BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN MATTER OF:	)	
	)	
	)	R 2023-018
AMENDMENTS TO 35 ILL. ADMIN. CODE	)	(Rulemaking-Air)
PARTS 201, 202 AND 212	)	

NOTICE OF FILING

TO: Persons on Attached Service List

PLEASE TAKE NOTICE THAT on the 7th day of March, 2023, I caused to be electronically filed with the Clerk of the Illinois Pollution Control Board, via the "COOL" System, the Post Hearing Comments of the Illinois Attorney General's Office, for the People of the State of Illinois, true and correct copies of which are attached hereto and hereby served upon you.

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. KWAME RAOUL, Attorney General
of the State of Illinois

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CERTIFICATE OF SERVICE

I, Jason E. James, an Assistant Attorney General, caused to be served on this 7th day of March, 2023, a true and correct copy of the Notice of Filing and Post Hearing Comments of the Illinois Attorney General's Office upon the persons listed on the Service List via electronic mail or electronic filing, as indicated.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

POST-HEARING COMMENTS
OF THE ILLINOIS ATTORNEY GENERAL'S OFFICE

The Illinois Attorney General's Office, on behalf of the People of the State of Illinois ("People"), hereby files its Post-Hearing Comments in this proceeding. The Attorney General is the chief legal officer of the State of Illinois and the Attorney General has an obligation to represent the interests of the People so as to ensure a healthful environment for all the citizens of the State. Ill. Const. 1970, art. V, § 15; *People v. NL Industries*, 152 Ill.2d 82, 103 (1992); *see also Pioneer Processing, Inc. v. E.P.A.*, 102 Ill.2d 119, 137 (1984). The Attorney General's obligations include ensuring that the environment of the State of Illinois is not threatened by air pollution. 415 ILCS 5/9.

In this comment, the People express support for the proposal from the Illinois Environmental Protection Agency ("IEPA") and respectfully request that the Illinois Pollution Control Board ("Board") adopt IEPA's proposal to remove regulatory provisions that unlawfully allow for sources of pollution to violate emissions limitations during startup, shutdown, and malfunction ("SSM"). IEPA's proposal would allow it to correct deficiencies in Illinois' State Implementation Plan ("SIP") and comply with the requirements of the Clean Air Act ("CAA") as outlined by guidance from the U.S. Environmental Protection Agency ("USEPA").

The People oppose the regulatory proposals submitted by Midwest Generation ("MWG"), Dynegy, the Illinois Environmental Regulatory Group ("IERG"), and the American

Petroleum Institute ("API") (collectively, "Industry Advocates" or "Industry"). Industry's proposals do not fully explain how their alternatives would affect Illinois' environment and lack any actual support in the record or analysis. Without a sufficiently developed rulemaking record, the Board lacks what it needs to adequately evaluate how Industry proposals would affect the environment, and therefore those proposals cannot be lawfully adopted into Illinois regulations. When pressed on this point at hearing, Industry Advocates asserted that their proposals would allow no more pollution than existing regulations—ignoring the fact that the existing regulations are unlawful and that the purpose of this rulemaking is to eliminate them from Illinois' SIP.

Furthermore, the Industry's proposals are not sufficient to satisfy federal CAA guidance requiring any SIP revision to discuss effects on environmental justice communities. For this and other reasons, the Industry proposals are unlikely to be approved by USEPA into Illinois' SIP.

Lastly, the People support comments from the Greater Chicago Legal Clinic and the Sierra Club (collectively, "Environmental Advocates") seeking to ensure that the provisions in IEPA's proposal come into effect immediately upon adoption for sources whose permits contain unlawful SSM provisions.

I. Background

The People will briefly summarize federal regulation and litigation concerning SSM provisions that have been detailed in full by IEPA's Statement of Reasons. R23-18, IEPA's Statement of Reasons at 2-13 (Dec. 7, 2022). Then, the People will briefly summarize rulemaking activity in this docket thus far.

In 2014, the U.S. Court of Appeals for the District of Columbia Circuit examined the legality of a USEPA regulation that created an affirmative defense to violations of the CAA for emissions of pollution due to a source's malfunction. *Natural Resources Defense Council v.*

USEPA, 749 F.3d 1055 (D.C. Cir. 2014). In the opinion written by Judge Brett Kavanagh, the Court ruled that USEPA cannot create through regulation an affirmative defense to CAA violations caused by a malfunction, because doing so conflicts with the citizen suit provisions of the CAA. That is, because Congress established a private right of action to enforce the CAA, USEPA could not regulate away that right. *Id*. at 13-18.

In response to this and other rulings, USEPA issued its 2015 SIP Call—a mandate to 36 states, including Illinois, whose SIPs contained provisions that are illegal under the CAA. 80 Fed. Reg. 33,840 (June 12, 2015). USEPA determined that Illinois' rules allow for violations of emission limits during SSM events and called for these unlawful provisions to be corrected. *Id*. at 33,966.

When the USEPA leadership changed after the 2016 Presidential election, it became clear that the 2015 SIP Call would no longer be enforced, and therefore IEPA did not begin the process of changing its regulations. *See* R23-18, Transcript of First Hearing at 168 (Jan. 19, 2023). However, under USEPA leadership appointed by President Biden, the policy of reducing air pollution again became a priority, and USEPA reinstated the 2015 SIP Call.[1] USEPA reiterated its directive to Illinois concerning its deficient SSM provisions in a Finding of Failure issued in 2022. 87 Fed. Reg. 1680 (Jan. 12, 2022).

To come into compliance with current legal requirements, IEPA proposed to eliminate affirmative defenses during SSM events in a fast-track rulemaking before the Board. R23-18, IEPA's Statement of Reasons at 2 (Dec. 7, 2022). The Act provides for a fast-track rulemaking when a change to Illinois' regulations is required by the CAA—precisely the situation at hand.

[1] USEPA, Withdrawal of the October 9, 2020 Memorandum Addressing Startup, Shutdown, and Malfunctions in the State Implementation Plans and Implementation of the Prior Policy (Sept. 30, 2021), *available at* https://www.epa.gov/system/files/documents/2021-09/oar-21-000-6324.pdf.

415 ILCS 5/28.5. An expedited process is necessary because if Illinois' regulations remain contrary to the CAA, the federal government will withhold funds for highway maintenance, among other consequences. *See* 42 U.S.C. § 7509 (2021). The Act requires an accelerated pace for fast-track rulemakings, reflecting the urgent need to quickly comply with CAA requirements. Carrying out the Act's directive, the Board promptly scheduled and held two hearings where IEPA and Industry each testified in support of their respective proposals.

II. IEPA's Proposal Carries Out the Purpose of the Environmental Protection Act

The People support IEPA's proposal to remove unlawful regulations that allow sources to violate emissions limits during SSM events. Not only will these regulatory changes allow Illinois to avoid the stiff penalties from violating the CAA, but they will enhance Illinois' environment. The proposal will afford both IEPA as well as parties empowered under citizen suit provisions to ensure that sources are held accountable. Furthermore, this proposal will benefit environmental justice communities, who have been forced to bear the burden of air pollution by living in close proximity to sources.

Enhancing the environment in this manner is the central purpose of the Act. The Illinois Supreme Court has made clear that the Board's rulemaking authority "is a general grant of very broad authority and encompasses that which is necessary to achieve the broad purposes of the Act." *Granite City Div. of Nat. Steel Co. v. IPCB*, 155 Ill. 2d 149, 182 (1993). The overall purpose of the Act is "to establish a unified, state-wide program supplemented by private remedies, to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them." 415 ILCS 5/2(b). More specifically, when enacting our state's bedrock environmental law concerning air pollution, the General Assembly found: "[P]ollution of the air of this State

constitutes a menace to public health and welfare, creates public nuisances, adds to cleaning costs, accelerates the deterioration of materials, adversely affects agriculture, business, industry, recreation, climate, and visibility, depresses property values, and offends the senses." 415 ILCS 5/8. Accordingly, the purpose of Title II of the Act is to "restore, maintain, and enhance the purity of the air of this State." *Id.* Moreover, these provisions are consistent with the Constitution's guarantee of the "right to a healthful environment." Ill. Const.1970, art. 11, § 2. Section 10(A) of the Act, 415 ILCS 5/10(A), also in Title II of the Act, provides that the Board, pursuant to procedures prescribed in Title VII of this Act, may adopt regulations to promote the purposes of this Title. In evaluating any rulemaking proposal, then, the Board certainly must consider if it will serve to "restore, maintain, and enhance the purity of the air of this State." 415 ILCS 5/8. *See also Granite City* at 183 (holding that the Board may adopt even "technology-forcing standards which are beyond the reach of existing technology," if the Board "determines that a proposed regulation is necessary to carry out the purpose of the Act").

The People respectfully request that the Board adopt IEPA's proposal in order to "restore, maintain, [or] enhance the purity of the air of this State," 415 ILCS 5/8. Further, as described below, proposals from the Industry Advocates all lack sufficient support in the record to enable the Board to adequately evaluate important factors. Therefore, Industry's proposals cannot be adopted in this fast track rulemaking.

III. Industry Failed to Demonstrate Their Proposals' Environmental Impact

The Industry Advocates failed to meaningfully describe how their regulatory proposals would affect Illinois' environment. In particular, Industry did not even attempt to show how their proposals' environmental impacts compare to the proposal put forth by IEPA. Instead, Industry Advocates merely contend that their proposals are no worse than Illinois' existing *unlawful* SSM

regulations. These bare conclusory assertions fail to provide a sufficient record for a Board determination on environmental impact. Because of these glaring gaps in the rulemaking record, the Board cannot adopt any of the alternative rulemaking proposals put forth by the Industry Advocates.

A. A Rulemaking Proposal to the Board Must Be Supported by A Record Showing How It Affects the Environment

The bedrock inquiry of any rulemaking before the Pollution Control Board—including a fast-track rulemaking—is what the information in the record shows regarding the proposals' effect on Illinois' environment. The Act specifies that "[a]ll rules adopted by the Board under this [fast-track rulemaking] section shall be based solely on the record before it." 415 ILCS 5/28.5(m). Illinois courts have held that when any Illinois administrative agency—including the Board—adopts a rule, it must consider all important aspects of the problem addressed. *County of Will v. Pollution Control Board*, 2019 IL 122798. If the Board fails to consider an important aspect of the problem—including environmental impact—then the rule is arbitrary and capricious.

This burden to provide information in the record concerning environmental impact is especially important in the context of a fast-track rulemaking, where the Board must make quick decisions: the Board "must complete a fast-track rulemaking by adopting a second notice order no later than 130 days after receipt of the proposal if no third hearing is held . . ." 415 ILCS 5/28.5(n). Fast-track regulatory proposals do not require less support from the rulemaking record than any other type of rulemaking, and the Board must consider the same factors as in a regular rulemaking. *Id*. at 5/28.5(h).

As shown below, Industry Advocates left the record bare, especially on the question of how the environmental impact of their proposals compares to the impact of IEPA's proposal.

Absent facts for the Board to rely on, Industry Advocates resort to arguing that their proposals are no more harmful than the *unlawful* status quo. This conclusory assertion, itself unsupported, provides no basis for the Board to make an informed determination on how Industry's proposals would affect the environment.

B. Coal-Fired Power Plant Owners Failed to Show the Environmental Impact of Their Proposals

The two owners of coal-fired power plants in Illinois—Dynegy and MWG—each proposed a substantially similar regulation for the Board to adopt instead of IEPA's proposal. R23-18, MWG's Pre-Filed Testimony and Dynegy's Pre-Filed Testimony (Feb. 6, 2023). Both companies offer an alternative averaging period to cover the opacity standards applicable to coal plants during periods of startup, malfunction, and breakdown. This alternative standard would implement a three-hour averaging period rather than a six-minute averaging period that currently applies to the regulated facilities. *E.g.*, MWG's Testimony at Exhibit A at 90.

MWG, without offering any information in support, concludes that its proposal is more stringent than its existing permit and therefore will not result in additional opacity or emissions of any pollutant.[2] Not only is nothing offered, but MWG's proposal fails even to contain analysis explaining why it believes that its proposal would not result in any increased pollution. And MWG does not even approach the question of how its proposal compares to IEPA's proposal.

Dynegy offers a substantially similar three-hour averaging period that would apply to its three coal-fired power plants during periods of startup, malfunction, and breakdown.[3] Likewise,

[2] *Id*. at 12: "The proposal is more stringent than the current authorizations in the Powerton CAAPP permit. As a result, it would result in no additional opacity, and no additional emissions of [Particulate Matter] or any other pollutant, and would not result in backsliding with respect to any National Ambient Air Quality Standard (NAAQS)."

[3] R23-18, Dynegy's Pre-Filed Testimony of Cynthia Vodopivec at 18-19 (Feb. 6, 2023): "Dynegy's proposal is more stringent than authorizations currently in place . . . As a result, Dynegy's proposal would

Dynegy offers mere conclusory statements promising that its proposed regulations are more stringent than current requirements and does not supports those statements with any facts or analysis. Dynegy Testimony at 18. And like MWG, Dynegy is completely silent on how pollution under its proposal compares to pollution under IEPA's proposal.

MWG and Dynegy's supplemental filings—offered less than a week before the close of this rulemaking's record past the date requested by the Board—offer anecdotal demonstrations of the pollution their facilities emit during startup, malfunction, and breakdown. R23-18, MWG's Responses to Questions Received at Hearing; Dynegy's Responses to Questions Received at Hearing (Mar. 1, 2023). However, not only do these anecdotes continue to make comparisons to the unlawful status quo, they rely on the assumption that the information provided is useful for demonstrating general operations. Neither company attempts to show why these records can be extrapolated to represent general operations.

C. IERG and API Failed to Show How Their Proposal Would Affect the Environment

i. IERG's Proposal

In place of Illinois' existing SSM regulatory provisions, IERG proposes to essentially incorporate by reference federal regulations applicable to industrial, commercial, and institutional boilers. R23-18, Pre-Filed Testimony of IERG, citing 40 C.F.R. 63, Subparts DDDDD and UUU (Feb. 6, 2023). IERG's proposal also fails to show how it would affect the environment. The heading in a section of IERG's testimony promises discussion of its proposal's environmental impact. However, despite this heading, the body of this section does not actually address environmental impact. *See* IERG Testimony at 62, subheading F ("Technical Feasibility,

result in no greater opacity from the Affected Units . . . than what is currently authorized by CAAPP permits."

Economic Reasonableness, and Environmental and Economic Impact"). This subsection contains three paragraphs discussing technical feasibility and economic reasonableness but contains no actual discussion of environmental impact.

Although analysis of environmental impact cannot be found in IERG's testimony labeled "environmental impact," IERG seems to imply elsewhere that by proposing to incorporate federal regulations, their proposal is *per se* environmentally beneficial. For example, IERG states that Illinois is not in violation of federal carbon monoxide requirements, which means, IERG seems to imply, that its proposal would not harm the environment. IERG's Pre-Filed Testimony at 35. Elsewhere, IERG states that many member facilities already comply with the federal regulations it seeks to incorporate by reference. *Id*. at 60-61. This, IERG argues, means that its proposal "will not result in any adverse harm to the environment or human health." *Id.* at 61. These arguments mistakenly suggest that so long as facilities comply with certain federal regulations, although not the SSM requirements, the facilities pose no harm to the environment or human health.

The Board's inquiry into environmental impact cannot be limited to merely the question of whether facilities comply with federal regulations. To adequately evaluate IERG's proposal, the Board needs information to accurately determine the environmental impact of IERG's member facilities. IERG merely gestures toward federal regulations without actually showing how their facilities would affect the environment. Lacking any detailed support, IERG does not create a sufficient record to allow the Board and other rulemaking participants to meaningfully consider their proposal.

ii. API's Testimony in Support of IERG's Proposal

API supports IERG's proposal for alternative limits with respect to four of its members' oil refineries in Illinois. R23-18, Testimony of API at 12 (Feb. 6, 2023). Beyond merely making conclusory statements, API, like IERG, fails to show that the proposal would reduce pollution beyond merely making conclusory statements. Tellingly, API states that there is "no evidence" that current regulations have caused a violation of federal National Ambient Air Quality Standards ("NAAQS"). *Id.* This demonstrates how the Industry Advocates flip the burden upside down—it is the *Industry Advocates* who must show on the record what the environmental impact would be if their proposal was adopted. Merely asserting that there is "no evidence" to the contrary is insufficient, particularly when evidence on NAAQS is not directly relevant to this rulemaking.

API's responses to questions also failed to provide any actual information on how its proposal would affect the environment. At hearing, the Board directly asked API's witness to compare pollution under its proposal with pollution under IEPA's proposal. Rather than providing facts for the Board, API's witness repeatedly returns to comparisons with existing, unlawful regulations rather than directly comparing their proposal to IEPA's proposal. R23-18, Transcript of Second Hearing at 38-40. This comparison is not compelling and should be given no consideration by the Board.

API's witness at hearing seems to imply that other states have also adopted proposals similar to those that Industry Advocates are supporting. *Id*. at 41 ("Take a state like California . . . they have provisions similar, not unlike what we are asking for.") However, this statement is at odds with earlier testimony stating that no other state has responded to the 2015 SIP Call with a similar proposal. *Id*. at 31 ("To API's knowledge, no other state has adopted similar alternative emissions limitations" and *id*. at 29 "To [IERG's] knowledge, no other state has adopted similar

emissions limitations . . .”). This apparent contradiction is not explained in either party’s testimony and is unclear based on the record. It should therefore be given no weight by the Board in its deliberations on this matter.

IV. Industry Alternatives Provide No Evidence on Environmental Justice Impacts

In addition to other deficiencies, Industry Advocates evaded questions about Environmental Justice (“EJ”) or generally declined to address whether their proposals would affect EJ communities—even though such information is required by the USEPA in a SIP application and even after being specifically asked by the Board to discuss EJ, as described below.

USEPA states that removing SSM exemptions from state regulations will help EJ communities. Reducing SSM emissions, USEPA says, promotes “greater protection for U.S. citizens, including minority, low-income, or indigenous populations, by ensuring that air agencies meet their statutory obligation to develop and submit SIPs to ensure that areas make progress toward reducing excess emissions during periods of SSM.” 87 Fed. Reg. 1680, 1682 (Jan. 12, 2022). As IEPA explained at the January hearing in this rulemaking, USEPA will require IEPA to “include [EJ] impacts in everything we send back in the SIP submittal.” Transcript of First Hearing at 175-76.

However, discussion of EJ impacts is not only necessary for a complete SIP submission—it also allows the Board to assess how a proposal will affect the most vulnerable minority and low-income populations that have historically borne the burden of pollution. Industry Advocates provided no discussion of this topic is in their initial written testimony.

MWG stated that even though its facility is “one or two miles away from the nearest [EJ] community,” there will be “no impact on an EJ area” because their proposal is no worse than

existing, unlawful regulations. R23-18, Transcript of Second Hearing at 69 (Feb. 16, 2023). This unsupported assertion, even taken at face value, completely fails to address whether the facility affects EJ communities.

After being pressed at hearing for information, API and IERG provided evasive and sparse statements about whether their facilities would affect EJ communities. API's witness, when directly asked by the Board to discuss effects to EJ communities, generally ignored the question. Rather, he asserted that the proposal "will not have any adverse air quality impacts relative to existing impacts" under existing *unlawful* regulations. Even taking this unsupported assertion at face value, API does not explain whether the existing unlawful regulations lead to harmful pollution in EJ communities. Transcript of Second Hearing at 37-38.

IERG, when asked the same question, did no better. Rather than providing information in support of its own proposal, IERG ambiguously responded that "at least one IERG member facility . . . is located in or near EJ areas" and asserted that their proposal will have no additional harm compared to *unlawful existing regulations*, ignoring the more useful comparison to IEPA's proposal. *Id*. at 44. IERG gave subsequent follow-up testimony at the request of the Board which also ambiguously stated that "at least one IERG member . . . is located in an environmental justice area" under IEPA's EJ map. R23-18, IERG's Response to Board's Question at Hearing (Feb. 24, 2023). Industry advocates could have easily input addresses of facilities into the IEPA EJ map and determine whether a site is in or near an EJ community. Although this would have provided the Board with a more complete response, the Industry Advocates failed to do so.

The Industry Advocates are nearly silent on the record regarding how their proposals will affect EJ communities. Incomplete, evasive, and ambiguous responses to direct questions from the Board about EJ again demonstrate Industry Advocates' upside-down approach to this

rulemaking: rather than providing information to support their own proposals, they make baseless conclusions that existing *unlawful* regulations are no worse. For these reasons, the Board should not adopt the Industry proposals.

V. The People Support Requiring Immediate Compliance with IEPA's Proposal

The Environmental Advocates have asked the Board to adopt regulations which require all facilities currently holding an air permit to immediately comply with new SSM provisions in this rulemaking. *See* R23-18, Comment of Citizens Against Ruining the Environment (Jan. 27, 2023) and Comment of Sierra Club (Feb. 14, 2023).

The People support this request and likewise urge the Board to adopt regulations that immediately require all facilities to comply with IEPA's proposed SSM provisions. As the Environmental Advocates note, permits issued in Illinois may be valid for up to 10 years. 35 IAC 201.162(a). The Board should not allow facilities to operate in an unlawful manner for a full decade after these regulations are adopted. Furthermore, this exclusion risks criticism from USEPA when IEPA's SIP proposal is reviewed.

VI. Conclusion

Any regulatory proposal to the Board must be supported by information in the rulemaking record. This basic rulemaking principle is particularly important in the context of a fast-track rulemaking, where the Board and interested parties must make decisions quickly and without the ability to extend the rulemaking to remedy an incomplete record.

The IEPA has fully supported this proposal, while the Industry Advocates have made no effort to provide the Board and interested parties with actual information showing how their facilities would affect the environment under their proposals. Instead, the Industry Advocates provide evasive responses and mere conclusory assertions.

Throughout this rulemaking, the Industry Advocates' refrain has been that their proposals are no worse than existing regulations, and therefore will not harm the environment and Illinois' citizens. This approach completely ignores why the Board is conducting this rulemaking in the first place—*the existing regulations violate the CAA*. By doing no more than comparing their proposals to unlawful regulations, the Industry Advocates fail to show how their proposals would affect the environment.

The Act requires the Board to consider the environmental impact of rules it adopts, and it declares that the purpose of the Act with respect to air quality is to "restore, maintain, and enhance the purity of the air of this State." 415 ILCS 5/8. Merely doing no worse than an unlawful provision cannot be a sufficient basis to adopt any of the Industry Advocates' proposed rules, and the Board should not do so.

For these reasons, the People urge the Board to adopt the regulations proposed by the IEPA with revisions proposed by the Environmental Advocates. The Board cannot adopt any alternative regulatory proposals put forth by Industry Advocates, because they have not provided sufficient information in the record to show how their proposals would affect Illinois' environment.

Respectfully submitted,

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