

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

PROPOSED NEW 35 ILL. ADM. CODE 204,)	
PREVENTION OF SIGNIFICANT)	
DETERIORATION, AMENDMENTS TO 35)	R 19-1
ILL. ADM. CODE PARTS 101, 105, 203, 211,)	(Rulemaking – Air)
AND 215)	

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 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 the **PUBLIC COMMENT OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP**, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP

Dated: May 4, 2020

By: /s/ LaDonna Driver
One of Its Attorneys

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CERTIFICATE OF SERVICE

I, LaDonna Driver, the undersigned, on oath state the following:
That I have served the attached **PUBLIC COMMENT OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP** via electronic mail upon:

Don Brown
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Illinois Pollution Control Board
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That my email address is LaDonna.Driver@heplerbroom.com.

That the number of pages in the email transmission is 8.

That the email transmission took place before 5:00 p.m. on the date of May 4, 2020.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP

Dated: May 4, 2020

By: /s/ LaDonna Driver
One of Its Attorneys

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PUBLIC COMMENT OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP

NOW COMES the Illinois Environmental Regulatory Group (“IERG”), by and through its attorneys, HEPLERBROOM, LLC, and pursuant to 44 ILLINOIS REGISTER 4109, 4317 (March 20, 2020), submits the following Public Comment for the Illinois Pollution Control Board’s (“Board”) consideration in the above-referenced proceeding.

IERG is an Illinois non-profit corporation affiliated with the Illinois Chamber of Commerce and is comprised of forty-six (46) member companies that are regulated by governmental agencies that promulgate, enforce, or administer environmental laws, rules, regulations, or other policies. IERG was an active participant in the adoption of Public Act 99-463, which amended Section 9.1(c) of the Illinois Environmental Protection Act (“Act”) to require the Board to adopt rules establishing a Prevention of Significant Deterioration (“PSD”) permit program. As such, IERG has an interest in the development of the regulations adopted thereunder. As a general matter, IERG supports the adoption of the Illinois Environmental Protection Agency’s (“Agency”) proposed 35 Ill. Adm. Code Part 204, and encourages the Board to proceed expeditiously in this proceeding. IERG raises concerns with two issues in the Board’s First Notice Opinion and Order.

Environmental Justice

In the Board's March 5, 2020 Opinion and Order ("Order"), the Board found that environmental justice ("EJ") concerns are an "important policy consideration" and that it has the discretion to review EJ in a PSD permit appeal. Order at 40. The Board explained, however, that it cannot reverse the issuance of a PSD permit based solely on EJ considerations when the permit applicant has complied with all applicable statutory and regulatory permit requirements. Order at 31.

First, IERG agrees with and supports the Board's findings that the Board cannot reverse the issuance of a PSD permit, and the Agency cannot deny a PSD permit or impose a condition based solely on EJ considerations. Order at 40. IERG also agrees with the Board's finding that the definition of Best Available Control Technology ("BACT") does not introduce EJ into the review of PSD permits and does not identify EJ as a basis to appeal an Agency determination under 35 Ill. Adm. Code 105.608. *Id.* However, IERG takes issue with the Board's finding that the Board has discretion to review EJ considerations in a PSD permit appeal. *Id.*

The Act provides no authority for the Board to consider EJ in a PSD permit appeal. As mentioned by the Board in its Order, Section 39 of the Act states that the Agency shall issue a permit if the application shows that the facility or equipment at issue will not cause a violation of the Act or regulations under the Act. 415 ILCS 5/39(a). Neither the Act, nor regulations under the Act, reference EJ in the context of air permitting generally, nor PSD permitting specifically.

Section 40.3 of the Act, regarding the review process for PSD permits, also does not mention EJ. 415 ILCS 5/40.3. Section 40.3(a)(2) provides the content requirements of a petition for review, which requires the petition to include an explanation why the Agency's response to an issue was clearly erroneous, or an exercise of discretion or an important policy consideration

that the Board should, in its discretion, review. This provision does not implicate EJ in PSD permit appeals.

The Agency has stated in this proceeding that the Agency's EJ policy is "not a formal rule developed from a statutory or regulatory enactment affecting environmental permitting." PC 1 at 8; PC 2 at 14. The Agency has acknowledged that any action it takes in the PSD permitting process that considers EJ will be pursuant to its internal EJ policy. PC 2 at 19. The Agency also described the review process for an allegation that the Agency failed to implement its EJ policy. PC 2 at 19. This review process does not include the Board.

IERG appreciates that the Board views EJ as an important policy consideration. However, there is no authority to include that consideration in review of PSD permit appeals. In its Order, the Board appears to rely on a legislative declaration of policy in the Illinois Environmental Justice Act ("EJA") to support its finding that EJ is an important policy consideration that the Board has discretion to review in PSD permit appeals. Order at 36, 40. Section 5 of the EJA contains "legislative findings" concerning EJ, including that "certain communities in the State may suffer disproportionately from environmental hazards related to facilities with permits approved by the State." 415 ILCS 155/5(ii). However, other than the "legislative findings" section, the only other provisions that the EJA contains are provisions that create an EJ Commission. *Id.* at Sec. 10. The Board explains that it is the "legislative findings" provisions, plus the fact that an EJ Commission was created, that persuaded it that EJ is an important policy consideration. Order at 37. However, the EJA does not contain any provisions that even allude to EJ being considered in a permit appeal. And, the EJA is not part of the Act. Thus, the EJA cannot be used as a basis for conferring authority to the Board to consider EJ in a

PSD permit appeal. The fact that EJ may be an important policy consideration in a general sense does not mean that the Board has the authority to consider it in a PSD permit appeal.

Moreover, IERG urges the Board to consider the practical effects of its determination that it can review EJ concerns in PSD permit appeals. The Board has clearly stated, and IERG agrees, that the Board cannot reverse the issuance of a PSD permit based solely on EJ, and that review of the appropriateness of a PSD permit condition cannot be based solely on EJ considerations. Therefore, IERG is concerned about the uncertainties that may arise for permittees due to Board determinations regarding EJ in a PSD permit appeal.

General Wording and Punctuation Changes

IERG noticed numerous changes by the Board to the Agency's proposed rule language that may be initially perceived as being subtle grammar and punctuation revisions. However, IERG cautions the Board against making these seemingly insignificant changes. Revisions that reword language or revise punctuation within a provision may change the substantive meaning of such provision. IERG is concerned about how these differences may impact federal review in the SIP approval process.

Rule Updates

Lastly, IERG notes that the federal PSD rules are subject to change. The issue of future updates to Part 204 to incorporate amendments to the federal rule was raised several times in this proceeding. In response to this issue, the Agency has stated that "[t]he Illinois EPA would necessarily have to conduct reviews as to the adequacy of the state PSD program whenever changes were made to 40 CFR 51.166 and/or 52.21." Agency's Second Post Hearing Comments at 23-24 (Apr. 4, 2019). The Agency further stated that ". . . in the context of this proposed rulemaking before the Board, it is only appropriate for the Illinois EPA to state that it will

propose any changes to Part 204 that are necessary for the State of Illinois to maintain its USEPA-approved state PSD program.” *Id.*

IERG agrees that it will be important to maintain the USEPA-approved state PSD program. Keeping up with incorporation of changes to the federal rule will allow the Agency, regulated entities, the Board, and others, to utilize federal regulatory determinations and guidance. This promotes efficiency and consistency in permitting decisions. In addition, it will provide permit applicants with program reliability that is key to the regulated community as it makes decisions about potential business developments in Illinois. IERG urges the Agency and the Board to timely address future rule updates.

IERG values the opportunity to submit public comments and we appreciate the Board’s consideration of these comments.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP

Dated: May 4, 2020

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

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