

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

IN THE MATTER OF:)
)
PROPOSED NEW 35 ILL. ADM. CODE 204)
PREVENTION OF SIGNIFICANT)
DETERIORATION, AMENDMENTS TO 35) R19-1
ILL. ADM. CODE PARTS 101, 105, 203, 211,) (Rulemaking – Air)
AND 215)
)
)

NOTICE OF FILING

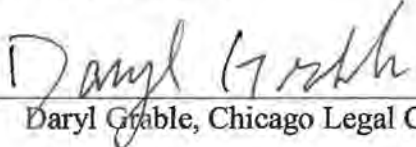
To: Don Brown, Clerk
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, IL 60601

And Attached Service List

Please take notice that on the 19th day of November, 2018, I filed electronically Pre-Filed Questions on behalf of Citizens Against Ruining the Environment for Illinois EPA's Witnesses with the Office of the Clerk of the Illinois Pollution Control Board.

A copy of this filing is hereby served upon you.

Respectfully submitted,

By: 
Daryl Grable, Chicago Legal Clinic, Inc.

Dated: November 19, 2018

Daryl Grable
Chicago Legal Clinic, Inc.
211 W. Wacker, Suite 750
Chicago, IL 60606
(312) 726-2938
(312) 726-5206 (fax)
dgrable@clclaw.org

Service List

Jennifer T. Nijman, Susan M. Franzetti, and Kristen Laughridge Gale
Nijman Franzetti LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
jn@nijmanfranzetti.com
sf@nijmanfranzetti.com
kg@nijmanfranzetti.com

Greg Wannier, Staff Attorney
Sierra Club Environmental Law Program
2101 Webster St., Suite 1300
Oakland, CA 94612
greg.wannier@sierraclub.org

Sally Carter
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794
sally.carter@illinois.gov

Alec M. Davis, Executive Director
Illinois Environmental Regulatory Group
215 East Adams Street
Springfield, IL 62701
adavis@ierg.org

Virginia Yang, Deputy Legal Counsel
Renee Snow, General Counsel
Illinois Department of Natural Resources
One Natural Resource Way
Springfield, IL 62702-1271
virginia.yang@illinois.gov
renee.snow@illinois.gov

Deborah J. Williams, Regulatory Affairs Director
City of Springfield
800 E. Monroe, Office of Public Utilities
Springfield, IL 62757
deborah.williams@cwlp.com

Kathryn A. Pamenter
Office of the Attorney General
69 W. Washington St., Suite 1800
Chicago, IL 60602
KPamenter@atg.state.il.us

Don Brown, Clerk
Illinois Pollution Control Board
100 W. Randolph St., Suite 11-500
Chicago, IL 60601
don.brown@illinois.gov

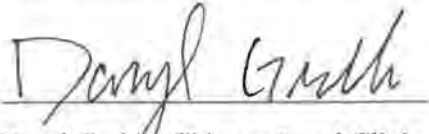
Katherine D. Hodge
N LaDonna Driver
Daniel L. Siegfried
Heplerbroom, LLC
4340 Acer Grove Drive
Springfield, IL 62711
Katherine.Hodge@heplerbroom.com
LaDonna.Driver@heplerbroom.com
Daniel.Siegfried@heplerbroom.com

CERTIFICATE OF SERVICE

I, Daryl Grable, the undersigned attorney, hereby certify that I served upon the individuals named on the attached Service List a true and correct copy of the seven page document-

Pre-Filed Questions on behalf of Citizens Against Ruining the Environment for Illinois EPA's Witnesses

-by email on November 19th, 2018, before the hour of 5:00 p.m., from my email address (dgrable@clclaw.org) at the email address provided on the attached Service List.

A handwritten signature in cursive script that reads "Daryl Grable". The signature is written in black ink and is positioned above a horizontal line.

Daryl Grable, Chicago Legal Clinic, Inc.

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PRE-FILED QUESTIONS OF CITIZENS AGAINST RUINING THE ENVIRONMENT FOR
ILLINOIS EPA'S WITNESSES

I, Daryl Grable, on behalf of Citizens Against Ruining the Environment ("CARE"), hereby file the pre-filed questions for the Illinois Environmental Protection Agency's ("IL EPA") witnesses in this matter, as provided by the Hearing Officer Order issued on September 18th, 2018. CARE submits the following questions:

1. In the current rulemaking proceeding IL EPA has proposed amendments to 35 Ill. Adm. Code Parts 101, 105, 203, 211, and 215. It is 2 Ill. Adm. Code § 2175, however, which governs the Illinois Pollution Control Board's ("Board") "Organization, Public Information, and Types of Proceedings," with Section 600 specifically addressing "Adjudicatory Proceedings." 2 Ill. Adm. Code § 2175.600(a) grants the Board the authority to hear certain adjudicatory cases, while 2 Ill. Adm. Code § 2175.600(a)(2) governs the "Permit Appeals" the Board may hear. That portion of the Administrative Code provides that "certain third parties may petition the Board for a hearing to contest the decision of the Agency" only in the specific limited instances where "the Agency grants a RCRA permit for a hazardous waste disposal site or grants or denies a National Pollution Discharge Elimination System (NPDES) permit."

This is at odds with proposed 35 Ill. Adm. Code § 105.604(c), which appears to grant the authority to appeal an Agency permitting decision to "[a]ny person who participated in the Agency public comment process for a PSD permit and is either aggrieved or has an interest that is or may be adversely affected by the PSD permit." In other words, proposed 35 Ill. Adm. Code § 105.604(c) grants the authority to appeal PSD permitting decisions to "certain third parties" like those referenced in 2 Ill. Adm. Code § 2175.600(a)(2).

- a. Is there currently a rulemaking proceeding underway that will amend 2 Ill. Adm. Code § 2175.600(a)(2) to include the rights of third parties in permit appeals concerning Clean Air Act PSD permitting decisions?

- i. If this is not the case, what are the practical effects of this on the rights of third parties in appealing final PSD permitting decisions?
 - ii. If this is not the case, will IL EPA pursue the appropriate course of action necessary to amend 2 Ill. Adm. Code § 2175.600(a)(2) to accurately reflect the proposed amendments in the immediate proceeding?
 2. At page 76 of the Statement of Reasons, IL EPA explains that it is not including 40 CFR § 52.21(o)(3) in proposed Section 204.1140. “40 CFR [§] 52.21(o)(3) provides the Administrator with the option of requiring visibility monitoring in any Federal Class I area near a proposed new stationary source or major modification as is necessary and appropriate.” The provided reasons for not including 40 CFR § 52.21(o)(3) are that: 1) “40 CFR [§] 51.166(p) does not mandate that each applicable state implementation plan submitted to USEPA for review and approval contain such a requirement,” and; 2) “no Class I area exists in Illinois, or in close proximity to Illinois.”
 - a. Why does IL EPA believe that the fact that no Class I areas *currently* exist in Illinois provides support for the proposed action?
 - b. Given that 40 CFR § 52.21(g) explicitly provides States and “Indian Governing Bodies” the authority to redesignate areas as Class I, what relevancy does the current lack of Class I designations have on the potential of future Class I designations?
 - c. As Class I designations most often apply to such lands as U.S. Wilderness Areas, National Parks and Forests, and other Federally-protected lands, given Illinois’ trend of increasing total Federal acreage within its borders (16.5% increase from 1990 to 2015)¹, isn’t it possible that the State of Illinois may want to use its authority to designate these lands as Class I in the future?
 - d. As the goal of the PSD program is to protect public health and welfare from the adverse effects of increased air pollution, isn’t IL EPA’s proposed elimination of the opportunity to require additional air monitoring antithetical to the Clean Air Act at large, and to the PSD program in particular?
 - e. If neither Illinois nor the relevant Indian Governing Bodies opt to use their authority to redesignate lands as Class I, is there any cost to preserve the authority found in 40 CFR § 52.21(o)(3)?
 - f. Given the potential for future Class I designations in Illinois, can IL EPA articulate any reason for eliminating this potential pollution monitoring mechanism apart from the fact that they are not explicitly required by 40 CFR § 51.166(p) to include it?
 3. Under Illinois’ existing PSD permitting scheme, USEPA’s Environmental Appeals Board (“EAB”) is the adjudicatory body governing PSD permitting appeals. As a federal entity, the EAB has acknowledged it has a legal requirement, due to Executive Order 12898, to address and consider environmental justice issues if they are raised as part of a PSD permit appeal. In addition, multiple EAB decisions have held that “a permit issuer should exercise its discretion to examine any ‘superficially plausible’ claim that a minority or low-income population may be disproportionately affected by a particular facility that is

¹ Carol H. Vincent, Laura A. Hanson & Carla N. Argueta, *Federal Land Ownership: Overview and Data*, 7-5700, at 17 (2017), available at <https://fas.org/sgp/crs/misc/R42346.pdf>.

the subject of a PSD permit proceeding.”² Although IL EPA has its own established environmental justice policy, the concept of environmental justice is not mentioned in either the proposed Board rules or in IL EPA’s Statement of Reasons, nor is it a part of established Board precedent.

- a. Can IL EPA clarify whether the Board will be required to evaluate the adequacy of IL EPA’s environmental justice-related permit decisions as part of a PSD permit appeal?
- b. In the portion of the Statement of Reasons addressing proposed amendments to Part 105 Subpart F, PSD Permit Appeals, beginning on page 88, IL EPA relies heavily on established EAB precedent, directly citing more than 20 EAB decisions and justifying a proposed standard of review on the basis that it “has been the same standard of review employed by USEPA’s EAB in its review of any PSD decisions issued by delegated agencies and/or USEPA Regional Offices.”
 - i. Does IL EPA believe that this same logic should apply to the legal relevancy of environmental justice concerns, that, because of their undeniable relevance in EAB PSD adjudications, the same legal relevancy should apply in subsequent Board PSD permit appeals?
- c. Does IL EPA believe that States should be permitted to assume control of federal permitting programs for purposes of relaxing legal requirements contained therein?
- d. As allowing for environmental justice concerns to be raised in PSD permit appeals is both legal and practical, is IL EPA still “committed to protecting the health of the citizens of Illinois and its environment, and to promoting environmental equity in the administration of its programs to the extent it may do so legally and practicably” as is claimed on its website?³
- e. Is IL EPA of the opinion that eliminating the ability to raise environmental justice concerns in PSD permit appeals is “support[ing] the objectives of achieving environmental equity for all of the citizens of Illinois,” as it purports to do on its website?⁴

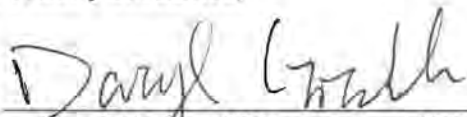
² *In re Avenal Power Center, LLC*, 15 E.A.D. 384, 398 (EAB 2011)(quoting *In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 69 n. 17 (EAB 1997)).

³ Illinois Environmental Protection Agency, Environmental Justice (EJ), Illinois.gov, <https://www2.illinois.gov/epa/topics/environmental-justice/Pages/default.aspx> (last visited November 16th, 2018).

⁴ *Id.*

Respectfully submitted,

By:



Daryl Grable, Chicago Legal Clinic, Inc.

Dated: November 19, 2018

Daryl Grable
Chicago Legal Clinic, Inc.
211 W. Wacker, Suite 750
Chicago, IL 60606
(312) 726-2938
(312) 726-5206 (fax)
dgrable@clclaw.org