

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF: )  
 )  
AMENDMENTS TO 35 ILL. ADM. CODE ) R23-18(A)  
PARTS 201, 202, AND 212 ) (Rulemaking – Air)

**NOTICE OF FILING**

TO: Don Brown  
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SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Board the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO THE AMERICAN PETROLEUM INSTITUTE'S MOTION FOR RELIEF AND/OR CLARITY, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

By: /s/ Charles E Matoesian  
Division of Legal Counsel

DATED: JUNE 22, 2023  
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**ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO THE AMERICAN PETROLEUM INSTITUTE'S MOTION FOR RELIEF AND/OR CLARITY**

The Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by one of its attorneys, pursuant to the Illinois Pollution Control Board ("Board") Rules at 35 Ill. Adm. Code 101.500 and 101.504, hereby responds to the American Petroleum Institute's ("API" or "Movant") Motion for Relief and/or Clarity ("Motion"). In response to the Motion, the Illinois EPA states as follows:

API brings this Motion seeking a delay in the effective date of a final rule in rulemaking R23-18, or in lieu of such relief, that the Board clarify whether certain stays are available or to expedite the Subdocket R23-18(A). This Motion arises from the Agency's proposed rulemaking to amend the Illinois Administrative Code to remove provisions that afford an affirmative defense to violations of otherwise applicable emission standards during startup, shutdown, or malfunction. Removing these provisions is necessary for the Illinois EPA to comply with the United States Environmental Protection Agency's ("USEPA") Startup, Shutdown and Malfunction ("SSM") State Implementation Plan ("SIP") Call, as described in the Agency's Statement of Reasons in R23-18. *See, Statement of Reasons* at 7 and 9. Specifically, the SSM SIP Call requires Illinois to remove this affirmative defense that sources could assert if they were the subject of an enforcement action.

The Board issued an order sending R23-18 to Second Notice on April 6, 2023.

Subsequently, R23-18(A) was opened as a subdocket to consider alternative emission standards. Movant argues that the removal of the SSM provisions “will unfairly and unnecessarily” cause refineries to “be faced with allegations of noncompliance during startup.” *Motion* (the Motion is not page numbered but citing to the second page). In particular, Movant states, “if the proposed revisions to Parts 201, 202 and 212 are made effective before the Subdocket addresses the interplay and applicability of the CO [carbon monoxide] Standard [35 Ill. Adm. Code Section 216.361] during SSM,” the sources could be out of compliance during startup. *Id.*

Before addressing the Motion, it should be noted that the Agency’s proposal and the Board’s order sending R23-18 to Second Notice did not seek to amend or repeal the carbon monoxide emission standard of 35 Ill. Adm. Code 216.361. That regulatory provision is identified by the Movant as the provision from which actual substantive relief may be sought. Indeed, R23-18 does not touch any of the substantive emissions standards set forth in Board rules to which sources have always been subject. However, R23-18 only seeks to remove the affirmative defense from Parts 201, 202, and 212 that a source could raise in an enforcement action to satisfy USEPA, and as needed to avoid sanctions by the USEPA. *Statement of Reasons* at 14; *Transcript of 01/19/23 Hearing* at p. 89, line 3; *Illinois EPA’s Post-Hearing Comments* at 17. Nor has the USEPA ever given any guidance to states about what if any alternative emission standards specific to startup (or shutdown, or malfunction) events would not run afoul of its prohibition on affirmative defenses. *IEPA’s Responses to Questions Received at Hearing* at 3. Furthermore, the Movant has always had the burden of complying with applicable emission limits, even during SSM events.

Any exceedances of emission standards during SSM events have always been a violation; the sources only had the ability to raise an affirmative defense to any enforcement action related to a violation of an emission standard during an SSM event. The absence or presence of affirmative defense language does not itself make the standard in Section 216.361 any more or less stringent. An affirmative defense is not a grant of immunity and is not absolute – it is a legal argument that must first be raised and is rebuttable. Even if the defense is raised, sources can still be found to have violated emission standards.

To remedy what it describes as a hardship in complying with Section 216.361 in certain circumstances, Movant is requesting that the Board grant one or more of the following:

- a. Delaying the effective date of the Final Rule in R 23-18 as to Movant and other persons seeking alternative emissions standards in the Sub docket R 23-18A; and/or
- b. Clarifying that the effective date of the Final Rule in R 23-18 will be stayed for persons filing for an adjusted standard within 20 days of the effective date pursuant to Section 28.1(e) of the Environmental Protection Act; and/or
- c. Clarifying that the effective date of the Final Rule in R 23-18 will be stayed for persons filing for a variance within 20 days of the effective date pursuant to Section 38(b) of the Environmental Protection Act; and/or
- d. Ordering the Hearing Officer in Subdocket R 23-18A to expedite consideration of API's Proposed Alternative Emissions Standard so that it is effective at the same time as the Final Rule in R 23-18.

*Motion* at second and third pages.

#### MOVANT'S REQUESTED RELIEF

- a. Delaying the effective date of the Final Rule in R 23-18 as to Movant and other persons seeking alternative emissions standards in the Subdocket R 23-18A

Movant's first suggested course of action is for the Board to delay the effective date of R23-18. However, doing so would cause Illinois to miss the August 11, 2023 deadline to submit an approvable SIP necessarily subjecting the State to mandatory USEPA sanctions. Movant does not address this consequence, which would include increased emissions offset ratios for New

Source Review and loss of federal highway funding. Without an adequate SIP submission, USEPA has the obligation to implement a Federal Implementation Plan pursuant to Section 110(c)(1) of the CAA within 24 months of a finding that Illinois failed to submit a complete SIP revision as required. 42 U.S.C. Section 7410(c)(1). The Agency requests that the Board not grant this relief.

- b. Clarifying that the effective date of the Final Rule in R 23-18 will be stayed for persons filing for an adjusted standard within 20 days of the effective date pursuant to Section 28.1(e) of the Environmental Protection Act

If the Board decides to address this request, the Agency (as well as the Movant) directs the Board to the specific language in Section 28.1 of the Environmental Protection Act (“Act”). 415 ILCS 5/28.1. Although no petition pursuant to that section of the Act has been filed, the Movant recognizes in its Motion that Section 28.1(e) would be the dispositive statutory provision to answer the request for clarification. The Agency finds that language clear on its face and certainly applicable to the Movant’s request, and asks that the Board issue any clarification in accordance with the statutory text.

- c. Clarifying that the effective date of the Final Rule in R 23-18 will be stayed for persons filing for a variance within 20 days of the effective date pursuant to Section 38(b) of the Environmental Protection Act

This request by the Movant, similar to the request above, presumes a petition would be filed but does not elaborate on the specifics of such petition. Regardless, the Agency again finds the statutory language of the Act in Sections 35 and 38(b) (415 ILCS 5/35, 38(b)) to be clear on their face and applicable to the request, should the Board decide to clarify their effect here, and as such asks that the Board let its decision be dictated by those provisions.

- d. Ordering the Hearing Officer in Subdocket R 23-18A to expedite consideration of API’s Proposed Alternative Emissions Standard so that it is effective at the same time as the Final Rule in R 23-18

The Agency does not object to this suggestion, provided any schedule does not compromise the State's ability to submit to USEPA by August 11, 2023, an approvable SIP. There would be great harm to the State if an approvable SIP is not submitted to USEPA by August 11. Movant does not explain how USEPA sanctions can be avoided. As such, if the Board expedites the subdocket rulemaking, it should not extend the R23-18 rulemaking effective date.

WHEREFORE, for the reasons set forth above, the Illinois EPA requests that the Board enter an order denying the Motion.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

By: /s/ Charles E Matoesian  
Division of Legal Counsel

DATED: June 22, 2023  
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**CERTIFICATE OF E-MAIL SERVICE**

I, the undersigned, on affirmation, state the following:

That I have served the attached ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO THE AMERICAN PETROLEUM INSTITUTE'S MOTION FOR RELIEF AND/OR CLARITY

by e-mail upon:

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That the number of pages in this e-mail transmission is 8.

That the e-mail transmission took place before 4:30 p.m. on the date of June 22, 2023.

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

By: /s/ Charles E Matoesian  
Division of Legal Counsel

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