

ILLINOIS POLLUTION CONTROL BOARD
June 5, 2025

IN THE MATTER OF:)
)
AMENDMENTS TO 35 ILL. ADM. CODE) R22-17
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)

ORDER OF THE BOARD (by M.D. Mankowski):

On April 17, 2025, the Board adopted final amendments to the Board’s air pollution regulations at Parts 201, 202, 203, 204, and 232 (35 Ill. Adm. Code 201, 202, 203, 204, 232). The amendments address, among other things, rules on nonattainment New Source Review or “NA NSR” (Part 203) and Prevention of Significant Deterioration or “PSD” (Part 204). On April 30, 2025, the Illinois Environmental Protection Agency (IEPA) filed a motion to clarify a statement made by the Board in its final opinion concerning the effective date of the final amendments. No response to the motion was filed.

In its final opinion, the Board stated that the adopted amendments “take effect upon filing with the Secretary of State.” 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, R22-17, slip op. at 1 (Apr. 17, 2025) (Amendments), citing 5 ILCS 100/5-40(d) (2022). IEPA’s motion asks the Board to “clarify that the amendments to Parts 203 and 204 would only take effect upon their full SIP [State Implementation Plan] approval by USEPA [the United States Environmental Protection Agency].” Mot. at 3. As discussed below, because “a later effective date” for the Part 203 and Part 204 amendments is not “required by statute” and was not “specified in the rulemaking,” those amendments became “effective upon filing.” 5 ILCS 100/5-40(d) (2022). The Board therefore denies IEPA’s motion to clarify.

DISCUSSION

Under the Illinois Administrative Procedure Act (IAPA), an adopted general rule “is effective upon filing” with the Illinois Secretary of State “unless a later effective date is required by statute or is specified in the rulemaking.” 5 ILCS 100/5-40(d) (2022). During the R22-17 proceeding, no one argued that a later effective date for the Part 203 and Part 204 amendments was “required by statute” or should be “specified in the rulemaking” within the meaning of the IAPA’s Section 5-40(d). *Id.* On April 23, 2025, the Board filed these final amendments with the Secretary of State’s Office, which published the adopted rules in the *Illinois Register*, reflecting their effective date as April 23, 2025. *See* 49 Ill. Reg. 6239, 6332 (May 9, 2025) (“Effective Date of Rule: April 23, 2025”).

In its motion, however, IEPA argues that for the amendments to Parts 203 and 204, a later effective date is “required by statute” based on two definitions in the Environmental Protection Act (Act) (415 ILCS 5 (2022)). Mot. at 2-3. Specifically, IEPA asserts that the Act’s definitions of “NA NSR permit” and “PSD permit” require a later effective date. *Id.* Both definitions refer to a permit for a new major source or major modification that is issued by IEPA “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.*” 415 ILCS 5/3.298, 3.363 (2022) (emphasis added) (definitions added by P.A. 99-463, eff. Jan. 1, 2016).

According to IEPA, these definitions provide that a State NA NSR permit or a State PSD permit, as applicable, may be issued only after the corresponding State permit program (*i.e.*, NA NSR or PSD) “has been approved as part of Illinois’ SIP.” Mot. at 2-3. On Part 203, IEPA maintains that the “practical effect” of the statutory definition of “NA NSR permit” is that the adopted Part 203 amendments “would not replace” unamended Part 203 until these amendments have been SIP-approved by the USEPA, and “[i]n the interim,” IEPA would administer NA NSR permitting pursuant to unamended Part 203 “as it has been historically done.” *Id.* at 2, n.2. IEPA indicates that for the Part 204, the same “practical effect” is dictated by the statutory definition of “PSD permit.” *Id.* at 2-3.

IEPA further claims that for the Part 203 amendments, “a later effective date was also specified in the rulemaking.” Mot. at 2. For this argument, IEPA quotes Section 203.100(a):

- 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. *Id.*, quoting 35 Ill. Adm. Code 203.100(a).

Subparts I through R were added to Part 203 in this rulemaking. See Amendments, R22-17, slip op. at 18-80.

The Board addresses IEPA’s last argument first because the text of Section 203.100(a) highlights why a later effective date for the amendments is neither “required by statute” nor “specified in the rulemaking.” 5 ILCS 100/5-40(d) (2022). By its plain terms, Section 203.100(a) refers to the effective date of USEPA’s full approval of the SIP revision, not the effective date of Subparts I through R of Part 203. Section 203.100(a) makes explicit that Subparts I through R “do not apply” until USEPA’s full approval of the SIP revision takes effect. 35 Ill. Adm. Code 203.100(a). Accordingly, Section 203.100(a) provides a later applicability date for Subparts I through R, but “a later effective date” for Subparts I through R was not “specified in the rulemaking.” 5 ILCS 100/5-40(d) (2022); see also Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303 and 304, R08-9(D), slip op. at 3-4 (Aug. 20, 2015) (rules that became effective upon filing with the Secretary of State on July 1, 2015, included water quality standards that “apply for chloride and temperature on July 1, 2018”).

Even without the explanatory Section 203.100(a), Subparts I through R cannot apply before their corresponding SIP approval becomes effective. That is because, by the Act's definition, an "NA NSR permit" is issued by IEPA under the construction permit program "that has been approved by the United States Environmental Protection Agency and incorporated into the Illinois State Implementation Plan." 415 ILCS 5/3.298 (2022). And based on the Act's definition of "PSD permit" (415 ILCS 5/3.363 (2022)), the same holds true for the applicability of this rulemaking's amendments to Part 204.

IEPA's position also finds no support in USEPA's history of approving Illinois SIP submittals regarding NA NSR and PSD. For each of the Board rules within Parts 203 and 204 that have been SIP approved by USEPA, the effective date of those Board rules has preceded the effective date of the corresponding USEPA SIP approval. *See* 40 C.F.R. § 52.720(c). For example, in Proposed New 35 Ill. Adm. Code 204, Prevention of Significant Deterioration, Amendments to 35 Ill. Adm. Code Parts 101, 105, 203, 211, and 215, R19-1, the Part 204 PSD rules became effective when the Board filed them with the Secretary of State on September 4, 2020. *See* 44 Ill. Reg. 14926 (Sept. 18, 2020). But USEPA did not issue its SIP approval of Part 204 until September 9, 2021, and that approval did not take effect until October 12, 2021. *See* 86 Fed. Reg. 50459 (Sept. 9, 2021). In that situation, USEPA explained:

While 35 Ill. Adm. Code Part 204 and the amendments to 35 Ill. Adm. Code Parts 203 and 211 have an effective date of September 4, 2020, those regulations would not take effect *in practice* until [US]EPA has approved them into the Illinois SIP. This is because Illinois law requires that a state PSD permit may only be issued once the state PSD permit program has been approved as part of the Illinois SIP. *See* 415 ILCS 5/3.363 (definition of "PSD permit"). *Id.* at 22374 (emphasis added)

In other words, Part 204 and the related amendments from R19-1 became effective under the IAPA upon their filing with the Secretary of State, but those rules did not *apply* until USEPA approved them as part of Illinois' SIP.

The Board finds that because a later applicability date for the Part 203 and Part 204 amendments comports with the Act's definitions of "NA NSR permit" and "PSD permit", respectively, a later effective date for those amendments is not "required by statute." 5 ILCS 100/5-40(d) (2022).

In addition, there is a question as to whether a state's SIP submittal to USEPA can be considered complete if it includes state rules that are not in effect. As USEPA explained:

The Federal regulations at 40 CFR 51.103 and 40 CFR part 51, appendix V, set forth the minimum criteria that any SIP submission must meet before [US]EPA is required to act on such submission. These criteria include, among other things: (1) Evidence that the state has adopted the proposed regulations in the state code or body of regulations, including the date of adoption or final issuance as well as the effective date of the regulations, if different from the adoption/issuance date

. . . . 86 Fed. Reg. 22372, 22374 (Apr. 28, 2021).

This issue arose in Amendments to 35 Ill. Adm. Code Parts 201, 202, and 212, R23-18, another Board air rulemaking. In R23-18, IEPA stated that USEPA likely could not deem IEPA's SIP submittal complete if the rule was not currently effective. See Amendments to 35 Ill. Adm. Code Parts 201, 202, and 212, R23-18, Tr.1 at 133-34 ("U.S. EPA Region 5 advised [IEPA] that they likely could not deem our submittal complete . . . if we submit a rule that is not currently effective."). IEPA opposed making the date of USEPA's SIP approval the effective date of the proposed amendments rather than the date of Board adoption. *Id.* at 134.

CONCLUSION

Contrary to IEPA's position, the amendments to Parts 203 and 204 do not "*take effect* upon their full SIP approval by USEPA." Mot. at 3 (emphasis added). Instead, they become applicable upon the effective date of USEPA's full approval of Illinois' SIP revision. As the Board stated in its final opinion, the amendments, including the Part 203 and Part 204 amendments, take effect upon their filing with the Secretary of State. Here, that effective date was April 23, 2025. The Board therefore denies IEPA's motion to clarify.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 5, 2025, by a vote of 5-0.

A handwritten signature in cursive script that reads "Don A. Brown". The signature is written in black ink and is positioned above a horizontal line.

Don A. Brown, Clerk
Illinois Pollution Control Board