illinois' approach is more stringent and effective in that it will require greater reductions . . . ." IEPA website on mercury rules, https://epa.illinois.gov/topics/forms/air-permits/mercury-rules.html (last accessed May 22, 2024).

[5] 42 U.S.C. 7416.

[6] *State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction*, 80 Fed. Reg. 33840, 33845 (June 12, 2015).

II. The Illinois Environmental Regulatory Group Has Failed to Support its Proposed Regulations.

The Illinois Environmental Regulatory Group ("IERG") proposes to amend the carbon monoxide ("CO") standards for fuel combustion emission sources during periods of startup and shutdown found in Section 216.121 of the Board's Air Pollution Regulations, 35 Ill. Adm. Code 216.121, as well as relevant definitions and incorporations by reference in Sections 216.103 and 216.104, 35 Ill. Adm. Code 216.103 and 216.104.[7] However, IERG has not supplied IEPA with the information it needs to evaluate the full impact of the proposal on CO emissions, and thereby demonstrate to USEPA that it will not increase CO emissions.[8] Therefore, the Illinois Attorney General's Office recommends that the Board reject IERG's proposed amendments to Part 216.

On October 23, 2023, IEPA submitted comments on IERG's proposed amendments which identified two critical deficiencies.[9] First, IERG's proposal is overly broad. Its proposed amendments would apply to approximately 3,900 emissions units located throughout Illinois, which make up about 1,500 sources.[10] IERG does not specify which of those sources need the relief the proposed alternative emission limits ("AELs") would supply, and without knowing the sources that will rely on the proposed AELs, it is difficult, if not impossible, for IEPA to determine their impact on CO emissions.[11] Second, IERG's proposal did not include sufficient technical information.[12] To address these deficiencies, IEPA requested (1) that IERG identify the emission sources the proposal would impact, and (2) that IERG provide additional technical data.[13] The technical data requested includes information "identifying the greatest potential for air quality impacts during startup and shutdown periods for subject sources, quantifying worst-case emissions, and demonstrating that CO emissions during these periods will not threaten the 1-hour and 8-hour CO NAAQS at these higher impact sources via modeling."[14]

In spite of the months that have elapsed since the October 23, 2023 comments, IERG has neither specified the sources to which its proposed amendments would apply nor supplied IEPA with additional technical support for those amendments.[15] As such, IEPA does not know how many sources would rely on IERG's proposed rule or its possible impacts on CO emissions at those sources. Without these two key types of information, IEPA has no way to ensure IERG's proposed amendments will not have an adverse impact on air quality.[16] Therefore, IEPA cannot offer IERG's proposed amendments to USEPA in a SIP submittal.[17] Because IEPA will be unable to offer IERG's proposed amendments to USEPA even if the Board adopts them, the Attorney General's Office respectfully recommends that they not be adopted.

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[7] *See generally* The Illinois Environmental Regulatory Group's Proposal for Regulations of General Applicability.
[8] *See* IEPA's Testimony of Rory Davis at 5.
[9] *See* IEPA's Comments, Oct. 23, 2023, at 25–27.
[10] *Id.* at 25.
[11] *Id.* at 25–26.
[12] *Id.* at 26.
[13] *Id.* at 25–27.
[14] IEPA's Testimony of Rory Davis, Apr. 2, 2024, at 5.
[15] *Id.*
[16] Third Hearing Transcript, Apr. 15, 2024, 10:4-11.
[17] IEPA's Testimony of Rory Davis, Apr. 2, 2024, at 5.

III. Midwest Generation and Dynegy Have Failed to Provide an Adequate Definition of "Good Engineering Practices."

On August 7, 2023, Midwest Generation, LLC ("MWG") and Dynegy Midwest Generation, LLC, *et al*. ("Dynegy") submitted to the Board a Joint Proposal to codify AELs during SSM periods. The Joint Proposal, in part, relies upon compliance with work practices as a condition to demonstrating compliance with the maximum opacity limitation, using an alternative averaging period. The Joint Proposal requires that "[a]ny person relying on the Alternative Averaging Period in Section 212.124(e)(1) of this Subpart must . . . use good engineering practices and best efforts to minimize the frequency and duration of operation in startup, malfunction and breakdown."

During the September 27, 2023 hearing, when asked to clarify the meaning of "good engineering practices", Dynegy's witness noted that the work practices provision was modeled on a recommendation in the USEPA 2015 SIP Call. Dynegy's witness testified that the "recommendation calls for operating, 'in a manner consistent with good practice for minimizing emissions.' Note also that similar terms are used in the Clean Air Act regulations and in Dynegy's CAAPP permits."[18] Midwest Generation's witness affirmed that response.[19]

In response to a follow-up question regarding the Illinois General Assembly Joint Committee on Administrative Rules' ("JCAR") request for an enforceable standard,[20] the MWG and Dynegy's attorney responded that "[MWG and Dynegy] will take that question under advisement and can respond to it in [their] joint comment at the end of the proceeding."[21]

On October 26, 2023, the Illinois Attorney General's Office moved for an additional hearing to allow IEPA to fully consider the environmental impact of the proposals. The Board granted that motion on November 16, 2023.

On November 3, 2023, prior to the Board's ruling, MWG and Dynegy filed their First Post-Hearing Comment answering the Board's questions and committing to answer other outstanding questions in subsequent post-hearing comments. MWG and Dynegy filed responses to IEPA's comments and request for additional information on December 1, 2023, March 15, 2024, and March 22, 2024. They also submitted Prefiled Direct Testimony on March 15, 2024 and supplemented that testimony on March 22, 2024.

At the April 15, 2024 hearing, the Illinois Attorney General's Office reiterated its question regarding the meaning of "good engineering practices" and whether MWG and Dynegy could suggest an enforceable standard. MWG and Dynegy responded, through their attorney, that the question would be answered in post-hearing comments.[22]

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[18] September 27, 2023 Hearing Transcript, 100:7-17.
[19] *Id.* at 101:3-8.
[20] Public Comment No. 2, Email Correspondence Between the Board and JCAR Regarding Suggested Changes, pg. 2, Comment 30.
[21] September 27, 2023 Hearing Transcript, 101:9-22.
[22] April 15, 2024 Hearing Transcript, 25:21-24, 26:1-11.

While the meaning of "good engineering practices" may be clarified in MWG and Dynegy's forthcoming comments, the Board and hearing participants did not and will not have an adequate opportunity to question their witnesses about that definition and its impact on the proposed AELs, nor even an opportunity to provide any comment. If MWG and Dynegy have not provided a sufficient explanation in their final post-hearing comments, the Board should disapprove the proposed Alternative Averaging Period. Alternatively, if MWG and Dynegy do provide such a definition and their position on the impact to the proposed AELs, the participants should have the opportunity to comment on it, at a minimum, to assist in developing the record for this proceeding.

IV. Rain Carbon Has Failed to Adequately Support its Regulatory Proposal

IEPA requested that Rain CII Carbon LLC ("Rain Carbon") justify its proposed AEL for PM which, if adopted, would have allowed the company to exceed the PM emission limit standard under Section 212.322 for up to 720 hours per kiln per calendar year.[23] In response, Rain Carbon revised its proposed AEL which would allow the company to exceed the PM emission limit for up to 300 hours per kiln per calendar year.[24] Rain Carbon justifies its revised proposed AEL by adding together three variables: (1) historic SMB data at its facility, (2) the number of hours the facility could exceed its PM emission limits during SMB events under its CAAPP Permit, and (3) estimating additional SMB hours if the facility were to operate year-round. This comment seeks to clarify the assumptions Rain Carbon makes in support of its proposed AEL.

First, Rain Carbon looks at the past ten years of operations at its facility. The company then excludes historical data for non-representative years (years in which Kiln 1 or Kiln 2 operated less than 50% of the year) and focuses on "representative" years (years in which Kiln 1 or Kiln 2 operated 50% or more of the year). Those non-representative years are 2021-2023 for Kiln 1 and 2015, 2018, 2022, and 2023 for Kiln 2. In other words, the company treats 35% of the last ten years of operations as outlier data. While Rain Carbon's responses do not include this information, fewer operating hours presumably means fewer SMB events. By excluding these purported non-representative years, the average SMB hours per kiln increases and therefore appears to justify a more lenient AEL. Even still, if the company sought AELs consistent with average SMB hours during representative years, the AELs would be 94.29 hours and 82.33 hours for Kilns 1 and 2, respectively. As such, Rain Carbon's AEL for PM is unsupported and should not be adopted as proposed.

Beyond its historic SMB hours, Rain Carbon adds in the difference between each actual SMB event and 24 hours. Rain Carbon's justification for this approach is that, prior to the Board's R23-018 rulemaking the facility's CAAPP Permit allowed the company to operate in excess of PM emission limits "during the entirety of a malfunction or breakdown event, and up to 24 hours during a start-up event."[25] For example, if a start-up event took 20 hours rather than the 24 hours allowed by its CAAPP Permit prior to the Board's R23-018 rulemaking, then Rain

[23] *See* IEPA's Comments at 9.
[24] *See generally* Rain Carbon's Supplemental Response to IEPA Comments at 5-8.
[25] *Id.* at 6.

Carbon subtracts 20 hours from 24 hours and adds the remaining 4 hours to its variable "Start-up Remainder Hours." Similarly, if a malfunction event took 5 hours to resolve, Rain Carbon subtracts 5 hours from 24 hours and adds the remaining 19 hours to its variable "Malfunction Remainder Hours." The effect of this approach is to treat each SMB event as a worst-case scenario. Further, using 24 hours as a baseline for malfunction events is suspect because Rain Carbon has previously represented that malfunction events are typically resolved in 4-5 hours.[26] In addition, Rain Carbon's table of "typical malfunction/breakdown events" demonstrates that the longest such event lasted 8.75 hours, and the average event lasted 5.85 hours.[27] Even if Rain Carbon sought AELs consistent with average SMB hours during representative years plus remainder hours, the averages would be 207.42 hours and 251 hours for Kilns 1 and 2, respectively. Therefore, Rain Carbon's AEL for PM is unsupported and should not be adopted as proposed.

Finally, Rain Carbon boosts its proposed AEL by estimating how many additional SMB hours the kilns would have if they operated year-round. On average, Kilns 1 and 2 operate 7,422 and 6,329 hours per year, respectively. Estimating additional hours as if the kilns operated 8,760 hours further pads the company's proposed AEL and appears to justify a more lenient AEL. Accordingly, Rain Carbon's AEL for PM is unsupported and should not be adopted as proposed.

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[26] *See* Rain Carbon's Amendments to 35 Ill. Adm. Code Parts 212 and 215 at 15.
[27] *See* Rain Carbon's Second Supplemental Response to IEPA Comments at 2.