

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

TO: Don A. Brown	Mr. Daniel Pauley
Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
100 West Randolph Street	100 W. Randolph Street
Suite 11-500	Suite 11-500
Chicago, Illinois 60601	Chicago, Illinois 60601
Don.Brown@illinois.gov	Daniel.Pauley@illinois.gov

(See Persons on Attached Service List)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board, **PRE-FIRST NOTICE COMMENT OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP**, copies of which are hereby served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP

Dated: September 12, 2022

By: /s/ Melissa S. Brown
One of Its Attorneys

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PRE-FIRST NOTICE COMMENT OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP

The ILLINOIS ENVIRONMENTAL REGULATORY GROUP (“IERG”), by and through its attorneys, HEPLERBROOM, LLC, hereby submits its Pre-First Notice Comment pursuant to the Illinois Pollution Control Board’s (“Board”) August 11, 2022 Order. The Board’s August 11, 2022 Order encouraged IERG, the Illinois Environmental Protection Agency (“Illinois EPA”), the Attorney General’s Office (“AGO”), and others to provide comments on the inclusion of provisions based on the Project Emissions Accounting Rule in IERG’s Proposal.

I. Introduction

On August 16, 2021, IERG filed a proposal for rulemaking to amend the Board’s Nonattainment New Source Review (“NA NSR”) rules at 35 Ill. Adm. Code Part 203. IERG’s Proposal also proposes to amend portions of the Board’s Prevention of Significant Deterioration (“PSD”) rules at Part 204 and Toxic Air Contaminants rules at Part 232. IERG is proposing to revise the Board’s rules to be up-to-date with the language in the federal NA NSR regulations. The NA NSR rules in Part 203 have not been updated since 1998. The federal NA NSR rules have been updated numerous times since then, resulting in differences between Part 203 and the federal rules. This implicates many federal regulatory changes, including various developments with ozone and PM_{2.5} nonattainment requirements. Aligning the language in Part 203 to more

closely track the federal NA NSR language, as well as with the PSD regulations at Part 204 where appropriate, is beneficial to Illinois EPA, the Board, regulated industries, and third parties.

IERG has carefully developed a holistic set of proposed regulations that begin with the federal blueprint rule, include appropriate provisions of 40 CFR Part 51 Appendix S, and retain certain aspects of existing Part 203. The result is intended to provide all interested parties with a regulation that is up-to-date and inclusive of all pertinent requirements in one set of rules. The amount of work that has gone into this effort also indicates the degree of difference that exists between current Part 203 and the federal requirements. This comprehensive work led IERG to conclude that the update to Part 203 would be best accomplished by creating entirely new Subparts, rather than attempting to revise Part 203's Subparts as they have existed for more than two decades.

IERG also engaged in lengthy discussions with Illinois EPA on the proposed rules. IERG has made various changes to the proposed rules at Illinois EPA's suggestion. On February 17 and April 7, 2022, hearings were held in this proceeding. The AGO's Motion to Stay, filed on May 6, 2022, has been fully briefed. In its August 11, 2022 Order, the Board set the pre-First Notice final comment deadline as September 12, 2022. IERG urges the Board to move to First Notice with IERG's Proposal.

II. The Board Should Move to First Notice with IERG's Proposal, Including the Provisions Based on the Project Emissions Accounting Rule

Proposed Part 203, Subpart J addresses the applicability of Part 203 to major stationary sources located in nonattainment areas. *See* proposed 35 Ill. Adm. Code 203.1410. Subpart J then addresses how to determine whether a project at an existing major stationary source constitutes a major modification – the project must cause both a significant emissions increase (“Step 1”) and a significant net emissions increase (“Step 2”). Proposed Section 203.1410(c)

describes the procedures for calculating whether a significant emissions increase and significant net emissions increase will occur, and incorporates language based on the Project Emissions Accounting Rule (“PEA Rule”) adopted by USEPA in November 2020. See “Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Project Emissions Accounting,” 85 Fed. Reg. 74890 (Nov. 24, 2020). Because PEA provisions were added to the federal NA NSR and PSD rules, provisions based on the PEA Rule are included in IERG’s proposed amendments to the NA NSR rules at Part 203 and IERG proposed amendments to the PSD rules at Part 204 to address the PEA Rule. The specific provisions that are based on the PEA Rule are located in Sections 203.1410(c)(5)-(6) for the NA NSR rules and in Sections 204.800(d)(5)-(6) for the PSD rules:

Section 203.1410 Applicability

* * *

c) The requirements of this Part will be applied in accordance with subsections (c)(1) through (c)(6).

* * *

5) Hybrid test for projects that involve multiple types of emissions units. A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the **difference for all** emissions units, using the method specified in subsections (c)(3) and (c)(4) as applicable with respect to each emissions unit, equals or exceeds the significant amount for that pollutant (as defined in Section 203.1370).

6) **The “sum of the difference” as used in subsections (c)(3) through (c)(5) shall include both increases and decreases in emissions calculated in accordance with those subsections.**

Section 204.800 Applicability

* * *

- d) The requirements of the program will be applied in accordance with the principles set out in this subsection (d).

* * *

- 5) Hybrid Test for Projects That Involve Multiple Types of Emissions Unit or Units. A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the ~~emissions increases for each~~ difference for all emissions units, using the method specified in subsections (d)(3) and (d)(4) as applicable with respect to each emissions unit, for each type of emissions unit equals or exceeds the significant amount for that pollutant (as defined in Section 204.660).
- 6) The “sum of the difference” as used in subsections (d)(3) through (d)(5) shall include both increases and decreases in emissions calculated in accordance with those subsections.

Proposed 35 Ill. Adm. Code 203.1410(c)(5)-(6) (language related to PEA Rule shown in bold); proposed 35 Ill. Adm. Code 204.800(d)(5)-(6) (language related to PEA Rule shown in strike-through and underline).

Proposed Sections 203.1410(c)(5)-(6) and 204.800(d)(5)-(6) are consistent with the currently effective federal provisions at 40 CFR §§ 51.165(a)(2)(ii)(F)-(G) and 52.21(a)(2)(iv)(f)-(g), respectively, including the revisions to those rules concerning PEA that were promulgated on November 24, 2020, and became effective on December 24, 2020. The PEA Rule is subject to a legal challenge, but the case is held in abeyance at the request of USEPA. *New Jersey, et al. v. USEPA, et al.*, No 21-1033 (D.C. Cir. Feb. 10, 2022). USEPA requested the case be held in abeyance while USEPA initiates a rulemaking process to consider revisions to the PEA Rule. *See id*; *see also* USEPA Response to Mot. For Reconsideration, EPA-HQ-OAR-2018-0048 (Oct. 12, 2021). The rulemaking has not yet been initiated. Therefore, not only are the federal provisions based on the PEA Rule still currently in effect, but

interested parties have not seen any indication from USEPA indicating what, if any, changes USEPA may be proposing to the PEA Rule.

Furthermore, Illinois EPA has proposed, and the Board has adopted, numerous regulatory provisions in the past that were based on federal rules being challenged at the time of adoption. For example, in the PSD Rulemaking at R 19-1, Illinois EPA proposed and the Board adopted provisions relating to enforceability of the actual-to-projected-actual emissions increase test at 35 Ill. Adm. Code 204.1400.¹ The corresponding provisions of the federal blueprint rule at 40 CFR § 51.166(r)(6) were at that time subject to a challenge being held in abeyance. *New Jersey v. EPA*, 989 F.3d 1038 (D.C. Cir. 2021).² IERG does not anticipate that there would be a time when the Board could adopt revisions to the NA NSR regulations that are consistent with then-current federal requirements without adopting rule provisions that are subject to legal challenge, as the NSR regulations are frequently subject to litigation.

Moreover, other states have revised their regulations to incorporate the PEA Rule and USEPA continues to propose approval of State Implementation Plan (“SIP”) revisions that include revisions based on the PEA Rule. For example, on July 26, 2022, USEPA published a proposed rule in the Federal Register proposing to approve SIP revisions submitted by South Carolina. “Air Plan Approval; South Carolina: New Source Review Updates,” 87 Fed. Reg. 44,314 (July 26, 2022). The proposed revisions include revisions based on the PEA Rule:

Since the time of South Carolina's previous April 24, 2020 submittal to revise its major NSR rules, EPA has updated the federal major NSR regulations to clarify the Project Emissions Accounting provisions and to correct certain errors in the NSR regulations that have accumulated over time. South Carolina's February 3, 2022, SIP submittal seeks to incorporate these updates to the federal rules into the

¹ Additional examples of the Board adopting regulatory provisions that were based on federal rules being challenged at the time of the adoption were provided in IERG's Response to AGO's Motion to Stay, PCB R 22-17 at 5-8 (May 20, 2022).

² Ultimately, the Court ruled that the petitioner failed to show that USEPA's action was arbitrary or capricious, and denied the petition challenging the provisions at issue.

EPA-approved major NSR regulations in the South Carolina SIP EPA is proposing to approve these changes as meeting the requirements of the federal PSD and NNSR programs and as being consistent with the CAA.

Id. at 44,314-44,315. In the Federal Register, USEPA did not raise any concerns about approving the provisions based on the PEA Rule with respect to any upcoming rulemakings to consider the PEA Rule. *See* 87 Fed. Reg. 44,314.³ Instead, USEPA has proposed that the revisions, including those based on the PEA Rule, meet the requirements of the Clean Air Act and implementing federal rules. *See id.* Additionally, no public comments were received objecting to the proposed rule on the basis of the inclusion of PEA.

The federal PEA Rule provisions are currently in effect and USEPA has proposed to approve them into another SIP just weeks ago. Therefore, the Board should proceed to First Notice with IERG's Proposal, including the provisions based on the PEA Rule.

III. Impacts of Moving Forward with IERG's Proposal Without the Provisions Based on the Project Emissions Accounting Rule

The Board's August 11, 2022, Order requested that participants comment on the implications of moving forward with IERG's Proposal without the provisions based on the PEA Rule. Board Order, PCB R 23-17, at 2, (August 11, 2022). If the Board adopted the proposed rules without the PEA Rule provisions, the Board would be choosing to not adopt provisions based on federal regulations that are currently in effect on the basis that a potential future rulemaking might revise the underlying federal regulations. USEPA has not yet initiated the rulemaking to consider revisions to the PEA Rule. Therefore, it is not clear as to what revisions, if any, USEPA may adopt or in what timeframe the rulemaking will be initiated, let alone finalized. It is possible, if not likely, that the proposed rulemaking will not be finalized until

³ *See also* USEPA's rulemaking docket, publicly available at <https://www.regulations.gov/docket/EPA-R04-OAR-2022-0397/document>.

sometime in 2024. And, it is possible that USEPA may decide to not adopt any revisions to the PEA Rule.

Nevertheless, if the Board is inclined to not move forward with the provisions based on the PEA Rule, IERG urges the Board to move to First Notice with the remainder of IERG's Proposal. Part 203 has not been updated since 1998. Numerous amendments to the federal rules have been promulgated that have not been incorporated into Part 203, including, for example, requirements for PM_{2.5} nonattainment areas and provisions governing Plantwide Applicability Limits ("PALs"). Adopting a comprehensive update to the Board's NA NSR rules now would add provisions, such as PALs, as well as consistency in language and organization, that are beneficial to all parties. Additionally, updating Part 203 to include provisions regarding PM_{2.5} nonattainment areas now provides much needed insight and certainty so that regulated entities, for future planning purposes, and the State, are aware of the requirements that will be expected if an area or areas are designated nonattainment for PM_{2.5} in the future.

IV. Conclusion

Given the numerous benefits of updating the Board's NA NSR regulations, the Board should move to First Notice with IERG's Proposal, including the PEA Rule provisions. The federal PEA Rule provisions are currently in effect. USEPA is continuing to propose approval of SIP revisions that include provisions based on the PEA Rule. Moreover, amendments to Illinois' NA NSR regulations are long overdue and would be beneficial to all parties involved. IERG asks that the Board move forward with the proposed rules, so that the Board, the Illinois EPA, the regulated community and other parties may have a current, cohesive set of requirements in Part 203.

WHEREFORE, for the above and foregoing reasons, the Illinois Environmental Regulatory Group hereby respectfully submits its Pre-First Notice Comment for the Illinois Pollution Control Board's consideration.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP

Dated: September 12, 2022

By: /s/ Melissa S. Brown
One of Its Attorneys

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CERTIFICATE OF SERVICE

I, Melissa S. Brown, the undersigned, hereby certify that I have served the attached **PRE-FIRST NOTICE COMMENT OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP** on September 12, 2022, to the following:

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That my email address is: Melissa.Brown@heplerbroom.com.

That the number of pages in the email transmission is 10 total pages.

That the email transmissions, depositing said documents in the United States Mail, and depositing said documents in a UPS drop box, as noted above, took place before 5:00 p.m. on the date of September 12, 2022.

/s/ Melissa S. Brown

Date: September 12, 2022