BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE

TO: See attached Service List

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S POST-HEARING COMMENTS, a copy of which is herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ Dana Vetterhoffer
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DATED: May 22, 2024

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IN THE MATTER OF:	**)**	
	)	**R23-18(A)**
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	)	

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S POST-HEARING COMMENTS

The Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by one of its attorneys, hereby submits its post-hearing comments in the above rulemaking proceeding regarding the public hearing that took place on April 15, 2024.

D.C. Circuit Court Decision

At the April 15, 2024, hearing, the Agency received several questions regarding the impact, if any, of the March 1, 2024, United States Court of Appeals for the District of Columbia Circuit decision ("D.C. Circuit Decision") in *Environmental Committee of the Florida Electric Power Coordinating Group, Inc. v. Environmental Protection Agency* regarding several states' startup/shutdown/malfunction ("SSM") State Implementation Plan ("SIP") Calls. Specifically, the Agency was asked whether the D.C. Circuit Decision would impact the rules adopted by the Illinois Pollution Control Board ("Board") in the R23-18 rulemaking or the rulemaking proposals currently being considered in this R23-18(A) subdocket.

In the D.C. Circuit case, several states and certain companies subject to those states' SIPs appealed the United States Environmental Protection Agency's ("USEPA") SIP Calls of their respective SSM standards. As the Agency explained at hearing, Illinois was not a party to the lawsuit (4/15/24 Transcript at p. 15) and Illinois' SIP Call was not considered by the Appellate Court. The Appellate Court did not indicate that it was vacating SIP Calls that had not been

appealed, and USEPA has not advised the Illinois EPA what indirect impacts, if any, the Appellate Court's decision may have on states such as Illinois.[1] (4/15/24 Transcript at p. 16-17).

The D.C. Circuit Decision should have no implications on the Board's previous adoption of rules in the main R23-18 docket. As explained at hearing, to the Agency's knowledge Illinois' SIP Call is still in effect, so nothing has yet changed. (4/15/24 Transcript at p. 18-19). Even if it were not in effect, however, the Board adopted regulations in R23-18 in compliance with all applicable regulatory requirements (4/15/24 Transcript at p. 19) and in response to federal mandates that were in place throughout the rulemaking proceeding. The rules are final and effective and will remain so unless and until amendments are adopted in a future rulemaking action.[2] (4/15/24 Transcript at p. 19). The Agency does not intend to propose regulations to the Board seeking repromulgation of the previous SSM provisions, and it does not intend to withdraw its SIP submittal of the R23-18 rules to USEPA. (4/15/24 Transcript at p. 18-19). As the Agency testified at hearing, it is not in a position to opine on what, if any, impact the D.C. Circuit Decision may have on USEPA's approval of Illinois' SIP submittal, but if the SIP Call is still in effect, then SIP approval is still needed. (4/15/24 Transcript at p. 17-18). Even if it were not needed for SIP Call purposes, the Illinois EPA would still request SIP approval of the rule to ensure consistency at the State and federal levels. (4/15/24 Transcript at p. 19).

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[1] Currently, USEPA's path forward is unclear. Other than appeal/rehearing avenues, it could choose to remedy the deficiencies noted by the Appellate Court and issue new SIP Calls to replace those that were vacated. Or it may choose to take action with regard to the remaining states' SIP Calls (including Illinois) consistent with the Appellate Court's reasoning, affirming some and amending or vacating others.

[2] Notably, even if the D.C. Circuit had considered and vacated Illinois' SIP Call, this would not be the first instance of the Board adopting regulations in response to federal requirements that were subsequently changed or vacated, nor will it likely be the last. For example, the Illinois Mercury Rule in Part 225 was adopted by the Board effective December 21, 2006, to address requirements set forth in the federal Clean Air Mercury Rule (*see,* R2006-025), which was subsequently vacated by federal courts in 2008 (*see, New Jersey v. Environmental Protection Agency,* 517 F.3d 574 (D.C. Cir. 2008)).

Similarly, the D.C. Circuit Decision should have no implications for the Board's consideration of proposed rules in the current R23-18(A) subdocket. Regardless of the SIP Call, rule proposals seeking to change existing emission limitations must be technically supported and environmental impact must be adequately assessed. Further, the bulk of the alternative emission limit ("AEL") criteria USEPA set forth as part of its SSM Policy, including the criteria indicating that source categories subject to an AEL should be narrowly-defined and that worst-case emissions analysis should be undertaken, has been in existence for decades; the SSM Policy, which is considered non-binding guidance, was simply updated in USEPA's 2015 SIP Call action. (4/15/24 Transcript at p. 19-20). While it is possible that USEPA will amend its SSM Policy in response to the D.C. Circuit Decision, or will implement its SSM Policy in such a way that takes into consideration relevant aspects of the decision, if any, the Agency's current understanding is that USEPA will be utilizing the same or similar criteria previously identified in assessing AELs. (4/15/24 Transcript at p. 20). Consequently, the D.C. Circuit Decision has not impacted the Illinois EPA's stated position regarding the rule proposals.

Agency Position Regarding Rule Proposals

The Agency indicated in its pre-filed testimony of Rory Davis that, based on the additional technical support and justification for the proposed amendments that East Dubuque Nitrogen Fertilizers LLC ("EDNF"), Rain CII Carbon LLC ("Rain Carbon"), the American Petroleum Institute ("API"), and Dynegy and Midwest Generation ("Dynegy/MWG") have provided, it does not object to the Board adopting the rule proposals as set forth in such proponents' March 15, 2024, filings with the Board. (*See generally, Illinois Environmental Protection Agency's Testimony of Rory Davis* (April 2, 2024) ("Testimony of Rory Davis")). The Agency has not identified problematic emissions impacts from the proposals and is not

aware of any potential issues with USEPA approval. (4/15/24 Transcript at p. 22). The Agency noted, however, that it does not support EDNF's proposed deletion of Section 217.381(b), (c), and (d), and it has confirmed with EDNF that the strikethrough of those subsections as set forth in its March 15, 2024, filing was inadvertent. (Testimony of Rory Davis at p. 8). Also, the Agency indicated at hearing that it has no objection to API's proposed amendments to 35 Ill. Adm. Code 216.103 and 104, which were not included in API's March 15, 2024, filing. (4/15/24 Transcript at p. 21).

Following the hearing, however, in the Board's docket regarding ExxonMobil's Adjusted Standard Petition which seeks an adjusted standard ("AS") substantively similar to API's rule proposal, ExxonMobil objected to the Agency's request that the stay of the AS proceeding be extended until the Board makes a decision in this rulemaking docket. (AS2024-001, *ExxonMobil Oil Corporation's Status Report and Response to Illinois Environmental Protection Agency's Motion to Extend Stay of Proceedings* (April 24, 2024) ("ExxonMobil Response")). ExxonMobil argued that the AS docket and this rulemaking are two different actions with different procedural requirements, and that the Agency should file its recommendation and leave it up to the Board to decide how best to handle the two overlapping actions. (ExxonMobil Response at p. 3-4). ExxonMobil claimed that the Agency's statements at the third hearing in this rule indicating it does not object to API's rule language are evidence that it is prepared to file a recommendation in the AS docket. (ExxonMobil Response at p. 5-6). The Hearing Officer decided in favor of ExxonMobil, indicating that there is no need for an additional stay and ordered the Agency to file its recommendation by June 10, 2024. (AS2024-001, *Hearing Officer Order* (April 25, 2024)).

While it is unfortunate and perplexing that the Agency must expend resources in two proceedings for the same substantive relief (particularly at this stage of the rulemaking), the Agency will file its recommendation in the AS proceeding in response to information in ExxonMobil's Petition for Adjusted Standard ("AS Petition") by the deadline specified. The Agency agrees with ExxonMobil that the AS proceeding and this rulemaking are two separate actions, but the actions do not just entail different procedural requirements as the company notes; they entail different substantive ones as well including different standards for Board action. Further, in its recommendation the Agency will not be responsible for supplementing the information set forth in ExxonMobil's AS Petition with any of the additional technical support/information provided by API in the rulemaking proceeding, which formed the basis for the Agency's testimony in the rulemaking context that it does not object to API's rule proposal. ExxonMobil is responsible for supplementing its AS Petition if desired with any additional information it wants considered relative to the context of an adjusted standard.

Given that ExxonMobil is actively pursuing an adjusted standard, and the Hearing Officer's denial of the Agency's stay request implies the Board is prepared to move forward as well, the Board should ensure that any actions it takes in this rulemaking and the AS proceeding are consistent with one another, as relief is not necessary and should not be provided in both forums.

If the Board adopts API's rule proposal, ExxonMobil's requested AS will not only no longer be necessary but granting its Petition would arguably be inappropriate as the regulations from which it sought relief will have changed such that adjusted standard criteria may not be met. Along those same lines, if the Board grants ExxonMobil's AS Petition first, the Agency objects to ExxonMobil's continued inclusion in API's proposed rule language as rule revisions

will no longer be necessary for the company and could cause confusion to the extent there are any differences between ExxonMobil's AS, which can include conditions, and the rule. It is unclear to the Agency whether ExxonMobil's continued position in the AS proceeding implies a preference for an adjusted standard over a rule, but that will be for the Board to ascertain and reconcile.

Next, the Agency objects to adoption of the Illinois Environmental Regulatory Group's ("IERG") rulemaking proposal to amend 35 Ill. Adm. Code Part 216 for thousands of fuel combustion emission sources throughout the State. The Agency has explained the additional technical support that would be necessary for the Agency to assess emission impact and determine whether the proposed amendments would be appropriate for a revision of the Illinois SIP, including identifying the greatest potential for air quality impacts during startup and shutdown periods for subject sources, quantifying worst-case emissions, and demonstrating that carbon monoxide ("CO") emissions during these periods will not threaten the 1-hour and 8-hour CO National Ambient Air Quality Standards at these higher impact sources via modeling. Without this support, it is not possible for the Board, the Agency, or the public to identify and consider the emissions impacts, including worst-case emissions impact, of the proposed AEL. The Agency also indicated that IERG's proposal is not sufficiently tailored to those sources that have an actual need for alternative emission limits and is not limited to a narrowly-defined source category. (*Illinois Environmental Protection Agency's Comments* at p. 24-27 (October 23, 2023); Testimony of Rory Davis at 3-5).

IERG has not provided additional technical support to the Agency or Board and has not narrowed the universe of affected sources to those that have indicated a need for alternative limits. The Agency, therefore, has insufficient information with which to evaluate IERG's

proposal. If adopted, the Agency does not intend to submit IERG's rule proposal to USEPA for approval. (Testimony of Rory Davis at p. 5).

SIP Submittals of Adopted AELs

If the rule proposals of EDNF, Rain Carbon, API, and Dynegy/MWG are adopted by the Board, the Agency intends to submit them to USEPA for approval as SIP revisions.[3] Such revisions are required to undergo public notice and opportunity for hearing before they are submitted to USEPA for approval under Section 110 of the Clean Air Act ("CAA"), 40 CFR 51.102, and 40 CFR Part 51.Appendix V. While the Agency can often rely on the Board's public notice for hearings as satisfying SIP notice requirements, that is not the case here. Per USEPA guidance, "[I]n order to satisfy the CAA and 40 CFR Part 51, the notice must clearly state that the regulations and/or documents that are the subject of the public notice will be submitted to the [USEPA] to be included in or to revise the [SIP] . . . and should identify the CAA requirements the revisions are intended to meet. Unless the public notice includes this statement, Section 110 of the CAA has not been satisfied." *Regional Consistency for the Administrative Requirements of State Implementation Plan Submittals and the Use of "Letter Notices"* at p. 6 (April 6, 2011).[4] Since the Agency was not the rule proponent here and its intent with regard to the SIP was unknown, the Board did not include a compliant statement in its public notice.

The Illinois EPA originally planned to provide public notice of the versions of the above specified rule amendments that are provided to the Joint Committee on Administrative Rules for

[3] As the Agency testified at hearing, however, USEPA Region 5 has not yet indicated whether these proposed AELs are likely approvable. If, prior to its submittal to USEPA, the Agency learns one or more of the AELs is likely not approvable, the Agency may reassess submitting those portions as SIP revisions. (4/15/24 Transcript at p. 23).
[4] Available at https://www.epa.gov/sites/default/files/2016-02/documents/mccabelltrras.pdf.

Second Notice whenever a Second Notice Order is adopted by the Board, with an eye toward completing public notice by the time the Board adopts a final rule such that the SIP submittals could occur shortly thereafter. Unfortunately, as the ExxonMobil AS proceeding is now moving forward, and as the timing of Board action in that proceeding is unknown, it may not be clear to the Agency at the Second Notice stage of this rulemaking in which proceeding ExxonMobil may be provided relief. If the Board grants ExxonMobil's adjusted standard and removes the company from API's rule language here, public notice would be needed for the adjusted standard instead. If the Board opts to provide duplicative relief in both proceedings (over the Agency's objection), the Agency would need to assess how to proceed for SIP purposes. To conserve resources, eliminate the possibility that the Agency would need to go to public notice more than once (particularly since with each notice there is the possibility of a public hearing), and ensure the Agency has all of the relevant information before proceeding, the Agency will wait until the Board has made a final decision in both this docket and ExxonMobil's AS docket before moving forward with public notice. This will delay the SIP submittals but is currently the most efficient path forward.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

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CERTIFICATE OF SERVICE

I, the undersigned, an attorney, state the following:

I have electronically served the attached ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S POST-HEARING COMMENTS upon the following persons:

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Respectfully submitted,

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