

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	R 22-17
AMENDMENTS TO 35 ILL. ADM. CODE)	
PART 203: MAJOR STATIONARY)	(Rulemaking - Air)
SOURCES CONSTRUCTION AND)	
MODIFICATION, 35 ILL. ADM. CODE)	
PART 204: PREVENTION OF)	
SIGNIFICANT DETERIORATION, AND)	
PART 232: TOXIC AIR CONTAMINANTS)	

NOTICE OF FILING

To: Persons on Attached Service List

PLEASE TAKE NOTICE THAT I have on Friday, August 23, 2024, I caused to be filed with the Clerk of the Illinois Pollution Control Board via the "COOL" System, Illinois Attorney General's Office's Objections to the Illinois Regulatory Group's Motion for Leave, *Instantly*, Its Objections to the Agency's First Notice Comments, a true and correct copy of which is attached hereto and hereby served upon you.

KWAME RAOUL
Attorney General
State of Illinois

/s/ Jason E. James
Jason E. James, AAG
Jason E. James
Environmental Bureau
Illinois Attorney General's Office
201 W. Pointe Dr., Suite 7
Belleville, IL 62226
(872) 276-3583
Primary e-mail address: jason.james@ilag.gov

SERVICE LIST

Via Electronic Filing and Email

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

Via Email

N. LaDonna Driver
Melissa S. Brown
HEPLERBROOM LLC
4340 Acer Grove Drive
Springfield, IL 62711
ldriver@heplerbroom.com
Melissa.brown@heplerbroom.com

Via Email

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

Via Email

Renee Snow
General Counsel
Illinois Department of Natural Resources
One Natural Resources Way
Springfield, IL 62702-1271
Renee.Snow@illinois.gov

Via Email

Deborah Williams
City of Springfield
Regulatory Affairs Director
800 E. Monroe
Office of Public Utilities
Springfield, IL 62757
deborah.williams@cwlp.com

Via Email

Sally A. Carter
Assistant Counsel
Illinois Environmental Protection Agency
1021 N. Grand Avenue East
Springfield, IL 62794
Sally.Carter@illinois.gov

CERTIFICATE OF SERVICE

I, Jason E. James, an Assistant Attorney General, do certify that on this 23rd day of August, 2024, I caused to be served the foregoing Notice of Filing and Objections to the Illinois Regulatory Group's Motion for Leave, *Instanter*, Its Objections to the Agency's First Notice Comments, on the parties named on the attached Service List via electronic filing and/or email, as indicated on such Service List.

/s/ Jason E. James

Jason E. James
Assistant Attorney General
Illinois Attorney General's Office
201 W. Pointe Dr., Suite 7
Belleville, IL 62226
(872) 276-3583
Jason.James@ilag.gov

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	R 22-17
AMENDMENTS TO 35 ILL. ADM. CODE)	
PART 203: MAJOR STATIONARY)	(Rulemaking - Air)
SOURCES CONSTRUCTION AND)	
MODIFICATION, 35 ILL. ADM. CODE)	
PART 204: PREVENTION OF)	
SIGNIFICANT DETERIORATION, AND)	
PART 232: TOXIC AIR CONTAMINANTS)	

THE ILLINOIS ATTORNEY GENERAL OFFICE’S OBJECTION TO THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP’S MOTION FOR LEAVE TO FILE, INSTANTER, ITS OBJECTION TO THE AGENCY’S FIRST NOTICE COMMENT

The Illinois Attorney General’s Office, on behalf of the People of the State of Illinois (“People”), pursuant to 35 Ill. Adm. Code 101.500(d) hereby objects to the Illinois Environmental Regulatory Group’s (“IERG”) Motion for Leave to File, Instanter, its Objection to the Agency’s First Notice Comment (Dkt. 23, Aug. 9. 2024) (“Motion”) filed nearly two months after the Board’s First Notice deadline. In addition, IERG’s Response to the Agency’s First Notice Comment, Attachment 1 to the Motion (“Response”), contains no useful new information for the Board. Rather, granting IERG leave to file a tardy comment would prejudice all other participants who have not been afforded the opportunity to engage in another round of public comment.

I. IERG’s Motion Should be Denied as Untimely.

On April 24, 2024, the Board issued proposed regulations for First Notice in the above-captioned rulemaking proceeding that were subsequently published in the Illinois Register. 48 Ill. Reg. 6330, 6554 (May 3, 2024). The Board allowed through June 17, 2024 to comment on the First Notice proposal. On June 17, 2024, the Illinois Environmental Protection Agency (“IEPA”) timely filed its First Notice comment in the above-captioned rulemaking proceeding which, in part, addressed the United States Environmental Protection Agency’s (“USEPA”) proposed

“Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Regulations Related to Project Emissions Accounting.” 89 Fed. Reg. 36870. (May 3, 2024). On August 9, 2024, IERG filed the Motion and Response, which addressed IEPA’s comment. *See* 35 Ill Adm. Code 102.108(d) (“Comments that are not timely filed . . . will not be considered, except . . . to prevent material prejudice.”).

IERG does not explain in the Motion or the Response why it submitted its comment three months after the USEPA published its proposed regulations and nearly two months after IEPA filed its timely comment. Rather, IERG simply contends that it “has not had the opportunity to respond to [IEPA’s] position that the Board should adopt language consistent with USEPA’s proposed amendments” (Motion at ¶ 9.) Yet, IERG could have asked for leave to respond to IEPA’s comment shortly after it was filed. Granting IERG leave to file at this late stage would prejudice all other parties who abided by the Board’s established period for First Notice comments.

II. IERG’s Motion Should be Denied as it Provides No Useful Information to the Board.

IERG’s Motion should also be denied because its Response fails to provide information useful to the Board in determining whether to advance to Second Notice. *See* 35 Ill. Adm. Code 102.100(a) (The purpose of comments is “to guide the Board in its rulemaking process”). IERG claims that USEPA’s final rule will “more likely than not” differ from USEPA’s published proposal (Response at p. 4). However, this statement is not supported by any meaningful examination of USEPA’s preamble to its proposal or discussion of comments to the proposal.

IERG argues that because “about 30 of [the 37 total public comments on USEPA’s proposal] either oppose or express concerns with the proposed rule language,” USEPA will modify its final rule. (*Id.* at 3.) IERG’s faulty implication is completely unsupported—Federal appellate courts have long held that federal agencies cannot base decisions on the number or length of

comments in a rulemaking. (See, e.g., *Public Employees for Env'tl Responsibility v. National Park Service*, 605 F. Supp. 3d 28, 41 (D.C. Cir. 2022), citing *Nat'l Res. Def. Council v. EPA*, 822 F.2d 104 (D.C. Cir. 1987)).

Furthermore, IERG does not meaningfully discuss or directly cite any of the comments that allegedly express concern. For instance, the Illinois Attorney General, along with seven other Attorneys General, submitted a comment that generally supported the proposal but recommended a minor change to how “project” is defined.¹ IERG does not say whether it counted this multistate Attorney General comment among the 30 that allegedly express concern. Nor does IERG explain why four anonymously submitted comments are worth serious consideration by USEPA or the Board.

IERG provides no reasoned basis for its predictions about USEPA’s final rule. The Board should disregard IERG’s broad generalizations about federal rulemakings, vague references to comments to USEPA’s proposed rule, and speculative arguments when considering whether to advance IERG’s proposal to Second Notice.

III. IERG’s Motion Should be Denied, as its Response Repeats Previous Arguments.

IERG’s Motion and Response reprises arguments for immediately advancing its proposal that it has already made several times to the Board. As the People previously discussed, President Biden directed USEPA to evaluate the PEA rule almost immediately after his inauguration. Following that directive, USEPA began work on a revised rule and abandoned defense of the existing rule in court.² Despite USEPA’s clear intention to replace a rule that fails to sufficiently protect the environment, IERG continues to advocate for the Board to rush forward with its

¹ EPA Rulemaking Docket EPA-HQ-OAR-2022-0381-0001, Comment submitted by New Jersey Attorney General Office, *et al.*, at 7 (“States accordingly support EPA’s revised definition of ‘project’ with one caveat”, available at <https://www.regulations.gov/comment/EPA-HQ-OAR-2022-0381-0048>).

² See People’s Pre-Hearing Comment, P.C. #2 to R22-17 (January 4, 2022).

proposal before knowing whether the rules it is considering for adoption will comply with federal law.

IERG has continually moved the goal posts during this rulemaking proceeding. At first, IERG argued that the Board should advance its rulemaking because there was no “indication from USEPA indicating [sic] what, if any, changes USEPA may be proposing to the PEA Rule.”³ Now that USEPA has published its proposal and clearly set out its intended improvements to the PEA Rule, IERG argues that “[t]he Board should not delay or pause this rulemaking until USEPA issues a final rule” Response at 5. Rather than risk adopting rules that could come into conflict with federal law mere weeks or months later, the better use of the Board’s resources—as well as those of the other parties in this matter—would be to wait until USEPA promulgates a final revised PEA rule or opts to retain the existing rule.

Conclusion

The People request that the Board deny IERG’s late Motion to file the Response that provides no useful information. Should the Board consider new regulatory language incorporating USEPA’s proposed or final regulations, IERG will have ample opportunity to comment at that time. Even in its late-filed Motion and Response, IERG provides no reason to advance its proposal to Second Notice while USEPA is actively working to adopt a stronger rule. For the foregoing reasons, the People request that the Board deny IERG’s Motion.

³ IERG’s Pre-First Notice Comment at 5, P.C. #11 in R22-17 (Sept. 12, 2022).

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
by KWAME RAOUL,
Attorney General of the State of Illinois

By: /s/ Jason E. James

Jason E. James

Assistant Attorney General

Illinois Attorney General's Office

201 W. Pointe Drive, Suite 7

Belleville, IL 62226

(872) 276-3583

jason.james@ilag.gov