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Suite 1500  
Chicago, Illinois 60601

October 10, 2018

Vicki Thomas, Executive Director  
Joint Committee on Administrative Rules  
700 Stratton Building  
Springfield, IL 62706

Dear Executive Director Vicki Thomas,

Included in this letter are comments submitted by the Illinois Environmental Council on the proposed changes to the Emissions Reduction Market System ("ERMS"), 35 Ill. Adm. Code 205. We request that you reject the proposed "Sunset Provision" addition to the Code on the grounds that inadequate justification for this provision have been provided, significant environmental harm could result from the addition of a Sunset Provision, and the IEPA lacks the statutory authority to end the ERMS program.

Inadequate Justification Provided by the Illinois Environmental Protection Agency

In the filings provided by the Illinois Environmental Protection Agency ("IEPA") to the Illinois Pollution Control Board ("IPCB"), the IEPA claimed that "the ERMS program is no longer effective in providing any additional emissions reductions or environmental benefit." Illinois Environmental Protection Agency, *Statement of Reasons*, Page 1, <https://pcb.illinois.gov/documents/dsweb/Get/Document-97199>. This claim is not sufficiently supported by the facts. The ERMS program was designed to reduce emissions of Volatile Organic Material ("VOM") through a cap and trade program. Since the implementation of the ERMS program, overall VOM emissions in the region have decreased significantly. It is fair to attribute this decline in VOM pollution to the success of the program. However, the IEPA has unreasonably assumed from the success of ERMS that if the program were to be eliminated, then the progress made under ERMS would stay intact. This is not a reasonable inference to draw.

To support their position that the region would not see rising VOM pollution if the program were to be withdrawn, the IEPA has cited the implementation of "state and federal regulations addressing VOM emissions" to indicate that a support mechanism would still be in place. *See id.* While it is true that the ERMS program is not the only mandate which works to reduce VOM emissions, the ERMS program has been successful in reducing VOM pollution to acceptable levels and until the IEPA can demonstrate that the ERMS program's burdens outweigh its benefits, there is inadequate justification to end the program. Additionally, the IEPA has argued that because some allotment trading units to emit VOM pollution have remained untapped, this indicates the program is not functioning properly. Surplus allotment is neither symptom of program failure nor proof of financial hardship for program participants. In fact, it may be evidence of a well-

functioning regulatory scheme in which participants can afford to ensure a margin of error to comply with their emissions requirements. As such, there is strong reason to believe the ERMS program has worked and still works today. A well-functioning program should not be repealed.

#### Benefits of the Emissions Reduction Market System

As it is currently written, the ERMS provides flexibility for industry sources to meet the VOM emissions targets in the most cost-effective manner for that company rather than imposing a specific pollution control technology or setting an emission reduction target that individual sources are not able to achieve cost effectively. Put another way, this is a cost effective, industry-friendly, and environmentally beneficial program. If this program were to be eliminated, Illinois runs the risk of allowing overall VOM pollution to increase or businesses to suffer.

With respect to the cost-effectiveness of the ERMS program, the purpose of the program was to create a regime in which market forces push for industry to “Implement innovative and cost-effective strategies to attain the national ambient air quality standard (NAAQS) for ozone and to meet the requirements of the Clean Air Act”. 35 Ill. Adm. Code 205.110. Cap and trade programs, such as the ERMS, have long been understood by economists to allow for the most cost effective compliance regime available. As such, other forms of controlling VOM pollution such as specific technology mandates could undermine the financial success of participating businesses.

Moreover, the ERMS program has accomplished its original environmental goal. By ensuring that VOM emissions remain low, if the ERMS program continues to operate we can expect that it will continue to protect the air quality in our region. Additionally, if the State determines at any point that the public health or welfare would be better protected by a lower overall VOM pollution level, the ERMS program offers an effective path to achieving those goals.

Finally, the ERMS system is less administratively complex than a command and control regime for adequate VOM management. In fact, the ERMS was designed to conserve limited Agency resources by allowing a simpler computation of required emission reductions to meet the Ozone National Ambient Air Quality Standard (“NAAQS”) for Ozone nonattainment areas in Illinois. By setting the pollution cap and then allowing industry to determine the best method of individual compliance, the IEPA avoids the resource intensive study and review of appropriate control technologies needed by specific source categories to attain NAAQS compliance.

#### Lack of Authority to Include a Sunset Provision

Finally, the IEPA’s proposal to modify the Illinois Code is inconsistent with the statutory mandate to create the ERMS program, and as such, it is outside of the authority of both the IEPA and the IPCB to add the Sunset Provision. In the enabling statute for the ERMS program, the legislation requires that “[t]he Agency shall design an emissions market system that will assist the State in meeting applicable post-1996 provisions under the CAAA of 1990...”. 415 ILCS 5/9.8(b). The statute does not give the IEPA authority end this program. Additionally, paragraph (c) of the enabling statute specifies program specifics that the Board must approve; “rules adopted by the Board shall include provisions...”. 415 ILCS 5/9.8(c). The enumerated program requirements

outline the basic elements of the market system, but do not grant the IPCB authority to end the ERMS program.

As additional evidence of the statutory mandate to continue the ERMS program, the enabling statute specifically stated the General Assembly's understanding that the "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." 415 ILCS 5/9.8(a). Even if the IEPA disagrees with this assessment today, they are required to abide by the legislative findings established in the enabling statute. Simply because the IEPA believes the program is no longer effective does not give it the authority to act on this belief.

If the IEPA wishes to add a Sunset Provision, the only legal process by which it may do so is by working with the Illinois General Assembly to amend the Environmental Protection Act to give the Agency the authority to end the ERMS program. As the law is written today, this authority has not been granted to the IEPA.

#### Conclusion

In sum, the IEPA has failed to provide sufficient justification for repealing the environmentally beneficial and cost-effective ERMS program. Moreover, even if the IEPA had provided persuasive policy reasons for ending the ERMS program, the IEPA does not have the authority to do so under the program's enabling statute; authority has been granted (and a mandate was given) to begin the program but not to end the program. As such, given that the ERMS program has proven to offer significant environmental benefit which may be lost if it is repealed, we ask that the Board reject the proposal of the IEPA to add a Sunset Provision to the Emissions Reduction Market System, 35 Ill. Adm. Code 205.

Additionally, while the IEPA surely understood that the environmental community would wish to comment on this proposal, the Illinois Environmental Council was never contacted directly to ask for feedback or participation in the earlier stages of the rulemaking process. Had we been contacted timely, we would have been happy to offer guidance and work with the IEPA to ensure that any future VOM emissions reduction program is both effective and supported by environmental groups.

Thank you for reviewing our commentary on the proposed Sunset Provision.

Sincerely,

Jen Walling

Executive Director

Illinois Environmental Council