**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

| | | |
|---|---|---|
| IN THE MATTER OF: | ) | |
| | ) | R23-18 |
| AMENDMENTS TO 35 ILL. ADM. CODE | ) | (Rulemaking – Air) |
| PARTS 201, 202, AND 212 | ) | |

**NOTICE OF FILING**

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SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Board the ILLINOIS EPA'S RESPONSES TO POST-HEARING QUESTIONS SUBMITTED BY IERG, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ Charles E. Matoesian
Division of Legal Counsel

DATED: February 14, 2023
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**ILLINOIS EPA's RESPONSES TO POST-HEARING QUESTIONS SUBMITTED BY IERG**

The Illinois Environmental Protection Agency (Illinois EPA or Agency ), by and through its attorneys, and pursuant to the Illinois Pollution Control Board's (Board) Hearing Officer Order dated January 20, 2023, hereby submits written answers to questions submitted by the Illinois Environmental Regulatory Group (IERG) in response to the Illinois EPA's January 30, 2023 Responses to Questions received at First Hearing.

Questions as to IEPA's Response to Question #1

a) In response to Question 1, Illinois EPA stated: "The Agency notes that both the volume of records and the inability to search permits based on particular provisions within them limits its ability to provide the requested information" Please provide an estimate of time it would have taken Agency staff to open all current CAAPP and FESOP permits and use the search function to identify permits that reference "201.149," "201.261," or "201.262."

**RESPONSE:** Question 1 also inquired about construction permits, as well as permits from varying time periods. But to the extent IERG is now asking just about current CAAPP and FESOP permits, searching for these three Section numbers alone is not all that would be required to respond to Question 1. More search terms would be needed to determine whether a permit contains "SMB provisions" including searches for different terms and spellings (startup, start-up, breakdown, break-down, etc.). As the Agency is limited to a manual review of permits for specific permit provisions, performing the type of search IERG suggests would likely require 15-30 minutes, at minimum, per permit for over 1200 permits, or approximately 300-600 hours.

1. Why did the Agency not perform this search either as part of developing its proposal in this rulemaking or as early as 2015 in response to the 2015 SSM SIP Call?

**RESPONSE:** Such a resource-intensive, time-consuming exercise was neither

required nor necessary. Removal of the Board's affirmative defense provisions potentially impacts any source that would seek such provisions in its permit—not only sources that have SMB provisions now but also those that may have otherwise requested them in permit applications in the future. Further, sources should be familiar with their permits and their contents.

b) In response to Question 1, Illinois EPA stated: "As to the question of whether the Agency's SMB language has evolved since 1971, to the best of the Agency's knowledge, the Board's SMB regulation establishing that the impact of SMB provisions is an affirmative defense and the Agency's implementation of that language have not changed …."

1. Was the Agency unable to locate a current permit that contains no obligation to notify regarding SMB events or file a report or notification concerning a startup with excess emissions? Is the Agency aware that such permits have been issued?

**RESPONSE:** The Agency is unclear what is being asked. As the Agency has explained, the volume of documents and search capabilities of the Agency limits its ability to search all permits for particular provisions. This question also incorrectly presumes that a permit that does not contain SMB-specific reporting obligations does not otherwise require the reporting of excess emissions during startup, malfunction, or breakdown. While there could be exceptions over the last fifty years, permits typically require that sources report violations/excess emissions, regardless of whether those emissions occur during "steady-state" operation or during startup or breakdown. Some permits contain additional or special reporting obligations specific to SMB events. But some do not, in which case excess emissions during SMB events must be reported under general reporting provisions, the same as any other excess emissions.

2. If so, how does that align with the Agency's claim that each occurrence is evaluated individually and a decision made on whether or not to pursue enforcement? Is the Agency aware of any operating permits that were issued in the past including SMB provisions that simply stated: "Operation in excess of applicable emission standards is allowed during startup" and "Operation in excess of applicable emission standards is allowed during malfunction and breakdown".

**RESPONSE:** This question covers decades of permitting and provides two quotations or perhaps partial quotations with no context. There are likely permits that contain these phrases, which are consistent with the provisions in Part 201, Subpart I. The phrases would allow continued *operation* in these instances, as equipment might be damaged or other issues may arise if operation ceases. The *excess emissions* that may result from continued operation, however, are considered violations and nothing in these provisions purports to change that.

i. If so, would the Agency consider those provisions as only establishing a prima facie defense?

**RESPONSE:** Yes. The Agency acknowledges that the verbiage in several sections of Part 201, Subpart I is odd, but Subpart I still clearly support the Agency's position. Section 201.261 regards "requests for permission to continue to *operate* during a malfunction," with no indication that resulting excess emissions are not violations or that an exception to emission standards is being created (emphasis added). Similarly, that same section regards "request[s] for permission *to violate* . . . standards or limitations" during startup (emphasis added). No mention of creating an exception, no statement that sources are not required to comply with emission standards during startup, and right in the provision itself an acknowledgement that the excess emissions are violations. Similarly, Section 201.264 notes that the above provisions concern "permission to *operate* during a malfunction, breakdown or startup" (emphasis added). If the rest of Subpart I is not enough, Section 201.265 then conclusively establishes that the effect of granting permission to operate during malfunction or breakdown or to violate during startup shall be a prima facie defense to an enforcement action alleging a violation of an emission standard. Not only is this language clear and unambiguous, but it would be completely unnecessary if the rest of Subpart I established exceptions or exemptions from emission limitations during SMB events, as some have errantly claimed in this proceeding.

3. Has the repeal of the Agency rule 35 Ill. Adm. Code Part 260 "Policy for Granting Permission to Operate During Periods of Excess Emissions" (13 Ill. Reg. 9503, effective June 12, 1989) resulted in any evolution in the SMB language? As background, the language in prior 35 Ill. Adm. Code 260.206 stated: "In granting a request to operate during periods of excess emissions, the Agency shall include those conditions which will insure that the applicant does not cause any violation of the Environmental Protection Act or regulations promulgated thereunder *other than those violations specifically allowed* in the operating permit issued by the Agency pursuant to this Part". (Emphasis Added). If so, how?

**RESPONSE:** No, not to the Agency's knowledge.

c) How many of the state's four petroleum refineries have SMB relief provisions in their current operating permits for FCCUs and other units?

**RESPONSE:** The operating permits for all four petroleum refineries in Illinois contain SMB provisions.

d) When was the last CAAPP permit issued to a petroleum refinery with SMB provisions?

**RESPONSE:** The last CAAPP permit issued to a petroleum refinery was to CITGO

Petroleum Corp, January 9, 2006.

Questions as to IEPA's Response to Question #2

a) In response to Question 2, the Agency states that, in reviewing the documents available on the Board's website in PCB R 71-23, there were several documents that discuss SMB provisions. IERG's review of the Board's online docket for PCB R 71-23 does not show any documents that address SMB provisions other than the Board's April 12, 1972 Order. Can the Agency please provide a listing of which documents other than the April 12, 1972 Order discuss SMB provisions.

**RESPONSE**: There are two documents where the Agency found different mentions of SMB. The first is the Board Order noted above. The second is the testimony of Robert T. Walsh, dated 1/1/71.

b) In response to Question 2, the Agency stated: "If there are passages that IERG has specific questions about, the Agency would be happy to answer those if possible." As noted in IERG's pre-proposal comment submitted to the Agency on December 6, 2022 and IERG's comment filed with the Board on December 30, 2022, the April 12, 1972 Board Order in PCB R 71-23 includes the following passage:

> Rule 105: Malfunctions, Breakdowns, and Startups. No machine works perfectly all the time. Further, startup conditions may result in less than optimum emission control. The policy of this Rule is that insofar as is practicable, efforts shall be made to reduce the incidence and duration of startups and excessive emissions during startup periods; and that, except in special cases, equipment whose pollution controls are out of order should not be operated, just as an automobile should not be operated when its brakes are out of commission. Clearly the latter principle cannot be absolute, for it may not be worth blacking out the entire Midwest to prevent emissions from a partly malfunctioning boiler precipitator. We cannot resolve the myriad of individual variations in a single rule. The Agency's admirable proposal, which we have adopted, places case-by-case discretion in the Agency under its permit powers, providing that if special conditions warrant permission to operate during a malfunction, or if irreducible startup emissions will somewhat exceed the general standards, [Illinois] EPA may grant permission for such emissions upon application and proof.

Based on the passage above or any other passage in the April 1972 Order, does the Agency acknowledge that the emission standards' numerical values were established at lower values that did not encompass believed higher emission rates anticipated during startup periods?

**RESPONSE:** The Agency acknowledges that emission standards were established that sources may not be able to comply with at all times, whether that be during startup, breakdown, or other circumstances that lead to violations.

Questions as to IEPA's Response to Question #4

a) In response to Question 4, the Agency states that it "is not providing documents that are attorney-client privileged, attorney work product, predecisional, or that have already been provided to the Board in this rulemaking." Please describe in general terms what documents would constitute "predecisional" documents.

**RESPONSE:** The Agency directs IERG to 5 ILCS 140/7(1)(f), the Illinois FOIA exemption for predecisional documents. The statute indicates that such documents include:

> Preliminary drafts, notes, recommendations, memorandum and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body.

i. Do any "predecisional" documents exist in relation to this rulemaking that are not protected under attorney-client privilege or attorney work product? If so, please provide the Agency's basis for withholding such "predecisional" documents.

**RESPONSE:** Yes, please see the answer immediately above. The Agency wishes to preserve this FOIA exemption for predecisional documents.

Questions as to IEPA's Response to Question #5

a) In response to Question 5, the Agency stated: "Comments that requested alternative standards did not change the Agency's proposal either. As explained it its Statement of Reasons and again during hearing, without any indication from USEPA that alternative limits will, in practice, be approvable and without additional direction or guidance from USEPA regarding the support necessary to satisfy the criteria set forth in its 2015 SIP Call for alternative limits, it is not advisable to propose or adopt such limits particularly not in this rulemaking considering the August 2023 adoption/submittal/completeness deadline." Following the Agency's receipt of IERG's pre-proposal comments on December 6, 2022, did the Agency discuss with USEPA the alternatives addressed on Page 10 of IERG's comment, including the two CO standards for boilers and Fluidized catalytic cracker units (FCCUs), for which USEPA had recently removed SSM relief provisions and inserted alternative emission limits in their analogous federal rules? If "no," why not? If "yes," what does the Agency understand to be the obstacles to putting forth a complete proposal that includes these alternative standards?

**RESPONSE:** Yes, the Agency shared the proposed alternative standards that have been filed with the Board. The Illinois EPA has not heard back from USEPA Region 5 regarding the substance of the proposed alternative standards, but Region 5 staff did indicate their preference that Illinois submit the rule revisions addressing the SIP Call requirements first, and handle any potential alternative standards later since including them in the same submittal would involve more staff and require more review time.

Any proposed alternative standards would need to be sufficiently supported and would need to include an analysis of emissions impact as part of a Section 110(l) anti-backsliding demonstration.

This fast-track rulemaking is limited in scope to addressing the Subpart I provisions found to be inadequate in the SIP Call. The Agency's proposed amendments are the only ones required to be adopted to satisfy the SIP Call. Any alternative emission limitations should be addressed in a different proceeding, whether that be another rulemaking or a regulatory relief proceeding. In that context, the proposed alternative limitations can be properly vetted by the Illinois EPA, the Board, and other participants, and USEPA will have sufficient opportunity to opine on the standards' approvability.

i. More specifically, did the Agency understand that these federal standards would not satisfy one or more of the seven USEPA criteria for developing alternate emission limitations and, if so, which?

**RESPONSE:** See the Agency's response above.

b) In response to Question 5, the Agency stated: "To the Agency's knowledge, all other states that have successfully addressed the SIP Call have done so by removing SSM provisions from their SIPs, and the states that have developed alternative standards have had such standards rejected by USEPA as insufficient." IERG is assuming for purposes of this question that "successfully addressed the SIP Call" means that the states' revisions to address the SIP Call were approved by USEPA. Did the states that successfully addressed the SIP Call have the same underlying numerical standards as Illinois?

**RESPONSE**: The Agency provided in its rulemaking submittal a list of the 13 states or portions of states that, based on the Agency's information at the time, had submitted SIPs in response to the SIP Call that were approved by USEPA. It also identified 3 additional states that submitted SIPs that USEPA proposed to approve. In all of these instances, the state appeared to address the SIP Call by simply removing offending SIP provisions (the same approach the Illinois EPA intends to take). The Agency also identified one state that submitted alternative standards that USEPA proposed to disapprove. The Illinois EPA provided citations to the pertinent Federal Registers, which are available to all participants.

Since that time, the Agency has identified an additional state (West Virginia) that submitted alternative standards that USEPA has proposed to disapprove. Also, Oklahoma submitted a SIP amendment removing offending SSM provisions, which USEPA has proposed to approve. (88 Fed. Reg. 7378, Feb. 3, 2023). Finally, the Agency recently learned that USEPA proposed approving an alternative emission limitation submitted by Alaska (88 Fed. Reg. 1454, Jan. 10, 2023) regarding opacity limits for residential woodstoves. Note that Alaska's SIP submittal was not to address the SIP Call, however; Alaska had already addressed the SIP Call by removing the offending SIP provisions, approved by USEPA in early 2022.

In sharing its findings regarding other states' attempts to address the SIP Call, the Agency did not indicate that it reviewed each state's underlying emission limitations, nor would the Agency generally expect those limitations to be recited in the Federal Registers approving states' removal of SSM provisions. The Agency does not intend to conduct such a review, particularly as the Agency is not proposing to amend any Illinois emission limitations in this narrow rulemaking and doing so is not necessary or required to address the SIP Call.

i. Is it possible that the states that successfully addressed the SIP Call had previously updated their underlying numerical standards since their initial adoption, such that those states did not have underlying standards that needed to be addressed through SSM provisions?

**RESPONSE:** See the Agency's response to the question above.

ii. Which state(s) has the Agency identified that have "rejected" alternative standards? And, for each of those states, are those "rejections" final?

**RESPONSE**: The Agency identified two instances where USEPA proposed disapproving state submissions that contained alternative standards. These are Georgia and West Virginia.

iii. For each state, what was the basis of "rejection", whether proposed or final? More specifically, was the basis of denial related to one or more of the seven USEPA criteria for approvable alternative emission limitations?

**RESPONSE:** See USEPA's reasoning set forth in 87 Fed. Reg. 72941 (Georgia) and 87 Fed. Reg. 78617 (West Virginia).

iv. For each state in which USEPA rejected alternative standards, do those states have a 200 ppm, corrected to 50% excess air, CO standard that applies to fuel combustion emission sources?

**RESPONSE:** The Agency has not reviewed West Virginia's or Georgia's CO standard, as they are not relevant to the Agency's proposal or the amendments

necessary to address the SIP Call.

v. For each state in which USEPA rejected alternative standards, do those states have a petroleum refinery with an FCCU? If "yes," do those states have a 200 ppm, corrected to 50% excess air, CO standard that applies to FCCUs?

**RESPONSE:** This is not within the Agency's knowledge. The Agency also directs IERG to its response to question (b)(iv).

Questions as to IEPA's Response to Question #10

a) In response to Question 10, the Agency stated as to its search of CAAPP permits: "The Agency conducted a search based on the Standard Industrial Classification Group Code 28 which resulted in 16 sources." However, in response to IERG's Question 1 concerning providing examples of SMB permit language, the Agency stated: "The Agency notes that both the volume of records and the inability to search permits based on particular provisions within them limits its ability to provide the requested information." What are the Agency's search capabilities for CAAPP permits?

**RESPONSE:** The Agency is limited to manual review of permits for specific permit provisions. The Agency's response to Question 10 was informed by simply looking at the SIC codes that were associated with the Source ID numbers of the estimated 119 CAAPP sources with SMB provisions identified in a previous effort of the Agency unrelated to this rulemaking. So, the response was not a result of an electronic search of permits, but a look at basic information related to those identified sources that could have included a source's SIC code, street address, contact phones and emails, etc.

Questions as to IEPA's Response to Question #11

a) In response to Question 11, the Agency sets forth four options for regulatory relief. Assuming that a source sought relief under one of these options relating to periods of SMB, which of these four options would require USEPA approval?

**RESPONSE:** To clarify, the Agency is the not, through these responses, setting forth or establishing any options for regulatory relief. Regulatory relief mechanisms are established under the Act and the Board's regulations and each participant is responsible for assessing those requirements Further, in its response to Question 11, the Agency acknowledged only two forms of longer-term regulatory relief—variances and adjusted standards. It then identified site-specific rulemakings and rulemakings of general applicability as two additional options for amending emission limitations.

The Agency is unclear what IERG is asking in terms of USEPA's approval. Any variance, adjusted standard, or rulemaking that amends an emission limitation or requirement that is part of Illinois' SIP may be submitted to USEPA for approval into

the SIP.

a. Do these regulatory relief options align with USEPA's vision for how the 2015 SIP Call and 2022 Finding of Failure should be addressed?

**RESPONSE:** The Illinois EPA does not understand this question or what is meant by USEPA's "vision." USEPA has found that certain portions of the Board's regulations are substantially inadequate to meet Clean Air Act requirements. Illinois must remedy that. The SIP Call and Finding of Failure will be fully addressed/resolved by removing the offending provisions from the SIP, as other states have done. USEPA's SSM policy (reflected in the same Federal Register that contained the SIP Call) as well as anti-backsliding considerations would inform USEPA's action concerning any future regulatory relief or amended emission limitations during SMB events that the Board may adopt and that the Illinois EPA may submit to USEPA for approval.

b) If alternative emission limits are addressed through one of these four regulatory relief options, as opposed to being addressed in this rulemaking, will the anti-backsliding demonstration become more difficult? Why or why not?

**RESPONSE:** The Agency cannot speak for USEPA on this issue. Having said that, Region 5 staff recently indicated that they do not view assessment of alternative emission limitations as more difficult when such limits are adopted subsequent to removal of offending SSM provisions; the assessment is the same. Further, anti-backsliding is a requirement in the Clean Air Act focused on whether a SIP submittal would interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement of the Clean Air Act. It is not specific to SMB, and the focus is not on the type of state proceeding, but on the substance of what is being submitted.

c) For the SIP approval process and the required technical demonstration and anti-backsliding applicability, what are the differences for different criteria pollutants? Is there a difference for CO relative to the other criteria pollutants, as Illinois has never had a designated CO nonattainment area?

**RESPONSE:** The Agency cannot speak for USEPA on this issue. Anti-backsliding demonstrations focus on whether a SIP submittal would interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement of the Clean Air Act. Some Clean Air Act requirements apply to all criteria pollutants, and some vary by pollutant and by nonattainment designation and classification.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
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**CERTIFICATE OF E-MAIL SERVICE**

I, the undersigned, on affirmation, state the following:

That I have served the attached ILLINOIS EPA'S RESPONSES TO POST-HEARING QUESTIONS SUBMITTED BY IERG by e-mail upon:

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

That the e-mail transmission took place before 4:30 p.m. on the date of February 14, 2023.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ Charles E. Matoesian
Division of Legal Counsel

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