ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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BRUCE RAUNER, GOVERNOR **ALEC MESSINA,** DIRECTOR

October 15, 2018

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

RE: Amendments to 35 Ill. Adm. Code Part 205, Sunset of the Emissions Reduction Market System (Illinois Pollution Control Board Rulemaking 18-22)

Dear Executive Director Thomas and Committee Members,

The Illinois Environmental Protection Agency ("Agency" or "Illinois EPA") submits these second notice comments for the above-titled matter to the Joint Committee on Administrative Rules ("JCAR"). The Illinois EPA responds to assertions made by the Environmental Defense Fund ("EDF") and the Illinois Environmental Council ("IEC") in their respective comments filed with JCAR on October 11, 2018, regarding the Illinois Pollution Control Board's ("Board") proposal of the sunset the Emissions Reduction Market System ("ERMS"), currently under second-notice review by JCAR. The Illinois EPA comments are as follows:

I. LEGAL AUTHORITY TO SUNSET

In the EDF's second notice comments to JCAR, it claims that the Board's proposed amendments to sunset the ERMS program is a "clear violation of Illinois statute." (EDF comments October 11, 2018, Letter at 1). The EDF cites Section 9.8 of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/9.8) in support of this contention. Section 9.8 required that the Agency "design an emissions market system that will assist the State in

meeting applicable post-1996 [Clean Air Act requirements] . . . and that takes into account . . . existing air quality conditions, and resultant emissions levels necessary to achieve or maintain attainment." It specifies that the Agency "*may* develop proposed rules" to implement the system and that any resulting rules adopted by the Board must meet certain criteria. (emphasis added). The legislation sets forth the boundaries of any program adopted by the Board, indicating that any Board rules must assure that emission reductions under the market system "will not be mandated unless it is necessary for the attainment and maintenance of the National Ambient Air Quality Standard ["NAAQS"] for ozone in the Chicago nonattainment area," and must ensure that sources subject to the program "will not be required to reduce emissions to an extent that exceeds their proportionate share of the total emission reductions required . . . to attain and maintain the [NAAQS]." (415 ILCS 5/9.8(c)(2) and (c)(3)).

The sunset of the ERMS program is consistent both with the statutory provisions above and the clear purpose behind such provisions. In full compliance with the Act, the Agency designed the ERMS program to reduce emissions of Volatile Organic Materials ("VOM") in the Chicago ozone nonattainment area ("NAA") to help attain the 1979 ozone NAAQS. It then exercised its discretion under Section 9.8 of the Act to propose rules implementing the ERMS program, which the Board adopted. The Agency implemented the program pursuant to these rules for the last two decades. The program, however, has since become obsolete such that the explicit purposes of the program, as set forth in Section 9.8 of the Act, can no longer be achieved. The program is no longer necessary for, or even helpful in achieving, the attainment and maintenance of the current ozone NAAQS in the Chicago NAA, as documented thoroughly in the Illinois EPA's Technical Support Document ("TSD"); the emission reductions resulting from the program have simply been eclipsed by other, more stringent regulations, permit

conditions, and source operations. As addressed in more detail below, the Agency's TSD explained:

> The proposed rulemaking will have no impact on the air quality in the Chicago NAA as discussed in detail in the 110(1) demonstration in Attachment A, because ERMS allowable emission limits as a whole are higher than the existing command and control federal and State substitution measures. In other words, the ERMS sources have since been regulated by newer federal and State rules, or by federally enforceable permit conditions, that limit their current emissions of VOM below their emissions allowed based on the amount of [Allotment Trading Units] they receive. Therefore, sunsetting the ERMS program will not change current emissions levels overall in the Chicago NAA. (*see* TSD at 5).

The Agency conducted an extensive analysis of each source subject to ERMS to ensure that the sunset will not cause "backsliding" of air quality in the Chicago NAA. USEPA indicated that it agrees with the Agency's analysis, and the IEC and EDF have provided nothing to the Board or to JCAR that refutes in any way the Agency's data or findings.

In sum, the Act mandated that the Agency design the ERMS program to achieve certain federal air quality standards, which the Agency fully complied with; while the Agency did propose regulations to implement the design, the Act did *not* mandate that it do so, and it certainly did not mandate that any rules adopted be retained in perpetuity, particularly once the program had outlived the very purposes stated in the legislation. In fact, the legislation makes clear that only emission reductions that aid attainment/maintenance of the NAAQS can be required by these Board rules; as the ERMS program no longer achieves emission reductions that aid attainment/maintenance of the ozone NAAQS, one could argue that the Board is in fact required to amend its rules to sunset the program at this time.

Sunsetting the ERMS program through a Board rulemaking is not in violation of Illinois law. Its sunset is not only legal, but may even be interpreted as required.

II. ECONOMIC IMPACT ANALYSIS

The EDF claims that the Illinois EPA failed to "conduct the requisite analysis of economic impact of the rule change," citing Section 9.8(c)(6) of the Act. (EDF comments October 11, 2018, Letter at 4 and 5). EDF's reading of this statutory provision is not only incorrect but also strange. Section 9.8(c)(6) required that, if the Board adopted rules to implement an ERMS program, such rules were required to "[a]ssure that relative economic impact and technical feasibility of emissions reductions under the banking and trading program, as compared to other alternatives, is considered." This requirement was clearly intended to safeguard regulated sources by ensuring that, prior to adopting an ERMS program, the Board compared technical feasibility/economic impact of a trading program with other avenues for emission reductions. Here, the Board is seeking to *sunset* the requirements of the ERMS program, which does not implicate the provisions above.

Having said that, as stated in the Agency's Statement of Reasons ("SOR") and the TSD, the Agency analyzed the technical feasibility and economic reasonableness of the sunset in accordance with other applicable rulemaking requirements. It demonstrated that the rule is technically feasible and that there will be no adverse economic impact or financial detriment to sources, which will simply be relieved of the burden of complying with the requirements of ERMS. (*see* SOR at 6 and TSD at 5). The Illinois EPA also submitted an Agency Analysis of Economic and Budgetary Effects of Proposed Rulemaking to the Board during the rulemaking process.

III. REVIEW PROCESS

The EDF claims that the Illinois EPA "failed to conduct a thorough process for review of the rule," since it did not specifically contact the EDF regarding the rulemaking. (EDF comments

October 11, 2018, Letter at 2, 4, and 5). The Agency and the Board followed all notice and comment requirements applicable in Illinois. The Board provided public notice of hearings regarding the Agency's proposal, both in newspapers and in the *Illinois Register*. The Board held two public hearings, on May 10, 2018, and June 7, 2018, and accepted public comments.

Both the IEC and the EDF had the same opportunity as every other member of the public to attend these hearings and/or submit comments to the Board during the eight months that this rulemaking has been pending.[1] They did not do so, and indeed waited until mere days before the second JCAR meeting during the rule's extended second notice period to claim concern. The IEC and EDF's extremely delayed participation in this rulemaking falls squarely on their own shoulders, not the Agency's or the Board's.

III. LACK OF ENVIRONMENTAL BENEFIT

The IEC's claim that eliminating the ERMS program creates a risk that overall VOM emissions will increase or businesses will suffer (IEC comments October 10, 2018, Letter at 2) is conclusory, wholly unsupported by the IEC and by the rulemaking record as a whole, and incorrect. Contrary to EDF's and IEC's claims, the Agency's findings that the ERMS program is no longer effective in providing additional emissions reductions or environmental benefit were not based on mere assumptions and inferences. The Agency conducted a lengthy, extensive assessment of the regulations and permit requirements applicable to each and every emissions unit subject to ERMS in order to adequately demonstrate both to the Board and to USEPA that sunsetting the program is appropriate and will not result in increased emissions. The Agency set forth its analyses and findings in its "110(l) Demonstration" as part of the TSD, and they have

[1] On April 17, 2018, a representative of the Agency testified at an unrelated Board rulemaking hearing (R18-20) regarding the ERMS sunset, in response to questions. Representatives of the Environmental Law and Policy Center, Sierra Club, and EDF itself were present at such hearing, belying any claims that EDF first learned of the ERMS sunset in August 2018 when the rule went to second notice.

not been refuted by any information provided during the rulemaking or by the IEC or EDF now. (*see* TSD at A-1).

The IEC erroneously attributes the decrease in overall VOM emissions in the Chicago region to the ERMS program. (IEC comments October 10, 2018, Letter at 2). As explained in detail in the Agency's proposal and TSD, ERMS created a reduction in emissions when it was originally enacted and no longer provides additional emissions reductions. The decrease in overall emissions in the Chicago NAA are due to various factors. Some of the affected sources have permanently shut down, and new sources and emission units that have become subject to ERMS do not emit at the rate of these older, shutdown sources. Additionally, several State and federal regulations addressing VOM emissions have been promulgated since ERMS began (all of which are clearly listed in the Agency's rulemaking proposal, *see* SOR at 3, and analysis in TSD at A-1 – A-17). The IEC's comment that the Agency interpreted a surplus of Allotment Trading Units ("ATUs") to mean that the ERMS program is not functioning properly is an inaccurate statement; the Agency's position is that the surplus of ATUs indicates that the program is simply not useful.

The EFD incorrectly states that the "entire basis for the sunsetting of the [ERMS program] is that it will reduce a time and paperwork burden on the State of Illinois." (EDF comments October 11, 2018, Letter at 5). As represented by the Agency throughout the rulemaking, the major basis for sunsetting the ERMS program is that it no longer effectively provides any additional emissions reductions or environmental benefit to the State. Eliminating an unnecessary and unhelpful program will also reduce the burden placed upon regulated sources and the Agency and, as pointed out by the IEC, will save the State of Illinois tens of thousands of dollars per year, all positive consequences of sunsetting the program.

IV. CONCLUSION

The IEC's and EDF's claims are incorrect and unsupported and should be given no weight by JCAR.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
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