

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
AMENDMENT TO 35 ILL. ADM. CODE)
205, EMISSIONS REDUCTION MARKET) R18-22
SYSTEM) (Rulemaking – Air)

NOTICE OF FILING

TO: Don Brown	Tim Fox
Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
100 W. Randolph Street, Suite 11-500	100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601	Chicago, Illinois 60601
(VIA ELECTRONIC MAIL)	(VIA ELECTRONIC MAIL)

(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, **POST-HEARING COMMENTS OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP**, on behalf of the Illinois Environmental Regulatory Group, a copy of which is herewith served upon you.

Respectfully submitted,

Dated: July 3, 2018

By: /s/ N. LaDonna Driver
N. LaDonna Driver

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

CERTIFICATE OF SERVICE

I, N. LaDonna Driver, the undersigned, on oath state the following:

That I have served the attached **POST-HEARING COMMENTS OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP**, via electronic mail upon:

Don Brown
Clerk of the Board
Illinois Pollution Control Board
100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601
Don.Brown@illinois.gov

Tim Fox
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601
Tim.Fox@illinois.gov

Annet Godiksen
Dana Vetterhoffer
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
Annet.godiksen@illinois.gov
Dana.vetterhoffer@illinois.gov

Eric Lohrenz
Illinois Department of Natural Resources
One Natural Resource Way
Springfield, Illinois 62702-1271
Eric.Lohrenz@illinois.gov

That my email address is LaDonna.Driver@heplerbroom.com.

That the number of pages in the email transmission is 10.

That the email transmission took place before 5:00 p.m. on the date of July 3, 2018.

/s/ N. LaDonna Driver
N. LaDonna Driver

Date: July 3, 2018

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
AMENDMENT TO 35 ILL. ADM. CODE)
205, EMISSIONS REDUCTION MARKET) R18-22
SYSTEM) (Rulemaking – Air)

**POST-HEARING COMMENTS OF THE ILLINOIS ENVIRONMENTAL
REGULATORY GROUP**

IERG appreciates the opportunity to present testimony at the June 12, 2018 hearing (“Hearing”), and to submit these post-hearing comments for consideration by the Illinois Pollution Control Board (“Board”). In response to a question from Illinois EPA at the Hearing, IERG determined that its members have at least 30 facilities that are ERMS-regulated sources. Thus, many of IERG’s members are affected by the way in which Illinois EPA has proposed to terminate the ERMS program.

At the Hearing, Alec Davis testified regarding IERG’s support for the sunset of the ERMS regulations. However, Mr. Davis also related IERG’s concern regarding the date of the sunset. Specifically, IERG is concerned that Illinois EPA’s cessation of the ERMS program, prior to approval by USEPA as a SIP revision, will create noncompliance. These concerns center on noncompliance with permit and SIP requirements. (Transcript at pp 10, 11 and 14.)

Enforcement vs. Noncompliance

Illinois EPA acknowledged at Hearing that ERMS is “federally enforceable until USEPA approves the sunset into the SIP.” (Transcript at p. 39.) The testimony and questions from Illinois EPA downplay IERG’s concerns on this point by focusing solely on the premise that enforcement from third parties or USEPA is not likely. (Transcript at pp. 33, 34 and 39.) However, even if this prediction comes true, it does not resolve the issue.

As stated by Mr. Davis at Hearing, although enforcement may not happen, this does not eliminate the *noncompliance*. (Transcript at p. 25.) This noncompliance exists because of the current SIP requirements and current permit conditions, both requiring ERMS compliance. Illinois EPA has stated that both circumstances remain until USEPA approves the ERMS sunset as a SIP revision. Therefore, for the time period between Board approval of the ERMS sunset and the date of EPA approval of the ERMS sunset as a SIP revision, ERMS sources will be in noncompliance with SIP and permit provisions.

Illinois EPA seemed to advance a theory at hearing that ERMS sources really aren't being placed in noncompliance by Illinois EPA's cessation of the ERMS program pending SIP approval. (Transcript at p. 40.) Illinois EPA stated that if an ERMS source emits VOM below its permitted ATU allocation and submits seasonal reports, it will be in compliance. (Transcript at p. 40.) And, Illinois EPA stated that if an ERMS source emits above its permitted allotment, it does not have to purchase ATUs to be in compliance. (Transcript at p. 46.) Upon questioning, Illinois EPA stated that the ERMS source will be in compliance even if the Illinois EPA does not issue ATUs. (Transcript at p. 44.)

Illinois EPA's position does not comport with the plain language of the ERMS regulations. Section 205.150(c) states that by the end of each year each ERMS source shall hold ATUs in an amount not less than its seasonal VOM emissions. Therefore, without ATUs to cover its seasonal emissions, an ERMS source will not be in compliance with the ERMS rule. Section 205.150(c) is also restated in Sections 6 or 7 (depending on date of issuance) of facilities' CAAPP Permits. As long as the ATU requirement has not been removed from the SIP and IEPA does not administer the issuance and transfer of ATUs, ERMS sources will be unable to certify compliance with the ATU obligation in their CAAPP Permits.

Illinois EPA further opined that the sources' permits state what the ATU allotment is and that is a "guarantee" under the permit. (Transcript at p. 45.) However, Section 205.400(d) makes clear that an ERMS allotment does not constitute a property right. Accordingly, a permitted allotment is not a guarantee of compliance. ERMS sources need ATUs in order to meet the ERMS requirements. Without those ATUs, ERMS sources are placed in noncompliance.

Mr. Davis stated that IERG's members do not want to face the decision of whether to continue operating in knowing noncompliance. (Transcript at pp 27, 28, 30 and 31.) Further, Mr. Davis pointed out that such noncompliance carries reporting implications, not only with respect to Illinois EPA and USEPA, but other regulatory agencies, such as the Securities and Exchange Commission. (Transcript at p. 32.) Again, IERG wholeheartedly supports termination of the ERMS program. Our only request is that the Illinois EPA and the Board conduct such termination in a way that allows regulated sources to operate seamlessly in compliance throughout the SIP transition.

Sunset and SIP Revision

Illinois EPA advanced some concerns at Hearing about IERG's proposed revisions to the sunset timing. Illinois EPA took the position that it is common to have a delay between a rule's effectiveness or compliance date and the time at which USEPA issues a SIP revision, including instances of regulatory relief. (Transcript at pp 38 and 39.) IERG acknowledges this generally, but Illinois EPA's point is irrelevant in this instance. The only reason that a noncompliance situation is being created here is that Illinois EPA decided to cease implementing the ERMS program before the current ERMS season even began and before the Board or USEPA could act to approve the ERMS program's sunset. With IERG's suggested revisions concerning the

ERMS sunset date, ERMS sources would not be placed in noncompliance pending approval of the sunset as a SIP revision and subsequent permit modification.

At Hearing, Illinois EPA objected to IERG's position on the sunset date, as Illinois EPA stated that the proposed revision to the sunset date promotes uncertainty because we do not know when USEPA will approve the sunset as a SIP revision. (Transcript at p. 40.) On the contrary, Illinois EPA's decision to retroactively sunset the ERMS program prior to Board or USEPA approval has created any such uncertainty. IERG's suggested timing for the sunset resolves this issue by allowing reasonable time for the SIP revision to take place before the program ends.

This amount of time is based on the timing of other SIP revisions. Of course, this is dependent on Illinois EPA timely submitting the SIP revision package following Board approval of the sunset. While Illinois EPA has stated that USEPA has informally indicated its inclination to approve the SIP revision, there could nevertheless be issues that arise in the SIP revision process. This could include the Section 110(l) demonstration or other items that may emerge during public participation. Timing of the SIP revision could also be affected by other actions pending with USEPA. It is therefore prudent to allow a proper period of time for the SIP approval process, as would be accomplished by IERG's proposed sunset provision.

In that vein, we offer for the Board's consideration USEPA's approval of a revision to the Ohio SIP. See 82 Fed. Reg. 16932 (April 7, 2017). OAC 3745-72-1 to 8 concerned the state's gasoline volatility standards in the Cincinnati and Dayton areas. The SIP revision removed the 7.8 pounds per square inch (psi) low Reid Vapor Pressure fuel requirements for the two areas as a component of the Ohio ozone SIP. Of note is how Ohio structured cessation of the fuel requirement:

The requirements of this chapter shall no longer be effective for the Dayton area or Cincinnati area or any part thereof, upon the effective date of approval by USEPA of the

removal, suspension or replacement of the requirements of this chapter in Dayton area or Cincinnati area, or any part thereof, as a part of Ohio's state implementation plan.

OAC 3745-72-01(B). (Emphasis added.)

Accordingly, there is precedent in Region V for structuring the ERMS sunset as IERG has proposed. And, doing so will not interfere with Illinois EPA's regulatory streamlining efforts. IERG supports the termination of ERMS and urges expeditious Board and USEPA approval of the same. Surely any measures to eliminate unnecessary regulations should not put the sources who are regulated in an impossible compliance position.

Illinois EPA further argued at Hearing that making the sunset contingent on USEPA approval of the SIP revision undermines the Board's authority. (Transcript at p. 41.) IERG is particularly surprised at this statement. If anything undermines the Board's authority, it is Illinois EPA's unilateral move to cease its regulatory-required actions to operate the ERMS program, without Board approval. Note Illinois EPA's obligations under the rule:

Each participating source shall receive an allotment which shall be issued by the Agency and distributed in ATUs.

35 Ill. Admin. Code 205.400(a). (Emphasis added.)

Illinois EPA has made clear in this proceeding that it has not issued ATUs for 2018 and will not do so for this season or any subsequent season. This directly contravenes the requirements of Section 205.400. Moreover, sources cannot avoid this problem by purchasing unretired 2017 ATUs on the market (which would only be an option for the 2018 season, due to the 2-year life of ATUs). Because Illinois EPA's position is that it will not be operating the ERMS program, it will not be processing ATU transfers. This implicates the following ERMS regulation:

- a) Transfer of ATUs shall be subject to the following requirements:

* * *

- 3) No transfer shall be considered official for purposes of the ERMS until entered into the Transaction Account database;
- 4) The Agency or its designee shall enter ATU transfers into the Transaction Account database within one week of the Agency receiving notification of a duly authorized ATU transfer; ...

35 Ill. Admin. Code 205.630(a). (Emphasis added.)

As the sunset is currently proposed by Illinois EPA, ERMS sources cannot comply with ERMS for 2018 and beyond because Illinois EPA has not issued ATU allotments and will not be processing any ATU transfers. Illinois EPA questioned IERG on this point at Hearing, asking if IERG was aware of enforcement over ERMS noncompliance. (Transcript at p. 34.) Section 205.720 details the process for emission excursion compensation for a source's failure to have sufficient ATUs by the regulatory deadline. The source is required to purchase ATUs at a defined ratio from the Alternative Compliance Market Account ("ACMA") administered by Illinois EPA. Section 205.720(f) states that sources providing emissions excursion compensation shall not be subject to enforcement authority granted to the State or any person under applicable State or federal laws or regulations or any permit conditions. Thus, ERMS has a mechanism for enforcing the ATU requirement on regulated sources, but that approach does not work if Illinois EPA does not administer the ACMA or engage the emissions excursion compensation process.

Illinois EPA is not meeting its requirements under the ERMS program and is placing ERMS sources in noncompliance. IERG respectfully requests that the Board not allow Illinois EPA to avoid its duties under the Board's rules, particularly where doing so will place regulated sources in jeopardy.

Permit Modification

In Illinois EPA's testimony at Hearing, Illinois EPA stated that ERMS sources should not be concerned about the time period between sunset of ERMS by the Board and approval by USEPA as a SIP revision. (Transcript at p. 39.) Illinois EPA stated that "sources can submit applications for minor permit modifications ... once the rule is sunset, the benefit of which confers immediately upon application." (Transcript at p. 39.) IERG questioned this statement as it appeared to conflict with what Illinois EPA provided in its comments following the first hearing, namely that sources can apply to modify their permits to remove ERMS requirements "after the USEPA approves the change in Illinois' SIP." (Transcript at p. 48.) Illinois EPA agreed to address this issue in its post-hearing comments. (Transcript at p. 48.)

IERG looks forward to Illinois EPA's clarification of its position on this point. We would point out that Illinois EPA's original statement, that a permit modification to address concerns here cannot occur until after a SIP revision, appears to be correct under USEPA's Title V guidance:

Where the local rule submitted to EPA as a SIP revision represents a relaxation of the current SIP requirement (e.g., the local rule would replace an existing technology forcing rule that has been determined to be unachievable in practice), a part 70 source may propose in its permit application to base its permit on the local rule in anticipation of EPA approval. However, a permit based on the local rule could not be issued prior to EPA approval of the rule. This is because a permit based on the relaxed requirements of the local rule could not assure compliance with the more stringent applicable requirement (the approved SIP), as required by section 504 of the Act.

White Paper Number 2 for Improved Implementation of the Part 70 Operating Permits Program (March 5, 1996) at p. 22. (Emphasis added.)

This discussion from USEPA calls into question Illinois EPA's statement at Hearing that a minor permit modification application eliminating ERMS requirements would in fact be

effective immediately. Therefore, IERG remains concerned about permit noncompliance until termination of ERMS is approved by USEPA as a SIP revision.

Conclusion

As we have stated throughout this process, IERG strongly supports the ERMS sunset. IERG simply seeks a proper path for doing so. We appreciate that Illinois EPA does not want to continue a program that is not providing environmental benefit and we applaud efforts to more appropriately manage Illinois EPA and regulated entity resources. However, such measures should not place the Illinois EPA or ERMS sources in a position of failing to meet regulatory obligations. We respectfully request that the Board consider these concerns in setting an appropriate sunset date for the ERMS program.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

Dated: July 3, 2018

By: /s/ N. LaDonna Driver
One of Its Attorneys

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