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

TO: Don Brown
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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 ENVIRONMENTAL PROTECTION AGENCY'S POST-HEARING COMMENTS, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S POST-HEARING COMMENTS

The Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by one of its attorneys, hereby files these Post-Hearing Comments.

Procedural Background

On December 7, 2022, the Illinois EPA filed a proposed rulemaking to amend the Illinois Administrative Code to remove provisions that allow sources to request, and the Illinois EPA to grant, advance permission to continue operating during a malfunction, or to violate emission limitations during startup. Removing these provisions is necessary for the Illinois EPA to comply with the United States Environmental Protection Agency's ("USEPA") *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* ("*SSM SIP Call*" or "*SIP Call*"), 80 *Fed. Reg.* 33840 (June 12, 2015) and *Finding of Failure to Submit State Implementation Plan Revisions to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction* ("*Finding of Failure*"), 87 *Fed. Reg.* 1680 (Jan. 12, 2022). *Statement of Reasons for In the Matter of: Amendments to 35 Ill. Adm. Code Parts 201, 202, and 212* ("*SOR*"), (December 7, 2022). Because of significant time restraints, and the threat of sanctions should the State not submit a SIP addressing the SSM SIP Call to

USEPA by August 2023, the rulemaking was filed under the fast-track rulemaking provisions of Section 28.5 of the Environmental Protection Act ("Act") (415 ILCS 5/28.5).

An initial hearing on the matter took place on January 19, 2023, where the Agency offered testimony in support of its proposal and responded to questions posed by the Board and several interested parties. On January 30, the Agency filed additional responses to certain questions tendered at the hearing. The Illinois Environmental Regulatory Group ("IERG") submitted additional questions to the Agency prior to the second hearing. The Agency responded to these on February 14, 2023. The second hearing was held on February 16, 2023, wherein interested parties provided testimony and responded to questions from the Board and the Attorney General's Office.

Illinois' SMB Regulations

As explained in Illinois EPA's rulemaking proposal, Illinois' SSM provisions are contained in Part 201 of Title 35 of the Illinois Administrative Code. This Part contains general provisions applicable to permits. Subpart I of the Part is entitled "Malfunctions, Breakdowns, or Startups." Section 201.261 sets forth a method by which sources can submit a request to the Agency in the application for an operating permit for permission to continue to operate during a malfunction or breakdown, or to violate emission limitations during startup. 35 Ill. Adm. Code 201.261.[1] Section 201.262 sets out the standards that the Agency must consider in order to grant permission to a source to continue operation during a malfunction or breakdown or to violate emission limitations during startup. 35 Ill. Adm. Code 201.262. Section 201.263 contains recordkeeping and reporting requirements for a source that obtains advance permission pursuant

[1] The provisions in Part 201 address only start-up, malfunction, and breakdown, not shutdowns in general or for other reasons such as scheduled shutdowns. The Agency has referenced "SSM," but "SMB" is more accurate for Illinois' current regulations.

to Section 201.261. 35 Ill. Adm. Code 201.263. Section 201.264 states that a source wanting to continue to operate during a malfunction or to violate emission standards during startup prior to the issuance of an operating permit must make an immediate application for permission to do so. 35 Ill. Adm. Code 201.264. Section 201.265 states that the grant of permission to continue operations during a malfunction or to violate emission limitations during startup constitutes a prima facie defense to an enforcement action alleging violation of the Administrative Code or air quality standards. 35 Ill. Adm. Code 201.265. *See also SOR*, at p. 4-5.

On June 12, 2015, USEPA issued a SIP Call regarding provisions in SIPs of 36 states, including Illinois, requiring these states to submit revised SIPs correcting deficiencies in their SSM provisions. USEPA found that SIP provisions that contain automatic exemptions, director's discretion exemptions, or affirmative defenses from otherwise applicable emission limitations during SSM are impermissible under the CAA because the law considers emissions in excess of emission limitations to be violations. *SSM SIP Call*, 80 *Fed. Reg.* 33840, 33844. Section 110(a)(2)(A) of the CAA requires SIPs to contain emission limitations, and the definition of emission limitations in Section 302(k) mandates that the limitations apply on a continuous basis. *Id.* at 33863; *SOR* at p. 6.

USEPA determined that Illinois' SSM provisions at 35 Ill. Adm. Code 201.261, 201.262, and 201.265 can be interpreted to provide for discretionary exemptions from emission limitations during periods of SSM, and therefore they are inconsistent with the CAA because the emission limitations are not continuously applicable. *SSM SIP Call*, 80 *Fed. Reg.* 33840, 33965, 33966. In its proposed SSM SIP Call, USEPA explained that Illinois' rules "can be read to create exemptions by authorizing a state official to determine in the permitting process that the excess emissions during startup and malfunction will not be considered violations of the applicable

emission limitations." *State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction* ("*Proposed SSM SIP Call")*, 78 *Fed. Reg.* 12460, 12514 (Feb. 22, 2013); *SOR* at p. 5-6. The discretion provided to the Agency could impermissibly preclude enforcement by USEPA or a citizen. *SOR*, at p. 6-7; *Proposed SSM SIP Call*, 78 *Fed. Reg.* 12460, 12515.

USEPA further explained that even if the prima facie defense provided in Section 201.265 is considered an affirmative defense, the provisions are also deficient. It indicated that "the enforcement structure of the CAA, embodied in section 113 and section 304, precludes any affirmative defense provisions that would operate to limit a court's jurisdiction or discretion to determine the appropriate remedy in an enforcement action. These provisions are not appropriate under the CAA, no matter what type of event they apply to, what criteria they contain or what forms of remedy they purport to limit or eliminate." *SSM SIP Call*, 80 *Fed. Reg.* 33840, 33851; *SOR* at p. 7. In finding these provisions in the Illinois Administrative Code to be inconsistent with the CAA, USEPA granted the Sierra Club's petition and issued a SIP Call with respect to the three identified regulations. *SOR*, at p. 7; *SSM SIP Call*, 80 *Fed. Reg.* 33840, 33966.

The SSM SIP Call sets forth options for curing the inadequacies, including removal of the provisions from the SIPs; inclusion of procedures by which air agency personnel can exercise enforcement discretion; or development of "alternative numerical limitations or other technological control requirements or work practice requirements [applicable] during startup or shutdown events." *SSM SIP Call*, 80 *Fed. Reg.* 33840, 33844.

SIP submissions curing the deficiencies were required to be submitted to USEPA by November 22, 2016. *SSM SIP Call*, at 33848. The CAA provides USEPA with six months to review SIP submittals for completeness with the required criteria. *See* 42 U.S.C. § 7410(k)(1)(B); *SOR* at p. 6-7. If a state does not submit such a submission or if the submission is incomplete, USEPA must issue a finding a failure to submit. *SOR*, at p. 6-7; 42 U.S.C. § 7410(k)(5). USEPA issued a finding of failure on January 12, 2022. *See, Finding of Failure to Submit SIP Revisions*, 87 Fed. Reg. 1680 (January 12, 2022); *SOR* at p. 8.

Should the State not submit a complete SIP submittal to USEPA and USEPA find that the submittal is complete by August 11, 2023, mandatory sanctions will be imposed pursuant to Section 179 of the CAA. *SSM SIP Call*, 80 *Fed. Reg.* 33840, 33849; *SOR* at 8. The first sanction will be a 2-to-1 emission offset requirement for all new and modified major sources subject to the nonattainment new source review program, making major construction activities in nonattainment areas of the State more difficult for sources. 40 CFR 52.31(d), (e). If the deficiencies are still unaddressed six months later, the State will lose highway funding. 40 CFR 52.31(d), (e).

Illinois EPA's Rulemaking Proposal

In response to the SIP Call and Finding of Failure, the Agency proposed a very narrow rulemaking, limited to the revisions necessary to address the SIP Call. These revisions consisted of the following: 1) repealing Part 201, Subpart I, consisting of Sections 201.261, 262, 263, 264, and 265; *SOR* at p. 6. USEPA's SIP Call required that the Illinois EPA remove Sections 201.261, 262, and 265. *SSM SIP Call,* 80 Fed. Reg. 33840, 33965; *SOR* at p. 6. Sections 201.263 and 201.264, however, necessarily depend upon the existence of the above provisions; they were noted by USEPA in the proposed SIP Call as being integral to the regulation of SSM

events and as such, USEPA indicated that Illinois might want to repeal these as well. *Proposed SSM SIP Call*, 78 Fed. Reg. 12460, 12514, footnote 148; and 2) amending Sections 201.149 (also noted by USEPA as integral to the regulation of SSM such that Illinois EPA may want to seek to repeal), 201.157,[2] 201.301, 202.107, 202.211, 212.124, and 212.324 to remove references to, or provisions dependent upon, Part 201, Subpart I. The Agency did not propose any other amendments and did not propose to change any emission limitations. The Agency did not propose to create a new exception to opacity limitations or a new opacity standard in Part 212, and did not propose any changes whatsoever to carbon monoxide provisions in Part 216.

The Agency filed the above proposal with the Board as a fast-track rulemaking, as the amendments were required by USEPA's SIP Call. The Board accepted the Agency's proposal as a fast-track rulemaking and the above provisions were published in the *Illinois Register* for First Notice on December 30, 2022. 46 *Ill. Reg*. 20627 (December 30, 2022). The Board also published public notice of the rulemaking and hearings in various newspapers, describing the scope of amendments proposed by the Agency (the repeal of certain provisions and amendments to remove references to such deleted provisions and provide clarification) and explaining, "Illinois EPA will submit the proposed amendments to 35 Ill. Adm. Code 201, 202, and 212 to the USEPA for review and approval as a revision to Illinois' State Implementation Plan ("SIP") regarding startup, malfunction, and breakdown events." (*See, e.g., Certificate of Publication The Dispatch/Rock Island Argus*, published on 12/23/22).

[2] The Agency initially suggested an additional amendment to Section 201.157 (adding the following language: "If emissions of an emission unit during startup would be higher than during normal operation of the emission unit") but, as explained at hearing, it agrees that this amendment should be removed from the rulemaking as unnecessary. *Transcript of 1st Hearing* ("*Tr. 1st*"), at p. 131. The Agency recommends against the Board adopting such language.

Scope of Fast-Track Rulemaking

On February 6, 2023, several entities pre-filed testimony for the second hearing in this matter containing proposals/requests that the Board adopt in this fast-track rulemaking new exceptions to emission limitations and/or new emission limitations that are not required to address the SIP Call. Specifically, IERG requests that the Board add Part 216 to this rulemaking and adopt in such Part new emission standards for carbon monoxide. The amendments would excuse certain sources from complying with the limitations set forth in Section 216.121 and establish new emission standards for such sources during periods of startup and shutdown; excuse other sources from complying with the limitations set forth in Section 216.361, and establish new emission standards for such sources during periods of startup, shutdown, and "hot standby;" add new definitions to Section 216.103; and add new incorporations by reference in Section 216.104. *Pre-Filed Testimony of Kelly Thompson and David R. Wall for the Illinois Environmental Regulatory Group* ("*Pre-Filed Thompson*," "*Pre-Filed Wall"*), at p. 24, 38-39. Dynegy requests that the Board adopt in a new Subsection 212.124(d) standards for opacity for several of its units via excepting such units from compliance with existing emission standards in Sections 212.122 and 212.123, and establishing different standards, reporting requirements, and work practices for those units during both startup and malfunction/breakdown. *Pre-Filed Testimony of Cynthia Vodopivec ("Pre-Filed Vodopivec"),* at p. 14-16. Similarly, Midwest Generation requests that the Board add a new Subsection 212.124(d) containing standards for opacity for several of its units via excepting such units from compliance with existing emission standards in Section 212.123, and establishing different standards, reporting requirements, and work practices for those units during startup and malfunction/breakdown. *Pre-Filed Testimony of Sharene Shealey* ("*Pre-Filed Shealey"*), at p. 7-10.

These proposed emission limitations should not be adopted by the Board in this proceeding. They are new substantive provisions that have not been adequately publicly noticed, and they are not required to be adopted to satisfy the Clean Air Act and thus are outside the scope of this fast-track rulemaking. Additionally, it is unlikely that Illinois EPA would be able to technically support such emission limitations in any SIP submittal, and it is unclear whether they are approvable by USEPA into Illinois' SIP.

First, the new emission limitation provisions have not been adequately publicly noticed, either for purposes of the Administrative Procedures Act ("APA") or for purposes of the SIP submittal that Illinois will make following the rulemaking. The APA requires agencies to give at least 45 days' notice of its intended action to the general public, including the text of the proposed rule and "[a] complete description of the subjects and issues involved." 5 ILCS 100/5-40(b). The Notice of Proposed Amendments published in the *Illinois Register* indicated that the Board's rulemaking would remove provisions allowing for advance permission to continue operating during a malfunction or to violate emission limitations during start-up. 46 *Ill. Reg.* 20627. Similarly, as described above, the Board's public notice of the hearings, which Illinois EPA typically relies upon to satisfy SIP submittal public notice requirements, noted only that the rulemaking would include the removal of sections found inconsistent with the Clean Air Act in the SSM SIP Call, and amendments to other sections of the Administrative Code arising from such removal including deleting certain sections and amending others to remove cross-references. *See, e.g., Certification of Publication The Dispatch/Rock Island Argus*, published on 12/23/22.

The Agency acknowledges that the Board may generally alter its proposed rule language in response to comments and testimony received during a rulemaking. However, this is not a

scenario where the publicly noticed rule amendments contained emission limitations that were adjusted in some way or further refined through the Board hearing process, or even a scenario where the description of the scope of the rulemaking alluded to changing emission limitations for specified pollutants. The Agency did not propose new emission limitations, changes to existing emission limitations, or new exceptions to existing emission limitations. Instead, the Agency proposed and the Board publicly noticed amendments removing Subpart I regarding a source's ability to request in a permit application, and the Agency's ability to grant, permit provisions establishing an affirmative defense for excess emissions during startup and malfunction/breakdown. The amendments repealed these provisions in Subpart I and deleted language in other provisions that referenced or was dependent upon Subpart I. The amendments were narrowly tailored to those required to address the SIP Call as is appropriate in a fast-track rulemaking proceeding. There is nothing indicating in the above public notice documents that the Board may be using fast-track rulemaking to adopt new opacity or carbon monoxide standards or to establish exceptions to existing opacity or carbon monoxide standards, or that it would be "opening" Part 216 at all, and the noticed proposed rulemaking language did not contain or allude to any such amendments either. Participants' proposed amendments are truly brand new rulemaking proposals. Therefore, if the Board wishes to adopt new emission limitations for particular pollutants, especially ones in different Parts of the Administrative Code than were noticed, it should provide the public additional notice of the proposed changes and additional opportunity to comment.

While not directly relevant to the Board's decision in this proceeding, the proposed new emissions standards have not been adequately publicly noticed for SIP submittal purposes either. Federal regulations require that states provide the public an opportunity to comment on SIP

submittals prior to submission. 40 CFR 51.102(a). Regulations and USEPA SIP guidance provide that the public notice must describe the amendments as well as the State's intent to submit them into the SIP, and must make a copy of the amendments available for public inspection. *Regional Consistency for the Administrative Requirements of State Implementation Plan Submittals and the Use of "Letter Notices,"* Janet McCabe, Deputy Assistant Administrator, Office of Air & Radiation (April 6, 2011) ("*USEPA 4/6/11 Guidance*"), at p. 6-7; 40 CFR 51.102(a) and (d); 40 CFR 51, APPENDIX V Section 2.0.(2.1)(f). USEPA SIP guidance elaborates that, "if a regulation is significantly changed by the State between the time of proposal and final adoption, it may be necessary for the State to conduct the public participation procedures . . . on the final regulations being submitted as a SIP revision." *USEPA 4/6/11 Guidance*, at p. 7.

The Board's public notice and the version of the Agency's proposal that was available for review by the public regarded removal of offending SIP provisions as required by the SIP Call. They did not mention or contemplate any changes to Part 216, and did not mention or contemplate adding new emission limitations or exceptions regarding opacity to Part 212. Additional SIP-related public notice would be needed before the Agency could submit any new emission limitations adopted by the Board to USEPA for approval into the SIP. Other issues may hinder a SIP submittal as well, described in more detail below. Therefore, just as a point of clarification, the Agency will only be submitting the amendments contained in the Agency's rulemaking proposal to USEPA to address the SIP Call. Any additional provisions adopted by the Board will be considered for SIP submission separately. USEPA Region V has also stated that this is its preference. *Illinois EPA's Response to Post-Hearing Questions Submitted by IERG*, ("*IEPA Responses to Questions, 2/14/23*") at p. 7.

Along these lines, federal regulations require that states provide evidence that they followed all procedural requirements under State law in adopting SIP amendments. 40 CFR 51, APPENDIX V Section 2.0(2.1)(e). While these regulations do not impact the Board's ability to adopt the proposed emission limitations in this proceeding, the Agency would need to consider whether they impact the Agency's ability to submit such limitations to USEPA without additional public notice under the APA.

Second, as touched upon above, the new emissions standards proposed by other participants are outside the scope of this fast-track rulemaking. Section 28.5(b) of the Act provides that fast-track rulemaking "applies solely to the adoption of rules proposed by the Agency and required to be adopted by the State under the Clean Air Act." 415 ILCS 5/28.5(b). "'[R]equires to be adopted' refers only to those regulations or parts of regulations for which the [USEPA] is empowered to impose sanctions against the State for failure to adopt such rules." 415 ILCS 5/28.5(b). As the other participants' proposals to amend carbon monoxide and opacity standards are not proposed by the Agency and are not required to be adopted to satisfy the Clean Air Act, and Illinois is not subject to sanctions for failure to do, they are outside the scope of fast-track rulemaking. The Act provides that the Board "must adopt rules in a fast-track rulemaking docket . . . that the [Clean Air Act] requires to be adopted, and may consider a non-required rule in a second docket that shall proceed under Title VII of this Act." 415 ILCS 5/28.5(i).

The above provisions are geared toward ensuring that expedited fast-track proceedings are limited to the revisions necessary to satisfy federal requirements, a fact that has been used in the past by sources themselves to urge the Board to bifurcate into separate rulemakings those

amendments that are eligible for fast-track and those that are not.[3] More time than the one month these emission exceptions and standards have been under consideration by the Board and others, much more technical support, and certainly more input from USEPA regarding federal approvability is necessary before new exceptions or emission limitations are adopted.

Next, it is unlikely that the Agency could support a 110(l) anti-backsliding demonstration in a SIP submittal with the information currently in the record, particularly as IERG, Dynegy, and Midwest Generation all failed to adequately address emissions impacts in their testimony and accompanying documentation. Section 110(l) 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. A SIP submittal of new emission limitations adopted by the Board 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. *IEPA Responses to Questions, 2/14/23*, at p.7. What is generally considered in a 110(l) demonstration involving revisions of regulations is a comparison between the emissions that subject sources are *allowed* to emit under a current standard versus what they are allowed to emit under the revised standard. These demonstrations do not consider whether there was historical compliance or noncompliance with an applicable emission standard, or whether historic noncompliance commonly resulted in an enforcement action.

[3] For example, R07-18, *In the Matter of: Fast Track Rules Under Nitrogen Oxide (NOx) SIP Call Phase II Amendments To 35 Ill. Adm. Code Section 201.146 and Parts 211 and 217* was bifurcated, with the non-fast-track amendments being docketed as R07-19, *Section 27 Proposed Rules For Nitrogen Oxide (NOx) Emissions From Stationary Reciprocating Internal Combustion Engines and Turbines: Amendments To 35 Ill. Adm. Code Parts 211 and 217.*

In their proposals of new emission standards, other participants claimed that the Board's SMB regulations went beyond establishing an affirmative defense and instead established exceptions to emission limitations during SMB events. *Pre-Filed Thompson*, at p. 5; *Pre-Filed Vodopivec,* at p. 12-13; *Pre-filed Shealey,* at p. 3-4. As such, they claimed that since their proposals establish new standards for SMB periods where none previously existed, they are more stringent than the current regulations and therefore there are no negative emissions impacts. *Pre-Filed Vodopivec* at p. 18; *Pre-filed Shealey*, at p. 9-10. This position is contrary to the Board's regulations and contrary to how the Agency has interpreted and implemented those regulations for over 50 years. Thus it cannot be the position taken by the Agency in support of any SIP submittal. The Agency's position has been and continues to be that sources are subject to applicable emission limitations. Subpart I simply established a means to obtain a possible affirmative defense in any enforcement proceeding brought in relation to excess emissions during SMB periods. *Tr.1st*, at p. 14, lines 3, 5-6, 14-15, 21-23; p. 29, lines 8-10; p. 66, lines 4-5; *Illinois Environmental Protection Agency's Responses to Questions Received at Hearing* ("*IEPA Responses To Questions, 1/30/23"*), response to Questions 1 and 5. This is supported by the Agency's testimony in this rulemaking, its response to questions, the sample permitting language that it provided in response to questions, and above all, by the regulations themselves, particularly Section 201.265. Such section clearly and explicitly provides that the impact of the permission granted via the other provisions in Subpart I is establishment of an affirmative defense in any subsequent enforcement proceeding.

Consequently, on their face, all of the emission limitations and exceptions proposed by others in this rulemaking likely allow backsliding as they establish more lenient standards during startup, malfunction/breakdown, or shutdown (incidentally, shutdown not related to a

malfunction or breakdown is a new mode of operation *not* currently addressed by the Board's SMB regulations, making it particularly likely to be viewed as backsliding). As described above, the emissions impact assessment required for a Section 110(l) demonstration does not take into account whether sources have historically complied with an emission limitation. In other words, 110(l) demonstrations do not assess whether more *actual* emissions will result if a regulation is amended; they instead look at whether more emissions will be *allowed* if a regulation is amended. So whether sources here have historically exceeded applicable emissions limitations in reliance on the SMB affirmative defense provisions in their permits is irrelevant to Section 110(l).[4] The Agency has not performed a detailed analysis of any of the participants' proposals, and none of the participants' testimony contains any quantitative assessment of potential emission increases that may result if their proposed amendments are adopted. It is therefore unclear to the Agency the emissions impact of these provisions, so more information as well as input from USEPA would be needed to determine whether an anti-backsliding demonstration is even possible.[5] Further, even if the Agency determined for itself that the provisions could be supported technically, USEPA may still disagree, which is the reason the Agency advises against the adoption of these proposed revisions without additional USEPA input.

USEPA may also separately determine that the standards do not adequately address the criteria for alternative emission limitations set forth in the SIP Call, and disapprove the provisions. The Agency has provided the participants' proposed emission standards to USEPA,

[4] The Agency is unaware of any 110(l) demonstration in which a "business as usual" approach that considers historic noncompliance in assessing emissions impact has been approved by USEPA.
[5] Region 5 staff indicated that they do not view the 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. *IEPA Responses to Questions, 2/14/23,* at p. 10.

but USEPA has not indicated that such provisions would be approvable. As explained in the SOR and again during hearing, the Agency has requested but USEPA has not provided additional guidance or clarity regarding whether alternative limits will, in practice, be approvable, how USEPA interprets and plans to implement the criteria for alternative limits set forth in the SSM SIP Call, suggested methods of developing alternative limits, or the technical demonstration USEPA will expect to support alternative limits and 110(l) anti-backsliding demonstrations. Without additional direction or guidance from USEPA in this regard, it is not advisable to propose or adopt such limits, particularly not in this expedited proceeding. *SOR*, at p. 10-11; *IEPA Responses To Questions, 1/30/23*, response to Question 5; *Tr. 1st*, at p. 45-47. At hearing, the Agency explained how uncommon it is to be left with this much uncertainty regarding USEPA's position regarding approvability of a state's action and its expectations with regard to supporting such action. *Tr. 1st*, at p. 48-50. The Agency has also explained that, as of February 14, 2023, the Agency was aware of 17 states or portions of states that had removed offending SSM provisions from their SIPs and obtained USEPA approval or proposed approval and two states that USEPA proposed disapproving because they contained unacceptable alternative limitations. *IEPA Responses to Questions, 2/14/23*, at p. 7-8. The Agency is not aware of any apt examples of a state promulgating an alternative emission standard similar to those proposed in this proceeding that passed USEPA muster. *Id.*

The Agency cannot and does not recommend that the Board adopt new emission standards for SMB timeframes without some degree of assurance that they are approvable by USEPA. *Tr. 1st*, at p. 47, lines 10-13. Having conflicting emissions limitations at the State and federal levels is problematic for several reasons, including the potential to cause confusion and regulatory uncertainty.

As the Agency has indicated, USEPA has stated that the only guaranteed way of adequately addressing the SIP Call is removal of the offending provisions, which to the Agency's knowledge is the route taken by all other states that have successfully addressed the SIP Call to date. *Tr. 1st,* at p. 29, lines 8-10; p. 29-30 lines 24-7; p. 45, lines 1-4; p. 65, lines 12-15; *SOR*, at p. 11, 16. This fast-track rulemaking is for the narrow purpose of doing just that, and should not be expanded. For all of these reasons, and as stated by the Agency throughout the rulemaking, proposed amendments establishing emission standards or exceptions should not be adopted in this narrow proceeding. *SOR*, at p. 12; *Tr. 1st*, at p. 32, lines 14-15; *Pre-Filed Testimony of Rory Davis* at p. 2; *IEPA Responses To Questions, 2/14/23*, at p. 7.

Issues Raised by Other Participants

Several issues were raised by other participants in this rulemaking. The Agency has addressed most if not all of these issues via its rulemaking submittal, testimony, and responses to questions, but provides the following as well.

Pre-Filing Outreach and Use of Section 28.5 Fast-Track Rulemaking

Several commentators criticized the Agency for the timing of the rulemaking, the length of informal pre-filing outreach, and the use of fast-track rulemaking. As stated by Mr. Davis at hearing, the Agency moved as quickly as it could in proposing the rulemaking, considering the continued lack of guidance from USEPA regarding the approvability of alternative emission limitations and considering the Agency's resources. *Tr. 1st* at p. 39, lines 17-20. The Agency's rulemaking proposal was very straightforward and narrowly tailored to address the SIP Call by removing the offending language found to be inconsistent with the CAA. It did not include any new or amended emission standards. "Information requests" that have been used by the Agency in certain instances in the past were therefore not appropriate or necessary. *Id.* at p. 35. Mr.

Davis explained that a fast-track rulemaking was utilized by the Agency because the Finding of Failure started an 18-month sanctions clock and the fast-track timelines would ensure rule adoption before the August 2023 deadline. *Tr.1st*, at p. 31, line 16-18. Fast-track rulemaking provisions were intended to address the very scenario at issue here and thus provided the wisest avenue for the Agency to take. *Tr.1st*, at p. 31, lines 19-22.

While not required to, the Agency engaged in pre-filing stakeholder outreach. It provided interested parties an opportunity to comment upon the Agency's proposal and it considered those comments prior to proposing the rulemaking to the Board. The Agency's proposal was narrowly tailored to address an express expectation/mandate of USEPA, and as such, none of the comments received by the Agency warranted changes to the proposal.

Technical Feasibility and Economic Reasonableness

IERG asked the Agency at hearing whether it considered the costs to sources of complying with the proposal, and whether it considered technical feasibility of complying. *Tr. 1st*, at p. 120, 121, lines 24-8, 15-16. The Agency did so, as set forth in the Agency's Statement of Reasons. *SOR*, at p. 15.

As supported in greater detail in other portions of these post-hearing comments, the Board regulations the Agency is seeking to repeal establish a framework for permit applicants to obtain an affirmative defense in the event excess emissions during SMB events lead to enforcement. By repealing them, the Agency is not changing any emission limitations or altering in any way sources' obligation or ability to comply with them. *Tr. 1st* at p. 122, lines 5-8. The Agency's proposal eliminates the possibility of seeking and obtaining a regulation-and-permit-based affirmative defense that may be utilized should an enforcement action result following

noncompliance.[6] The Agency's proposal is limited to this. Therefore, the technical feasibility or economic reasonableness of complying with emission limits adopted in past proceedings by the Board are not at issue in this rulemaking. *SOR*, at p. 15. As the Agency testified at hearing, "If a source believes that an emission limit needs to be revisited, it is the agency's position that a future proceeding would be more appropriate." *Tr. 1st* at p. 120-121, lines 24-8. Those proceedings will not be subject to federal deadlines such that any proposed limits and the environmental/emissions impact can be more thoroughly assessed.

The Illinois EPA has always had the ability to enforce against a source for excess emissions during SMB events. The Illinois EPA clarified in response to questions that it does not currently take into account whether or not a source has SMB provisions in its permit when assessing whether to take enforcement action against such source for emissions exceedances during startup or malfunction/breakdown. "In other words, the Agency assesses each exceedance based on the facts of the particular situation, regardless of whether a source has SMB permit provisions." *IEPA Responses To Questions, 1/30/23*, response to Question 8. Moving forward, the Agency intends to assess emissions exceedances during SMB events consistent with this past practice. *Tr. 1st*, at p. 124-125.

Affirmative Defense vs. Exception

One of the central arguments made by entities advocating for adoption of more lenient emissions standards during SMB events is that the Board's SMB regulations, regardless of what they actually state, *really* created exceptions to emission limitations, not just affirmative defenses as the regulations clearly provide. This is "news" to the Illinois EPA, which has always made clear to sources that SMB provisions do not establish exceptions, exemptions, or waivers. Even

[6] The Agency's proposal does not impact any other type of affirmative defense that may be available to sources in an enforcement proceeding.

USEPA's 2013 Proposed SSM SIP Call quoted the Illinois EPA's long-standing position that "35 Ill. Adm. Code 201.265 clearly states that violating an applicable state standard even if consistent with any expression of authority regarding malfunction/breakdown or startup set forth in a permit shall only constitute a prima facie defense to an enforcement action for violation of said regulation." *Proposed SSM SIP Call*, 78 *Fed. Reg.* 12460, 12514, *quoting* Ill. Envtl. Prot. Agency, Statement of Basis for a Planned Revisions of the CAAPP Permit for U.S. Steel Corp. Granite City Works, March 15, 2011. Sources have been made well aware of that position through documents such as permit responsiveness summaries (for example, the 2011 responsiveness summary mentioned above).

In the SIP Call, USEPA had determined the categories of SSM provisions that were unacceptable under the CAA and was tasked with trying to determine where numerous states' regulations "fit in." Regarding Illinois, USEPA merely opined that the language in certain provisions of Subpart I created ambiguity and *could be read* as allowing the state to be the unilateral arbiter of whether excess emissions constitute a violation. *Proposed SSM SIP Call* at p. 12514-12515. USEPA did not opine that the provisions in fact created an exception, just that they could be read to do so. Likewise, USEPA did not claim this has ever been the Board's or Illinois EPA's position or that Illinois EPA has ever implemented the regulations as such. USEPA indeed acknowledged that the regulations could also be read to create an affirmative defense, opining that, even if that is the case, "the 'prima facie defense' mechanism in [Sections 201.261, 262, and 265] is not an acceptable affirmative defense provision under the CAA." *Proposed SSM SIP Call* at p. 12515.

The Agency testified at hearing that, to the best of the Agency's knowledge, its position that SMB provisions establish only an affirmative defense and that excess emissions during SMB

events are violations has not changed since these provisions were adopted by the Board. *Tr. 1st*, at p. 13, line 19, p. 14, line 3 and 6-7, 14-15, 21-23; *see also IEPA Responses to Questions, 02/14/23*, at. p. 4. The Agency explained in response to questions:

> 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.

Id. at p. 4.

Indeed, arguments that the Board's regulations create anything other than affirmative defenses would require that the Board completely ignore the existence of Section 201.265, which pulls all of Subpart I together and establishes that the impact of the permission to operate during a malfunction or breakdown or to violate the standards or limitations during startup pursuant to Sections 201.261 and 201.262 is "a prima facie defense" to an enforcement action alleging violation of air quality standards. The Board adopted this language in R71-23 as Illinois' strategy for addressing SMB events, and the Illinois EPA has implemented that strategy consistent with the Board's regulations, including the language and wording chosen by the Board, ever since. While the Agency acknowledged that "over time and with experience, the language of SMB permit provisions has been refined and clarified," its position and overall

implementation strategy has remained consistent. *IEPA Responses to Questions, 1/30/23*, response to Question 1. The Agency has made no secret of its implementation efforts or of its position and has communicated its position to regulated entities on many occasions. Any argument now that the Board's regulations and the Illinois EPA's 50 years of implementation of those regulations should be disregarded and replaced by regulated entities' newly claimed "understanding" that SMB provisions constitute exceptions to emission limitations should be given absolutely no credence. It is inadequately unsupported and without merit.

Agency's Ability to Utilize Enforcement Discretion

At the second hearing, IERG pre-filed testimony stating, "IERG is opposed to any statutory or regulatory change in this rulemaking that would solely rely on the State's use of enforcement discretion as a replacement for the prima facie defense currently provided during periods of SMB." *Pre-Filed Thompson*, at p. 11. IERG also stated, "If Illinois EPA's proposal is adopted without any alternative standards during SMB, entities will be left with inevitable noncompliance during periods of SMB." *Pre-Filed Thompson*, at p. 11. At hearing, Mr. Wall testified on behalf of IERG that "a state relying on enforcement discretion that is not addressed in the SIP appears to be inconsistent with U.S. EPA's approach as to correcting SSM SIP deficiencies." *Second Hearing Transcript* ("*Tr. 2nd*"), at p. 28, lines 6-9.

First, while Mr. Wall acknowledged USEPA's statement that under the CAA any parties with enforcement authority for SIP provisions also have enforcement discretion that may be exercised, to the extent his or other testimony may be interpreted as indicating that, if not in the SIP, the Illinois EPA does not have enforcement discretion with regard to excess emissions during SMB events, the Agency disagrees with that statement. Nowhere in the SSM SIP Call does USEPA indicate that enforcement discretion provisions must be included in the SIP in order

to be utilized by states. USEPA indicates only that a state *may* choose to include in its SIP the criteria and procedures it will utilize in exercising enforcement discretion. *SIP Call*, 80 *Fed. Reg.* 33840, 33980-81. USEPA also points out that Section 110(a)(2) of the CAA requires states to have adequate enforcement authority. State SIPs cannot therefore unreasonably limit the state's own enforcement discretion to enforce the requirements of the SIP. *SSM SIP Call*, at 33856, 33981.

Second, the Illinois EPA has never stated that it intends to "rely on the State's use of enforcement discretion as a replacement for the prima facie defense currently provided during periods of SMB." *Pre-Filed Thompson* at p. 11. IERG is conflating two separate "stages" following a source's violation of a standard. First the Illinois EPA assesses a violation and decides whether to pursue enforcement or exercise enforcement discretion. This "stage" is not impacted by the current rulemaking, nor is it specific to emissions exceedances during SMB events versus exceedances during other modes of source operation. As explained above, the Agency has indicated that it has no intention of changing how it assesses emissions exceedances as a result of this rulemaking, nor does it currently take into account whether a source has SMB provisions in its permit when making its assessments during the enforcement discretion stage. *IEPA Responses To Questions, 1/30/23*, response to Question 8; *Tr. 1st*, at p. 124-125. Once the Agency decides to pursue enforcement and all of the steps required by Section 31 of the Environmental Protection Act are complied with, the Agency refers the case to a prosecuting authority, and that authority agrees to pursue enforcement, only then would an SMB affirmative defense come into play. This is the only enforcement "stage" impacted by this rulemaking. Further, IERG's statement that if Illinois EPA's proposal is adopted, "entities will be left with inevitable noncompliance during periods of SMB" is misleading. If a source is not complying

with an emission limitation during SMB, it is out of compliance/violating that emission limitation *right now* and is required to report that violation to the Illinois EPA. The Illinois EPA's proposal does not change that.

Moreover, any rule language the Agency may propose regarding enforcement discretion would likely be opposed by the same entities opposing the Agency's rule here, as these provisions would necessarily create limits or boundaries on such discretion. *Tr. 1st*, at p. 55, lines 1-4.

Potential Issues with Certain Proposed Alternative Standards

The Agency opposes adoption of any new or revised emission standards or exceptions to existing emission standards in this rulemaking for the reasons set forth above, but provides additional comments regarding certain proposals below.

Midwest Generation Alternative Standard

Midwest Generation proposed an alternative standard at the second hearing entailing "an alternative averaging period for demonstrating compliance during times of startup, malfunction and breakdown of the coal-fired boilers at Midwest Generation's Powerton Generating Station." ("Powerton"). *Pre-Filed Shealey*, at p. 1. Midwest Generation proposes adding a new subsection (d) to Section 212.124. *Id.* at p. 7.

Midwest Generation's proposal provides, "when compliance of the Affected Boilers cannot be demonstrated with the 30% standard in Section 212.123(a) on a six-minute average basis during times of startup, malfunction or breakdown, Midwest Generation would have the option to demonstrate compliance using a three-hour averaging period (the Alternative Averaging Period). This would be accomplished for a given six-minute block period when the Alternative Averaging Period is needed by taking the average opacity measurements from the

COMS for those six minutes and the preceding 174 minutes of data." *Pre-Filed Shealey*, at p. 6-7. The proposal also includes recordkeeping and reporting obligations. *Id.* at p. 7.

While the Agency has not performed a detailed analysis of the emissions impact of the proposed alternative averaging period, the Agency is able to offer a few points of clarification as examples of why the proposed three-hour averaging period could be problematic. In *Midwest Generation, LLC Responses to Questions Received at Hearing* ("*Midwest Responses To Questions, 3/1/23*"), Midwest Generation states on p. 4,

> Notably, these are just two examples of the need for a longer averaging period. Excess opacity events may last longer or result in higher opacity, thus creating the need for the proposed alternative averaging period. MWG selected a 3-hour averaging period in order to align with its Compliance Assurance Monitoring ("CAM") Plan. It puts an outside limit on authorized opacity exceedance, in contrast to the current regulations and Powerton's Clean Air Act Permit Program ("CAAPP") permit. Consequently, MWG's proposal would not interfere with any applicable requirement concerning attainment and reasonable further progress.

Midwest Responses To Questions, 3/1/23, at p. 4.

First, the Agency and the Board are under no obligation to extend averaging times to whatever extent would ensure the compliance of a given emission unit at all times. Demonstrating previous incidents of non-compliance should not be the basis for drafting and adopting new standards. So, the Agency would disagree with the assertion with the data presented that, "Excess opacity events may last longer or result in higher opacity, thus creating the need for the proposed alternative averaging period." Second, in response to the three-hour averaging period placing "an outside limit on authorized opacity exceedance, in contrast to the current regulations and Powerton's Clean Air Act Permit Program ('CAAPP') permit," as stated repeatedly by the Agency, there are currently no *authorized opacity violations. Tr. 1st*, at p. 147, lines 18-19; p. 151, lines 23-24; p. 152, lines 5-9. Third, MWG asserts that, "Consequently, MWG's proposal would not interfere with any applicable requirement concerning attainment and

reasonable further progress." *Midwest Responses To Questions, 3/1/23*, at p. 4. This is asserted without providing any evidence or analysis that elevated opacity during a three-hour period could not lead to a modeled or monitored violation of a particulate matter NAAQS or any other air quality standard. Finally, as previously stated, revising standards to accommodate a "business as usual" level of emissions, and merely asserting that a proposal of that sort meets the requirements of CAA Section 110(l), does not mean that USEPA will approve an Illinois SIP submittal that would contain such a revision.

Dynegy Alternative Standard

Dynegy's proposal relates to its permitted coal-fired boilers at the Baldwin Energy Complex, Kincaid Power Station, and the Newton Power Station. *Pre-Filed Vodopivec*, at p. 4. Dynegy seeks a new subsection (d) in Section 212.124, just as Midwest Generation did. *Id.* at p. 14. Similar to the Agency's limited commentary on Midwest Generation's answers to the Board's questions, in Dynegy's response to Board questions submitted after the second hearing, Dynegy presents the same concerns. *Dynegy's Responses to Questions Received at Hearing ("Dynegy Responses, 3/1/23").* First, Dynegy asserts, "Dynegy has enclosed actual opacity monitoring data to support its contention that the proposed 3-hour averaging period would be necessary." *Dynegy Responses, 3/1/23*, at p. 4. Again, what would be "necessary" to ensure their emission units comply at all times does not equate to what is appropriate from a regulatory standpoint or for a SIP submittal to USEPA. *Id.* Likewise, on p. 5 of the responses, Dynegy states that, "Dynegy selected a 3-hour averaging period in order to align with its Compliance Assurance Monitoring ('CAM') Plans, even though this means that some events that currently constitute SMB and are authorized under Dynegy's Clean Air Act Permit Program ('CAAPP') permits would not qualify for relief under Dynegy's proposal." *Dynegy Responses, 3/1/23*, at p.

5. The Agency would again clarify that continued operation during these events is authorized, not the violation of the standard, and therefore the Agency would disagree with the assertion that follows on that page that, "This further demonstrates that Dynegy's proposal is narrower than the current regulations and permit authorizations—both in principle and in practice." *Id.*

Finally, Dynegy also asserts that, "Dynegy's proposal would not interfere with any applicable requirement concerning attainment and reasonable further progress," without providing any evidence or analysis that elevated opacity during a three-hour period could not lead to a modeled or monitored violation of a particulate matter NAAQS or any other air quality standard. *Id.* Again, these assertions without appropriate support raise the same concerns about the approvability of any SIP submittal containing the proposed alternative averaging period.

Other Proposed Changes to Rule Language

In addition to proposals to establish new emission limitations or exceptions to existing limitations, other commenters suggested changes to the Agency's proposal. First, comments were filed with the Board by the Citizens Against Ruining the Environment ("CARE") and the Sierra Club, requesting that the Board explicitly state that the rule applies immediately to existing permit holders, making it clear that all permit holders are immediately required to comply with "new obligations" for operating during SSM. *Public Comment, the Illinois Environmental Protection Agency Proposed Amendments to 35 Ill. Adm. Code 201, 202, and 212, R 2023-018* ("*CARE's Comments"),* at p. 2; *see also, Public Comments on Illinois Environmental Protection Agency Proposed Amendments to 35 Ill. Adm. Code 201, 202, and 212, R-2023-018* ("*Sierra Club Comments"*), at p. 2. Specifically, Sierra Club indicates that the "proposed rules should explicitly and unambiguously state that the revised regulations will immediately apply to all existing permit holders." *Sierra Club Comments*, at p. 2. CARE also

states that the "critical issue is how IL EPA will implement its proposal to ensure it is not just a regulatory change but also immediately and directly affects the permits, operations and enforcement options related to existing permitted sources" and requests amendments that clarify the Agency's proposal "can be immediately enforced." *CARE's Comments*, at p. 2, 4.

The Agency does not support any rule changes in response to these comments. The Agency's rule proposal requests repeal of certain regulations or portions of regulations, to be effective immediately upon Board adoption and filing with Secretary of State. While the Agency agrees that the Board should not delay the effective date, as USEPA has indicated that doing so may hinder its ability to find Illinois' SIP submittal complete (*Tr. 1st*, at p. 133, lines 18-24), it is not necessary for the rule itself to note the effective date. The documents that the Board will file with the Secretary of State with the adopted rule will recite the effective date. The Agency also does not support addressing enforcement authority in the rule. The Agency disagrees with any statements indicating or implying that its ability to enforce existing emission limitations were hindered by the SMB provisions at issue. As noted throughout this proceeding, excess emissions during SMB events are considered violations by the Agency and any prior decisions the Agency has made regarding whether to enforce against a source for a specific SMB-related violation have been made consistent with the Agency's typical compliance and enforcement assessment and exercise of its enforcement discretion. *Tr. 1st*, at p. 20, lines 2-10. No new language is necessary to clarify that the Agency has the ability to enforce emission limitations.

Finally, the Agency does not support amendments to clarify the rulemaking's impact on existing permits. Any time the Board amends its regulations, sources' permits will not and cannot immediately reflect those changes; rather, any revisions to affected permits likely would occur in the regular course of permit renewal. Notwithstanding that, as a general matter, new

regulations become enforceable beginning on their effective date/compliance deadline, regardless of whether they have been added to a source's permit by that time. No clarification in this regard is therefore necessary. While it is possible a source may present legal arguments to the contrary in any future enforcement action, those arguments will be addressed at that time within the context of that proceeding.

The Sierra Club also requests that the Board change the Agency's proposed revisions to Section 201.301. It characterizes the Agency's changes as "inadvertently overbroad," removing permit holder's obligation to keep records of SMB events. *Id.* at p. 3. Sierra Club requests that the language "records detailing all malfunctions, breakdowns or startups" remain in the rule, and be placed later in the same paragraph as the Agency's proposed deletion. *Id.* at p. 3. The Agency does not recommend that the Board adopt this change, as other recordkeeping and reporting requirements that sources must comply with tied to specific emission standards are sufficient for the Agency's purposes.

Lastly, the Sierra Club suggests deleting 35 Ill. Adm. Code 205.225. *Id.* at p. 4. That Section reads, "Participating or new participating sources permitted to operate during startup, malfunction or breakdown pursuant to 35 Ill. Adm. Code 201.262, 270.407 and 270.408 are not required to hold ATUs for excess VOM emission during startup, malfunction and breakdown as authorized in the source's permit." *Id.* Considering the amendments proposed by the Illinois EPA in this rulemaking, the Sierra Club notes that the language above is no longer necessary. *Id.* While the Agency agrees that the language is no longer necessary, Part 205 has already been "sunsetted" by the Board via adoption of Section 205.115, which indicates that Part 205 "does not apply after April 29, 2018." As such, no changes to Part 205 are necessary.

Conclusion

For the reasons set forth above, the Agency requests that the Board adopt in this rulemaking only the amendments set forth in the Agency's rulemaking proposal.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
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CERTIFICATE OF E-MAIL SERVICE

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

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