

From: [McGill, Richard](#)
To: [Brown, Don](#)
Subject: FW: 35 IAC 201 Second Notice
Date: Friday, May 5, 2023 9:47:57 AM
Attachments: [image001.png](#)

Good afternoon, Mr. Clerk:

Please docket this email exchange with JCAR staff as a public comment in R23-18.

Thank you.

Richard R. McGill, Jr.
Senior Attorney for Research & Writing
Illinois Pollution Control Board
60 E. Van Buren St., Suite 630
Chicago, Illinois 60605
richard.mcgill@illinois.gov (312) 814-6983



From: McGill, Richard
Sent: Friday, May 5, 2023 9:46 AM
To: Eastvold, Jonathan C. <JonathanE@ilga.gov>
Subject: RE: 35 IAC 201 Second Notice

Good morning, Jonathan:

Removing the SSM provisions from Part 201 will eliminate the prima facie defense that a source with an SSM permission may plead if and when an enforcement action is brought against it. Any exercise of IEPA's enforcement discretion would necessarily precede that point. Removing these provisions therefore does not affect IEPA's enforcement discretion.

Best regards,

Richard

Richard R. McGill, Jr.
Senior Attorney for Research & Writing
Illinois Pollution Control Board
60 E. Van Buren St., Suite 630
Chicago, Illinois 60605
richard.mcgill@illinois.gov (312) 814-6983



From: Eastvold, Jonathan C. <JonathanE@ilga.gov>
Sent: Thursday, May 4, 2023 3:57 PM
To: McGill, Richard <Richard.McGill@illinois.gov>
Subject: [External] RE: 35 IAC 201 Second Notice

Thanks. The piece that I don't think has been answered is EPA's enforcement discretion (see highlighted text below). Any ideas?

From: McGill, Richard <Richard.McGill@illinois.gov>
Sent: Thursday, May 4, 2023 15:39
To: Eastvold, Jonathan C. <JonathanE@ilga.gov>
Subject: RE: 35 IAC 201 Second Notice

Good afternoon, Jonathan:

Below are **Board staff responses** to the items you mentioned, which I repeat here for convenience.

ENFORCEMENT DISCRETION: IERG: This rulemaking removes the standards by which EPA can grant permission to operate during an SSM event. **IERG opposes any change that would solely rely on the State's enforcement discretion as a replacement for the SSM defense currently being provided.** **EPA:** Has no intention of changing how it assesses emissions exceedances as a result of this rulemaking. The change is that once EPA brings an enforcement action against an entity that entity would no longer be able to claim SSM as an affirmative defense. **Also, EPA should not have to put limits on its enforcement discretion in rule.** **PCB: No clear response. As detailed in the Board's Second Notice filing (response 9(B)) and the Board staff response (PC 16) to a JCAR staff question (PC 4), the SSM provisions must be removed from Part 201 or else the State of Illinois will face mandatory sanctions under the Clean Air Act, each of which might bring serious economic harm to the State (e.g., loss of federal highway funding). Upon the removal of the SSM provisions, there will be no Part 201 rules providing for IEPA decisions on requests for SSM permissions. Accordingly, as amended, Part 201 will not provide for the IEPA decisions to which any standards could apply. But the Board has opened a sub-docket for the express purpose of considering alternative limits that would apply during SSM events. The Board stated that comments submitted in this rulemaking (docket R23-18) will be considered in the sub-docket (docket R23-18(A)).**

■ **ENVIRONMENTAL JUSTICE: C23D32:** Using the fast-track process on this rulemaking and only reaching out to industry, environmental organizations, and USEPA means that EPA did not reach out to minority, low-income, English-limited, and other marginalized subsets of the public. **Sierra Club: EPA should prioritize enforcement of emissions limit violations due to SSM in low-income, minority, and over-burdened communities.** **PCB: No clear response. As detailed in the Board's Second Notice filing (response 9(B)) and the Board staff response (PC 16) to a JCAR staff question (PC 4), for the State of Illinois to avoid mandatory federal sanctions, it was essential for IEPA to use the "fast-track" rulemaking procedures dictated by Section 28.5 of the Environmental Protection Act (415 ILCS 5/28.5). Section 28.5 prescribes, among other things, the subject of each hearing, including the second hearing, which "shall be devoted to presentation of**

testimony, documents, and comments by affected entities and all other interested parties.” 415 ILCS 5/28.5(f)(2). The Board has no authority over IEPA’s outreach. In USEPA’s 2022 “Finding of Failure to Submit SIP Revisions,” USEPA addressed environmental justice considerations, stating its intent that “the actions and deadlines resulting from this notice will promote 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). The Board has taken environmental justice into account in its rules when directed to do so by the General Assembly (415 ILCS 22.59(a), (g); 35 Ill. Adm. Code 845.700(g)), but the Board has no authority over how IEPA exercises its discretion in prioritizing enforcement when SSM events violate emission limits.

Thank you.

Best regards,

Richard

Richard R. McGill, Jr.
Senior Attorney for Research & Writing
Illinois Pollution Control Board
60 E. Van Buren St., Suite 630
Chicago, Illinois 60605
richard.mcgill@illinois.gov (312) 814-6983



From: Eastvold, Jonathan C. <JonathanE@ilga.gov>
Sent: Wednesday, May 3, 2023 9:20 AM
To: Bilbruck, Shannon O. <Shannon.O.Bilbruck@Illinois.gov>; Jcar Public <Jcar@ilga.gov>
Cc: McGill, Richard <Richard.McGill@illinois.gov>; Salk, Chloe <Chloe.Salk@Illinois.gov>; Fox, Tim <Tim.Fox@illinois.gov>; Tipsord, Marie <Marie.Tipsord@illinois.gov>
Subject: [External] RE: 35 IAC 201 Second Notice

Thanks so much.

Does the Board have any specific responses to the following sets of comments?:

ENFORCEMENT DISCRETION: IERG: This rulemaking removes the standards by which EPA can grant permission to operate during an SSM event. IERG opposes any change that would solely rely on the State's enforcement discretion as a replacement for the SSM defense currently being provided. **EPA:** Has no intention of changing how it assesses emissions exceedances as a result of this rulemaking. The change is that once EPA brings an enforcement action against an entity that entity would no longer be able to claim SSM as an affirmative defense. Also, EPA should not have to put limits on its enforcement discretion in rule. **PCB: No clear response.** ■ **ENVIRONMENTAL JUSTICE: C23D32:** Using

the fast-track process on this rulemaking and only reaching out to industry, environmental organizations, and USEPA means that EPA did not reach out to minority, low-income, English-limited, and other marginalized subsets of the public. **Sierra Club:** EPA should prioritize enforcement of emissions limit violations due to SSM in low-income, minority, and over-burdened communities.

PCB: No clear response.

From: Bilbruck, Shannon O. <Shannon.O.Bilbruck@Illinois.gov>

Sent: Tuesday, May 2, 2023 16:08

To: Jcar Public <Jcar@ilga.gov>

Cc: McGill, Richard <Richard.McGill@illinois.gov>; Salk, Chloe <Chloe.Salk@Illinois.gov>; Fox, Tim <Tim.Fox@illinois.gov>; Tipsord, Marie <Marie.Tipsord@illinois.gov>

Subject: 35 IAC 201 Second Notice

Attached are the following Illinois Pollution Control Board documents for second-notice review of Proposed Amendments to 35 IAC 201: Permits and General Provisions, addressing the issues raised in the rejection.

Cover Letter from Board's Clerk;
Second Notice;
State Mandates Act Questionnaire;
Analysis of Economic and Budget Effects; and
Attachment A

Below is a link to the Board's webpage for the second-notice opinion and order, which the Board adopted April 6, 2023 <https://pcb.illinois.gov/documents/dsweb/Get/Document-107932> and addendum <https://pcb.illinois.gov/documents/dsweb/Get/Document-107933>

State of Illinois - CONFIDENTIALITY NOTICE: The information contained in this communication is confidential, may be attorney-client privileged or attorney work product, may constitute inside information or internal deliberative staff communication, and is intended only for the use of the addressee. Unauthorized use, disclosure or copying of this communication or any part thereof is strictly prohibited and may be unlawful. If you have received this communication in error, please notify the sender immediately by return e-mail and destroy this communication and all copies thereof, including all attachments. Receipt by an unintended recipient does not waive attorney-client privilege, attorney work product privilege, or any other exemption from disclosure.

SECOND NOTICE

- 1) Agency: Pollution Control Board
- 2) Title and Administrative Code Citation: Permits and General Provisions, 35 Ill. Adm. Code 201
- 3) Date and Citation to Illinois Register: December 30, 2022; 46 Ill. Reg. 20627
- 4) Text and Location of any Changes from First Notice: See Attachment A.
- 5) Response to Codification Recommendations: No changes were requested by the Secretary of State.
- 6) Incorporations by Reference: None.
- 7) Final Regulatory Flexibility Analysis:
 - A) Summary of Issues Raised by Small Business: No issues were raised by small businesses during first notice.
 - B) Description of Actions and Alternatives Proposed by Small Business during First Notice: No actions or alternatives were proposed by small businesses during first notice.
- 8) Compliance with Section 5-30 of the APA and 1 Ill. Adm. Code 220.285: The Board placed the proposal on the Board's website: pcb.illinois.gov. The Board also notified the public through publication in the *Illinois Register*. The Board did not receive a comment from the Small Business Office.
- 9)
 - A) List of Commenters: In this rulemaking (docket R23-18), the Board received public comment from C23D32 (twice), the Illinois Environmental Regulatory Group (IERG), the Illinois Manufacturers' Association (IMA), the Joint Committee on Administrative Rules (JCAR), the Chemical Industry Council of Illinois (CICI), Citizens Against Ruining the Environment (CARE), the Glass Packaging Institute (GPI), Sierra Club, the Illinois Association of Aggregate Producers (IAAP), the Illinois Attorney General's Office (AG), Dynegy Midwest Generation (Dynegy), the American Petroleum Institute (API), and the Illinois Environmental Protection Agency (IEPA).
 - B) Issues Raised and Board Analysis:

Issues Raised: (1) the eligibility of this proposal for "fast-track" rulemaking procedures; (2) the perceived delay in the filing of this proposal; (3) the availability of alternative standards during startup, shutdown, or malfunction

(SSM); (4) IEPA's pre-filing outreach; (5) the immediate application of the rules to existing permitted sources; and (6) the Department of Commerce and Economic Opportunity (DCEO) not responding to the Board's request for an economic impact study of this proposal.

C23D32 (PC 1). In its comment, C23D32 described itself as "a private and anonymous watchdog group that monitors IEPA leadership behaviors and action for abuse and corruption of authority." PC 1 at 1. It added that it "exists to expose incompetency and dishonesty and examine the outcome of such behavior to impose change to an Agency fraught with corrupt and unethical behavior." *Id.*

C23D32 argued that IEPA had not complied with requirements for the statutory fast-track process. PC 1 at 1. It questioned the amount of time that passed from the United States Environmental Protection Agency (USEPA) 2015 State Implementation Plans (SIP) Call until IEPA's proposal. PC 1 at 2. It also questioned whether IEPA's proposal will result in increased emissions, noting that USEPA has developed alternative emission standards to address SSM events. PC 1 at 4-5.

C23D32 concluded that, "[b]ecause this rule is based on nothing more than some bureaucrat[']s opinion that was likely influenced by narrow-minded IEPA leadership toward unpreparedness rather than consideration for the community this rulemaking must be pulled off notice, fixed, and refiled at a later date to do the right thing." PC 1 at 5.

IERG (PC 2). IERG commented that it "strongly opposes Illinois EPA's proposal to remove the startup and malfunction/breakdown ('SMB') provisions without adding new language to the Board's rules for alternative limits and/or work practice standards that apply during period of SMB." PC 2 at 1. IERG argued that IEPA has been able since USEPA's 2015 SIP Call to propose revised rules. PC 2 at 3. IERG added that it opposes fast-track procedures for considering the proposal. *Id.*

In an attached letter it had submitted to IEPA during outreach to stakeholders, IERG stated that it "recognizes that time is short with the SIP Call deadline of August of 2023 for Illinois to submit SIP revisions." PC 2, Exh. 1 at 6. IERG stated that it "is preparing further information for the Board's consideration on alternative limits and work practice standards that apply during periods of startup, shutdown, malfunction, and breakdown as well as additional provisions to allow affected sources to maintain ongoing compliance." PC 2 at 4.

IMA (PC 3). IMA commented that it opposes IEPA's proposal. PC 3 at 1. IMA also commented that, although IEPA "had considerable time to produce the rule and do outreach to the regulated community, very little feedback or outreach has been done." *Id.*

Although IMA lamented that regulated entities had not had a meaningful opportunity to participate in developing an approach to SSM, it acknowledged that it “is aware and is sensitive to the fact that the federal rule includes the threat of imposing sanctions against Illinois for failing to meet the specified deadline.” PC 3 at 1.

IMA also stated that it was “shortsighted” for IEPA to propose removing SSM provisions “without further providing operational standards during these special events.” PC 3 at 1.

JCAR (PC 4). In addition to suggesting 20 changes to the first-notice proposal, JCAR asked “why did the Agency and the Board fail to address this problem in 2015 when USEPA first required it?”

CICI (PC 5). CICI stated that its members “are opposed to IEPA proposed revisions to startup, shutdown, malfunction, and breakdown.” PC 5 at 2. CICI commented specifically on the importance of SSM provisions to selective catalytic reduction (SCR), a system for addressing nitrogen oxides (NO_x) that is typically employed by chemical production units and boilers. PC 5 at 1-2.

CICI commented that, “[w]ith the SIP Call deadline approaching, we understand that there is a short timeline for Illinois to submit their SIP revisions by August 2023 to USEPA.” PC 5 at 2. CICI added that lack of timing should not prevent hearing the positions of regulated entities. CICI offers “continued support and interest in the development and implementation of solutions related to the SIP Call proposed rule.” *Id.*

CARE (PC 6). CARE stated that it is a not-for-profit organization representing persons in Will County. PC 6 at 1. It added that it has “participated in permit proceedings and permit appeals challenging the application of startup and shutdown exemptions.” *Id.*

CARE commented that it generally supports IEPA’s proposal, and it “endorses the use of fast track rulemaking.” PC 6 at 2.

CARE questioned how IEPA would implement the proposed rules so that they are immediately enforceable against existing permit holders. PC 6 at 2-3.

GPI (PC 7). GPI commented on the importance of SSM provisions to its members. PC 7 at 1. It stated that removing these provisions may require its members to shut down completely when an SSM event occurs, with significant consequences for their plants and operations. *Id.*

GPI requested that the Board not proceed with the proposed amendments. PC 7 at 2. It added that it is willing to work with IEPA and other regulated entities on revising the SSM rules. *Id.*

Sierra Club (PC 8). Sierra Club commented that it supports fast-track rulemaking in this proceeding. PC 8 at 1. It commented that IEPA should clarify that the revised rules will apply immediately to current permit holders, regardless of whether sources' existing permits (which may be valid for up to ten years) contain SSM provisions. PC 8 at 2-3. Sierra Club also suggested two other changes it considered to be technical in nature, one to retain SSM recordkeeping text in Section 201.301 and the other to repeal Section 205.225 as no longer necessary. PC 8 at 3-4.

IAAP (PC 9). IAAP's comment addressed controlling opacity from members' processing equipment during startup and breakdown. It also commented on applying SSM provisions to those events. PC 9 at 2.

IAAP commented that it opposes IEPA's proposal to remove SSM provisions "without adding alternative language in its place to address compliance during what are likely to be inevitable exceedances during SSM events." PC 9 at 3. If the Board moves forward with the proposal, IAAP requested adding specified federal language to address these circumstances. *Id.*

C23D32 (PC 10). C23D32 commented that alternate limits consistent with USEPA's "must be established now." PC 10 at 2. "If the USEPA is writing rules that allows SMB events in their own rules, then a SIP rule must be approvable by the USEPA that mimics their action." *Id.* C23D32 also commented that this rulemaking should wait until DCEO responds to the Board's request for an economic impact study. *Id.*

IEPA (PC 11). IEPA commented that USEPA issued a SIP Call requiring states including Illinois to submit revised SIPs correcting deficiencies in their SSM provisions. PC 11 at 4. IEPA "proposed a very narrow rulemaking, limited to the revisions necessary to address the SIP Call." PC 11 at 6.

IEPA stated that if USEPA does not receive a SIP submission and find it complete by August 11, 2023, mandatory sanctions will be imposed under the Clean Air Act. PC 11 at 6. "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." *Id.*, citing 40 CFR 52.31. "If the deficiencies are still unaddressed six months later, the State will lose highway funding." *Id.*

IEPA recognized criticism of its pre-filing outreach. It commented that this informal outreach is not required, but IEPA nevertheless provided an opportunity to comment on its proposal and considered those comments. PC 11 at 17-18.

IEPA commented that alternative standards should not be adopted in this proceeding because they are not necessary to satisfy the Clean Air Act, have not

received sufficient public notice, and may not be approvable by USEPA. PC 11 at 9. IEPA concluded that the Board should proceed with only the amendments it proposed. PC 11 at 30.

API (PC 12). API commented that it opposes IEPA's proposed amendments and supports IERG's proposed alternative standards. PC 12 at 1. It commented specifically on four Illinois refineries that would be affected by IEPA's proposal. PC 12 at 3. API added that if the Board adopts IEPA's proposal to remove these provisions, the Board should also adopt provisions tailored to operations during SMB events. PC 12 at 4.

IERG (PC 13). IERG commented that it opposes IEPA's proposal to remove SMB provisions without proposing alternative standards addressing these events. PC 13 at 1. IERG commented that if the Board proceeds with IEPA's proposal, the Board should also proceed with IERG's proposed alternative standards in Part 216. PC 13 at 4, 9; *see* Pre-Filed Testimony of Kelly Thompson and David R. Wall for IERG at 23-28.

Dynergy (PC 14). Dynergy commented that it opposes IEPA's proposal while adding that Dynergy can support the proposal if it includes alternative opacity standards for Dynergy's coal-fired boilers. PC 14 at 1. Dynergy's comment specifically addressed these proposed alternative standards. PC 14 at 13-26.

AG (PC 15). The AG commented that it supports IEPA's proposal. PC 15 at 1. The AG also commented that it opposes alternative standards proposed by industry, as they lack sufficient support in the record and are not likely to be approved by USEPA. PC 15 at 1-2, 5-13.

In addition, the AG echoed the wishes of CARE and Sierra Club that compliance with the amended rules be required immediately on their effective date, regardless of whether sources' existing permits contain SSM provisions. PC 15 at 13.

Board Analysis: The Board first addresses JCAR's comment, which concerns the perceived delay in the filing of this proposal, an issue raised in other comments. The Board then responds to the other issues raised in comments: the eligibility of this proposal for "fast-track" rulemaking procedures; the availability of alternative standards during SSM; IEPA's pre-filing outreach; the immediate application of the rules to existing permitted sources; DCEO not responding to the Board's request for an economic impact study of this proposal; and proposed technical changes.

First, as for the perceived delay in the filing of this proposal (PC 1, 2, 4, 11), the Board responded (PC 16) to JCAR (PC 4) first by stressing "the separate statutory roles of IEPA and the Board in proposing and adopting rules required by the federal Clean Air Act, as amended (CAA)." PC 16 at 2.

To address why IEPA did not file its rulemaking proposal earlier, the Board summarized events that had occurred and had not occurred in the executive and judicial branches of the federal government between 2015 and 2022. PC 16 at 3. The summary relied upon matters of public record, including pages 4-12 of IEPA's Statement of Reasons filed on December 7, 2022; the transcript of the Board's January 19, 2023 hearing; and the *Federal Register* (87 Fed. Reg. 1680-82 (Jan. 12, 2022)). *Id.*

The Board concluded by noting that on January 12, 2022, USEPA published a "Finding of Failure to Submit SIP Revisions," which became effective on February 11, 2022. PC 16 at 3-4. USEPA's Finding of Failure gave 12 states, including Illinois, 18 months to cure the failure by submitting a revision. PC 16 at 4. Although IEPA sought guidance, USEPA advised IEPA that no formal guidance would be provided concerning alternative emission standards and that the only compliance option clearly approvable by USEPA would be removing the offending SSM provisions. *Id.* IEPA prepared a rulemaking proposal, conducted public outreach in November 2022, and filed the proposal with the Board on December 7, 2022. *Id.*

Second, as for this proposal's eligibility for "fast-track" rulemaking procedures (PC 1, 2, 6, 8, 11), Section 28.5 of the Environmental Protection Act (Act) applies to adopting rules proposed by IEPA "and required to be adopted by the State under the Clean Air Act as amended by the Clean Air Act Amendments of 1990) (CAAA)." 415 ILCS 5/28.5(a). The General Assembly in 2021 extended this authority through December 31, 2026. Public Act 102-243 (eff. Aug. 3, 2021). Under Section 28.5, fast-track rulemakings promulgate rules "that the CAAA requires to be adopted," which "refers only to those regulations or parts of regulations for which the United States Environmental Protection Agency is empowered to impose sanctions against the State for failure to adopt such rules." 415 ILCS 5.28.5(b).

If USEPA does not receive a SIP submission and find it complete by August 11, 2023, mandatory sanctions will be imposed under the Clean Air Act. PC 11 at 6. "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 area of the State more difficult for sources." PC 11 at 6, citing 40 CFR 52.31. "If the deficiencies are still unaddressed six months later, the State will lose highway funding." *Id.*

Commenters noted Illinois' August 2023 deadline to adopt rules addressing USEPA's Finding of Failure. Commenters agreed that this provides a strict timeline and recognized the risk of Illinois being sanctioned if it does not meet its deadline. The Board has not failed to register that these commenters disagree with using Section 28.5 procedures to consider and adopt these proposed rules. However, by recognizing the deadline and risk of sanctions, these commenters effectively acknowledge that the SSM revisions are "required to be adopted"

under Section 28.5 and eligible for consideration as “fast-track” rules. Moreover, “[w]hen the CAAA requires rules other than identical in substance rules to be adopted, upon request by the Agency, the Board *must* adopt rules under fast-track rulemaking requirements.” 415 ILCS 5/28.5(c) (emphasis added).

The Board notes that some commenters, including the AG (PC 15), specifically supported the use of “fast-track” procedures here. The Board also notes that, while Section 28.5(i) allows the Board to consider non-required rules in a second docket under Title VII of the Act, no participant filed a motion requesting that the Board do so.

The Board’s second-notice opinion in this rulemaking (docket R23-18) concluded that IEPA’s filing of its proposal and the Board’s consideration of it are appropriate under the fast-track procedures established in Section 28.5 by the General Assembly. This authority necessitated proceeding to second notice with IEPA’s proposal with limited revisions.

Third, as for alternative standards to address SSM events (PC 1, 2, 3, 5, 7, 9, 10, 11, 12, 13, 14, 15), the Board’s second-notice opinion recognized that many of the comments favored their consideration. In pre-filed testimony, IERG and Dynegy proposed language for alternative standards. The AG maintained, however, that the Board cannot propose these alternative standards for second-notice because the rulemaking record is insufficient as to their impacts on the environment and environmental justice communities; further, their approval by USEPA is unlikely. In its second-notice opinion, the Board agreed that it is appropriate to consider specific alternative standards, and it opened a sub-docket to address them. In doing so, the Board stated that comments submitted in this proceeding (docket R23-18) will be considered in the sub-docket (docket R23-18(A)).

Fourth, as for IEPA’s outreach before filing its proposal (PC 3, 11), the Board has not failed to register the displeasure in comments over IEPA’s pre-filing communication. While the Board recognizes that these communications may generally be productive, no comment suggested that IEPA’s action in this regard had violated any statutory or regulatory requirement. The Board cannot conclude that these comments remove IEPA’s proposal from consideration under Section 28.5, nor can the Board direct IEPA’s pre-filing actions.

Fifth, as for the immediate application of the rules to existing permitted sources (PC 6, 8, 15), while IEPA anticipates changing the permits to remove SSM provisions during the regular course of permit renewal, the amended rules will apply and be enforceable on their effective date. Therefore, on that date, facilities with SSM provisions in their permits must abide by the amended rules, regardless of whether their permits reflect those rules. *See* PC 11.

Sixth, as for DCEO not responding to the Board’s request for an economic impact study (PC 10), the Board’s Chair, Barbara Flynn Currie, requested on December

16, 2022, that DCEO perform an economic impact study of this proposal. Section 27(b) of the Act (415 ILCS 5/27(b)) requires that the Board make this request. In turn, DCEO “may within 30 to 45 days of such request produce a study of the economic impact of the proposed rules.” 415 ILCS 5/27(b)(1). Chair Currie specifically requested that DCEO respond by January 27, 2023, so that the study could be addressed by participants at the hearing scheduled for February 16, 2023.

Section 27(b) provides only that DCEO “may” produce a requested economic impact study. To date in this docket, the Board has not received from DCEO either a study or an explanation for not producing one. The Board does not have the authority to compel DCEO to perform an economic impact study.

Finally, as for proposed technical changes (PC 8), Sierra Club first asked that the Board not remove the phrase “records detailing all malfunctions, breakdowns or startups” from Section 201.301 on recordkeeping. IEPA opposed Sierra Club’s proposed change. PC 11 at 29. Sierra Club’s proposed change was not included in the Board’s second-notice proposal because “other recordkeeping and reporting requirements that sources must comply with tied to specific emission standards are sufficient for [IEPA’s] purposes.” *Id.* Sierra Club also proposed repealing Section 205.225, which concerns SSM under the Emission Reduction Market System, because it would no longer apply to any sources. But as IEPA pointed out, this proposed change is unnecessary because Part 205 was “sunsetting” by Section 205.115 (35 Ill. Adm. Code 205.115) and therefore no longer applicable after April 29, 2018. PC 11 at 29. Moreover, Section 205.225 was not included in the Board’s first-notice proposal.

- C) Change in the Rule: See Attachment A.
 - D) Public Hearing Requests: None, but the Board held public hearings on January 19, 2023, and February 16, 2023.
- 10) Justification and Rationale:
- A) Changes in Statutory Language: None
 - B) Changes in Board Policy, Procedures, or Structure: None
 - C) Citations to Federal Laws, Rules, or Regulations, or Funding Requirements: None
 - D) Court Decisions: None
 - E) Other Reasons: This proposal amends 35 Ill. Adm. Code 201, 202, and 212 to remove provisions allowing for advance permission to continue operating during a malfunction or to violate emission limitations during start-up. Removing the

provisions is required to comply with USEPA's findings of deficiencies in the Illinois SIP under the CAA.

This proposal is intended to meet obligations of the State of Illinois under the CAA and was filed under Section 28.5 of the Act (415 ILCS 5/28.5). Section 28.5 of the Act requires the Board to proceed toward adoption of the proposed regulation by meeting a series of strict deadlines.

11) Name of Agency Representative:

Richard McGill
Illinois Pollution Control Board
60 E Van Buren St, Suite 630
Chicago, IL 60605
Richard.McGill@illinois.gov

State Mandates Act Questionnaire

Agency: Pollution Control Board

Part/Title: Permits and General Provisions (35 Ill. Adm. Code 201)

Illinois Register Citation: December 30, 2022, 46 Ill. Reg. 20627

1. Does this rulemaking affect any of the following:

- | | |
|---------------------------------------|--|
| <input type="checkbox"/> Municipality | <input type="checkbox"/> Other Unit of Local Govt. |
| <input type="checkbox"/> County | <input type="checkbox"/> School District |
| <input type="checkbox"/> Township | <input type="checkbox"/> Community College Dist. |

2. Does this rule require any of the above entities to establish, expand or modify its activities in such a way as to necessitate additional expenditures from local revenues?

Yes No Number of units affected N.A.

If yes, please estimate the amount of additional expenditures necessitated by this rulemaking per unit of government: \$ N.A.

Note: If the dollar amount, or total number of units affected is unknown, please outline and attach to this form an explanation of the steps taken by the agency to determine the approximate expense of the rulemaking, and the number of units affected.

If no, please explain why the rule does not necessitate such additional expenditures.

The Board initiated this rulemaking to propose the removal of several provisions. The Board did not intend to establish, expand, or modify substantive requirements that would affect entities listed above or their expenditures from local revenues.

3. Were any alternatives that do not necessitate additional expenditures considered?

Yes No

If yes, please list these alternatives and explain why they were rejected.

4. What are the policy objectives of the rulemaking? (Please be specific)

This proposal amends 35 Ill. Adm. Code 201, 202, and 212 to remove provisions allowing for advance permission to continue operating during a malfunction or to violate emission limitations during start-up. The removal of the provisions is required to comply with the United States Environmental Protection Agency (USEPA) findings of deficiencies in the Illinois State Implementation Plan under the Clean Air Act (CAA) 42 U.S.C. §4701, et seq.

This proposal is intended to meet obligations of the State of Illinois under CAA and was filed pursuant to Section 28.5 of the Act (415 ILCS 5/28.5(2020)). Section 28.5 of the

Act requires the Board to proceed toward adoption of the proposed regulation by meeting a series of strict deadlines.

5. Please explain why the policy objectives of this rule cannot be achieved in the absence of the rule or through a rule that does not create a State Mandate.

**AGENCY ANALYSIS OF ECONOMIC AND
BUDGETARY EFFECTS OF PROPOSED RULEMAKING**

Agency: Pollution Control Board

Part/Title: 35 Ill. Adm. Code 201: Permits and General Provisions

Illinois Register Citation: December 30, 2022, 46 Ill. Reg. 20627

Introduction:

1. Anticipated effect on State expenditures and revenues.

(a) Current cost to the agency for this program/activity.

Unknown, as the Board does not break its costs down by case type or program.

(b) If this rulemaking will result in an increase or decrease in cost, specify the fiscal year in which this change will first occur and the dollar amount of the effect.

N/A.

(c) Indicate the funding source, including Fund and appropriation lines, for this program/activity.

N/A.

(d) If an increase or decrease in the costs of another State agency is anticipated, specify the fiscal year in which this change will first occur and the estimated dollar amount of the effect.

Will this rulemaking have any effect on State revenues or expenditures not already indicated above? Specify effects and amounts.

No such effect expected.

2. Economic effect on persons affected by the rulemaking.

(a) Indicate the economic effect and specify the persons affected:

In considering these rules, which are “required to be adopted,” the Board’s second-notice opinion (docket R23-18) addressed the economic reasonableness of the proposal. The Board reviewed the record, including the Illinois Environmental Protection Agency (IEPA) Statement of Reasons and the transcript of the January 19, 2023 hearing.

IEPA asserted that its required amendments are economically reasonable because they “do not impose any new or additional obligations such as emission limits or control requirements on affected sources.” IEPA’s Statement of Reasons (SR) at 15. The proposal does not change emission limits or a source’s obligation to comply with them. The Board considered the economic reasonableness of those underlying rules when it adopted them. IEPA “does not interpret or implement the [startup, shutdown, or malfunction (SSM) rules] to provide any type of exemption from applicable limitations.” SR at 6. IEPA’s proposal affects only a sources’ ability to request and obtain a prima facie defense that it may use if an enforcement action results from exceeding emission limits during an SSM event.

IEPA commented that it has always had authority to initiate an enforcement action against a source that exceeds emission limits during an SSM event. It added that it would continue considering these exceedances on a case-by-case basis as it has done in the past, including cases involving SSM permit provisions.

Based on all these factors in considering rules “required to be adopted,” the Board correctly concluded that its second-notice proposal is economically reasonable.

The Joint Committee on Administrative Rules (JCAR) correctly notes that, on December 16, 2022, the Board’s Chair, Barbara Flynn Currie, requested that that the Department of Commerce and Economic Opportunity (DCEO) perform an economic impact study of this proposal. Section 27(b) of the Environmental Protection Act (415 ILCS 5/27(b)) requires that the Board make this request. In turn, DCEO “may within 30 to 45 days of such request produce a study of the economic impact of the proposed rules.” 415 ILCS 5/27(b)(1). Chair Currie specifically requested that DCEO respond by January 27, 2023, so that the study could be addressed by participants at the hearing scheduled for February 16, 2023.

Section 27(b) provides only that DCEO “may” produce a requested economic impact study. To date in this docket, the Board has not received from DCEO either a study or an explanation for not producing one. As a fellow agency, the Board clearly understands that requests of this nature might place heavy demands on resources, including staff time. DCEO has not for some time granted a Board request to perform an economic impact study of a rulemaking proposal.

The Board wishes to stress that it would of course provide to JCAR a copy of an economic impact analysis prepared by DCEO’s Business Assistance Office. Because it has not received one, the Board can only conclude that the office did not receive a request to perform one as provided by Section 5-30(c) of the Illinois Administrative Procedure Act (5 ILCS 100/5-30(c)) and exercised its discretion under that provision to conclude that one was not warranted. The Board requested four months ago that DCEO conduct a study, and it lacks authority to compel DCEO to perform one.

- (b) If an economic effect is predicted, please briefly describe how the effect will occur.

N/A

- (c) Will the rulemaking have an indirect effect that may result in increased administrative costs? Will there be any change in requirements such as filing, documentation, reporting or completion of forms? Compare to current requirements.

No increased administrative costs are anticipated.

SECOND NOTICE CHANGES

AGENCY: Pollution Control Board

RULEMAKING: Permits and General Provisions (35 Ill. Adm. Code 201; 46 Ill. Reg. 20627)

1. In line 192, strike "set forth" and add "stated"
2. In line 193, strike "of this Chapter".
3. In line 196, strike "set forth" and add "stated", after "Subchapter" add "c".
4. In line 206, strike ", as a minimum,".
5. In line 212, strike "pursuant to" and add "in compliance with".
6. In line 214, strike "pursuant to" and add "in compliance with".
7. In lines 214-215, strike "; provided, however, that" and add ", but".
8. In lines 216-217, strike "If emissions of an emission unit during startup would be higher than during normal operation of the emission, unit an" and reinstate "An".
9. In line 228, strike "set forth" and add "specify".
10. In line 319, strike "pursuant to" and add "under".
11. In line 320, strike "pursuant to" and add "in compliance with".
12. In line 322, strike "pursuant to" and add "in compliance with".
13. In line 323, strike "such".
14. In line 334, strike "APA Act" and add "Illinois Administrative Procedure Act [5 ILCS 100]".

SECOND NOTICE

- 1) Agency: Pollution Control Board
- 2) Title and Administrative Code Citation: Alternative Control Strategies, 35 Ill. Adm. Code 202
- 3) Date and Citation to Illinois Register: December 30, 2022; 46 Ill. Reg. 20638
- 4) Text and Location of any Changes from First Notice: See Attachment A.
- 5) Response to Codification Recommendations: No changes were requested by the Secretary of State.
- 6) Incorporations by Reference: None.
- 7) Final Regulatory Flexibility Analysis:
 - A) Summary of Issues Raised by Small Business: No issues were raised by small businesses during first notice.
 - B) Description of Actions and Alternatives Proposed by Small Business during First Notice: No actions or alternatives were proposed by small businesses during first notice.
- 8) Compliance with Section 5-30 of the APA and 1 Ill. Adm. Code 220.285: The Board placed the proposal on the Board's website: pcb.illinois.gov. The Board also notified the public through publication in the *Illinois Register*. The Board did not receive a comment from the Small Business Office.
- 9)
 - A) List of Commenters: In this rulemaking (docket R23-18), the Board received public comment from C23D32 (twice), the Illinois Environmental Regulatory Group (IERG), the Illinois Manufacturers' Association (IMA), the Joint Committee on Administrative Rules (JCAR), the Chemical Industry Council of Illinois (CICI), Citizens Against Ruining the Environment (CARE), the Glass Packaging Institute (GPI), Sierra Club, the Illinois Association of Aggregate Producers (IAAP), the Illinois Attorney General's Office (AG), Dynegy Midwest Generation (Dynegy), the American Petroleum Institute (API), and the Illinois Environmental Protection Agency (IEPA).
 - B) Issues Raised and Board Analysis:

Issues Raised: (1) the eligibility of this proposal for "fast-track" rulemaking procedures; (2) the perceived delay in the filing of this proposal; (3) the availability of alternative standards during startup, shutdown, or malfunction

(SSM); (4) IEPA's pre-filing outreach; (5) the immediate application of the rules to existing permitted sources; and (6) the Department of Commerce and Economic Opportunity (DCEO) not responding to the Board's request for an economic impact study of this proposal.

C23D32 (PC 1). In its comment, C23D32 described itself as "a private and anonymous watchdog group that monitors IEPA leadership behaviors and action for abuse and corruption of authority." PC 1 at 1. It added that it "exists to expose incompetency and dishonesty and examine the outcome of such behavior to impose change to an Agency fraught with corrupt and unethical behavior." *Id.*

C23D32 argued that IEPA had not complied with requirements for the statutory fast-track process. PC 1 at 1. It questioned the amount of time that passed from the United States Environmental Protection Agency (USEPA) 2015 State Implementation Plans (SIP) Call until IEPA's proposal. PC 1 at 2. It also questioned whether IEPA's proposal will result in increased emissions, noting that USEPA has developed alternative emission standards to address SSM events. PC 1 at 4-5.

C23D32 concluded that, "[b]ecause this rule is based on nothing more than some bureaucrat[']s opinion that was likely influenced by narrow-minded IEPA leadership toward unpreparedness rather than consideration for the community this rulemaking must be pulled off notice, fixed, and refiled at a later date to do the right thing." PC 1 at 5.

IERG (PC 2). IERG commented that it "strongly opposes Illinois EPA's proposal to remove the startup and malfunction/breakdown ('SMB') provisions without adding new language to the Board's rules for alternative limits and/or work practice standards that apply during period of SMB." PC 2 at 1. IERG argued that IEPA has been able since USEPA's 2015 SIP Call to propose revised rules. PC 2 at 3. IERG added that it opposes fast-track procedures for considering the proposal. *Id.*

In an attached letter it had submitted to IEPA during outreach to stakeholders, IERG stated that it "recognizes that time is short with the SIP Call deadline of August of 2023 for Illinois to submit SIP revisions." PC 2, Exh. 1 at 6. IERG stated that it "is preparing further information for the Board's consideration on alternative limits and work practice standards that apply during periods of startup, shutdown, malfunction, and breakdown as well as additional provisions to allow affected sources to maintain ongoing compliance." PC 2 at 4.

IMA (PC 3). IMA commented that it opposes IEPA's proposal. PC 3 at 1. IMA also commented that, although IEPA "had considerable time to produce the rule and do outreach to the regulated community, very little feedback or outreach has been done." *Id.*

Although IMA lamented that regulated entities had not had a meaningful opportunity to participate in developing an approach to SSM, it acknowledged that it “is aware and is sensitive to the fact that the federal rule includes the threat of imposing sanctions against Illinois for failing to meet the specified deadline.” PC 3 at 1.

IMA also stated that it was “shortsighted” for IEPA to propose removing SSM provisions “without further providing operational standards during these special events.” PC 3 at 1.

JCAR (PC 4). In addition to suggesting 20 changes to the first-notice proposal, JCAR asked “why did the Agency and the Board fail to address this problem in 2015 when USEPA first required it?”

CICI (PC 5). CICI stated that its members “are opposed to IEPA proposed revisions to startup, shutdown, malfunction, and breakdown.” PC 5 at 2. CICI commented specifically on the importance of SSM provisions to selective catalytic reduction (SCR), a system for addressing nitrogen oxides (NO_x) that is typically employed by chemical production units and boilers. PC 5 at 1-2.

CICI commented that, “[w]ith the SIP Call deadline approaching, we understand that there is a short timeline for Illinois to submit their SIP revisions by August 2023 to USEPA.” PC 5 at 2. CICI added that lack of timing should not prevent hearing the positions of regulated entities. CICI offers “continued support and interest in the development and implementation of solutions related to the SIP Call proposed rule.” *Id.*

CARE (PC 6). CARE stated that it is a not-for-profit organization representing persons in Will County. PC 6 at 1. It added that it has “participated in permit proceedings and permit appeals challenging the application of startup and shutdown exemptions.” *Id.*

CARE commented that it generally supports IEPA’s proposal, and it “endorses the use of fast track rulemaking.” PC 6 at 2.

CARE questioned how IEPA would implement the proposed rules so that they are immediately enforceable against existing permit holders. PC 6 at 2-3.

GPI (PC 7). GPI commented on the importance of SSM provisions to its members. PC 7 at 1. It stated that removing these provisions may require its members to shut down completely when an SSM event occurs, with significant consequences for their plants and operations. *Id.*

GPI requested that the Board not proceed with the proposed amendments. PC 7 at 2. It added that it is willing to work with IEPA and other regulated entities on revising the SSM rules. *Id.*

Sierra Club (PC 8). Sierra Club commented that it supports fast-track rulemaking in this proceeding. PC 8 at 1. It commented that IEPA should clarify that the revised rules will apply immediately to current permit holders, regardless of whether sources' existing permits (which may be valid for up to ten years) contain SSM provisions. PC 8 at 2-3.

IAAP (PC 9). IAAP's comment addressed controlling opacity from members' processing equipment during startup and breakdown. It also commented on applying SSM provisions to those events. PC 9 at 2.

IAAP commented that it opposes IEPA's proposal to remove SSM provisions "without adding alternative language in its place to address compliance during what are likely to be inevitable exceedances during SSM events." PC 9 at 3. If the Board moves forward with the proposal, IAAP requested adding specified federal language to address these circumstances. *Id.*

C23D32 (PC 10). C23D32 commented that alternate limits consistent with USEPA's "must be established now." PC 10 at 2. "If the USEPA is writing rules that allows SMB events in their own rules, then a SIP rule must be approvable by the USEPA that mimics their action." *Id.* C23D32 also commented that this rulemaking should wait until DCEO responds to the Board's request for an economic impact study. *Id.*

IEPA (PC 11). IEPA commented that USEPA issued a SIP Call requiring states including Illinois to submit revised SIPs correcting deficiencies in their SSM provisions. PC 11 at 4. IEPA "proposed a very narrow rulemaking, limited to the revisions necessary to address the SIP Call." PC 11 at 6.

IEPA stated that if USEPA does not receive a SIP submission and find it complete by August 11, 2023, mandatory sanctions will be imposed under the Clean Air Act. PC 11 at 6. "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." *Id.*, citing 40 CFR 52.31. "If the deficiencies are still unaddressed six months later, the State will lose highway funding." *Id.*

IEPA recognized criticism of its pre-filing outreach. It commented that this informal outreach is not required, but IEPA nevertheless provided an opportunity to comment on its proposal and considered those comments. PC 11 at 17-18.

IEPA commented that alternative standards should not be adopted in this proceeding because they are not necessary to satisfy the Clean Air Act, have not received sufficient public notice, and may not be approvable by USEPA. PC 11 at 9. IEPA concluded that the Board should proceed with only the amendments it proposed. PC 11 at 30.

API (PC 12). API commented that it opposes IEPA's proposed amendments and supports IERG's proposed alternative standards. PC 12 at 1. It commented specifically on four Illinois refineries that would be affected by IEPA's proposal. PC 12 at 3. API added that if the Board adopts IEPA's proposal to remove these provisions, the Board should also adopt provisions tailored to operations during SMB events. PC 12 at 4.

IERG (PC 13). IERG commented that it opposes IEPA's proposal to remove SMB provisions without proposing alternative standards addressing these events. PC 13 at 1. IERG commented that if the Board proceeds with IEPA's proposal, the Board should also proceed with IERG's proposed alternative standards in Part 216. PC 13 at 4, 9; *see* Pre-Filed Testimony of Kelly Thompson and David R. Wall for IERG at 23-28.

Dynegy (PC 14). Dynegy commented that it opposes IEPA's proposal while adding that Dynegy can support the proposal if it includes alternative opacity standards for Dynegy's coal-fired boilers. PC 14 at 1. Dynegy's comment specifically addressed these proposed alternative standards. PC 14 at 13-26.

AG (PC 15). The AG commented that it supports IEPA's proposal. PC 15 at 1. The AG also commented that it opposes alternative standards proposed by industry, as they lack sufficient support in the record and are not likely to be approved by USEPA. PC 15 at 1-2, 5-13.

In addition, the AG echoed the wishes of CARE and Sierra Club that compliance with the amended rules be required immediately on their effective date, regardless of whether sources' existing permits contain SSM provisions. PC 15 at 13.

Board Analysis: The Board first addresses JCAR's comment, which concerns the perceived delay in the filing of this proposal, an issue raised in other comments. The Board then responds to the other issues raised in comments: the eligibility of this proposal for "fast-track" rulemaking procedures; the availability of alternative standards during SSM; IEPA's pre-filing outreach; the immediate application of the rules to existing permitted sources; and DCEO not responding to the Board's request for an economic impact study of this proposal.

First, as for the perceived delay in the filing of this proposal (PC 1, 2, 4, 11), the Board responded (PC 16) to JCAR (PC 4) first by stressing "the separate statutory roles of IEPA and the Board in proposing and adopting rules required by the federal Clean Air Act, as amended (CAA)." PC 16 at 2.

To address why IEPA did not file its rulemaking proposal earlier, the Board summarized events that had occurred and had not occurred in the executive and judicial branches of the federal government between 2015 and 2022. PC 16 at 3. The summary relied upon matters of public record, including pages 4-12 of

IEPA's Statement of Reasons filed on December 7, 2022; the transcript of the Board's January 19, 2023 hearing; and the *Federal Register* (87 Fed. Reg. 1680-82 (Jan. 12, 2022)). *Id.*

The Board concluded by noting that on January 12, 2022, USEPA published a "Finding of Failure to Submit SIP Revisions," which became effective on February 11, 2022. PC 16 at 3-4. USEPA's Finding of Failure gave 12 states, including Illinois, 18 months to cure the failure by submitting a revision. PC 16 at 4. Although IEPA sought guidance, USEPA advised IEPA that no formal guidance would be provided concerning alternative emission standards and that the only compliance option clearly approvable by USEPA would be removing the offending SSM provisions. *Id.* IEPA prepared a rulemaking proposal, conducted public outreach in November 2022, and filed the proposal with the Board on December 7, 2022. *Id.*

Second, as for this proposal's eligibility for "fast-track" rulemaking procedures (PC 1, 2, 6, 8, 11), Section 28.5 of the Environmental Protection Act (Act) applies to adopting rules proposed by IEPA "and required to be adopted by the State under the Clean Air Act as amended by the Clean Air Act Amendments of 1990) (CAAA)." 415 ILCS 5/28.5(a). The General Assembly in 2021 extended this authority through December 31, 2026. Public Act 102-243 (eff. Aug. 3, 2021). Under Section 28.5, fast-track rulemakings promulgate rules "that the CAAA requires to be adopted," which "refers only to those regulations or parts of regulations for which the United States Environmental Protection Agency is empowered to impose sanctions against the State for failure to adopt such rules." 415 ILCS 5.28.5(b).

If USEPA does not receive a SIP submission and find it complete by August 11, 2023, mandatory sanctions will be imposed under the Clean Air Act. PC 11 at 6. "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 area of the State more difficult for sources." PC 11 at 6, citing 40 CFR 52.31. "If the deficiencies are still unaddressed six months later, the State will lose highway funding." *Id.*

Commenters noted Illinois' August 2023 deadline to adopt rules addressing USEPA's Finding of Failure. Commenters agreed that this provides a strict timeline and recognized the risk of Illinois being sanctioned if it does not meet its deadline. The Board has not failed to register that these commenters disagree with using Section 28.5 procedures to consider and adopt these proposed rules. However, by recognizing the deadline and risk of sanctions, these commenters effectively acknowledge that the SSM revisions are "required to be adopted" under Section 28.5 and eligible for consideration as "fast-track" rules. Moreover, "[w]hen the CAAA requires rules other than identical in substance rules to be adopted, upon request by the Agency, the Board *must* adopt rules under fast-track rulemaking requirements." 415 ILCS 5/28.5(c) (emphasis added).

The Board notes that some commenters, including the AG (PC 15), specifically supported the use of “fast-track” procedures here. The Board also notes that, while Section 28.5(i) allows the Board to consider non-required rules in a second docket under Title VII of the Act, no participant filed a motion requesting that the Board do so.

The Board’s second-notice opinion in this rulemaking (docket R23-18) concluded that IEPA’s filing of its proposal and the Board’s consideration of it are appropriate under the fast-track procedures established in Section 28.5 by the General Assembly. This authority necessitated proceeding to second notice with IEPA’s proposal with limited revisions.

Third, as for alternative standards to address SSM events (PC 1, 2, 3, 5, 7, 9, 10, 11, 12, 13, 14, 15), the Board’s second-notice opinion recognized that many of the comments favored their consideration. In pre-filed testimony, IERG and Dynege proposed language for alternative standards. The AG maintained, however, that the Board cannot propose these alternative standards for second-notice because the rulemaking record is insufficient as to their impacts on the environment and environmental justice communities; further, their approval by USEPA is unlikely. In its second-notice opinion, the Board agreed that it is appropriate to consider specific alternative standards, and it opened a sub-docket to address them. In doing so, the Board stated that comments submitted in this proceeding (docket R23-18) will be considered in the sub-docket (docket R23-18(A)).

Fourth, as for IEPA’s outreach before filing its proposal (PC 3, 11), the Board has not failed to register the displeasure in comments over IEPA’s pre-filing communication. While the Board recognizes that these communications may generally be productive, no comment suggested that IEPA’s action in this regard had violated any statutory or regulatory requirement. The Board cannot conclude that these comments remove IEPA’s proposal from consideration under Section 28.5, nor can the Board direct IEPA’s pre-filing actions.

Fifth, as for the immediate application of the rules to existing permitted sources (PC 6, 8, 15), while IEPA anticipates changing the permits to remove SSM provisions during the regular course of permit renewal, the amended rules will apply and be enforceable on their effective date. Therefore, on that date, facilities with SSM provisions in their permits must abide by the amended rules, regardless of whether their permits reflect those rules. *See* PC 11.

Finally, as for DCEO not responding to the Board’s request for an economic impact study (PC 10), the Board’s Chair, Barbara Flynn Currie, requested on December 16, 2022, that DCEO perform an economic impact study of this proposal. Section 27(b) of the Act (415 ILCS 5/27(b)) requires that the Board make this request. In turn, DCEO “may within 30 to 45 days of such request produce a study of the economic impact of the proposed rules.” 415 ILCS

5/27(b)(1). Chair Currie specifically requested that DCEO respond by January 27, 2023, so that the study could be addressed by participants at the hearing scheduled for February 16, 2023.

Section 27(b) provides only that DCEO “may” produce a requested economic impact study. To date in this docket, the Board has not received from DCEO either a study or an explanation for not producing one. The Board does not have the authority to compel DCEO to perform an economic impact study.

- C) Change in the Rule: See Attachment A.
- D) Public Hearing Requests: None, but the Board held public hearings on January 19, 2023, and February 16, 2023.

10) Justification and Rationale:

- A) Changes in Statutory Language: None
- B) Changes in Board Policy, Procedures, or Structure: None
- C) Citations to Federal Laws, Rules, or Regulations, or Funding Requirements: None
- D) Court Decisions: None
- E) Other Reasons: This proposal amends 35 Ill. Adm. Code 201, 202, and 212 to remove provisions allowing for advance permission to continue operating during a malfunction or to violate emission limitations during start-up. Removing the provisions is required to comply with USEPA’s findings of deficiencies in the Illinois SIP under the CAA.

This proposal is intended to meet obligations of the State of Illinois under the CAA and was filed under Section 28.5 of the Act (415 ILCS 5/28.5). Section 28.5 of the Act requires the Board to proceed toward adoption of the proposed regulation by meeting a series of strict deadlines.

11) Name of Agency Representative:

Richard McGill
Illinois Pollution Control Board
60 E Van Buren St, Suite 630
Chicago, IL 60605
Richard.McGill@illinois.gov

State Mandates Act Questionnaire

Agency: Pollution Control Board

Part/Title: Alternative Control Strategies (35 Ill. Adm. Code 202)

Illinois Register Citation: December 30, 2022, 46 Ill. Reg. 20638

1. Does this rulemaking affect any of the following:

- | | |
|---------------------------------------|--|
| <input type="checkbox"/> Municipality | <input type="checkbox"/> Other Unit of Local Govt. |
| <input type="checkbox"/> County | <input type="checkbox"/> School District |
| <input type="checkbox"/> Township | <input type="checkbox"/> Community College Dist. |

2. Does this rule require any of the above entities to establish, expand or modify its activities in such a way as to necessitate additional expenditures from local revenues?

Yes No X Number of units affected N.A.

If yes, please estimate the amount of additional expenditures necessitated by this rulemaking per unit of government: \$ N.A.

Note: If the dollar amount, or total number of units affected is unknown, please outline and attach to this form an explanation of the steps taken by the agency to determine the approximate expense of the rulemaking, and the number of units affected.

If no, please explain why the rule does not necessitate such additional expenditures.

The Board initiated this rulemaking to propose the removal of several provisions. The Board did not intend to establish, expand, or modify substantive requirements that would affect entities listed above or their expenditures from local revenues.

3. Were any alternatives that do not necessitate additional expenditures considered?

Yes No X

If yes, please list these alternatives and explain why they were rejected.

4. What are the policy objectives of the rulemaking? (Please be specific)

This proposal amends 35 Ill. Adm. Code 201, 202, and 212 to remove provisions allowing for advance permission to continue operating during a malfunction or to violate emission limitations during start-up. The removal of the provisions is required to comply with the United States Environmental Protection Agency (USEPA) findings of deficiencies in the Illinois State Implementation Plan under the Clean Air Act (CAA) 42 U.S.C. §4701, et seq.

This proposal is intended to meet obligations of the State of Illinois under CAA and was filed pursuant to Section 28.5 of the Act (415 ILCS 5/28.5(2020)). Section 28.5 of the

Act requires the Board to proceed toward adoption of the proposed regulation by meeting a series of strict deadlines.

5. Please explain why the policy objectives of this rule cannot be achieved in the absence of the rule or through a rule that does not create a State Mandate.

**AGENCY ANALYSIS OF ECONOMIC AND
BUDGETARY EFFECTS OF PROPOSED RULEMAKING**

Agency: Pollution Control Board

Part/Title: 35 Ill. Adm. Code 202: Alternative Control Strategies

Illinois Register Citation: December 30, 2022, 46 Ill. Reg. 20638

Introduction:

1. Anticipated effect on State expenditures and revenues.

(a) Current cost to the agency for this program/activity.

Unknown, as the Board does not break its costs down by case type or program.

(b) If this rulemaking will result in an increase or decrease in cost, specify the fiscal year in which this change will first occur and the dollar amount of the effect.

N/A.

(c) Indicate the funding source, including Fund and appropriation lines, for this program/activity.

N/A.

(d) If an increase or decrease in the costs of another State agency is anticipated, specify the fiscal year in which this change will first occur and the estimated dollar amount of the effect.

Will this rulemaking have any effect on State revenues or expenditures not already indicated above? Specify effects and amounts.

No such effect expected.

2. Economic effect on persons affected by the rulemaking.

(a) Indicate the economic effect and specify the persons affected:

In considering these rules, which are “required to be adopted,” the Board’s second-notice opinion (docket R23-18) addressed the economic reasonableness of the proposal. The Board reviewed the record, including the Illinois Environmental Protection Agency (IEPA) Statement of Reasons and the transcript of the January 19, 2023 hearing.

IEPA asserted that its required amendments are economically reasonable because they “do not impose any new or additional obligations such as emission limits or control requirements on affected sources.” IEPA’s Statement of Reasons (SR) at 15. The proposal does not change emission limits or a source’s obligation to comply with them. The Board considered the economic reasonableness of those underlying rules when it adopted them. IEPA “does not interpret or implement the [startup, shutdown, or malfunction (SSM) rules] to provide any type of exemption from applicable limitations.” SR at 6. IEPA’s proposal affects only a sources’ ability to request and obtain a prima facie defense that it may use if an enforcement action results from exceeding emission limits during an SSM event.

IEPA commented that it has always had authority to initiate an enforcement action against a source that exceeds emission limits during an SSM event. It added that it would continue considering these exceedances on a case-by-case basis as it has done in the past, including cases involving SSM permit provisions.

Based on all these factors in considering rules “required to be adopted,” the Board correctly concluded that its second-notice proposal is economically reasonable.

The Joint Committee on Administrative Rules (JCAR) correctly notes that, on December 16, 2022, the Board’s Chair, Barbara Flynn Currie, requested that the Department of Commerce and Economic Opportunity (DCEO) perform an economic impact study of this proposal. Section 27(b) of the Environmental Protection Act (415 ILCS 5/27(b)) requires that the Board make this request. In turn, DCEO “may within 30 to 45 days of such request produce a study of the economic impact of the proposed rules.” 415 ILCS 5/27(b)(1). Chair Currie specifically requested that DCEO respond by January 27, 2023, so that the study could be addressed by participants at the hearing scheduled for February 16, 2023.

Section 27(b) provides only that DCEO “may” produce a requested economic impact study. To date in this docket, the Board has not received from DCEO either a study or an explanation for not producing one. As a fellow agency, the Board clearly understands that requests of this nature might place heavy demands on resources, including staff time. DCEO has not for some time granted a Board request to perform an economic impact study of a rulemaking proposal.

The Board wishes to stress that it would of course provide to JCAR a copy of an economic impact analysis prepared by DCEO’s Business Assistance Office. Because it has not received one, the Board can only conclude that the office did not receive a request to perform one as provided by Section 5-30(c) of the Illinois Administrative Procedure Act (5 ILCS 100/5-30(c)) and exercised its discretion under that provision to conclude that one was not warranted. The Board requested four months ago that DCEO conduct a study, and it lacks authority to compel DCEO to perform one.

- (b) If an economic effect is predicted, please briefly describe how the effect will occur.

N/A

- (c) Will the rulemaking have an indirect effect that may result in increased administrative costs? Will there be any change in requirements such as filing, documentation, reporting or completion of forms? Compare to current requirements.

No increased administrative costs are anticipated.

SECOND NOTICE CHANGES

AGENCY: Pollution Control Board

RULEMAKING: Alternative Control Strategies (35 Ill. Adm. Code 202; 46 Ill. Reg. 20638)

1. In line 81, strike "which" and add "that".
2. In line 88, after "condition" add a comma.
3. In line 110, strike "which" and add "that".

SECOND NOTICE

- 1) Agency: Pollution Control Board
- 2) Title and Administrative Code Citation: Visible and Particulate Matter Emissions, 35 Ill. Adm. Code 212
- 3) Date and Citation to Illinois Register: December 30, 2022; 46 Ill. Reg. 20644
- 4) Text and Location of any Changes from First Notice: See Attachment A.
- 5) Response to Codification Recommendations: No changes were requested by the Secretary of State.
- 6) Incorporations by Reference: None.
- 7) Final Regulatory Flexibility Analysis:
 - A) Summary of Issues Raised by Small Business: No issues were raised by small businesses during first notice.
 - B) Description of Actions and Alternatives Proposed by Small Business during First Notice: No actions or alternatives were proposed by small businesses during first notice.
- 8) Compliance with Section 5-30 of the APA and 1 Ill. Adm. Code 220.285: The Board placed the proposal on the Board's website: pcb.illinois.gov. The Board also notified the public through publication in the *Illinois Register*. The Board did not receive a comment from the Small Business Office.
- 9)
 - A) List of Commenters: In this rulemaking (docket R23-18), the Board received public comment from C23D32 (twice), the Illinois Environmental Regulatory Group (IERG), the Illinois Manufacturers' Association (IMA), the Joint Committee on Administrative Rules (JCAR), the Chemical Industry Council of Illinois (CICI), Citizens Against Ruining the Environment (CARE), the Glass Packaging Institute (GPI), Sierra Club, the Illinois Association of Aggregate Producers (IAAP), the Illinois Attorney General's Office (AG), Dynegy Midwest Generation (Dynegy), the American Petroleum Institute (API), and the Illinois Environmental Protection Agency (IEPA).
 - B) Issues Raised and Board Analysis:

Issues Raised: (1) the eligibility of this proposal for "fast-track" rulemaking procedures; (2) the perceived delay in the filing of this proposal; (3) the availability of alternative standards during startup, shutdown, or malfunction

(SSM); (4) IEPA's pre-filing outreach; (5) the immediate application of the rules to existing permitted sources; and (6) the Department of Commerce and Economic Opportunity (DCEO) not responding to the Board's request for an economic impact study of this proposal.

C23D32 (PC 1). In its comment, C23D32 described itself as "a private and anonymous watchdog group that monitors IEPA leadership behaviors and action for abuse and corruption of authority." PC 1 at 1. It added that it "exists to expose incompetency and dishonesty and examine the outcome of such behavior to impose change to an Agency fraught with corrupt and unethical behavior." *Id.*

C23D32 argued that IEPA had not complied with requirements for the statutory fast-track process. PC 1 at 1. It questioned the amount of time that passed from the United States Environmental Protection Agency (USEPA) 2015 State Implementation Plans (SIP) Call until IEPA's proposal. PC 1 at 2. It also questioned whether IEPA's proposal will result in increased emissions, noting that USEPA has developed alternative emission standards to address SSM events. PC 1 at 4-5.

C23D32 concluded that, "[b]ecause this rule is based on nothing more than some bureaucrat[']s opinion that was likely influenced by narrow-minded IEPA leadership toward unpreparedness rather than consideration for the community this rulemaking must be pulled off notice, fixed, and refiled at a later date to do the right thing." PC 1 at 5.

IERG (PC 2). IERG commented that it "strongly opposes Illinois EPA's proposal to remove the startup and malfunction/breakdown ('SMB') provisions without adding new language to the Board's rules for alternative limits and/or work practice standards that apply during period of SMB." PC 2 at 1. IERG argued that IEPA has been able since USEPA's 2015 SIP Call to propose revised rules. PC 2 at 3. IERG added that it opposes fast-track procedures for considering the proposal. *Id.*

In an attached letter it had submitted to IEPA during outreach to stakeholders, IERG stated that it "recognizes that time is short with the SIP Call deadline of August of 2023 for Illinois to submit SIP revisions." PC 2, Exh. 1 at 6. IERG stated that it "is preparing further information for the Board's consideration on alternative limits and work practice standards that apply during periods of startup, shutdown, malfunction, and breakdown as well as additional provisions to allow affected sources to maintain ongoing compliance." PC 2 at 4.

IMA (PC 3). IMA commented that it opposes IEPA's proposal. PC 3 at 1. IMA also commented that, although IEPA "had considerable time to produce the rule and do outreach to the regulated community, very little feedback or outreach has been done." *Id.*

Although IMA lamented that regulated entities had not had a meaningful opportunity to participate in developing an approach to SSM, it acknowledged that it “is aware and is sensitive to the fact that the federal rule includes the threat of imposing sanctions against Illinois for failing to meet the specified deadline.” PC 3 at 1.

IMA also stated that it was “shortsighted” for IEPA to propose removing SSM provisions “without further providing operational standards during these special events.” PC 3 at 1.

JCAR (PC 4). In addition to suggesting 20 changes to the first-notice proposal, JCAR asked “why did the Agency and the Board fail to address this problem in 2015 when USEPA first required it?”

CICI (PC 5). CICI stated that its members “are opposed to IEPA proposed revisions to startup, shutdown, malfunction, and breakdown.” PC 5 at 2. CICI commented specifically on the importance of SSM provisions to selective catalytic reduction (SCR), a system for addressing nitrogen oxides (NO_x) that is typically employed by chemical production units and boilers. PC 5 at 1-2.

CICI commented that, “[w]ith the SIP Call deadline approaching, we understand that there is a short timeline for Illinois to submit their SIP revisions by August 2023 to USEPA.” PC 5 at 2. CICI added that lack of timing should not prevent hearing the positions of regulated entities. CICI offers “continued support and interest in the development and implementation of solutions related to the SIP Call proposed rule.” *Id.*

CARE (PC 6). CARE stated that it is a not-for-profit organization representing persons in Will County. PC 6 at 1. It added that it has “participated in permit proceedings and permit appeals challenging the application of startup and shutdown exemptions.” *Id.*

CARE commented that it generally supports IEPA’s proposal, and it “endorses the use of fast track rulemaking.” PC 6 at 2.

CARE questioned how IEPA would implement the proposed rules so that they are immediately enforceable against existing permit holders. PC 6 at 2-3.

GPI (PC 7). GPI commented on the importance of SSM provisions to its members. PC 7 at 1. It stated that removing these provisions may require its members to shut down completely when an SSM event occurs, with significant consequences for their plants and operations. *Id.*

GPI requested that the Board not proceed with the proposed amendments. PC 7 at 2. It added that it is willing to work with IEPA and other regulated entities on revising the SSM rules. *Id.*

Sierra Club (PC 8). Sierra Club commented that it supports fast-track rulemaking in this proceeding. PC 8 at 1. It commented that IEPA should clarify that the revised rules will apply immediately to current permit holders, regardless of whether sources' existing permits (which may be valid for up to ten years) contain SSM provisions. PC 8 at 2-3.

IAAP (PC 9). IAAP's comment addressed controlling opacity from members' processing equipment during startup and breakdown. It also commented on applying SSM provisions to those events. PC 9 at 2.

IAAP commented that it opposes IEPA's proposal to remove SSM provisions "without adding alternative language in its place to address compliance during what are likely to be inevitable exceedances during SSM events." PC 9 at 3. If the Board moves forward with the proposal, IAAP requested adding specified federal language to address these circumstances. *Id.*

C23D32 (PC 10). C23D32 commented that alternate limits consistent with USEPA's "must be established now." PC 10 at 2. "If the USEPA is writing rules that allows SMB events in their own rules, then a SIP rule must be approvable by the USEPA that mimics their action." *Id.* C23D32 also commented that this rulemaking should wait until DCEO responds to the Board's request for an economic impact study. *Id.*

IEPA (PC 11). IEPA commented that USEPA issued a SIP Call requiring states including Illinois to submit revised SIPs correcting deficiencies in their SSM provisions. PC 11 at 4. IEPA "proposed a very narrow rulemaking, limited to the revisions necessary to address the SIP Call." PC 11 at 6.

IEPA stated that if USEPA does not receive a SIP submission and find it complete by August 11, 2023, mandatory sanctions will be imposed under the Clean Air Act. PC 11 at 6. "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." *Id.*, citing 40 CFR 52.31. "If the deficiencies are still unaddressed six months later, the State will lose highway funding." *Id.*

IEPA recognized criticism of its pre-filing outreach. It commented that this informal outreach is not required, but IEPA nevertheless provided an opportunity to comment on its proposal and considered those comments. PC 11 at 17-18.

IEPA commented that alternative standards should not be adopted in this proceeding because they are not necessary to satisfy the Clean Air Act, have not received sufficient public notice, and may not be approvable by USEPA. PC 11 at 9. IEPA concluded that the Board should proceed with only the amendments it proposed. PC 11 at 30.

API (PC 12). API commented that it opposes IEPA's proposed amendments and supports IERG's proposed alternative standards. PC 12 at 1. It commented specifically on four Illinois refineries that would be affected by IEPA's proposal. PC 12 at 3. API added that if the Board adopts IEPA's proposal to remove these provisions, the Board should also adopt provisions tailored to operations during SMB events. PC 12 at 4.

IERG (PC 13). IERG commented that it opposes IEPA's proposal to remove SMB provisions without proposing alternative standards addressing these events. PC 13 at 1. IERG commented that if the Board proceeds with IEPA's proposal, the Board should also proceed with IERG's proposed alternative standards in Part 216. PC 13 at 4, 9; *see* Pre-Filed Testimony of Kelly Thompson and David R. Wall for IERG at 23-28.

Dynegy (PC 14). Dynegy commented that it opposes IEPA's proposal while adding that Dynegy can support the proposal if it includes alternative opacity standards for Dynegy's coal-fired boilers. PC 14 at 1. Dynegy's comment specifically addressed these proposed alternative standards. PC 14 at 13-26.

AG (PC 15). The AG commented that it supports IEPA's proposal. PC 15 at 1. The AG also commented that it opposes alternative standards proposed by industry, as they lack sufficient support in the record and are not likely to be approved by USEPA. PC 15 at 1-2, 5-13.

In addition, the AG echoed the wishes of CARE and Sierra Club that compliance with the amended rules be required immediately on their effective date, regardless of whether sources' existing permits contain SSM provisions. PC 15 at 13.

Board Analysis: The Board first addresses JCAR's comment, which concerns the perceived delay in the filing of this proposal, an issue raised in other comments. The Board then responds to the other issues raised in comments: the eligibility of this proposal for "fast-track" rulemaking procedures; the availability of alternative standards during SSM; IEPA's pre-filing outreach; the immediate application of the rules to existing permitted sources; and DCEO not responding to the Board's request for an economic impact study of this proposal.

First, as for the perceived delay in the filing of this proposal (PC 1, 2, 4, 11), the Board responded (PC 16) to JCAR (PC 4) first by stressing "the separate statutory roles of IEPA and the Board in proposing and adopting rules required by the federal Clean Air Act, as amended (CAA)." PC 16 at 2.

To address why IEPA did not file its rulemaking proposal earlier, the Board summarized events that had occurred and had not occurred in the executive and judicial branches of the federal government between 2015 and 2022. PC 16 at 3. The summary relied upon matters of public record, including pages 4-12 of

IEPA's Statement of Reasons filed on December 7, 2022; the transcript of the Board's January 19, 2023 hearing; and the *Federal Register* (87 Fed. Reg. 1680-82 (Jan. 12, 2022)). *Id.*

The Board concluded by noting that on January 12, 2022, USEPA published a "Finding of Failure to Submit SIP Revisions," which became effective on February 11, 2022. PC 16 at 3-4. USEPA's Finding of Failure gave 12 states, including Illinois, 18 months to cure the failure by submitting a revision. PC 16 at 4. Although IEPA sought guidance, USEPA advised IEPA that no formal guidance would be provided concerning alternative emission standards and that the only compliance option clearly approvable by USEPA would be removing the offending SSM provisions. *Id.* IEPA prepared a rulemaking proposal, conducted public outreach in November 2022, and filed the proposal with the Board on December 7, 2022. *Id.*

Second, as for this proposal's eligibility for "fast-track" rulemaking procedures (PC 1, 2, 6, 8, 11), Section 28.5 of the Environmental Protection Act (Act) applies to adopting rules proposed by IEPA "and required to be adopted by the State under the Clean Air Act as amended by the Clean Air Act Amendments of 1990) (CAAA)." 415 ILCS 5/28.5(a). The General Assembly in 2021 extended this authority through December 31, 2026. Public Act 102-243 (eff. Aug. 3, 2021). Under Section 28.5, fast-track rulemakings promulgate rules "that the CAAA requires to be adopted," which "refers only to those regulations or parts of regulations for which the United States Environmental Protection Agency is empowered to impose sanctions against the State for failure to adopt such rules." 415 ILCS 5.28.5(b).

If USEPA does not receive a SIP submission and find it complete by August 11, 2023, mandatory sanctions will be imposed under the Clean Air Act. PC 11 at 6. "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 area of the State more difficult for sources." PC 11 at 6, citing 40 CFR 52.31. "If the deficiencies are still unaddressed six months later, the State will lose highway funding." *Id.*

Commenters noted Illinois' August 2023 deadline to adopt rules addressing USEPA's Finding of Failure. Commenters agreed that this provides a strict timeline and recognized the risk of Illinois being sanctioned if it does not meet its deadline. The Board has not failed to register that these commenters disagree with using Section 28.5 procedures to consider and adopt these proposed rules. However, by recognizing the deadline and risk of sanctions, these commenters effectively acknowledge that the SSM revisions are "required to be adopted" under Section 28.5 and eligible for consideration as "fast-track" rules. Moreover, "[w]hen the CAAA requires rules other than identical in substance rules to be adopted, upon request by the Agency, the Board *must* adopt rules under fast-track rulemaking requirements." 415 ILCS 5/28.5(c) (emphasis added).

The Board notes that some commenters, including the AG (PC 15), specifically supported the use of “fast-track” procedures here. The Board also notes that, while Section 28.5(i) allows the Board to consider non-required rules in a second docket under Title VII of the Act, no participant filed a motion requesting that the Board do so.

The Board’s second-notice opinion in this rulemaking (docket R23-18) concluded that IEPA’s filing of its proposal and the Board’s consideration of it are appropriate under the fast-track procedures established in Section 28.5 by the General Assembly. This authority necessitated proceeding to second notice with IEPA’s proposal with limited revisions.

Third, as for alternative standards to address SSM events (PC 1, 2, 3, 5, 7, 9, 10, 11, 12, 13, 14, 15), the Board’s second-notice opinion recognized that many of the comments favored their consideration. In pre-filed testimony, IERG and Dynegy proposed language for alternative standards. The AG maintained, however, that the Board cannot propose these alternative standards for second-notice because the rulemaking record is insufficient as to their impacts on the environment and environmental justice communities; further, their approval by USEPA is unlikely. In its second-notice opinion, the Board agreed that it is appropriate to consider specific alternative standards, and it opened a sub-docket to address them. In doing so, the Board stated that comments submitted in this proceeding (docket R23-18) will be considered in the sub-docket (docket R23-18(A)).

Fourth, as for IEPA’s outreach before filing its proposal (PC 3, 11), the Board has not failed to register the displeasure in comments over IEPA’s pre-filing communication. While the Board recognizes that these communications may generally be productive, no comment suggested that IEPA’s action in this regard had violated any statutory or regulatory requirement. The Board cannot conclude that these comments remove IEPA’s proposal from consideration under Section 28.5, nor can the Board direct IEPA’s pre-filing actions.

Fifth, as for the immediate application of the rules to existing permitted sources (PC 6, 8, 15), while IEPA anticipates changing the permits to remove SSM provisions during the regular course of permit renewal, the amended rules will apply and be enforceable on their effective date. Therefore, on that date, facilities with SSM provisions in their permits must abide by the amended rules, regardless of whether their permits reflect those rules. *See* PC 11.

Finally, as for DCEO not responding to the Board’s request for an economic impact study (PC 10), the Board’s Chair, Barbara Flynn Currie, requested on December 16, 2022, that DCEO perform an economic impact study of this proposal. Section 27(b) of the Act (415 ILCS 5/27(b)) requires that the Board make this request. In turn, DCEO “may within 30 to 45 days of such request produce a study of the economic impact of the proposed rules.” 415 ILCS

5/27(b)(1). Chair Currie specifically requested that DCEO respond by January 27, 2023, so that the study could be addressed by participants at the hearing scheduled for February 16, 2023.

Section 27(b) provides only that DCEO “may” produce a requested economic impact study. To date in this docket, the Board has not received from DCEO either a study or an explanation for not producing one. The Board does not have the authority to compel DCEO to perform an economic impact study.

- C) Change in the Rule: See Attachment A.
- D) Public Hearing Requests: None, but the Board held public hearings on January 19, 2023, and February 16, 2023.

10) Justification and Rationale:

- A) Changes in Statutory Language: None
- B) Changes in Board Policy, Procedures, or Structure: None
- C) Citations to Federal Laws, Rules, or Regulations, or Funding Requirements: None
- D) Court Decisions: None
- E) Other Reasons: This proposal amends 35 Ill. Adm. Code 201, 202, and 212 to remove provisions allowing for advance permission to continue operating during a malfunction or to violate emission limitations during start-up. Removing the provisions is required to comply with USEPA’s findings of deficiencies in the Illinois SIP under the CAA.

This proposal is intended to meet obligations of the State of Illinois under the CAA and was filed under Section 28.5 of the Act (415 ILCS 5/28.5). Section 28.5 of the Act requires the Board to proceed toward adoption of the proposed regulation by meeting a series of strict deadlines.

11) Name of Agency Representative:

Richard McGill
Illinois Pollution Control Board
60 E Van Buren St, Suite 630
Chicago, IL 60605
Richard.McGill@illinois.gov

State Mandates Act Questionnaire

Agency: Pollution Control Board

Part/Title: Visible and Particulate Matter Emissions (35 Ill. Adm. Code 212)

Illinois Register Citation: December 30, 2022, 46 Ill. Reg. 20644

1. Does this rulemaking affect any of the following:

- | | |
|---------------------------------------|--|
| <input type="checkbox"/> Municipality | <input type="checkbox"/> Other Unit of Local Govt. |
| <input type="checkbox"/> County | <input type="checkbox"/> School District |
| <input type="checkbox"/> Township | <input type="checkbox"/> Community College Dist. |

2. Does this rule require any of the above entities to establish, expand or modify its activities in such a way as to necessitate additional expenditures from local revenues?

Yes No X Number of units affected N.A.

If yes, please estimate the amount of additional expenditures necessitated by this rulemaking per unit of government: \$ N.A.

Note: If the dollar amount, or total number of units affected is unknown, please outline and attach to this form an explanation of the steps taken by the agency to determine the approximate expense of the rulemaking, and the number of units affected.

If no, please explain why the rule does not necessitate such additional expenditures.

The Board initiated this rulemaking to propose the removal of several provisions. The Board did not intend to establish, expand, or modify substantive requirements that would affect entities listed above or their expenditures from local revenues.

3. Were any alternatives that do not necessitate additional expenditures considered?

Yes No X

If yes, please list these alternatives and explain why they were rejected.

4. What are the policy objectives of the rulemaking? (Please be specific)

This proposal amends 35 Ill. Adm. Code 201, 202, and 212 to remove provisions allowing for advance permission to continue operating during a malfunction or to violate emission limitations during start-up. The removal of the provisions is required to comply with the United States Environmental Protection Agency (USEPA) findings of deficiencies in the Illinois State Implementation Plan under the Clean Air Act (CAA) 42 U.S.C. §4701, et seq.

This proposal is intended to meet obligations of the State of Illinois under CAA and was filed pursuant to Section 28.5 of the Act (415 ILCS 5/28.5(2020)). Section 28.5 of the

Act requires the Board to proceed toward adoption of the proposed regulation by meeting a series of strict deadlines.

5. Please explain why the policy objectives of this rule cannot be achieved in the absence of the rule or through a rule that does not create a State Mandate.

**AGENCY ANALYSIS OF ECONOMIC AND
BUDGETARY EFFECTS OF PROPOSED RULEMAKING**

Agency: Pollution Control Board

Part/Title: 35 Ill. Adm. Code 212: Visible and Particulate Matter Emissions

Illinois Register Citation: December 30, 2022, 46 Ill. Reg. 20644

Introduction:

1. Anticipated effect on State expenditures and revenues.

(a) Current cost to the agency for this program/activity.

Unknown, as the Board does not break its costs down by case type or program.

(b) If this rulemaking will result in an increase or decrease in cost, specify the fiscal year in which this change will first occur and the dollar amount of the effect.

N/A.

(c) Indicate the funding source, including Fund and appropriation lines, for this program/activity.

N/A.

(d) If an increase or decrease in the costs of another State agency is anticipated, specify the fiscal year in which this change will first occur and the estimated dollar amount of the effect.

Will this rulemaking have any effect on State revenues or expenditures not already indicated above? Specify effects and amounts.

No such effect expected.

2. Economic effect on persons affected by the rulemaking.

(a) Indicate the economic effect and specify the persons affected:

In considering these rules, which are “required to be adopted,” the Board’s second-notice opinion (docket R23-18) addressed the economic reasonableness of the proposal. The Board reviewed the record, including the Illinois Environmental Protection Agency (IEPA) Statement of Reasons and the transcript of the January 19, 2023 hearing.

IEPA asserted that its required amendments are economically reasonable because they “do not impose any new or additional obligations such as emission limits or control requirements on affected sources.” IEPA’s Statement of Reasons (SR) at 15. The proposal does not change emission limits or a source’s obligation to comply with them. The Board considered the economic reasonableness of those underlying rules when it adopted them. IEPA “does not interpret or implement the [startup, shutdown, or malfunction (SSM) rules] to provide any type of exemption from applicable limitations.” SR at 6. IEPA’s proposal affects only a sources’ ability to request and obtain a prima facie defense that it may use if an enforcement action results from exceeding emission limits during an SSM event.

IEPA commented that it has always had authority to initiate an enforcement action against a source that exceeds emission limits during an SSM event. It added that it would continue considering these exceedances on a case-by-case basis as it has done in the past, including cases involving SSM permit provisions.

Based on all these factors in considering rules “required to be adopted,” the Board correctly concluded that its second-notice proposal is economically reasonable.

The Joint Committee on Administrative Rules (JCAR) correctly notes that, on December 16, 2022, the Board’s Chair, Barbara Flynn Currie, requested that the Department of Commerce and Economic Opportunity (DCEO) perform an economic impact study of this proposal. Section 27(b) of the Environmental Protection Act (415 ILCS 5/27(b)) requires that the Board make this request. In turn, DCEO “may within 30 to 45 days of such request produce a study of the economic impact of the proposed rules.” 415 ILCS 5/27(b)(1). Chair Currie specifically requested that DCEO respond by January 27, 2023, so that the study could be addressed by participants at the hearing scheduled for February 16, 2023.

Section 27(b) provides only that DCEO “may” produce a requested economic impact study. To date in this docket, the Board has not received from DCEO either a study or an explanation for not producing one. As a fellow agency, the Board clearly understands that requests of this nature might place heavy demands on resources, including staff time. DCEO has not for some time granted a Board request to perform an economic impact study of a rulemaking proposal.

The Board wishes to stress that it would of course provide to JCAR a copy of an economic impact analysis prepared by DCEO’s Business Assistance Office. Because it has not received one, the Board can only conclude that the office did not receive a request to perform one as provided by Section 5-30(c) of the Illinois Administrative Procedure Act (5 ILCS 100/5-30(c)) and exercised its discretion under that provision to conclude that one was not warranted. The Board requested four months ago that DCEO conduct a study, and it lacks authority to compel DCEO to perform one.

- (b) If an economic effect is predicted, please briefly describe how the effect will occur.

N/A

- (c) Will the rulemaking have an indirect effect that may result in increased administrative costs? Will there be any change in requirements such as filing, documentation, reporting or completion of forms? Compare to current requirements.

No increased administrative costs are anticipated.

SECOND NOTICE CHANGES

AGENCY: Pollution Control Board

RULEMAKING: Visible and Particulate Matter Emissions (35 Ill. Adm. Code 212; 46 Ill. Reg. 20644)

1. In line 206, strike "which" and add "that", strike "pursuant to" and add "in compliance with".
2. In line 208, strike "of this Subpart".
3. In line 232, strike "part".
4. In line 233, strike "of this Part".
5. In line 242, strike "of this Part".
6. In line 298, strike the comma.
7. In line 300, strike "one hour" and add "one-hour".
8. In line 303, strike "of this Section".
9. In lines 308-309 and 312, strike "of this Section".
10. In line 316, strike "lbs/ mmbtu" and add "lbs/MMBtu".
11. In lines 318-319 and 322, strike "of this Section".
12. In line 324, delete "must" and add "will".
13. In line 334, strike the period.
14. In line 338, strike "of this Section".
15. In line 352, strike "(10)".
16. In line 356, "(3)".