

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

**IN THE MATTER OF:**

**AMENDMENTS TO 35 ILL. ADM. CODE  
PARTS 201, 202, AND 212**

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**R 2023-018(A)  
(Rulemaking - Air)**

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**NOTICE OF FILING**

To: ALL PARTIES ON THE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board the attached **Dynegy's Response to American Petroleum Institute's Motion for Relief and/or to Clarify**, copies of which are hereby served upon you.

/s/ Sarah L. Lode

Dated: June 22, 2023

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NOW COMES Dynegy Midwest Generation, LLC; Electric Energy Inc.; Illinois Power Generating Company; Illinois Power Resources Generating, LLC; and Kincaid Generation, LLC (collectively, "Dynegy") by their attorneys, pursuant to 35 Ill. Adm. Code 101.500 and the Hearing Officer's December 8, 2022 Order, and submits this Response to the American Petroleum Institute's ("API") Motion for Relief and/or to Clarify (the "Motion"), and states as follows:

**I. Introduction**

In its Motion, API requests that the Board (i) "Delay the effective date of the Final Rule in the original SSM docket (R 23-18) as to persons such as [API] seeking alternative standards in the Subdocket R 23-18A; and/or" (ii) "Clarify and state that the effective date of the Final Rule in the original SSM docket (R 23-18) will be stayed for persons who file for an adjusted standard within 20 days of the effective date pursuant to Section 28.1(e) of the Environmental Protection Act; and/or" (iii) "Clarify and state that the effective date of the Final Rule in the original SSM docket (R 23-18) will be stayed for persons file for a variance within 20 days of the effective date pursuant to Section 38(b) of the Environmental Protection Act; and/or" (iv) "Order the Hearing Officer in Subdocket R 23-18A to expedite consideration of the Proposed Alternative Emissions Standard

request of Movant so that it is effective at the same time that the Final Rule in the original SSM proceeding (R 23-18) becomes effective.”

For the reasons articulated in the Motion, Dynegy supports API’s requests (i) and (iv) to delay the effective date of the Final Rule and to expedite consideration of proposed alternative emissions standards. However, because the plain text of Sections 28.1(f) and 38(b) of the Act unambiguously provides that a rule or regulation will be stayed as to sources that file a petition for an individual adjusted standard or variance within 20 days of the effective date, there is no need for the Board to clarify these provisions. Thus, the Board need not address API’s requests (ii) and (iii) for clarification that the effective date of the Final Rule will be stayed for persons who file for an adjusted standard or variance within 20 days of the effective date.

## **II. The Board Should Decline to Clarify the Relief Arising from Timely Filing of Adjusted Standard Requests.**

It is unnecessary and improper for the Board to clarify that the Final Rule will be stayed as to persons who timely file a petition for an individual adjusted standard because the text of Section 28.1 of the Act is clear on its face. API’s concerns that this exemption may not be available in the context of R23-18 appear to be due to an incomplete reading of the statute.

To begin with, API’s Motion incorrectly refers to Section 28.1(e) of the Act. The stay provisions of Section 28.1(e) explicitly do not apply “to the operation of any regulation . . . adopted by the Board to implement, in whole or in part, the requirements of the federal Clean Air Act[.]”

The relevant paragraph instead is Section 28.1(f), which provides that:

Within 20 days after the effective date of any regulation that implements in whole or in part the requirements of the Clean Air Act, if any person files a petition for an individual adjusted standard in lieu of complying with the regulation, such source will be exempt from the regulation until the Board makes a final determination on the petition. If the regulation adopted by the Board from which the

individual adjusted standard is sought replaces a previously adopted Board regulation, the source shall be subject to the previously adopted Board regulation until final action is taken by the Board on the petition.

Section 28.1(f) of the Act plainly states *any* person who files a timely petition for an adjusted standard following *any* rulemaking implementing Clean Air Act provisions will be exempt as to that *source* from the new provisions while the petition is pending before the Board. The statute further clarifies that in situations where the new regulation replaces a previously adopted regulation (such as in R23-18), the previously adopted regulation will apply during the stay of the new rule. There is no ambiguity and no need for clarification. Where the text of a statute is clear and unambiguous, the Board must “adhere to [the statute’s] plain language and meaning.” *In re Liquidation of Legion Indem. Co.*, 2023 IL App (1st) 211370, ¶ 24, quoting *Lawler v. Univ. of Chicago Med. Ctr.*, 2017 IL 120745, ¶ 12. The Board has previously recognized that Section 28.1(f) is sufficiently clear by adopting the text of the statute unchanged and without clarification into its administrative rules. *See* 35 Ill. Adm. Code § 104.412(b).

API expresses concern that the filing of a timely petition for an adjusted standard may not stay the effect of the Final Rule in R23-18 because “this matter is not an adjusted standard proceeding.” Motion at 10. This concern is unfounded. Section 28.1(f) applies to petitions for adjusted standards following “*any* regulation that implements in whole or in part the requirements of the Clean Air Act[.]” (emphasis added). So long as R23-18 implements federal CAA requirements (which it does), there is no additional requirement that R23-18 be an “adjusted standard proceeding.” The Board may not “depart from the plain language and meaning of the statute by reading into it exceptions, limitations, or conditions that the legislature did not express. *Lawler v. Univ. of Chicago Med. Ctr.*, ¶ 12. There is no need for the Board to clarify that it will

not read additional limitations into Section 28.1(f) because the legislature expressed no limitations in the statute.

### **III. The Board Should Decline to Clarify the Relief Arising from Timely Filing of Variance Requests.**

It is similarly unnecessary for the Board to clarify that the Final Rule will be stayed as to persons who file a timely variance request pursuant to Section 38(b) of the Act. As explained above, the Board does not have discretion to depart from the plain meaning of a clear and unambiguous statute or to read additional exceptions or limitations that the legislature did not express. Section 38(b) provides that “if any person” files a timely petition for a variance from the requirements of a rule or regulation, “the operation of such rule or regulation shall be stayed as to such person pending the disposition of the petition.” Section 38(b) does include an exception for a rule or regulation “which implements . . . a State RCRA, UIC, or NPDES program.” However, the statute explicitly does not include an exception for CAA.

As with Section 28.1(f), the Board adopted the exact text of Section 38(b) into its administrative rules. *See* 35 Ill. Adm. Code 104.200(b)(2). The Board saw no need to expand or clarify upon the stay provisions when it promulgated the procedural rules, and API has not articulated any changed circumstances that would require additional clarification now.

### **IV. Conclusion**

For the reasons stated in API’s Motion, Dynegy requests that the Board grant API’s request to either delay the effective date of the Final Rule in R23-18 as to persons seeking alternative emissions standards in the Subdocket R23-18A, and/or to order the Hearing Officer in Subdocket R23-18A to expedite consideration of proposed alternative emissions standards so that they take effect at the same time as the Final Rule in R23-18. However, given the unambiguous text of the

stay provisions in the Act, Dynegy requests the Board decline API's requests for clarification as to the relief arising from a timely filing of adjusted standard requests or of petitions for variances.

Respectfully submitted,

/s/ Joshua R. More

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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on this 22<sup>nd</sup> day of June, 2023, I have served electronically the attached **Dynegy's Response to American Petroleum Institute's Motion for Relief and/or to Clarify**, upon the individuals on the attached service list. I further certify that my email address is sarah.lode@afslaw.com; the number of pages in the email transmission is 8; and the email transmission took place today before 5:00 p.m.

Respectfully submitted,

/s/ Sarah L. Lode

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