

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	
)	R 23-18(A)
AMENDMENTS TO 35 ILL. ADM. CODE)	(Rulemaking – Air)
PARTS 201, 202, AND 212)	

NOTICE OF FILING

TO: Mr. Don A. Brown,	Timothy Fox
Clerk of the Board	Chloe Salk
Illinois Pollution Control Board	Hearing Officers
100 West Randolph Street,	Illinois Pollution Control Board
Suite 11-500	60 East Van Buren Street, Suite 630
Chicago, Illinois 60601	Chicago, Illinois 60605

(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 **ENTRY OF APPEARANCE and AMERICAN PETROLEUM INSTITUTE'S MOTION FOR RELIEF AND/OR TO CLARIFY**, copies of which, are hereby served upon you.

Respectfully submitted,
AMERICAN PETROLEUM INSTITUTE,

By: /s/ Alec Messina
One of its Attorneys

Dated: June 9, 2023

Alec Messina
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IN THE MATTER OF:

AMENDMENTS TO 35 ILL. ADM. CODE
PARTS 201, 202, AND 212

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) R 23-18(A)
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ENTRY OF APPEARANCE OF ALEC MESSINA

NOW COMES Alec Messina, of the law firm HEPLERBROOM, LLC, and hereby enters
his appearance in this matter on behalf of the AMERICAN PETROLEUM INSTITUTE.

Respectfully submitted,

AMERICAN PETROLEUM INSTITUTE,

By: /s/ Alec Messina
One of its Attorneys

Dated: June 9, 2023

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AMENDMENTS TO 35 ILL. ADM. CODE)	R 23-18(A)
PARTS 201, 202, AND 212)	(Rulemaking – Air)
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**AMERICAN PETROLEUM INSTITUTE'S MOTION FOR RELIEF
AND/OR TO CLARIFY**

NOW COMES, the American Petroleum Institute (“API” or “Movant”), by and through its attorneys HeplerBroom, LLC, and pursuant to 35 Ill. Adm. Code Part 101, subpart E, requests that the Board either delay the effective date of any Final Rule in R 23-18, clarify that the effective date of any Final Rule in R 23-18 will be stayed for persons seeking an adjusted standard or variance, or order the Hearing Officer in Subdocket R 23-18A to expedite review of API’s request for alternative emissions standard, and in support thereof states as follows:

INTRODUCTION

On April 6, 2023, the Board issued an Opinion and Order in R 23-18 (“Order”) that sent to second notice changes proposed for 35 Ill. Adm. Code Parts 201, 202 and 212 and opened this Sub-docket (R 23-18A) to consider alternative emissions standards applicable during periods of startup, shutdown and malfunction (“SSM”). The Order did not, however, discuss how filing a request for an alternative emissions standard in R 23-18A would impact the effective date of the Final Rule in R 23 -18.

Pursuant to the Board Order, API anticipates requesting that the Board adopt an alternative emissions standard that would apply instead of the carbon monoxide standard located at 35 Ill. Adm. Code 216.361 (“CO standard”) or the general prohibitions of Parts 201, 202 and 212 during

periods of startup for fluid catalytic cracking units (“FCCUs”) (“Proposed Alternative Emissions Standard”). The Proposed Alternative Emissions Standard would consist of the proposal from pages 38 – 60 of the February 6, 2023, Pre-Filed Testimony of Kelly Thompson and David R. Wall for the Illinois Environmental Regulatory Group (“IERG”) in R 23-18.

Absent the relief requested herein, the Board presumably will address in the normal course the Proposed Alternative Emissions Standard during SSM for FCCUs in Subdocket R 23-18A. *But*, and importantly, if the proposed revisions to Parts 201, 202 and 212 are made effective *before* the Subdocket addresses the interplay and applicability of the CO Standard during SSM, then refineries in Illinois with FCCUs will unfairly and unnecessarily be faced with allegations of noncompliance during startup while the Subdocket work progresses. The Board, however, can easily prevent these drastic consequences.

The purpose of this Motion is to prevent the drastic consequences arising from the interplay of two aforementioned separate regulatory provisions; specifically, this Motion requests that the Board provide temporary relief from the effects that will arise if the changes to Parts 201, 202 and 212 in R 23-18 are made effective *before* the CO Standard for FCCUs is addressed for SSM activities. The Board can provide the temporary relief necessary by either:

- 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; and/or
- 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
- 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

- 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.

This relief is sought so that, as explained more fully below, refineries in Illinois remain in compliance with the requirements of 35 Ill. Adm. Code 216.361 and Parts 201, 202 and 212 during startup, which will be made more stringent as a result of the removal of the SSM provisions in Parts 201, 202 and 212, while the Board considers the Proposed Alternative Emissions Standard request. Without the requested relief, refineries will unfairly and unnecessarily be faced with allegations of noncompliance during startup while the Subdocket work progresses.

BACKGROUND

Comments filed with the Board in the R 23-18 proceeding demonstrated that eliminating the SSM provisions in Parts 201, 202 and 212 would render numerous existing emissions limitations and standards in the Board's regulations infeasible or impossible to meet. As such, IERG and API proposed (among other things) that the Board amend the Board's regulations at 35 Ill. Adm. Code 216.361, which imposes carbon monoxide ("CO") emissions standards on specified petroleum and petrochemical processes (including FCCUs), or to include language in Parts 201, 202 and 212 to include an alternative emissions standard applicable during periods of SSM. In its comments, API noted that "CO emissions from FCCUs can vary widely during startup due to the complex procedures needed to eventually bring a unit and its air pollution controls to a steady state", and that, "Indeed, IEPA has long been aware that facilities with FCCUs require provisions for operations during periods of SMB¹ under this standard and has routinely provided case-by-case allowances in site-specific permits." (API post-hearing comment, page 2.) The Post-hearing

¹ Startup, malfunction and breakdown. Because SSM and SMB are functional equivalents, the two abbreviations are used interchangeably in this Motion.

comments of IERG, which also address these issues, explained that the Board previously recognized that SSM provisions were a foundational part of generic numeric emissions standards such as the CO standard of 35 Ill. Adm. Code 216.361. (IERG post-hearing comment, pages 1, *citing* Opinion and Order of the Board, PCB R 71-23 (April 13, 1972), at 9, and 11.) IERG also explained that “If Illinois EPA’s proposal is adopted without any alternative standards during SMB, entities will be left with inevitable noncompliance during periods of SMB.” (IERG post-hearing comment, page 2.) Even the US EPA understands this issue: in its 2015 update of the NESHAP applicable to FCCUs, the US EPA established alternative CO standards for startup and shutdown. 80 Fed. Reg. 75178, 75211 (December 1, 2015). Although API and IERG urged the Board to adopt proposed revisions to Part 216 simultaneously with the proposed removal of the SSM provisions in Parts 201, 202 and 212, or in the alternative delaying the effective date until US EPA SIP approval, the Board opted not to do so in its April 6 Opinion and Order.

The IEPA’s potential exercise of enforcement discretion is not sufficient relief on which refineries in Illinois may rely. First, whether the IEPA will exercise its enforcement discretion not to pursue violations of 35 Ill. Adm. Code 216.361 during SSM periods is not certain. The Board noted in its April 6 Opinion and Order that the IEPA has historically interpreted the SSM provisions in Parts 201, 202 and 212 as “affirmative defenses”, not enforcement discretion provisions. (Page 5 - 6.) In addition, the US EPA may not approve of the IEPA’s exercise of enforcement discretion based on its past statements. *See* 78 Fed. Reg. 12514 – 15 (February 22, 2013). The Board has recognized that the US EPA has objected to SSM provisions that are either “an automatic exemption, a statement regarding exercise of enforcement discretion by the air agency or an affirmative defense.” Page 5 of April 6 order. As such, with or without the IEPA’s exercise of enforcement discretion, the Final Rule in R 23-18 could make refineries subject to the

possibility of federal, other state agency, or third-party citizen enforcement if the refineries were to operate in violation of 35 Ill. Adm. Code 216.361 once the SSM provisions are removed from Parts 201, 202 and 212.

A genuine and serious risk therefore exists that multiple refineries in Illinois will unfairly and unnecessarily be faced with allegations of noncompliance during startup while the Subdocket work progresses. John Derek Reese's Pre-filed testimony in the R 23-18 proceeding explained that four refineries in Illinois would be impacted by the proposed changes to Part 201, and that the proposed changes, "could cause direct economic harm to Illinois refineries by potentially resulting in periods of unnecessary curtailment of gasoline, diesel, aviation fuel, and other key feedstocks production in the Illinois and greater mid-west markets." (Page 3; *see also* Second Hearing Transcript, PCB R 23-18 at 31:9-24 and 32:1-9 (February 16, 2023).) As IERG noted in its post-hearing comments,

All IERG members take very seriously their environmental regulatory and permit compliance obligations. Many members have gone so far as to adopt corporate policies at the executive and board levels to direct staff that oversee their facilities to operate in compliance with all laws, regulations, permits, and orders. The employees do not have discretion to knowingly disregard applicable emission standards, and in the case of impossible compliance scenarios as described herein, employees are left with no feasible alternative.

(IERG post-hearing comments, pages 13 and 14.) The Board, therefore, should provide Movant and the refineries in Illinois with one of the four alternative requests for relief requested in this Motion so that the refineries can remain in compliance when the Final Rule in R 23-18 is issued.

I. REQUEST TO DELAY EFFECTIVE DATE

For persons such as Movant or its member companies seeking alternative emissions standards in Subdocket R 23-18A, one potential avenue of relief is for the Board to delay the effective date of the Final Rule in the original docket (R 23-18) until the alternative emissions standard request process is completed. As explained above, eliminating the current SSM provisions of Parts 201, 202 and 212 will cause the CO emissions standards of 35 Ill. Adm. Code 216.361, which were designed to apply during steady-state operations, to apply during periods of SSM. It is highly impractical if not impossible, however, for FCCUs to comply with the generic CO emissions standard during periods of SSM. (*See Proposed Alternative Emissions Standard.*) If the Board does not delay the effective date of the Final Rule in the original SSM docket (R 23-18) while persons (such as Movant or its member companies) address SSM in the Subdocket R 23-18A, the Board's Final action as to R 23-18 will be unlawful and arbitrary, as explained below.

The fast-track procedures of Section 28.5 of the Act require the Board to consider the economic reasonableness and technical feasibility of the proposal. Section 28.5(g) requires that the Board, among other things, "consider the economic benefit of the rule based on the record". Section 28.5(h) requires the Board to "take into account factors set forth in subsection (a) of Section 27 of the Act", and Section 27(a) requires the Board to take into account "the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution." The information before the Board in R 23-18 demonstrates that immediate compliance with revised Parts 201, 202, and 212 is neither technically feasible nor economically reasonable. Absent this temporary relief while interrelated SSM rules are addressed in Subdocket R 23-18A, FCCUs (*i.e.*, refineries) will unfairly and unnecessarily be faced with allegations of noncompliance during startup while the Subdocket work progresses. This may be true for others seeking alternative

emissions standards as well. Delaying the effective date of the Final Rule is not only the right thing to do, but it is also legally required.

In its April 6 Opinion and Order, the Board incorrectly determined that the proposed amendments to Parts 201, 202, and 212 were technically feasible and economically reasonable. The Board based this determination on the IEPA's assertions that the proposed amendments do not impose new requirements and that the Board would have addressed the economic reasonableness of the underlying standards when they were adopted. That simply is not the case with respect to the Board's adoption of 35 Ill. Adm. Code 216.361, as explained above. Movant hopes and respectfully requests that the Board accurately address the severe consequences to Illinois sources if the Board's Final Rule removes the SSM provisions without also providing relief for sources seeking alternative emissions standards in Subdocket R 23-18A.

II. REQUEST FOR CLARIFICATION AS TO RELIEF ARISING FROM TIMELY FILING OF ADJUSTED STANDARD REQUESTS

As explained above, the Board will effectively make 35 Ill. Adm. Code 216.361 more stringent by removing the well-relied on SSM provisions from Parts 201, 202 and 212. If the Board fails to grant the relief requested in Section I above, refineries may need to file an adjusted standard request pursuant Section 28.1 of the Illinois Environmental Protection Act. However, due to a regulatory nuance (explained immediately below), the impact of this action under Section 28.1 needs Board clarification.

Seeking an adjusted standard can only provide the needed requested relief if filing an adjusted standard stays the effect of removing the SSM provisions from Parts 201, 202 and 212. Section 28.1(e) states in part:

If any person files a petition for an individual adjusted standard in lieu of complying with the applicable regulation within 20 days after the effective date of the regulation, the operation of the regulation shall be stayed as to such person pending the disposition of the petition; provided, however, that the operation of any regulation shall not be stayed if that regulation was adopted by the Board to implement, in whole or in part, the requirements of the federal Clean Air Act, Safe Drinking Water Act or Comprehensive Environmental Response, Compensation and Liability Act, or the State RCRA, UIC or NPDES programs.

Because of the existence of Parts 201, 202 and 212, Movant did not need to request an adjusted standard when 35 Ill. Adm. Code 216.361 was originally adopted. Movant may, however, seek an adjusted standard if the proposed changes to Parts 201, 202, and 212 become effective immediately as to sources seeking alternative emissions standards. If the stay provisions of Section 28.1(e) would not be available to persons filing a request for adjusted standard within 20 days after the effective date of the revisions to Parts 201, 202 and 212, however, then filing an adjusted standard request would not be necessary. In other words, filing an adjusted standard request would not provide the temporary relief that Movant is seeking. Movant, therefore, requests that the Board clarify that the temporary relief available to persons who file a request pursuant to Section 28.1(e) for an adjusted standard will be available to persons filing adjusted standard requests within 20 days after the effective date of the revisions to Parts 201, 202 and 212.

The Board can clarify whether filing an adjusted standard request within 20 days of the effective date will stay the effect of the Final Rule in R 23- 18 even though this matter is not an adjusted standard proceeding. Although the Board has opened Subdocket R 23-18A to consider alternative emissions standards, the Board has not precluded providing parties with temporary relief while it considers proposals for alternative emissions standards. In addition, the Board has not precluded parties from requesting alternative emissions standards from also seeking adjusted standard relief. Unless the Final Rule in R 23 – 18 is stayed as to parties filing requests for adjusted

standards within 20 days of the effective date, however, then filing an adjusted standard request will not provide the temporary relief needed. The limited resources and time of the Board (as well as those of any persons seeking alternative emissions standards) will therefore be conserved if the Board clarifies and states affirmatively in this matter that filing adjusted standard requests within 20 days of the effective date of the Final Rule in R 23 – 18 will provide the relief that is necessary (*i.e.*, will provide relief from Final Rule in R 23 – 18 until the adjusted standard requests are fully addressed). So doing would be in the interests of administrative and judicial economy. The Board has previously acted in the interests of administrative and judicial economy in similar circumstances. *See Brickyard Disposal and Recycling v. IEPA*, PCB No. 16-66 at page 2 (April 12, 2017) (staying final order pending appeal).

III. REQUEST FOR CLARIFICATION AS TO RELIEF ARISING FROM TIMELY FILING OF VARIANCE REQUESTS

If the Board fails to grant the relief requested in Sections I or II above, refineries may need to file a variance request pursuant Section 35(a) of the Illinois Environmental Protection Act. Under Section 35(a) of the Act, the Board is authorized to grant variances when it finds that “compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship.” Just as in Section 28.1(e) with respect to adjusted standards, Section 38(b) of the Act states with respect to variances, in part:

If any person files a petition for a variance from a rule or regulation within 20 days after the effective date of such rule or regulation, the operation of such rule or regulation shall be stayed as to such person pending the disposition of the petition; provided, however, that the operation of any rule or regulation adopted by the Board which implements, in whole or in part, a State RCRA, UIC, or NPDES program shall not be stayed.

As explained above, requiring refineries to comply with 35 Ill. Adm. Code 216.361 while waiting for the Board to consider its alternative emissions standards proposal would impose an arbitrary or unreasonable hardship. Unless the effects of Final Rule in R 23 – 18 are stayed as to parties filing requests for variance within 20 days of the effective date, however, then filing a variance request will not provide the temporary relief that is needed. But, if the Board provides this clarification and stay, the limited resources and time of the Board (as well as those of any persons seeking alternative emissions standards) will be conserved. Movant requests that the Board clarifies and states affirmatively that the filing of variance requests within 20 days of the effective date of the Final Rule in R 23 – 18 will provide the relief that is necessary (*i.e.*, will provide relief from Final Rule in R 23 – 18 until the variance requests are fully addressed).

IV. REQUEST FOR EXPEDITED REVIEW

If the Board does not grant the relief requested in Sections I, II, or III above, then Movant asks the Board to ordering the Hearing Officer in Subdocket R 23-18A to expedite review of the Proposed Alternative Emissions Standard that would apply during periods of startup for fluid catalytic cracking units (“FCCUs”) instead of the generic carbon monoxide standard located at 35 Ill. Adm. Code 216.361. Pursuant to 35 Ill. Adm. Code 101.512(a), a Motion for Expedited Review must be directed to the Board and “completely state the facts and reasons for the request and must be accompanied by an oath or affirmation attesting that the facts cited are true.” Pursuant to 35 Ill. Adm. Code 101.512(b), the Board must, when acting on a motion for expedited review, “consider all statutory requirements and whether material prejudice will result from the motion being granted or denied.” This Motion clearly demonstrates that Movant and its refinery members

in Illinois will be subject to material prejudice unless the requested relief is granted. In addition, no statutory requirement would prevent the Board from granting the requested relief.

Granting expedited consideration of the Proposed Alternative Emissions Standard will not lead to sanctions being imposed by the EPA. IERG's Post-Hearing comments noted, "US EPA has not yet considered the types of narrowly tailored alternative emission standards as those proposed by IERG, in response to the 2015 SIP Call.... Including IERG's proposed revisions to Part 216 will not make that SIP submission incomplete." (Page 12 and 13.)

In fact, the Board may grant the requested relief even if US EPA sanctions may be an issue. Although the IEPA argued in its comments in the R 23-18 proceeding that the proposed changes to Parts 201, 202 and 212 are necessary to avoid sanctions imposed by the US EPA, the Board noted on page 8 of its April 6 Order that the US EPA said it would, "consider and assess any path chosen by a state." The fast-track process rule states:

The Board must adopt rules in the fast-track rulemaking docket under the requirements of this Section that the CAAA requires to be adopted and may consider a non-required rule in a second docket that shall proceed under Title VII of this Act.

Section 28.5(i). The Board has previously granted expedited review when EPA sanctions were an issue. See Section 27 Proposed Rules for Nitrogen Oxide (NO_x) Emissions From Stationary Reciprocating Internal Combustion Engines and Turbines: Amendments to 35 Ill. Adm. Code Parts 211 and 217, R07-19, at 4 (Apr. 2, 2009); In the Matter of: Nitrogen Oxides Emissions from Various Source Categories, Amendments to 35 Ill. Adm. Code Parts 211 and 217, R08-19, at 4 (Apr. 2, 2009). Granting expedited review of Movant's Proposed Alternative Emissions Standard is within the Board's authority and necessary in this instance to prevent material prejudice.

REQUEST FOR ALTERNATIVE RELIEF

As the Board stated in its Opinion and Order, PCB R 71-23 (April 13, 1972):

Many of the substantive limitations adopted today impose stringent new requirements which cannot be met immediately without closing down large numbers of existing facilities. While it is important that the new standards be met as soon as practicable, we have no wish to obtain clean air at the cost of closing down society.

Page 8. To prevent Illinois refineries who have requested the Proposed Alternative Emissions

Standard from potentially being in noncompliance pending Board action on the proposal,

Movant respectfully requests in the alternative that the Board either:

- Delay the effective date of the Final Rule in the original SSM docket (R 23-18) as to persons such as Movant seeking alternative standards in the Subdocket R 23-18A; and/or
- Clarify and state that the effective date of the Final Rule in the original SSM docket (R 23-18) will be stayed for persons who file for an adjusted standard within 20 days of the effective date pursuant to Section 28.1(e) of the Environmental Protection Act; and/or
- Clarify and state that the effective date of the Final Rule in the original SSM docket (R 23-18) will be stayed for persons file for a variance within 20 days of the effective date pursuant to Section 38(b) of the Environmental Protection Act; and/or
- Order the Hearing Officer in Subdocket R 23-18A to expedite consideration of the Proposed Alternative Emissions Standard request of Movant so that it is effective at the same time that the Final Rule in the original SSM proceeding (R 23-18) becomes effective.

Respectfully submitted,

AMERICAN PETROLEUM INSTITUTE,

By: /s/ Alec Messina
One of its Attorneys

Dated: June 9, 2023

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CERTIFICATE OF SERVICE

I, the undersigned, on oath state the following: That I have served the attached the **ENTRY OF APPEARANCE** and **AMERICAN PETROLEUM INSTITUTE'S MOTION FOR RELIEF AND/OR TO CLARIFY** via electronic mail upon:

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That my email address is Alec.Messina@heplerbroom.com

That the number of pages in the email transmission is 16.

That the email transmission took place before 5:00 p.m. on June 9, 2023.

Date: June 9, 2023

/s/ Alec Messina
Alec Messina