EDF
ENVIRONMENTAL DEFENSE FUND
Finding the ways that work

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Environmental Defense Fund ("EDF") provides these written comments to urge the Joint Committee on Administrative Rules ("JCAR") to **OBJECT** to and declare a **FILING PROHIBITION** on the Illinois Pollution Control Board's proposed modifications to add a sunset provision to 35 Ill. Adm. Code 205, Emissions Reduction Market System. Illinois law requires that the Illinois Environmental Protection Agency maintain this program.

EDF is a national nonprofit organization whose mission is to preserve the natural systems on which all life depends. Guided by science and economics, EDF finds practical and lasting solutions to the most serious environmental problems.

INTRODUCTION

The Rule change submitted by the Illinois Pollution Control Board ("PCB") at the behest of the Illinois Environmental Protection Agency ("IEPA" or "Agency") adds a new "sunset" provision to the Emissions Reduction Market System ("ERMS") that is a clear violation of Illinois statute.

The ERMS was created by Title II of the Illinois Environmental Protection Act ("Act"). Section 9.8 of Title II of the Illinois Environmental Protection Act requires that

> The Agency **shall** design an emissions market system that will assist the State in meeting applicable post-1996 provisions under the CAAA of 1990, provide maximum flexibility for designated sources that reduce emissions, and that takes into account the findings of the national ozone transport assessment, existing air quality conditions, and resultant emissions levels necessary to achieve or maintain attainment.

415 ILCS 5/9.8(b)) (emphasis added).

The ERMS cannot, by law, sunset, unless the Agency is replacing it with another system to meet the requirements of the Act. The Agency, instead, has proposed to sunset the ERMS and

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not replace it. Notwithstanding that fatal deficiency, both the flawed procedural process and the insufficient policy reasoning behind the change merit JCAR objection to the rule change.

HISTORY

The IEPA has run the Emission Reduction Market System since 1997, as required by Title II of the Act. The program was created by the Illinois General Assembly for the express purpose of using economic incentives and market-based approaches to achieve compliance with federal Clean Air Act requirements, and specifically to address the Chicago region's status as a Non-Attainment Area for ozone. The ERMS was approved by the U.S. EPA-approved as part of Illinois' State Implementation Plan for compliance with National Ambient Air Quality Standards.

Ozone at the ground level is created by chemical reactions between oxides of nitrogen ("NOx") and volatile organic compounds ("VOC"). This happens when pollutants emitted by cars, power plants, industrial boilers, refineries, chemical plants, and other sources chemically react in the presence of sunlight. Ozone at ground level is a harmful air pollutant, because of its effects on people and the environment, and it is the main ingredient in "smog."

Ozone in the air we breathe can harm our health. Breathing ozone can trigger a variety of health problems including chest pain, coughing, throat irritation, and airway inflammation. It also can reduce lung function and harm lung tissue. Ozone can worsen bronchitis, emphysema, and asthma, leading to increased medical care. People most at risk from breathing air containing ozone include people with asthma, children, older adults, and people who are active outdoors, especially outdoor workers.

FINDINGS

On August 23, the Illinois Pollution Control Board submitted the IEPA's proposed rule change to sunset the ERMS on Second Notice to the Joint Committee on Administrative Rules. EDF has identified several grave concerns with both the proposed change and the process by which the IEPA conducted the rulemaking process, and urges JCAR to **OBJECT** and declare a **FILING PROHIBITION** on the proposed rule. The Agency should restart discussion on how to measure and improve on its existing statutorily-required program, rather than illegally conclude it. Not only is it unlawful to sunset the ERMS at this time, the IEPA did not follow the Illinois General Assembly's procedural rulemaking requirements in developing the rule modification and did not conduct a thorough review of the proposed rule. Additionally, the basis for the rule change – to save the state money – falls flat, with the Agency admitting that sunsetting the program will save the state just $36,800 annually.

1) IEPA is required by statute to run the Emission Reduction Market System

There is a clear statutory requirement that the Agency shall maintain an emissions reduction market system. The Board's Order, like the IEPA's proposed rule before it, failed to explain, reference, or describe the statutory requirement to establish the Emission Reduction Market System in the first place. EDF finds no citation in the Illinois Pollution Control Board's Order to the enacting legislation. Rather, the Order simply references the Emission Reduction Market System as something that was adopted by the Board. This implies this was a voluntary board initiative, and ignores that the program is a statutory requirement. The Board provided the history of the ERMS as, simply:

> The Board adopted ERMS in 1997. Emission Reduction Market System Adoption of 35 Ill. Adm. Code 205, R97-13 (Nov. 20, 1997); see 21 Ill. Reg. 15777 (Dec. 5, 1997). In 2001, the U.S. Environmental Protection Agency (USEPA) approved it as part of Illinois' State Implementation Plan (SIP). 66 Fed. Reg. 52343 (Oct. 15, 2001); see SR at 1; TSD at 1.

Illinois Pollution Control Board R18-22, Amendment to 35 Ill. Adm. Code Part 205, Opinion and Order of the Board on Second Notice of August 23, 2018 at 3. The reality is that the Illinois General Assembly set very clear guidelines that the Illinois Environmental Emission Reduction Market System is something the Agency must create. EDF provides the actual statutory language here for the benefit of JCAR:

> 415 ILCS 5/9.8
>
> *Sec. 9.8. Emissions reductions market system.*
>
> *(a) The General Assembly finds:*
>
> *(1) That achieving compliance with the ozone attainment provisions of federal Clean Air Act Amendments (CAAA) of 1990 calls for innovative and cost-effective implementation strategies.*
>
> *(2) That economic incentives and market-based approaches can be used to achieve clean air compliance in an innovative and cost-effective manner.*
>
> *(3) That development and operation of an emissions market system should significantly lessen the economic impacts associated with implementation of the federal Clean Air Act Amendments of 1990 and still achieve the desired air quality for the area.*
>
> *(b) The Agency **shall** design an emissions market system that will assist the State in meeting applicable post-1996 provisions under the CAAA of 1990, provide maximum flexibility for designated sources that reduce emissions, and that takes into account the findings of the national ozone transport assessment, existing air*

> *quality conditions, and resultant emissions levels necessary to achieve or maintain attainment. (emphasis added)*

Any attempts by the IEPA and the Illinois Pollution Control Board to "sunset" the program would clearly run afoul of Illinois law and the explicit directive of the Illinois General Assembly to maintain an emission reduction market system. If the IEPA wished to sunset the program, it should have approached the Illinois General Assembly to amend Section 9.8 of Title II of the Illinois Environmental Protection Act.

2) IEPA did not conduct the statutorily-required economic impact analysis

In the same section of the Illinois Environmental Protection Act, the Illinois General Assembly provided clear guidance on provisions that any rulemaking adopted by the Illinois Pollution Control Board must follow certain requirements. Among those requirements is that the rule adopted by the Board shall include provisions that "*(6) Assure that relative economic impact and technical feasibility of emissions reductions under the banking and trading program, as compared to other alternatives, is considered.*" 415 ILCS 5/9.8(c).

Although the Board requested an economic impact statement from the Illinois Department of Commerce and Economic Opportunity, that request was ignored. The IEPA further did not conduct the requisite analysis of economic impact of the rule change.

Per the statute, the rule cannot be modified absent the economic impact analysis. The IEPA should be directed to include a detailed economic impact assessment for its proposed rule change, and should be urged to secure cooperation from other state departments within the same administration to provide that assessment. If they cannot secure such an assessment, they are required by law to conduct their own.

3) The Illinois Environmental Protection Agency failed to conduct a thorough process for review of the rule

In testimony, the IEPA admitted that it failed to conduct outreach to anyone other than industry groups in developing this rulemaking. From the Board's order on Second Notice:

> *The Board asked IEPA whether it conducted outreach to regulated entities while it prepared its rulemaking proposal. David Bloomberg, Manager of the Air Quality Planning Section in IEPA's Bureau of Air, responded that IEPA communicated through industry groups. During 2017, he twice presented information to members of the Illinois Environmental Regulatory Group (IERG). IERG determined that its members "have at least 30 facilities that are ERMS-regulated sources." Mr. Bloomberg also presented information informally to other ERMS participants.*

Illinois Pollution Control Board R18-22, Amendment to 35 Ill. Adm. Code Part 205, Opinion and Order of the Board on Second Notice of August 23, 2018 at 4 (internal citations omitted).

The failure of the IEPA to reach out to environmental groups, cities, towns, public health officials, consumer advocates, and other interested parties is highly concerning. Instead, the IEPA presented information to one trade group as far back as 2017. The first that Environmental Defense Fund was made aware of this proposed rule change was in August of 2018 when it was submitted to JCAR on second notice, nearly a year after apparent backroom negotiations were being held between the state officials and industry on yet another IEPA rule to roll back pollution protections in Illinois.

There is no rush to complete this rulemaking in October of 2018 from an environmental protection standpoint. The next seasonal allotment period does not begin until May of 2019. That provides sufficient time for the IEPA to conduct public meetings in affected regions of the state and to engage with cities, towns, environmental experts, consumer advocates, and others that can provide a fuller, legally-sustainable recommendation for amending this program.

4) Ending this program will save the state just $36,800

The entire basis for the sunsetting of the Emission Reduction Market System is that it will reduce a time and paperwork burden on the State of Illinois. Yet, when pressed on the actual benefit of to the State, IEPA admitted that its "analysis of economic effects of the proposal reports that the 'sunset' would annually save IEPA approximately $36,800." Illinois Pollution Control Board R18-22, Amendment to 35 Ill. Adm. Code Part 205, Opinion and Order of the Board on Second Notice of August 23, 2018 at 19.

5) The program is still needed and working

As of spring 2018, Illinois has additional areas that have been designated as nonattainment under the new 2015 Ozone standard. The state will be required to submit a SIP within three years that demonstrates attainment with the new NAAQS and for achieving mandated Reasonable Further Progress requirements. The ERMS program has been a cornerstone for making that legally-required demonstration and achieving air quality objectives for 18 years, through a market-based mechanism. The last publicly available annual performance report on the program for 2016 calls the program "successful" and notes that numerous companies are relying on it to meet their emission reduction targets.[1] Other Illinois companies benefit from their ability to sell excess reductions. Despite evidence of VOM reductions during the life of the program, and the presence of other rules that regulate these emissions, Illinois is still not in attainment with the Ozone standard. The alternative to the ERMS program is a "command and control" regulation effort over individual businesses and emissions sites.

CONCLUSION

Accordingly, EDF urges JCAR reject the Proposed Rule through an **OBJECTION and FILING PROHIBITION**. The rule as proposed is contrary to the enacting statute and was developed without the statutorily-required economic impact analysis. Additionally, there was no meaningful process for stakeholder input, and there is no emergent need for a rule change at

[1] https://www2.illinois.gov/epa/Documents/iepa/air/erms/2017/aprr2016.pdf

present. EDF requests that JCAR requires additional hearings at the PCB to address these deficiencies.

EDF appreciates the opportunity to submit these comments, and thanks JCAR for its consideration.

Dated: October 11, 2018