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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

2520 WEST ILES AVENUE, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276 • (217)782-3397
JB PRITZKER, GOVERNOR JAMES JENNINGS, ACTING DIRECTOR

March 31, 2025

Kimberly Schultz, Executive Director
Joint Committee on Administrative Rules
Illinois General Assembly
700 Stratton Building
Springfield, IL 62706

Sent via email only: KimberlyS@ilga.gov, jcar@ilga.gov

Subject: Comments regarding Illinois Pollution Control Board Rulemaking, R2022-17. In the Matter of Amendments to 35 Ill. Adm. Code 203, Major Stationary Sources Construction and Modification, 35 Ill. Adm. Code 204, Prevention of Significant Deterioration, and 35 Ill. Adm. Code 232, Toxic Air Contaminants

Ms. Schultz,

The Illinois Environmental Protection Agency (Illinois EPA) submits these comments regarding rulemaking proposal R2022-17. In the Illinois Pollution Control Board's (Board) Opinion and Order, dated March 6, 2025 (Board's Order), the Board committed to making certain changes to proposed amendments to Part 203, Major Stationary Sources Construction and Modification, to ensure consistency with the federal blueprint at 40 CFR 51.165. However, not all these changes were made in the Second Notice. In addition, the Illinois EPA now recognizes that, in certain instances, it could have been clearer in prior comments provided to the Board.

Before providing its specific comments on the Second Notice, the Illinois EPA would like to recognize the effort and resources that the Board has committed to revising certain existing provisions of 35 Ill. Adm. Code, that together constitute the state nonattainment new source review (NA NSR) permitting program in Illinois. This rulemaking addresses a highly nuanced permitting program that includes the federal implementing rules, extensive case authorities and interpretative federal guidance that necessarily guide this state rulemaking. The Board's March 6, 2025, Opinion and Order for the Proposed Amendments carefully reviews this regulatory proposal in light of the General Assembly's mandate that the Part 203 rules meet the requirements of the federal Clean Air Act (CAA). This analysis will also assist the Illinois EPA, the regulated community, and the public in its future implementation of the state NA NSR program.

The Rulemaking Proposal

This rulemaking proposal is consistent with the legislative mandate of Section 9.1(c) of the Illinois Environmental Protection Act (Act) which provides that the regulations adopted by the Board to establish a NA NSR program shall meet the requirements of Section 173 of the CAA. This necessarily includes not only the federal blueprint at 40 CFR 51.165 but a forty-year accumulation of case authorities and interpretative guidance that are instructive to the

implementation of the federal new source review (NSR) rules. In addition, Section 3.298 of the Act created a definition of “Nonattainment new source review” or “NA NSR permit” to mean:

a permit or the portion of a permit for a new major source or major modification that is issued by the Illinois Environmental Protection Agency under the construction permit program pursuant to subsection (c) of Section 9.1 that has been approved by the United States Environmental Protection Agency and incorporated into the Illinois State Implementation Plan to implement the requirements of Section 173 of the Clean Air Act and 40 CFR 51.165.

415 ILCS 5/3.298.

Given the interplay between these federal and state law requirements, and after extensive dialogue with United States Environmental Protection Agency (USEPA) staff, the Illinois EPA’s comments to these Proposed Amendments to the state NA NSR program were based largely on case authorities, interpretative guidance and key elements of the program’s regulatory development but also ensuring that the rules meet the requirements in 40 CFR 51.165 for state NA NSR rules to be approved by USEPA. If the text of the proposed rules deviates from this framework, it could presumptively result in a determination by USEPA that these state rules are less stringent than the federal rules. To this end, it is important that any departures from the federal rules be a product of careful deliberation.

The First Notice Version made many grammatical changes to Part 203 as proposed by the proponent and agreed to by the Illinois EPA, including replacing “shall” with the term “must,” “will,” or “may,” replacing “such” with the term “the,” and replacing “in accordance with” with the phrase “according to.” The Illinois EPA subsequently explained to the Board that while these changes might appear inconsequential, many of these changes would substantively alter the proposal in a way that is contradictory to the federal blueprint as it currently exists at 40 CFR 51.165. In doing so, such changes could threaten approval of these Proposed Amendments as part of Illinois’ state implementation plan (SIP). In its First Notice Opinion and Order, dated April 18, 2024, and again in the Board’s Order, the Board recognized these concerns and tailored its decisions accordingly. See, First Notice Opinion and Order, dated April 18, 2024, page 14 and Board’s Order at pages 8-19.

As Part 203 is not consistent with the federal blueprint, and to the extent that the provisions in Part 203 are intended to mirror Part 204, confusion in future implementation could also occur especially where the legal basis for the deviation from the federal blueprint (or existing Part 204) was not elaborated upon by either the proponent in its proposal, the Illinois EPA in its comments to the Board, or by the Board in its final Order adopting the rule. This could prove challenging for the Illinois EPA and permit applicants during permitting and the Board as the review authority for appeals of permits. The Board recognized these concerns when it cited to the proponent’s justification for these Proposed Amendments, stating as follows:

IERG [Illinois Environmental Regulatory Group] notes that “in addition to mirroring the federal language, IERG’s proposed revisions to Part 203 also track, when possible, the language and regulatory structure in the Boards Prevention of Significant Deterioration (“PSD”) regulations at 35 Ill. Adm. Code Part 204.” 2/15/22 IERG Ans. at 2. This consistency, IERG argues, is valuable for regulated entities because they will likely have

to go through both a PSD analysis and NA NSR analysis when proposing a project that would trigger NSR review. *Id.*

First Notice Opinion and Order, dated April 18, 2024, page 18.

Use of the Word “Shall”¹

In the following instances, the Proposed Amendments to Part 203 would deviate from the federal blueprint at 40 CFR 51.165 as it would, in many instances, use a word other than “shall” and, in one instance, would use “shall” in lieu of “may.” To achieve consistency with the federal blueprint as required by the Act, the Illinois EPA recommends that the following sections be revised:

- 35 Ill. Adm. Code 203.1440(b) – Change “may” to “shall” and “will” to “shall” so the following two sentences would read, “In any nonattainment area, no person shall begin actual construction of a new major stationary source or major modification that is major for the regulated NSR pollutant for which the area is designated as nonattainment area under section 107(d)(1)(A)(i) of the CAA (42 USC 7407(d)(1)(A)(i)), except as in compliance with this Subpart and Subpart N. Revisions to this Part which were adopted to implement the CAA Amendments of 1990 shall not apply to any new major stationary source or major modifications for which a permit application was submitted by June 30, 1992, for PM₁₀; by May 15, 1992, for SO₂; or by November 15, 1992, for VOM and NO_x emissions for sources located in all ozone nonattainment areas.” (emphasis added).
- 35 Ill. Adm. Code 203.2330 – Change “shall” back to “may” so that the following sentence would read, “However, a different consecutive 24-month period may be used for each different PAL pollutant.”² (emphasis added).
- Section 203.2360 – Change “will” to “shall” in two instances so the following sentence would read, “Any PAL that is not renewed in accordance with the procedures in Section

¹ In one instance, the Proposed Amendments to Part 203 would deviate from Illinois’ existing SIP. The use of “may” and “will” in proposed Section 203.1440(b) would contradict the use of “shall” in existing SIP-approved Section 203.201.

² As written, the use of the mandatory verb “shall” would require the use of a different 24-month period for each Plantwide Applicability Limitation (PAL) pollutant rather than the use of the permissive auxiliary verb “may” that would merely authorize the use of a different 24-month period for each PAL pollutant. The use of “shall” in this instance would not only contradict the federal blueprint at 40 CFR 40 CFR 51.165(f)(6)(i) but would also contradict the corresponding provision in Section 204.1820(a). Notably, when USEPA established the final regulatory provisions for actuals PALs, USEPA included nearly identical requirements (and language) in the NA NSR rules for nonattainment areas at 40 CFR 51.165(f) and in the PSD rules for attainment areas at 40 CFR 51.166(w) (detailing those requirements that must be included in any SIP submittal for PSD). 67 Fed. Reg. 80186 (December 2002). While USEPA intended the requirements for PALs to generally be the same in attainment and nonattainment areas, the Second Notice Version would include language in Part 203 that would deviate from the language in Part 204 as it now exists for PALs.

203.2370 shall expire at the end of the PAL effective period, and the requirements in this Section shall apply.”³ (emphasis added).

- 35 Ill. Adm. Code 203.2410(b) – Change “will” to “shall” so the following sentence would read, “A report submitted pursuant to 40 CFR 70.6(a)(3)(iii)(B) shall satisfy this reporting requirement.”⁴ (emphasis added).
- 35 Ill. Adm. Code 203.2500 – Change “will” to “shall” so the following sentence would read, “This Subpart shall not apply to a major stationary source or major modification with respect to a particular pollutant if the owner or operator demonstrates that, as to that pollutant, the source or modification is located in an area designated as nonattainment pursuant to section 107 of the CAA (42 USC 7407).” (emphasis added).

Changing the Use of the Word “Such”

In the Proposed Amendments to Part 203, the word “such” was replaced in the text of the proponent’s proposal as previously agreed to by the Illinois EPA. The word “such” is typically used before a noun or a phrase to add emphasis; “such” typically stresses the type previously mentioned in a sentence. *Accord., Cambridge English Dictionary*. Consistent with the federal blueprint, “such” was proposed for use in revised Part 203 to emphasize the same nouns or phrases emphasized in the federal blueprint. The Illinois EPA recommends that “such” be used in each instance that it was replaced in the text of revised Part 203 for clarity and consistency with the federal blueprint. The following section of the Proposed Amendments to Part 203 should be revised to be consistent with the federal blueprint.⁵

- 35 Ill. Adm. Code 203.1210(b) – Change “the” to “such” so the following sentence would read, “The most stringent emissions limitation which is achieved in practice by such class or category of stationary sources.” (emphasis added).

Section 203.100 Effective Dates

The Illinois EPA recommends that the phrase, “the full,” be included in Sections 203.100(a) and (b) to read, in part, “the effective date of the full approval of . . .” (emphasis added). While the Board agreed to make this change, the Board did not include this proposed

³ The use of “will” in this instance would not only contradict the federal blueprint at 40 CFR 51.165(f)(9) but would also contradict the corresponding provision in Section 204.1850 pertaining to PALs.

⁴ The use of “will” in this instance would not only contradict the federal blueprint at 40 CFR 51.165(f)(14)(ii) but would also contradict the corresponding provision in Section 204.1900(b) pertaining to PALs.

⁵ In one instance, the Proposed Amendments to Part 203 would deviate from Illinois’ existing SIP. The use of “the” in proposed Section 203.1810(b)(1) would contradict the use of “such” in existing SIP-approved Section 203.302(a)(1). The Illinois EPA recommends Section 203.1810(b)(1) be revised to change “the” back to “such” so the following sentence would read, “For new major stationary sources or major modifications in ozone nonattainment areas, the ratio of total emissions reductions provided by emissions offsets for VOM or NO_x to total increased emissions of such pollutants shall be at least as follows:” (emphasis added).

language in the Second Notice Version. (Board's Order at page 11). To ensure that any construction permit issued by the Illinois EPA pursuant to a provision in [revised] Part 203 meets the definition of a NA NSR permit in Illinois, the Illinois EPA recommends that Sections 203.100(a) and (b) read, in part, "the effective date of the full approval of . . ." (emphasis added).

It is possible that the USEPA could elect to provide only partial approval of revised Part 203, disapproving it, in part. If the USEPA were to partially approve and partially disapprove revised Part 203 or were to disapprove revised Part 203, such action could cause a conflict with the statutory definition of "NA NSR permit" in Section 3.298 of the Act. Consistent with the mandate of the CAA that requires states to develop and submit SIPs to USEPA for its approval, this definition provides that a state NA NSR permit may only be issued once the state NA NSR program has been approved as part of Illinois' SIP. The CAA's NA NSR requirements are among the requirements that must be addressed in a state SIP. 42 U.S.C. § 7410(a)(2)(C) & (1).

Without the inclusion of the phrase, "the full," Section 203.100 would suggest that a NA NSR permit could be issued consistent with provisions of [revised] Part 203 that had not yet been SIP approved and, yet such permit would meet Illinois' definition of a NA NSR permit. This is not the case. If any part of a construction permit would be issued pursuant to a provision in [revised] Part 203 that had not been approved by the USEPA, this permit would not meet the definition of a NA NSR permit in Illinois.

Section 203.1070 Baseline Actual Emissions

In subsection (d), the First Notice Version used "according to" in lieu of "in accordance with" in two instances. After the Illinois EPA explained that this approach is inconsistent with the usage of "in accordance with" in the federal blueprint, 40 CFR 51.165(a)(1)(xxxv)(D) and the corresponding definition of "baseline actual emissions" in Section 204.240(d), the Board agreed to mirror the federal blueprint. (Board's Order at page 12). While the first "according to" was replaced in the Second Notice, the second "according to" was not. The Illinois EPA recommends that subsection (d) read as follows: "For a PAL for a stationary source, the baseline actual emissions shall be calculated for existing electric utility steam generating units in accordance with the procedures contained in subsection (a), for other existing emissions units in accordance with the procedures contained in subsection (b), and for a new emissions unit in accordance with the procedures contained in subsection (c). (emphasis added).

Section 203.1200 Good Engineering Practice⁶

The Illinois EPA recommends that a reference to Part 51 be included in subsection (a)(2)(A) to read, in part, "preconstruction approvals or permits required under 40 CFR Parts 51 and 52 . . ." (emphasis added). While the Board agreed to include a reference to preconstruction approvals of permits required under 40 CFR Part 51 in addition to Part 52 in the definition of "Good engineering practice," this reference to Part 51 was not included in the language of the Second Notice Version. (Board's Order at page 13). Such change would be consistent with the proposed revision to the corresponding definition of "Good engineering practice" in Section 204.420(a)(2)(A). For stacks in existence on January 12, 1979, an owner or operator could have obtained any necessary preconstruction approvals or permits required under 40 CFR Parts 51 and

⁶ 40 CFR 51.100(ii) and 35 Ill. Adm. Code 204.420.

52. The Illinois EPA requests that the reference to preconstruction approvals or permits required under 40 CFR Part 51 be included in this definition.

Section 203.1340 Regulated NSR Pollutant

The Illinois EPA recommends that the phrase, “NSR are,” be included in subsection (c) to read, “Precursors for purposes of NSR are the following . . .” (emphasis added). While the Board stated it was persuaded by the Illinois EPA’s concern over following the federal blueprint and proposed language that mirrors the federal blueprint, the Second Notice Version proposed language in subsection (c) that would deviate from 40 CFR 51.165(a)(1)(xxxvii)(C). (Board’s Order at page 14). The Illinois EPA recommends that subsection (c) read, in part, “Precursors for purposes of NSR are the following . . .” (emphasis added)

Section 203.2350 Effective Period and Reopening a PAL Permit

Section 203.2350 would provide 10 years as the effective period for a PAL in subsection (a) and specifies the conditions in subsection (b) under which the Illinois EPA must or may reopen a PAL permit. Relevant to this discussion is the language of subsection (b)(2)(C) where the Second Notice Version made, without accompanying explanation, what might appear to be inconsequential changes to Section 203.2350(b)(2)(C).⁷ Such changes may unnecessarily delay SIP-approval and create unnecessary confusion in future implementation of Section 203.2350(b)(2)(C). For consistency with the federal blueprint at 40 CFR 51.165(f)(8)(ii)(B)(3) and the same PAL requirement in 35 Ill. Adm. Code 204.1840(b)(2), the Illinois EPA requests that Section 203.2350(b)(2)(C) read as follows:

- 2) The Agency shall have discretion to reopen the PAL permit for the following:

- C) Reduce the PAL if the Agency determines that a reduction is necessary to avoid causing or contributing to a NAAQS violation ~~or to a violation of an ambient air increment established in Subpart D of 35 Ill. Adm. Code 204~~, or PSD increment violation, or to an adverse impact on an air quality related value that has been identified for a Federal Class I area by a Federal Land Manager and for which information is available to the general public.

⁷ In addition, the Proposed Amendments to Part 203 would necessarily address the concept of “increment” earlier in the Proposed Amendments in the definition of “Excessive Concentration” at Section 203.1170 that would state as follows:

For sources subject to this Part, an excessive concentration alternatively means a maximum ground-level concentration due to emissions from a stack due in whole or part to downwash, wakes or eddy effects produced by nearby structures or nearby terrain features that individually is at least 40% in excess of the maximum concentration experienced in the absence of the downwash, wakes, or eddy effects and greater than an ambient air increment under 35 Ill. Adm. Code 204.900.

(emphasis added).

(emphasis added)

Section 203.2410 Reporting and Notification Requirements

While less significant, the Illinois EPA would recommend that the terms “Quality Assurance” or “Quality Control” in subsection (a)(3) be capitalized like the capitalization of the corresponding terms in 35 Ill. Adm. Code 204.1900(a)(3) and the federal blueprint at 40 CFR 51.165(f)(14)(i)(C).

Sincerely,



Sally Carter
Assistant Counsel
Division of Legal Counsel

cc: Don Brown, Illinois Pollution Control Board, Clerk
Service List for R2022-17