

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	
AMENDMENTS TO 35 ILL. ADM. CODE)	R22-17
PART 203: MAJOR STATIONARY SOURCES)	(Rulemaking – Air)
CONSTRUCTION AND MODIFICATION,)	
35 ILL. ADM. CODE PART 204: PREVENTION)	
OF SIGNIFICANT DETERIORATION, AND)	
PART 232: TOXIC AIR CONTAMINANTS)	

NOTICE OF FILING

TO: Mr. Don A. Brown, Clerk of the Board Illinois Pollution Control Board 60 East Van Buren Street, Suite 630 Chicago, Illinois 60605 (VIA ELECTRONIC MAIL)	Mr. Daniel Pauley Hearing Officer Illinois Pollution Control Board 60 East Van Buren Street, Suite 630 Chicago, Illinois 60605 (VIA ELECTRONIC MAIL)
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(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board, **ILLINOIS ENVIRONMENTAL REGULATORY GROUP'S MOTION FOR LEAVE TO FILE, INSTANTER, ITS RESPONSE TO THE AGENCY'S FIRST NOTICE COMMENT**, copies of which are hereby served upon you.

Respectfully submitted,
ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

Dated: August 9, 2024

By: /s/ Melissa S. Brown

Melissa S. Brown
N. LaDonna Driver
HEPLERBROOM, LLC
4340 Acer Grove Drive
Springfield, Illinois 62711
Melissa.Brown@heplerbroom.com
LaDonna.Driver@heplerbroom.com
(217) 528-3674

CERTIFICATE OF SERVICE

I, Melissa S. Brown, the undersigned, hereby certify that I have served the attached **ILLINOIS ENVIRONMENTAL REGULATORY GROUP'S MOTION FOR LEAVE TO FILE, INSTANTER, ITS RESPONSE TO THE AGENCY'S FIRST NOTICE COMMENT** on August 9, 2024, to the following:

Don A. Brown
Clerk of the Board
Illinois Pollution Control Board
60 East Van Buren Street, Suite 630
Chicago, Illinois 60605
don.brown@illinois.gov

Daniel Pauley
Hearing Officers
Illinois Pollution Control Board
60 East Van Buren Street, Suite 630
Chicago, Illinois 60605
Daniel.Pauley@illinois.gov

Sally Carter
Assistant Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
PO Box 19276
Springfield, Illinois 62794
Sally.Carter@illinois.gov

Kathryn Pamenter
Assistant Attorney General
Jason James
Assistant Attorney General
69 West Washington Street, Ste 1800
Chicago, Illinois 60602
Kathryn.Pamenter@ilag.gov
Jason.James@ilag.gov

Renee Snow
General Counsel
Illinois Department of Natural Resources
One Natural Resource Way
Springfield, Illinois 62702-1274
Renee.Snow@illinois.gov

Deborah Williams
Regulatory Affairs Director
City of Springfield
800 East Monroe
Springfield, Illinois 62757
Deborah.Williams@cwlp.com

Trejahn Hunter
Illinois Environmental Regulatory Group
215 East Adams Street
Springfield, Illinois 62701
thunter@ierg.org

That my email address is Melissa.Brown@heplerbroom.com

That the number of pages in the email transmission is 13.

That the email transmission took place before 5:00 p.m. on the date of June August 9, 2024.

Date: August 9, 2024

/s/ Melissa S. Brown
Melissa S. Brown

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ILLINOIS ENVIRONMENTAL REGULATORY GROUP’S MOTION FOR LEAVE TO FILE, INSTANTER, ITS RESPONSE TO THE AGENCY’S FIRST NOTICE COMMENT

The ILLINOIS ENVIRONMENTAL REGULATORY GROUP (“IERG”), by and through its attorneys, pursuant to Sections 102.402 and Section 101.500 of the Illinois Pollution Control Board’s (“Board”) procedural regulations, 35 Ill. Adm. Code 102.402 and 101.500, respectfully requests leave to file, instanter, its Response to the Illinois Environmental Protection Agency’s (“Agency” or “Illinois EPA”) First Notice Comment. In support of this Motion for Leave, IERG states as follows:

1. On April 18, 2024, the Board issued an Order proposing for First Notice the proposed amendments to 35 Ill. Adm. Code Parts 201, 202, 203, 204, and 232. The First Notice version of the proposed rules was published in the *Illinois Register* on May 3, 2024. 48 Ill. Reg. 6330, 6554.

2. On May 3, 2024, the United States Environmental Protection Agency (“USEPA”) published in the Federal Register a proposed rule to amend the federal New Source Review regulations. *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Regulations Related to Project Emissions Accounting*, 89 Fed. Reg. 36870 (May 3, 2024). The proposed rule proposes to amend the Project Emissions Accounting (“PEA”) language in both the Nonattainment NSR and Prevention of Significant Deterioration (“PSD”)

rules to require that decreases accounted for in Step 1 of the significant emissions increase calculation be enforceable. The proposed amendments also revise the definition of the term “project” to include criteria for determining the scope of a project that may be subject to the major NSR regulations. Lastly, the proposed amendments revise monitoring, recordkeeping, and reporting provisions.

3. First Notice comments in this rulemaking were due by June 17, 2024. 48 Ill. Reg. 6554 (May 3, 2024).

4. On June 17, 2024, IERG, Illinois EPA, and the Attorney General’s Office (“AGO”) filed their First Notice comments with the Board.

5. In the AGO’s First Notice Comment, the AGO argued that the Board should “pause this rulemaking until USEPA finalizes the revised PEA Rule or decides not to revise the existing rule.” First Notice Comment of the Illinois Attorney General’s Office, PCB R 22-17, at 1, 4 (June 17, 2024).

6. In IERG’s Comment, IERG urged the Board to move its proposed amendments to Second Notice and explained that the Board’s proposed amendments at First Notice are consistent with the currently applicable federal regulations. As to USEPA’s recently proposed amendments, IERG argued against any further delays in the rulemaking in order to wait for USEPA’s proposed rule to be finalized, if it is ultimately finalized.

7. In the Agency’s Comment, among other comments, the Agency recommended that “Part 203 (and Part 204) be consistent with USEPA’s recent regulatory activity, i.e., USEPA’s proposed rule addressing Regulations Related to Project Emissions Accounting, 89 Fed. Reg. 36870 (May 3, 2024).” Illinois EPA’s Comments Regarding the First Notice Version of the Proposed Rule, PCB R 22-17, at 19 (June 17, 2024).

8. Section 101.500(c) of the Board's rules provides that "[m]otions may be filed at any time unless otherwise specifically provided." 35 Ill. Adm. Code 101.500(c).

9. IERG is requesting leave to file a Response to the Agency's First Notice Comment because IERG has not had the opportunity to respond to Illinois EPA's position that the Board should adopt language consistent with USEPA's proposed amendments prior to USEPA finalizing the amendments in the event that they are promulgated.

10. IERG does not seek leave for purposes of undue delay and granting leave would not prejudice any participant involved in this rulemaking.

11. IERG's Response to Illinois EPA's First Notice Comment is attached hereto as Attachment 1.

WHEREFORE, for the above and foregoing reasons, the Illinois Environmental Regulatory Group respectfully requests that the Board grant its Motion for Leave to File, Instantly, Its Response to the Agency's First Notice Comment, and accept the attached Response as filed on this date.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP

Dated: August 9, 2024

By: /s/ Melissa S. Brown
One of Its Attorneys

N. LaDonna Driver
Melissa S. Brown
HEPLERBROOM, LLC
4340 Acer Grove Drive
Springfield, Illinois 62711
LaDonna.Driver@heplerbroom.com
Melissa.Brown@heplerbroom.com
(217) 528-3674

Trejahn Hunter
Illinois Environmental Regulatory Group
215 East Adams Street
Springfield, Illinois 62701
thunter@ierg.org

ATTACHMENT 1

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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**ILLINOIS ENVIRONMENTAL REGULATORY GROUP’S
RESPONSE TO THE AGENCY’S FIRST NOTICE COMMENT**

The ILLINOIS ENVIRONMENTAL REGULATORY GROUP (“IERG”), by and through its attorneys, pursuant to Sections 102.402 and Section 101.500 of the Illinois Pollution Control Board’s (“Board”) procedural regulations, 35 Ill. Adm. Code 102.402 and 101.500, hereby files its Response to the Illinois Environmental Protection Agency’s (“Agency” or “Illinois EPA”) First Notice Comment.

I. Background

On April 18, 2024, the Board issued an Order proposing for First Notice its proposed amendments to 35 Ill. Adm. Code Parts 201, 202, 203, 204, and 232. The First Notice version of the proposed rules was published in the Illinois Register on May 3, 2024. 48 Ill. Reg. 6330, 6554. In its First Notice Opinion, the Board denied the Motion for Stay filed by the Attorney General’s Office (“AGO”) relating to the potential amendments to the Project Emissions Accounting (“PEA”) Rule. First Notice Opinion and Order, PCB R 22-17 at 7 (Apr. 18, 2024). In the First Notice Opinion, the Board also noted that, on February 22, 2024, the United States Environmental Protection Agency (“USEPA”) issued a pre-publication proposal relating to amendments to the PEA Rule and amendments to the definition of “project.” *Id.* The Board invited participants to file comments explaining their positions on whether the Board should

proceed to Second Notice, as well as comment on any implications of the pre-publication proposal. *Id.*

On May 3, 2024, USEPA's proposed amendments were published in the Federal Register. *PSD and NNSR: Regulations Related to Project Emissions Accounting*, 89 Fed. Reg. 36870 (May 3, 2024). USEPA's proposed rule proposes to amend the PEA rule language in both the Nonattainment NSR and Prevention of Significant Deterioration ("PSD") rules to require that decreases accounted for in Step 1 of the significant emissions increase calculation be enforceable. The proposed amendments also propose to revise the definition of the term "project" to include criteria for determining the scope of a project that may be subject to the major NSR regulations. In sum, USEPA's proposed amendments would expand on the definition of "project" as "a discrete physical change in, or change in the method of operation of, an existing major stationary source, or a discrete group of such changes (occurring contemporaneously at the same major stationary source) that are substantially related to each other. Such changes are substantially related if they are dependent on each other to be economically or technically viable." USEPA's proposal also proposes to revise recordkeeping and reporting provisions in the "reasonable possibility" provisions.

On June 17, 2024, the Agency filed its Comment in response to the First Notice rulemaking. *Illinois EPA's Comments Regarding the First Notice Version of the Proposed Rule, PCB R 22-17, P.C. #19* (June 17, 2024). In its Comments as related to USEPA's recent proposal, Illinois EPA proposed that Part 203 and Part 204 be consistent with USEPA's May 3, 2024 proposed amendments. *Id.* at 19-20. The Agency also offered to provide proposed language for the Board's review if the Board decided that it would be appropriate for Part 203 and Part 204 to be updated consistent with USEPA's recent proposal. *Id.* Illinois EPA stated that USEPA's

proposed amendments would increase the stringency of its NSR rules as compared to the current rules. *Id.* at 20. Illinois EPA argued that it would be more efficient for the Board to address the proposed amendments now rather than by means of a new regulatory proposal in the event USEPA's proposal becomes final. *Id.* Illinois EPA further stated that, "[i]n the event USEPA's proposal does not become final, a revised Part 203 incorporating updated regulations related to PEA would be approvable by USEPA. Implementation of more stringent rules has been recognized by USEPA as satisfying the requirements of the CAA and 40 CFR 51.165." *Id.*

II. The Board should not adopt USEPA's recently proposed amendments at this time.

The Board should not adopt language in this rulemaking that is based on USEPA's May 2024 proposed rule. If USEPA decides to finalize the proposed rule, by the time the final rule is issued, it is likely that the language will differ from the language included in the proposed rule. The proposed amendments were published in the Federal Register on May 3, 2024 and public comments were required to be filed by July 2, 2024. There were 37 comments filed, about 30 of which either oppose or express concerns with the proposed rule language, seek clarification on the proposed rule language, propose revisions, and/or respond to USEPA's request for comments on the specific issues addressed above.¹ For example, as to the opposition to the proposed amendments, numerous commentors expressed concern as to the proposed amendments to the definition of "project." Several commentors disagree with the basis for the proposed amendments to the definition (avoiding New Source Review obligations by selectively aggregating or disaggregating projects) and that the proposed amendments will lead to additional confusion and more burdensome requirements. Commenters also expressed opposition to the proposed

¹ Comments are publicly available at <https://www.regulations.gov/docket/EPA-HQ-OAR-2022-0381/comments?sortBy=postedDate>. The comments include several from state agencies, including, for example, the Minnesota Pollution Control Agency.

amendment that would require emissions decreases under Step 1 to be legally and practicably enforceable, arguing that the proposed amendment is unnecessary, overly burdensome, and inconsistent with the New Source Review program.

Given the opposition and/or proposed revisions addressed in the comments filed, it is more likely than not that the proposed rule language will change by the time it is finalized, if it is finalized at all. There are instances where USEPA has proposed amendments to its regulations which were never ultimately promulgated.² Additionally, the majority of USEPA's rulemakings, including New Source Review rulemakings, result in rule language being promulgated that is different than the rule language initially proposed.³ Moving forward with adopting the proposed rule language will likely result in language that is different than the final federal rule language.

IERG acknowledges that Illinois has the authority to adopt state regulations that are more stringent than the federal regulations. However, it will not be clear how stringent the federal amendments will be until they are finalized. Additionally, USEPA has already initiated the rulemaking on the proposed amendments and accepted comments on the proposal. As explained more below, IERG believes it would be prudent and a better use of the Board's and participants' resources to initiate a separate regulatory action to incorporate USEPA's amendments that make the NSR more stringent if and when they are finalized. As explained in IERG's prior filings in this rulemaking, once Part 203 is updated to be up to date with the current federal NA NSR regulations, any future updates to Part 203 will be a more efficient process.

² See, e.g., *Proposed Rule, Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation; Reconsideration*, 75 Fed. Reg. 19567 (April 15, 2010).

³ See, e.g., fn 4; see also recent examples of non-NSR rulemakings: Final Rule, *Per- and Polyfluoroalkyl Substances National Primary Drinking Water Regulation*, 89 Fed. Reg. 32532 (Apr. 26, 2024); Final Rule, *NSPS for SOCM I and NEHAP for SOCM I and Group I & II Polymers and Resins Industry*, 89 Fed. Reg. 42932 (May 16, 2024); Final Rule, *Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act; Safer Communities by Chemical Accident Prevention*, 89 Fed. Reg. 17622 (March 11, 2024).

If the Board determines that Illinois EPA should propose language consistent with USEPA's proposed amendments, IERG requests that the Board require Illinois EPA to submit a robust justification in support of adopting the proposed rule language, including technical feasibility and economic reasonableness for compliance with the proposed language. If Illinois EPA is advocating for certain language consistent with USEPA's proposed amendments regardless of whether the proposed amendments are finalized, or finalized with different language, then Illinois EPA should be required to provide an independent justification for such language. Given this, along with the time and effort needed for Illinois EPA to consult with USEPA on any proposed language (assuming USEPA would be willing to consult on language prior to taking final action with respect to the proposed amendments to the federal blueprint), adopting language consistent with USEPA's proposed amendments would not result in a more efficient use of time as opposed to initiating a separate rulemaking if USEPA decides to finalize its proposed amendments. Additionally, if the Board proceeded to adopt language that is consistent with USEPA's proposed rules and, if USEPA finalizes the rule with language that differs from the proposed rule language, it is possible that an entity may decide to initiate a rulemaking to revise Parts 203 and 204 consistent with USEPA's finalized rule language. This would result in a subsequent rulemaking in addition to the added efforts expended by Illinois EPA, the Board, and participants in finalizing language consistent with USEPA's proposed rule in this rulemaking.

III. The Board should not delay moving its proposed amendments to Second Notice.

As explained in IERG's Comment, IERG urges the Board to move its proposed amendments to Second Notice. The Board should not delay or pause this rulemaking until USEPA issues a final rule based on its May 2024 proposal. If USEPA decides to issue a final

rule, it is unclear when such final action will take place. As noted above, there are numerous comments that express concerns about and suggest revisions to the proposal. It will take time for USEPA to evaluate those issues and make any revisions or, at the very least, draft responses to each of the comments.

Furthermore, if the Board were to decide over IERG's objection that it would be appropriate to move forward with incorporating USEPA's proposal (without waiting for it to be finalized) into Part 203 and Part 204, the Agency noted that it would be willing to submit proposed language for the Board's review. Illinois EPA's Comments, PCB R 22-17, P.C. #19, at 19-20 (June 17, 2024). The Agency stated that it would require time for consultation with USEPA "[g]iven the highly nuanced nature of USEPA's proposed regulations pertaining to project emissions accounting." *Id.* It is unclear how much time would be needed for Illinois EPA's consultation with USEPA before proposing draft language to the Board.

Part 203 has not been updated since 1998 and the Board has agreed that "an update is now prudent." First Notice Opinion and Order, PCB R 22-17 at 7 (April 18, 2024). There have been several updates to the federal regulations that have not been incorporated into Part 203. Also, because Illinois EPA and sources often rely upon USEPA guidance when interpreting and implementing federally derived programs, updating Part 203 will bolster consistency in the application of USEPA's guidance documents. In addition to mirroring the federal language, the proposed amendments to Part 203 also track, when possible, the language and regulatory structure of the PSD rules at Part 204. Consistency in the language and regulatory scheme between the Board's NA NSR regulations and PSD regulations is valuable especially because regulated entities in nonattainment areas may likely be required to go through both a PSD analysis and NA NSR analysis when proposing a project that would trigger NSR review.

Revising Part 203 to be consistent with the language in the federal NA NSR regulations is beneficial to the Illinois EPA, the Board, regulated industries, and third parties. And, as explained previously, the need for an update to Part 203 is even more prudent now given the recently revised PM_{2.5} National Ambient Air Quality Standards. *See* IERG First Notice Comment, PCB R 22-17 at 2-3 (citing Final Rule, *Reconsideration of the NAAQS for Particulate Matter*, 89 Fed. Reg. 16202 (March 6, 2024)). IERG requests that the Board move forward with the proposed amendments without further delay.

IV. Conclusion

For the above and foregoing reasons, IERG respectfully requests that the Board move its proposed amendments to Second Notice. IERG appreciates the opportunity to submit this Response to the Agency's First Notice Comment for the Illinois Pollution Control Board's consideration.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP

Dated: August 9, 2024

By: /s/ Melissa S. Brown
One of Its Attorneys

N. LaDonna Driver
Melissa S. Brown
HEPLERBROOM, LLC
4340 Acer Grove Drive
Springfield, Illinois 62711
LaDonna.Driver@heplerbroom.com
Melissa.Brown@heplerbroom.com
(217) 528-3674

Trejahn Hunter
Illinois Environmental Regulatory Group
215 East Adams Street
Springfield, Illinois 62701
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