

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**NOTICE OF FILING**

TO: Don A. Brown  
Clerk of the Board  
Illinois Pollution Control Board  
60 E. Van Buren St., Suite 630  
Chicago, Illinois 60605  
[don.brown@illinois.gov](mailto:don.brown@illinois.gov)

**SEE ATTACHED SERVICE LIST**

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board the COMMENT AND REQUEST FOR HEARING OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and APPEARANCE OF CHARLES E. MATOESIAN, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

By: /s/ Audrey L. Walling  
Division of Legal Counsel

DATED: August 14, 2023  
1021 N. Grand Ave. East  
P.O. Box 19276  
Springfield, IL 62794-9276  
(217) 782-5544

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**COMMENT AND REQUEST FOR HEARING OF THE ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY**

In response to the Illinois Pollution Control Board's ("Board") July 6, 2023, Order, the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency") by its attorneys requests two hearings regarding all proposals filed in the above-referenced proceeding and provides the following public comment.

**I. BACKGROUND**

On July 20, 2023, the Board adopted a final rule in R23-18, repealing regulatory provisions that allowed sources to request and the Illinois EPA to approve permitting language that provided sources with a potential affirmative defense should emission limitation violations during startup and malfunction or breakdown ("SMB") result in enforcement. [R23-18 Board Opinion and Order (July 20, 2023)].

On April 6, 2023, the Board ordered that a sub-docket be opened in R23-18(A) to consider proposed alternative emissions standards for startup, shutdown, and malfunction ("SSM") periods. On July 6, 2023, the Board issued an Order setting filing deadlines for the sub-docket consistent with expedited review ("July 6 Order"). The Board indicated that anyone wishing to file a rulemaking proposal for alternative emission standards during SSM periods must do so by August 7. The Board also stated:

By August 14, 2023, anyone, regardless of whether they filed a proposal in this sub-docket, may request that one or more hearings be held in this sub-docket on any proposal filed and otherwise may comment on whether the Act requires one or more hearings to be held in this sub-docket on any proposal filed, including whether any hearing already held in the main docket would satisfy all or part of that requirement, as well as public notice requirements under the Act and the Clean Air Act.

[July 6 Order at p. 6-7].

On August 7, three proposals were filed with the Board seeking rule amendments that would be generally applicable to any subject unit/source, by American Petroleum Institute ("API"), East Dubuque Nitrogen Fertilizers, LLC ("EDNF"), and Illinois Environmental Regulatory Group ("IERG"). API proposes amendments to the carbon monoxide emissions regulations in 35 Ill. Adm. Code Sections 216.103 and 216.104, and amendments to the emissions standard for carbon monoxide in Section 216.361 for catalytic cracking units during startup and hot standby. [API

Statement of Reasons at p. 14-17]. EDNF proposes amendments to nitrogen oxides and opacity standards in Section 217.381 for “new weak nitric acid manufacturing processes.” [EDNF Statement of Reasons at p.1]. IERG proposes amendments to the carbon monoxide emissions regulations in Sections 216.103 and 216.104, and amendments to the emissions standard for carbon monoxide in Section 216.121 for fuel combustion emissions sources during startup and shutdown. [IERG Statement of Reasons at p. 14, 24].

In addition, two proposals were filed for source/unit-specific amendments, one by Dynegy Midwest Generation (“Dynegy”) and Midwest Generation, LLC (“Midwest Generation”) combined, and one by Rain CII Carbon, LLC (“Rain Carbon”). Dynegy and Midwest Generation propose adding to Section 212.124 an exception to the opacity standards in Section 212.122(a) and (b) for certain specified coal-fired boilers at the Baldwin, Kincaid, Newton, and Powerton generating stations during times of startup, malfunction, and breakdown. [Dynegy and Midwest Generation Exhibit 1]. Rain Carbon proposes adding to Section 212.124 an exception to the opacity standards in Section 212.123(a) during startup; proposes amendments to the particulate matter emissions standards in Section 212.322 during startup, malfunction, and breakdown; and proposes adding to Section 215.302 an alternative emission standard for volatile organic materials (“VOM”) in lieu of compliance with Section 215.301 during startup. These proposed amendments regard certain specified kilns at Rain Carbon’s facility in Crawford County. [Rain Carbon Statement of Reasons at p. 4].

## **II. THE ENVIRONMENTAL PROTECTION ACT REQUIRES THAT TWO HEARINGS BE HELD IN R23-18(A)**

### **A. The Agency Requests that Two Hearings Be Held in the R23-18(A) Sub-Docket**

Two hearings are required under both the Environmental Protection Act (Act) and the Board’s regulations. Section 28(a) of the Act states, “No substantive regulation shall be adopted, amended or repealed until after a public hearing within the area of the State concerned. In the case of state-wide regulations hearings shall be held in at least two areas.” [415 ILCS 5/28(a); *See also* 35 Ill. Admin. Code 102.412(a)].

The Board indicated in its July 6 Order that it would combine all proposals that were filed on August 7 into a single proposal that will then be noticed. [July 6 Order at p.5]. As such, the sources impacted by the proposal are located throughout the State. The proposal will impact specified facilities in Randolph, Christian, and Jasper Counties (Dynegy); a specified facility in Tazewell County (Midwest Generation); refineries statewide but currently located in Will, Madison, and Crawford Counties (API); a specified facility in Crawford County (Rain Carbon); facilities with new weak nitric acid manufacturing processes statewide but currently at a facility located in Jo Daviess County (EDNF); and likely thousands of facilities with fuel combustion emission sources in counties across the State (IERG). Given the geographical diversity of the areas of the State involved, and also given that portions of the proposal are statewide, two hearings are required.<sup>1</sup>

<sup>1</sup> The Board’s decision to expedite review in this rulemaking does not alter the Act’s hearing requirements, nor does having two hearings hinder the Board’s ability to expedite.

Further, even if it were not required, two hearings are in the best interest of all participants. The proposals seek changes to several different emissions standards for different pollutants and involve very different groups of sources. The technical support provided to the Board also varies among the individual proposals. The necessity and emissions impact of each of the proposed emissions standards will need to be explored. In the past, the Board has typically held at least two hearings in rulemakings of this breadth and designated different purposes for each (one hearing for testimony and cross examination of rule proponents, one for other participants). Doing so again here will provide the Board and others time to consider the proposals and plumb the various issues and would give public commenters in different areas of the State an opportunity to attend.

Based on the above and consistent with the July 6 Order, the Illinois EPA requests that two hearings be held in this sub-docket. At present, the Agency is unavailable on the following dates: September 25 through 26, October 2 through 9, November 20 through 24, and December 18 through January 2, 2024.

**B. HEARINGS HELD IN R23-18 DO NOT SATISFY PUBLIC NOTICE OR HEARING REQUIREMENTS**

With regard to the rulemaking proposals filed with the Board by API, Dynegy and Midwest Generation, and IERG, the hearings held in R23-18 do not satisfy or partially satisfy the public notice or hearing requirements applicable to this rulemaking. First, for regulatory proposals, the Act requires that at least 20 days prior to a hearing the Board publish notice of the hearing, specify in that notice the purpose of the hearing, and “make available to any person upon request copies of the proposed regulations, together with summaries of the reasons supporting their adoption.” [415 ILCS 5/28(a); *See also* 35 Ill. Admin. Code 102.416]. In R23-18, the public notices published by the Board indicated that the scheduled hearings would regard the Agency’s narrow proposal to repeal specified SMB affirmative defense provisions as required by the United States Environmental Protection Agency (“USEPA”). [See Board’s Certificates of Publication, R23-18]. The first hearing involved the presentation of Agency testimony in support of its proposed repeal. It did not regard the rulemaking proposals at issue in this sub-docket.

For the second hearing testimonies were filed, not seeking revisions to the Agency’s proposal, but rather asking the Board to adopt new emissions standards for opacity and carbon monoxide in various portions of the Administrative Code. These proposed amendments were not part of a rulemaking proposal, were never previously contemplated, were outside the scope of the Agency’s rulemaking proposal, and were outside the scope of the fast-track rulemaking as they were not federally required. The Board’s public notice had not indicated or implied that the second hearing was for the purpose of assessing rule amendments other than those in the Agency’s proposal, and certainly not amendments changing substantive emissions limitations some of which were in Sections, subsections, or Parts of the Code not touched in the Agency’s proposal. Further, neither the new proposed regulations nor summaries of the reasons supporting their adoption were made available to the public 20 days before the hearing as required; they were not made available to the Board or others until 10 days before the second (and last) hearing. Thus, even if some of the rule amendments filed with the Board in this sub-docket are similar to those in the testimonies from

R23-18, they were never the subject of a properly noticed hearing that would satisfy in any aspect the Act's hearing requirements for rulemaking proposals.

Along the same lines, allowing either hearing in R23-18 to satisfy or partially satisfy hearing requirements for the rulemaking proposals in this docket is inconsistent with Section 28(a) of the Act, which contemplates that hearings regarding a regulatory proposal will take place *after* the filing of such proposal with the Board. Regulatory proposals have been filed in this sub-docket. If accepted by the Board as satisfying the requirements of the Act and Board regulations, the Section 28(a) requirement for hearings prior to adoption will be implicated. These proposals were not filed in R23-18, and no Section 28(a) hearing has taken place regarding them. None of the testimonies submitted in R23-18 contained all of the required components of a rule proposal, such as appropriate documentation, adequate technical support, assessment of emissions impact, and identification of impacted sources, nor were any of them accepted or publicly noticed by the Board as rule proposals. These missing components highlight the differences between what can be filed as testimony and what is required in a proposal seeking new rule amendments. The above information is key to any meaningful analysis of proposed changes, particularly those that seek to establish new emissions standards. It also helps form the basis for any cross-examination of witnesses at hearing. Without a rulemaking proposal for participants to review and assess well in advance of a hearing, the hearing is necessarily inadequate to satisfy the Act's Section 28(a) hearing requirements.<sup>2</sup>

Additionally, the motivation of potentially interested parties to participate in R23-18 was potentially very different than in this sub-docket. The R23-18 regulatory proposal was a narrow fast-track rulemaking regarding repeal of SMB affirmative defense provisions only, and it was publicly noticed as such. Here, entities have filed regulatory proposals requesting that emissions standards for opacity and carbon monoxide be changed during SSM periods. With substantive rule amendments and potential emissions consequences at issue, more or different groups and entities may wish to participate or may choose to participate to a greater extent than in R23-18.

In its rule proposal, Dynegy and Midwest Generation argue that hearings on its proposal are not required based on a provision in the Act indicating that, after a hearing on a regulatory proposal, "the Board may revise the proposed regulations before adoption in response to suggestions made at hearing, without conducting a further hearing on the revisions." [415 ILCS 5/28(a); Dynegy and Midwest Generation Statement of Reasons at p. 38-39]. This provision is not implicated in this rulemaking, however, at least not at present. It only eliminates the further hearing requirement in instances where a hearing has already taken place on a regulatory proposal and based on suggestions at that hearing, the Board chooses to revise the proposed regulations before moving forward to adoption, none of which has yet occurred for the regulatory proposals filed here. This provision was not implicated in R23-18 either. As detailed above, the suggestions made at the second hearing in R23-18 did not regard revisions to the proposed regulations at issue in that rulemaking. Some of the suggestions did not even regard the Sections or Parts of the Code

<sup>2</sup> Also, to the extent one or more of these entities have changed or supplemented their prior testimonies with additional information/data and analyses to attempt to satisfy rulemaking requirements, their proposals might differ from what was presented to the Board in R23-18.

under consideration. Even if they had though, the Board did not choose to revise the Agency's proposed regulations prior to adoption.

Under the Act, public notice is not just a matter of informing the public that a rulemaking and hearing are taking place, as suggested in several of the rule proposals; it requires providing the public basic substantive information about what the rulemaking and hearing regard, an opportunity to review the rule amendments that will be considered at the hearing, and an opportunity to review the reasons that support their adoption, all at least 20 days in advance of the hearing. The Board indeed publicly noticed the second hearing on the Agency's proposal in R23-18; that notice did not, however, satisfy any of the above requirements with regard to the proposed rule amendments at issue here. The R23-18(A) sub-docket should allow for thorough, robust consideration of any rulemaking proposals that are accepted by the Board. Hearings are a necessary component of that consideration. No hearing held in R23-18 satisfied the applicable hearing and notice requirements for the rule proposals filed in this docket. Two new hearings are therefore required to take place.

### **III. PUBLIC NOTICE REQUIREMENTS UNDER THE CLEAN AIR ACT**

The Agency often requests that the Board include in its public notice of hearings certain language required by federal regulations for SIP submittals, indicating the Agency's intent to submit the proposed regulations, if adopted, to USEPA for approval as SIP revisions. The Agency typically makes this request after USEPA has performed a pre-review of its proposed revisions and has informally indicated that the regulatory changes are likely approvable into the SIP.

At the time of this filing, the Agency has not had adequate time to evaluate the multiple rule proposals and technical support filed with the Board one week ago. USEPA has likely not reviewed the proposals in full either, has not indicated its position regarding the proposals, and is not likely to do so before the Board notices hearings. Therefore, the Agency cannot indicate at this time whether such proposals, if adopted, will be submitted to USEPA for approval, so it does not wish for statements regarding its intent in this regard to be included in the Board's public notice. The Agency will address federal notice and hearing requirements outside of the Board's proceeding as needed.

Respectfully Submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

By: /s/ Audrey L. Walling  
Division of Legal Counsel

DATED: August 14, 2023  
1021 N. Grand Ave. East  
P.O. Box 19276  
Springfield, IL 62794-9276  
(217) 782-5544

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**APPEARANCE**

The undersigned hereby enters his appearance as an attorney on behalf of the Illinois  
Environmental Protection Agency.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

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

DATED: August 14, 2023

1021 N. Grand Ave. East  
P.O. Box 19276  
Springfield, IL 62794-9276  
(217) 782-5544

**CERTIFICATE OF SERVICE**

I, Audrey L. Walling, Assistant Counsel, caused to be served on this 14th day of August 2023, a true and correct copy of the COMMENT AND REQUEST FOR HEARING OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY and APPEARANCE OF CHARLES E. MATOESIAN upon the persons listed on the Service List via electronic mail or electronic filing, as indicated.

**Don Brown**

Illinois Pollution Control Board  
100 W. Randolph St., Suite 11-500  
Chicago, IL 60601  
[Don.brown@illinois.gov](mailto:Don.brown@illinois.gov)

**Renee Snow**

Illinois Department of Natural Resources  
One Natural Resources Way  
Springfield, IL 62702  
[renee.snow@illinois.gov](mailto:renee.snow@illinois.gov)

**Michael Leslie**

U.S. EPA Region 5  
Ralph H. Metcalfe Federal Building  
77 West Jackson Blvd.  
Chicago, IL 60604  
[Leslie.Michael@epa.gov](mailto:Leslie.Michael@epa.gov)

**David M. Loring**

**Sarah L. Lode**

**Alex Garel-Frantzen**

ArentFox Schiff, LLP  
233 South Wacker Drive, Suite 6600  
Chicago, IL 60606  
[Alex.Garel-Frantzen@afslaw.com](mailto:Alex.Garel-Frantzen@afslaw.com)  
[David.Loring@afslaw.com](mailto:David.Loring@afslaw.com)

**Andrew N. Sawula**

ArentFox Schiff, LLP  
One Westminster Place, Suite 200  
Lake Forest, IL 50045  
[Andrew.Sawula@asflaw.com](mailto:Andrew.Sawula@asflaw.com)

**Timothy Fox**

**Chloe Salk**

Illinois Pollution Control Board  
60 East Van Buren Street, Suite 630  
Chicago, IL 60605  
[Tim.fox@illinois.gov](mailto:Tim.fox@illinois.gov)  
[chloe.salk@illinois.gov](mailto:chloe.salk@illinois.gov)

**Molly Kordas**

**Ann Marie A. Hanohano**

Illinois Attorney General  
69 West Washington Street, Suite 1800  
Chicago, IL 60602  
[Molly.kordas@ilag.gov](mailto:Molly.kordas@ilag.gov)  
[annmarie.hanohano@ilag.gov](mailto:annmarie.hanohano@ilag.gov)

**Jason James**

Illinois Attorney General  
201 West Point Drive, Suite 7  
Belleville, IL 62226  
[Jason.james@ilag.gov](mailto:Jason.james@ilag.gov)

**Joshua R. More**

**Amy Antonioli**

**Samuel A. Rasche**

Arentfox Schiff LLP  
233 South Wacker Drive, Suite 7100  
Chicago, IL 60606  
[Joshua.More@afslaw.com](mailto:Joshua.More@afslaw.com)  
[Amy.Antonioli@afslaw.com](mailto:Amy.Antonioli@afslaw.com)  
[Sam.Rasche@afslaw.com](mailto:Sam.Rasche@afslaw.com)



**Kelly Thompson**

Illinois Environmental Regulatory Group  
215 E. Adams St.  
Springfield, IL 62701  
[kthompson@ierg.org](mailto:kthompson@ierg.org)

**Cantrell Jones**

Environmental Law and Policy Center  
35 E. Wacker Drive, Suite 1600  
Chicago, IL 60601  
[CJones@elpc.org](mailto:CJones@elpc.org)

**Keith I. Harley**

Greater Chicago Legal Clinic, Inc.  
211 West Wacker Drive, Suite 750  
Chicago, IL 60606  
[kharley@kentlaw.edu](mailto:kharley@kentlaw.edu)

**Byron F. Taylor**

**John M. Heyde**

**Alicia Garten**

Sidley Austin LLP  
One South Dearborn  
Chicago, IL 60603  
[bftaylor@sidley.com](mailto:bftaylor@sidley.com)  
[jheyde@sidley.com](mailto:jheyde@sidley.com)  
[agarten@sidley.com](mailto:agarten@sidley.com)

**Faith E. Bugel**

1004 Mohawk Rd.  
Wilmette, IL 60091  
[fbugel@gmail.com](mailto:fbugel@gmail.com)

**Alec Messina**

**Melissa S. Brown**

4340 Acer Grove Drive  
Springfield, IL 62711  
[Alec.Messina@heplerbroom.com](mailto:Alec.Messina@heplerbroom.com)  
[Melissa.brown@heplerbroom.com](mailto:Melissa.brown@heplerbroom.com)

**Mark A. Bilut**

McDermott, Will & Emery  
227 West Monroe Street  
Chicago, IL 60606-5096  
[mbilut@mwe.com](mailto:mbilut@mwe.com)

My e-mail address is [Audrey.L.Walling@illinois.gov](mailto:Audrey.L.Walling@illinois.gov)

The number of pages in the e-mail transmission is 9.

The e-mail transmission took place before 5:00 p.m.

/s/ Audrey L. Walling

Audrey L. Walling  
Assistant Counsel  
Illinois Environmental Protection Agency  
Air Regulatory Unit  
1021 N. Grand Ave. East, P.O. Box 19276  
Springfield, IL 62794-9276  
(217)782-5544  
[Audrey.L.Walling@illinois.gov](mailto:Audrey.L.Walling@illinois.gov)