BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE

TO: Don Brown
Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph St., Suite 11-500
Chicago, IL 60601-3218

SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Pollution Control Board the **ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S MOTION FOR WAIVER OF REQUIREMENTS AND ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S COMMENTS REGARDING THE FIRST NOTICE VERSION OF THE PROPOSED RULES** a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: Sally Carter

Sally Carter
Assistant Counsel
Division of Legal Counsel

DATED: May 4, 2020

1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
217/782-5544

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S MOTION FOR WAIVER OF REQUIREMENTS

The Illinois Environmental Protection Agency ("Agency"), by its attorney and pursuant to 35 Ill. Adm. Code 101.500, hereby moves the Illinois Pollution Control Board ("Board") to waive certain requirements, namely that the Illinois Environmental Protection Agency's Comments Regarding the First Notice Version of the Proposed Rule ("Agency's Comments") not exceed 50 pages in length as otherwise provided by 35 Ill. Adm. Code 101.302(k). In support of this Motion, the Agency states as follows:

1. On March 5, 2020, the Board issued its Opinion and Order proposing to adopt Part 204, to amend Parts 101 and 105 of its procedural rules and to amend Parts 203, 211 and 215 of its air pollution rules. The First Notice version of the proposed rule ("First Notice Version") was published in the *Illinois Register* on March 20, 2020.

2. While the Board welcomed comment on any matter relevant to the proposal, the Board specifically requested comment on four topics. The Agency has provided a considered response for each topic, as requested by the Board.

3. In addition, the First Notice Version of Part 204 would make many changes to the Agency's proposal. Given the nuanced nature of many aspects of the federal PSD rules, the Agency carefully compared the First Notice Version and the federal PSD rules. In many instances, the planned changes to Part 204 would substantively alter Part 204 in a way that is

contrary to the federal PSD rules as they now exists at 40 CFR 52.21 and to the requirements at 40 CFR 51.166 for state implementation plan ("SIP") approval of state PSD permitting programs. In doing so, these changes may threaten the United States Environmental Protection Agency's ("USEPA") ability to approve Part 204 as part of Illinois' SIP. Consequently, the Agency's Comments must address many provisions in the First Notice Version.

4. While the Agency's Comments are 62 pages in length, this is reasonable given both the complexity and significance of the changes that would potentially be made to Part 204, as reflected in the First Notice Version. The Agency has sought to provide a detailed review of the First Notice Version, particularly how it compares to the federal PSD rules, to assist the Board in this rulemaking. At the same time, the Agency diligently attempted to minimize the length of the Agency's Comments and, where possible, the Agency has not responded to trivial or collateral matters. Despite these efforts, the Agency has found it impossible to set forth the numerous matters that must be addressed in no more than 50 pages.

5. Concurrently with this Motion, the Agency is submitting the Illinois Environmental Protection Agency's Comments Regarding the First Notice Version of the Proposed Rule to the Board for filing, which filing is in excess of 50 pages in length.

WHEREFORE, for the reasons set forth above, the Illinois Environmental Protection Agency respectfully requests that the Board provide approval for the Agency to file the Agency's Comments in excess of fifty pages.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: Sally Carter

Sally Carter
Assistant Counsel
Division of Legal Counsel

DATED: May 4, 2020

1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
217/782-5544

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S COMMENTS REGARDING THE FIRST NOTICE VERSION OF THE PROPOSED RULE

The Illinois Environmental Protection Agency ("Agency"), by its attorney, offers the following comments on the Illinois Pollution Control Board's ("Board") Opinion and Order, dated March 5, 2020, ("Order") and First Notice version of the proposed rule ("First Notice Version"), published in the *Illinois Register* on March 20, 2020.

Notice of Proposed Amendments

The Agency observes that the following inadvertent errors exist in paragraph 13(a) of the *Illinois Register,* Notice of Proposed Amendments ("Notice"), that accompanies proposed 35 Ill. Adm. Code Part 204 and the proposed revisions to 35 Ill. Adm. Code 101, 105, 203, 211 and 215. The Notice states that "The proposal may apply to an entity proposing a new major stationary source *of* major modification at an existing major stationary source to which the PSD permitting program applies." (*emphasis added*). Proposed Part 204 would apply to an entity proposing a new major stationary source *or* a major modification at an existing major stationary source.

In addition, a transcriptional error exists in paragraph 13(b) of the Notice that accompanies the proposed revision to 35 Ill. Adm. Code Part 105. In paragraph 13(b), the Notice makes a reference to Part 101 when the reference should be to Part 105.

The Board's March 5, 2020 Opinion and Order

Upon review of the Board's Order, the discussion of Major Modification at Existing Major Sources, overlooks a potentially important, second step in determining whether PSD permitting would be triggered by a modification at an existing major stationary source. SR at pgs. 13-14. While the Order recognizes that "[t]otal increased emissions from a project are compared against significant emissions rates under the PSD rules" citing to Agency testimony, the Order overlooks the subsequent step as explained in the Agency's Statement of Reasons. If the increase in emissions for a particular pollutant equals or exceeds the significant emission rate set for that pollutant, then the PSD applicability analysis may be extended by the source to include creditable changes in emissions resulting from other contemporaneous projects to consider the net change in emissions of the source. 40 CFR 51.166(b)(3). SR at pgs. 10-11. In such case, the determination of the necessity of PSD permitting is only made after any creditable change(s) in emissions from the source's contemporaneous projects has been considered, *i.e.*, the calculated net increase equals or exceeds the applicable significance emission rate thereby triggering PSD permitting.

Inadvertent Errors or Misstatements in the Opinion Offered by the Board in the Board Order

In addition, the Agency observes that the following errors or misstatements were made in the opinion offered in the Board's Order.

In the fifth paragraph on page 59, the Board states that "[i]f a petitioner can rely on any document in the record, *it* could effectively becoming the permitting authority on these newly-raised issues, or it could remand the permit and cause unnecessary delays." (*emphasis added*). In this instance, the Environmental Appeals Board ("EAB") was referring to the EAB. However, this statement by the Board suggests that the EAB was referring to the petitioner and the petitioner could become the permitting authority. Rather, the Environmental Appeals Board was

concerned about the EAB effectively becoming the permitting authority if the petitioner could rely on any document in the record.

In the fourth paragraph on page 93, the Order misquotes a statement made by the Agency on page 48 of the Agency's Statement of Reasons. The Order states that "*IEPA* elected to stay the revised regulatory language and to revert back to the earlier regulatory text." (*emphasis added*). Rather the Statement of Reasons stated that the "*USEPA* elected to stay the revised regulatory language and to revert back to the earlier regulatory text." (*emphasis added*). SR at pg. 48.

At the bottom of page 95 and the top of page 96, the Order cites to page 55 of the Agency's Statement of Reasons stating that "[i]f Part 204 becomes part of Illinois' SIP, *IEPA* would no longer be a delegated permitting authority, and an *IEPA* implemented program would no longer relevant." (*emphasis added*). As accurately reflected in the Agency's Statement of Reasons, if Part 204 becomes part of Illinois' SIP, a program implemented by USEPA would no longer be relevant. While the Agency currently administers and has historically administered the PSD program in Illinois, the program has been and will continue to be the USEPA program until Part 204 is SIP-approved by the USEPA.

In the fifth paragraph on page 104, the Order states that the "IEPA proposed to add to the federal definition language based on Section 302(z) of the CAA that is consistent with USEPA's implementation of federal permitting." As a point of clarification, the Agency did not propose to add to the federal definition; rather the Agency proposed the inclusion of language from the federal definition, similar to Section 302(z) of the CAA, in Section 204.690.

Response to Topics for Which the Board Requests Comments

In the Board Order, the Board requests comment on four topics. First, the Board

questions if the Agency's definition of "OSFM record" in 35 Ill. Adm. Code Section 101.202 should refer to an "eligibility and deductib*ility* decision" rather than an "eligibility and deductible decision." Board Order at pgs. 47, 160 (*emphasis added*). As previously explained in the Agency's First Post Hearing Comments (Agency's First Comments), all changes proposed to regulations involving programs regulated by the Office of State Fire Marshall ("OSFM") were first discussed between Agency counsel and OSFM counsel. Any language change proposed by the Agency to regulations applicable to the OSFM first received OSFM concurrence. The Agency would not agree to any revision to this phrase without the consent of the OSFM. Agency's First Comments, ¶45.

In response to the Board's request for comment, Agency counsel forwarded to OSFM counsel both the Board's Order and the First Notice effectively making the OSFM aware of the Board's request. In a subsequent email to the Agency, the OSFM requests that the Agency convey OSFM's position, as follows, to the Board:

> OSFM feels that the proposed definition of "OSFM record" in 35 Ill. Adm. Code Section 101.202 should refer to an "eligibility and deductible decision". This is because all Eligibility and Deductible (E & D) applications receive a deductible based on 415 ILCS 5/57.9, which requires the assessing of a deductible amount based on the statutory provisions as they apply to the incident at hand.

Email from OSFM counsel to Agency counsel, dated April 29, 2020. The Agency defers to OSFM on the definition of "OSFM record", *i.e.*, the definition should refer to "eligibility and deductib*le* decision" rather than "eligibility and deductib*ility* decision".

Second, the Board seeks comment on any effects of the retitling by Congress of Indiana Dunes National Lake Shore ("Indiana Dunes") as a national park in Public Law No. 116-6 and, more specifically, whether this retitling warrants the inclusion of language based on 40 CFR 52.21(o)(3) in Part 204. Board Order at pgs. 44, 161. As previously discussed in the Agency's

Second Post Hearing Comments ("Agency's Second Comments"), 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 for such purposes and by such means as is necessary and appropriate. (*emphasis added*).

In the Clean Air Act, as amended August 1977, Congress designated certain existing areas of the country as mandatory Class I areas, precluding redesignation to a less restrictive class. This reflected the intent that there be at most minimal deterioration of air quality in these areas. Congress designated international parks, national wilderness areas and national memorial parks in excess of 5,000 acres and national parks in excess of 6,000 acres, in existence on August 7, 1977, as Class I areas. 42 U.S.C. §7472. While Indiana Dunes may have been in existence on August 7, 1977, Indiana Dunes was not a national park in existence at that time and consequently, is not a mandatory Class I area. Nor has Congress subsequently adopted legislation designating Indiana Dunes a *federal* Class I area under the PSD program. Rather, Indiana Dunes has simply been retitled a national park. The retitling of Indiana Dunes as a national park is of no relevance for purposes of the PSD program as it does not make this area a *federal* Class I area. (*emphasis added*).

The topic upon which the Board specifically seeks comments is whether the addition of a provision similar to 40 CFR 52.21(o)(3) is warranted for inclusion in Illinois' PSD program at this time. The Agency would offer that Part 204 should be specific to the particular circumstances in Illinois. The recent retitling of Indiana Dunes as a national park does not indicate that language modeled after 40 CFR 52.21(o)(3) is appropriate for inclusion in Part 204. Given no federal Class I area exists in Illinois, or in close proximity to Illinois, such monitoring would not yet be needed. In the event an area in Illinois, or in close proximity to Illinois, were to

become a federal Class I area, the Agency would review the adequacy of the state PSD program at that time. If the circumstances particular to Illinois were to change warranting the inclusion of language similar to that included within 40 CFR 52.21(o)(3), the Agency would appropriately initiate any needed rulemaking proceeding.

Moreover, as indicated in the Statement of Reasons, while 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, 40 CFR 51.166(p) does not mandate that each applicable state implementation plan ("SIP") submitted to USEPA for approval contain such requirement. (*emphasis added*). The inclusion of language similar to 40 CFR 52.21(o)(3) in Part 204 is not necessary for USEPA approval of Part 204.

Third, the Board questions if the language of new Section 105.606(a) could be revised to more succinctly focus on the petition filing deadline. The Agency initially proposed the following language for Section 105.606(a):

> Except as provided in subsection (b), if a person who may petition the Board under Section 105.604 of this Subpart wishes to appeal the Agency's final decision to the Board under this Subpart, the person must file the petition with the Clerk within 35 days after the date of the Agency's final permit action.

The Board thereafter requested comment on whether the following language would be acceptable for Section 105.606(a):

> Except as provided in Subsection (b), a person who may petition the Board under Section 105.604 for review of the Agency's final decision must file the petition with the Clerk within 35 days after the date of the Agency's final permit action.

As previously discussed in the Agency's First Post Hearing Comments, these changes to Section 105.606(a) would be acceptable to the Agency. Agency's First Comments, ¶ 47a. In the Board's Order, the Board states it continued to review the proposed additions to its procedural rules.

Board's Order at pg. 55. As a result of this review, the Board requests comment on the following changes to Section 105.606(a):

> Any petition for review under Section 105.604(a) or (c) must be filed with the Clerk within 35 days after the date of the Agency's final permit action.

Board Order at pg. 161. While the Agency generally prefers the simplified language offered by the Board, the Agency observes that this language differs from the language used elsewhere within Part 105 detailing petition filing requirements. The subject in the recently proposed language would no longer be a "person" but a "petition for review".

In the Agency's initial proposal, the Agency modeled 35 Ill. Adm. Code 105.606 after the provisions in Part 105, Subpart B, Appeal of Agency Permit Decisions and Other Final Decisions of the Agency. Similar to the Agency's original proposal, Section 105.206 provides that "[e]xcept as provided in Subsection (b), if *a person who may petition the Board under Section 105.204 wishes to appeal the Agency's final decision, the person* must file the petition with the Clerk within 35 days . . ." (*emphasis added*). *See also,* 35 Ill. Adm. Code 105.302(c) "*the applicant, any person who participated in the public comment process under Section 39.5(8) of the Act, or any other person who could obtain judicial review under Section 41(a) of the Act* may contest the decision of the Agency . . .") (*emphasis added*); *see also* 35 Ill. Adm. Code 105.404 ("Within 35 days after the date of service of the Agency's final decision, *the petitioner* may file with the Clerk . . .) (*emphasis added*). Interestingly though, the Board's petition filing requirements of 35 Ill. Adm. Code 105.504 pertaining to Appeal of OSFM Leaking Underground Storage Tank ("LUST") decisions more closely mirror the language that the Board is now requesting comment, *i.e..,* the subject is "the petition for review" rather than "a person". ("The *petition for review* must be filed with the Board within 35 days after the date of the OSFM's

"Eligibility and Deductibility Determination" letter or within 35 days from . . . . ") (*emphasis added*).

Fourth, the Board questions if the language of new Section 105.606(b) could be revised to more succinctly focus on the petition filing deadline. The Agency initially proposed the following language in new Section 105.606(b):

> If the permit applicant wishes to appeal the Agency's failure to act on an application for a PSD permit within the time frame specified in Section 39(f)(3) of the Act, the person must file a petition for review with the Clerk before the Agency denies or issues the final permit.

The Board thereafter requested comment on whether the following language would be acceptable for Section 105.606(b):

> A permit applicant who wishes to appeal the Agency's failure to act on an application for a PSD permit within the time frame specified in Section 39(f)(3) of the Act, must file a petition for review with the Clerk before the Agency denies or issues the final permit.

As previously discussed in the Agency's First Post Hearing Comments, these changes to Section 105.606(b) would be acceptable to the Agency. Agency's First Comments, ¶ 47b. In the Board's Order, the Board states it continued to review the proposed additions to its procedural rules. Board's Order at pg. 55. As a result of this review, the Board requests comment on the following changes to Section 105.606(b):

> Any petition for review under Section 105.604(b) must be filed with the Clerk before the Agency denies or issues the final permit.

Board Order at pg. 161. While the Agency generally prefers the simplified language provided by the Board, the Agency offers the comments tendered above when discussing 35 Ill. Adm. Code 105.604(a) or (c).

Background to Agency's Regulatory Proposal

The First Notice Version of Part 204 makes changes to the Agency's proposal. Many of these revisions appear to be grammatical in nature, mainly focusing on the selective removal or insertion of a comma, replacing "shall" with the term "must", and replacing "such" with a variety of words. To the casual observer, these changes might appear as largely inconsequential or a streamlining tool. Unfortunately, in many instances, these changes substantively alter the proposal in a way that is contradictory to the federal PSD rules as it currently exists in 40 CFR 52.21. In doing so, these changes may threaten approval of Part 204 as part of Illinois' SIP.

Perhaps it bears repeating a point made implicit in the Agency's initial proposal: the General Assembly intends for the Part 204 rules to mirror, not merely approximate, the federal PSD rules. In this regard, the Board must adopt regulations establishing a PSD program meeting the requirements of Section 165 of the CAA. This necessarily includes not only the federal implementing rules but a forty-year accumulation of case authorities and interpretative guidance that are instructive to the meaning of the federal PSD rules. Consistent with the General Assembly's mandate, the Agency proposed rules for a state PSD program modeled after both the federal PSD regulations of 40 CFR 52.21 and key elements of the program's regulatory development. If the text of the proposed rules deviates from this framework, it could presumptively result in a determination that these state rules are less stringent than the federal rules. To this end, it is important that any such departure from the federal rules be a product of careful deliberation and not a misplaced comma or clause.

Confusion in future state implementation could also occur to the extent that Part 204 is not consistent with the federal PSD rules, especially where the legal basis for any changes to technical terms or phrases from the federal PSD rules was not elaborated upon by the Agency in its regulatory proposal or by the Board in its final Order adopting the rule. This could prove

challenging in subsequent permitting appeals or enforcement proceedings, affecting the Agency in its role as the permitting authority, permit applicants and the Board as the review authority.[1]

In addition, Section 3.363 of the Act established a new definition of "PSD permit" to mean a permit or a portion of a permit for a new major source or major modification that is issued by the Agency under Section 9.1(c) that has been approved by the USEPA and incorporated into the Illinois SIP to implement Section 165 of the Clean Air Act and 40 CFR 51.166. The Agency's proposal is not only based as closely as possible on the language of 40 CFR 52.21 but also on meeting the requirements for SIP approval in 40 CFR 51.166. The Agency provided this proposal to USEPA, Region 5 for preliminary review and comment, engaging in extensive dialogue with staff prior to filing this regulatory proposal with the Board. Given the highly nuanced aspects of the program, the perfunctory nature of many of the proposed changes compared to the language of the federal PSD rules will likely be disconcerting to the Agency's federal counterparts and could imperil USEPA's approval of Part 204.

General Comments

Changing the Use of the Word "Shall" and "Must" as Found in 40 CFR 52.21

The Agency proposed language for Part 204 with the intent of mirroring the language in the federal PSD rules, in keeping with the goal of achieving consistency required by the Act. To this end, the Agency's proposal included the use of the word "shall" in every instance in which it was reflected in in the federal PSD rules. The recurring use of this auxiliary verb in the federal

[1] As previously discussed in this rulemaking, pertaining to the related to the role of EAB precedents in appeals of PSD permits before the Board, it is important to remember that Section 9.1(d)(1) of the Act provides that "No person shall: (1) violate any provisions of Sections 111, 112, 165 and 173 of the Clean Air Act, as now or hereafter amended, or federal regulations adopted pursuant thereto . . ." Given this statutory mandate, the Board would necessarily have to consider EAB precedents as they are linked to Section 165 of the Clean Air Act when hearing appeals that involve Part 204. As a general matter, if the Board were to relax the applicable requirements of Part 204 by way of a Board decision, the USEPA could take the position that the decision was contrary to the SIP and find Illinois' PSD SIP deficient.

PSD rules makes sense given that many aspects of the program, originating nearly 40 years ago, are the product of extensive guidance, regulatory development and enforcement litigation.

In reviewing the First Notice Version for Part 204, the Agency observes that the word "shall"[2] as used throughout the Agency's proposal has been routinely replaced by a variety of other words. In many instances, "much" is used. In more limited instances, "shall" is replaced

[2] In certain instances, the federal PSD rules make use of the word "must" and the Agency's proposal for Part 204 also made use of this word. Interestingly, in certain places, the First Notice Version replaces "must" as found in the federal PSD rules with "shall". For instance, the definition of "Adverse impact on visibility" as addressed in the federal PSD rules provides that the "determination *must* be made on a case-by-case basis taking into account the geographic extent, intensity, duration, frequency and time of visibility impairment and how these factors correlate with . . ." The First Notice Version of Section 204.220 provides that the "determination *shall* be made on a case-by-case basis . . ."

Elsewhere, the federal PSD rules mandate that "[e]ach PAL permit *must* contain enforceable requirements for the monitoring system that accurately determines plantwide emissions of the PAL pollutant . . ." (*emphasis added*). While the First Notice Version of Section 204.1880 states that "[e]ach PAL permit *shall* contain enforceable requirements . . ." Interestingly, the First Notice Version of Section 204.1880 does not alter the use of "must" elsewhere within this section. See, 35 Ill. Adm. Code 204.1880 ("Any monitoring system authorized for use in the PAL permit *must* be based on sound science and meet generally acceptable scientific procedures for data quality and manipulation. Additionally, the information generated by such system *must* meet minimum legal requirements for admissibility in a judicial proceeding to enforce the PAL permit.") (*emphasis added*).

by "has"[3], "is"[4], "are"[5], "will"[6], "does"[7] or "do"[8]. Without a guide to explain the basis for the change in usage, it can only be presumed that these changes are substantive in nature. Even if merely grammatical, these changes in wording are problematic.

For purposes of comparison, the Agency acknowledges that "shall" and "must" both impose an obligation to act. In this regard they are similar, although the former may also refer to an imminent (or likely) future action. "Shall" is also most often used in a formal legal setting, such as in the case of contracts or legislative/regulatory drafting. In this context, considerable litigation has arisen in recent years concerning whether the use of "shall" is meant as mandatory as opposed to permissive, usually being contrasted with another common auxiliary verb "may". The same usage can come into focus in a corollary examination of a governmental body's legal

[3] For instance, the federal PSD rules when addressing definitions of terms for PAL permits, provides that "[w]hen a term is not defined in these sections, it *shall* have the meaning given in this Part, Part 211, or in the CAA." (*emphasis added*). In Section 204.1610, the First Notice Version would use "has" rather than "shall".

[4] The federal PSD rules provide that any owner or operator who performs certain acts "*shall be* subject to appropriate enforcement action." (*emphasis added*). In Section 204.820, the First Notice replaces "shall be" with "is". While this change may at first appear inconsequential, the First Notice Version would alter the meaning of this provision. To be clear, the First Notice Version suggests that the owner or operator *is* already subject to enforcement, while the federal PSD rules *authorize* the initiation of enforcement. (*emphasis added*).

[5] The relevant provisions in the federal PSD rules that address "Restriction on area classifications", provide that "[a]ll of the following areas which were in existence on August 7, 1977, *shall be* Class I areas and may not be redesignated. . ." (*emphasis added*). In contrast, Section 204.920(a) in the First Notice Version would provide "[a]ll of the following areas which were in existence on August 7, 1977, *are* Class I areas . . ." (*emphasis added*).

[6] The definition of "Building, structure, facility or installation" in the federal PSD rules provides "[p]ollutant emitting activities *shall* be considered adjacent if they are located on the same surface site . . ." (*emphasis added*). In contrast, Section 204.290 in the First Notice Version would provide that "[p]ollutant emitting activities *will* be considered adjacent if they are located on the same surface site . . ." (*emphasis added*).

[7] The definition of "Major stationary source" in the federal PSD rules provides that "[t]he term chemical processing plant *shall* not include ethanol production facilities . . ." (*emphasis added*). In contrast, Section 204.510(c)(20) of the First Notice Version would provide that "[t]he term chemical processing plant *does* not include ethanol production facilities . . ." (*emphasis added*).

[8] The definition of "Net emissions increase" in the federal PSD rules provides "[b]aseline actual emissions for calculating increase and decreases under this subsection *shall* be determined as provided in Section 204.240, except that Sections 204.240(a)(3) and 204.240(b)(4) shall not apply." (*emphasis added*). In contrast, Section 204.550(a)(2) of the First Notice Version would replace the word "shall" with "do".

authority, such as whether a mandatory requirement expressed in a statute or regulation is also a jurisdictional one.

The frequent attention provided to these issues by courts have led some observers to conclude that "shall" should always be replaced with "must". *See, https://plainlanguage.gov/guidelines/conversational/shall-and-must/.* In addition to minimizing court challenges, such observers may also perceive the chance to reduce potential ambiguity, as "must" will not be confused with a requirement for future action. Several legal reference sources are cited by advocates for this change in word usage, including the Federal Register Document Drafting Handbook, Section 3,[9] and the Federal Aviation Administration, Notice 1000.36 – FAA Writing Standards, issued March 31, 2000.[10]

If such a trend now exists, however, it is neither prescriptive nor a cure-all for litigation surrounding the legislative or regulatory intent of statutes and regulations. The desired word of choice does not imply future action but it is also not singular in its meaning.[11] The imperfection of nearly all language, subject as it is to various origins and meanings, is no assurance that "must" will avoid the same pitfalls of "shall", *i.e.*, comparison to "may". Moreover, judicial review of interpretative issues seldom involves the future action meaning of "shall" but usually focuses on whether the wording and context illustrate a force of command rather than discretion.[12]

---

[9] https://www.archives.gov/federal-register/write/legal-docs/clear-writing.html

[10] https://www.faa.gov/about/initiatives/plain_language/articles/mandatory

[11] "Must" can mean something aspirational or expectant, rather than a duty or obligation, as in the statement "he simply must get a haircut." Such a statement does not assure predictability but, rather, implies a hope or preference for the intended result. *Accord., https://www.merriam-webster.com/dictionary/must* ("must" be urged to: ought by all means to).

[12] *See, People v. Robinson,* 298 Ill. Dec. 37, 51-52 (Ill. 2005).

In view of these considerations, the Agency recognizes that some jurisdictions use "must" in lieu of "shall"[13], but nonetheless urges the Board to refrain from applying this practice in this proceeding. The state program should mirror the federal program's usage of auxiliary verbs, assuring a standard of consistency that will secure the necessary federal approval of a SIP submission. To do otherwise should require, in each instance, that the Board independently analyze the First Notice Version's use of the terms "must", "shall", "has", "is", "are", "will", "does" or "do" for consistency with the federal PSD rules. Given that this comment runs to practically every section of the First Notice Version of Part 204, the Board should make explicit its consideration and supporting rationale for its word choice in each provision of Part 204 that would differ from the word used in the federal PSD rules.

The approach urged by the Agency will also avoid the inevitable difficulty, posed not only in the SIP review process but in future implementation and enforcement, of interpreting the Part 204 rules. To broadly illustrate, if the federal program uses "shall" in a provision that, based on a current or future USEPA guidance or court ruling, is interpreted as permissive and not mandatory, the Part 204 rules would yield the opposite result if "shall" is generally replaced with "must". Any argument that the improved grammar of the Part 204 rules better reflects the meaning or intent of the federal PSD rules misses the mark, as the guidance document or court ruling would itself provide such meaning or intent. And though one might assert that the State-adopted rule can be more stringent than its federal counterpart, the enabling authority under the Act conditions such a departure upon the Board's finding that it is "appropriate" and seemingly contemplated in relation to the relevant provisions of the rules. See, 415 ILCS 5/9.1(c)(2018).

[13] https://www.archives.gov/federal-register/write/legal-docs/clear-writing.html

If the Board is inclined to revise the verb usage, in part or throughout the Part 204 rules, the Agency wishes to point out that the First Notice Version is not consistent in its use of language mandating an obligation by an actor.[14] It initially appeared to the Agency as if the First Notice Version made use of "must" when addressing the obligations of the owner or operator of the proposed major stationary source or major modification and inserted "shall" when discussing an action of the Agency or USEPA.[15] Further scrutiny of the First Notice Version revealed this is not always the case.[16] In many instances, the action required by the owner or operator of the proposed major stationary source or major modification is not mandated by "must" but rather is mandated by "shall".

For instance, Section 204.1400 identifies mandatory recordkeeping obligations on an owner or operator if a "reasonable possibility" exists that a project that is not projected to be a major modification for a pollutant when the owner or operator elects to use the method in Sections 204.600(b)(1) through (b)(3)[17] for calculating projected actual emissions after the project may, nevertheless in practice, result in a significant emissions increase. Despite being mandatory obligations on an owner or operator, the First Notice Version makes use of "shall" rather than "must", in all but one case, in Section 204.1400. Section 204.1400(b) provides that

[14] In many instances, the use "must" in lieu of "shall" in the First Notice Version makes the regulatory requirement, at best, difficult to comprehend. *See*, Section 204.900(a) of the First Notice Version ("In areas designated as Class I, II or III, increases in pollutant concentration over the baseline concentration *must* be limited to the following . . .").

[15] Language mandating certain obligations by the USEPA, as provided in the federal PSD rules, would be altered by the First Notice Version. In Section 204.930(e), the First Notice Version provides "USEPA *must* disapprove, within 90 days after submission, a proposed redesignation of any area . . ." (*emphasis added*). The federal PSD rules provide that the "USEPA *shall* . . ."

[16] For instance, in Section 204.350(b)(2)(C), the First Notice Version uses "must" in lieu of "shall" providing ". . . the Illinois EPA *must* presume that merging was significantly motivated by an intent to gain emissions credit for greater dispersion."

[17] In Section 204.1400, the First Notice Version would refer to Section 204.600(b)(1) rather than to Sections 204.600(b)(1), (2) and (3).

"[b]efore beginning actual construction of the project, the owner or operator *shall* document and maintain a record of the following information . . ." (*emphasis added*). Meanwhile, 204.1400(d) provides that the "owner or operator *shall* (1) monitor the emissions of any regulated NSR pollutant . . ." (*emphasis added*). In 204.1400(e), "[i]f the unit is an existing electric utility steam generating unit, the owner or operator *shall* submit a report to the Agency . . ." (*emphasis added*).

Section 204.1400 illustrates another problem with the use of "must" and "shall" in the First Notice Version. While Section 204.1400 predominantly makes use of "shall" when discussing the recordkeeping requirements of the owner or operator, Section 204.1400(c) makes use of "must" when discussing the recordkeeping requirements of an existing electric utility steam generating unit. *See,* 35 Ill. Adm. Code 204.1400(c) "[i]f the emissions unit is an existing electric utility steam generating unit, before beginning actual construction, the owner or operator *must* provide a copy of the information set out in subsection (a) to the Agency . . ." (*emphasis added*). Inconsistent with the underlying federal PSD rules, the First Notice Version makes a distinction between the mandatory recordkeeping obligations of an owner or operator of an existing electric utility steam generating unit the owners or operators of other units subject to the requirements of Section 204.1400.

Another striking example of the First Notice Version's inconsistent use of "shall" and "must" takes place in Section 204.1100, Control Technology Review. In the first three subsections of Section 204.1100, the First Notice Version provides that either the "[a] major stationary source or major modification *shall* meet . . .", "[a] new major stationary source *shall* apply . . .", or "[a] major modification *shall* apply . . ." 35 Ill. Adm. Code 204.1100(a)-(c) (*emphasis added*). Meanwhile for a different obligation on the major stationary source or major

modification in subsection (d), the First Notice Version uses the "must" in lieu of "shall" stating that "[f]or phased construction projects, the determination of BACT *must* be reviewed and modified as appropriate . . ." (*emphasis added*). The First Notice Version makes a distinction between the mandatory obligations on a major stationary source or major modification in subsections (a)-(c) with a similar mandatory obligation in subsection (d) that does not exist in the federal PSD rules.[18]

Changing the Use of the Word "Such" as Found in 40 CFR 52.21

In the First Notice Version of Part 204, the word "such" was either deleted or replaced in the text of the Agency's proposal with "this", "that", "those", or "the". The word "such" is typically used before a noun or a phrase to add emphasis; "such" typically stresses the type previously mentioned in a sentence. *See generally, Cambridge English Dictionary.* Consistent with the federal PSD rules, "such" was proposed for use in Part 204 to emphasize the same nouns or phrases emphasized in the federal PSD rules. The Agency recommends that "such" be used in each instance that it was either deleted or replaced in the text of Part 204 for clarity and

[18] One obvious discrepancy would be the definition of "Baseline actual emissions" proposed in Section 204.240(a). The relevant provisions in the federal PSD rules provide:

1) The average rate *shall* include fugitive emissions to the extent quantifiable . . .
2) The average rate *shall* be adjusted downward to exclude any noncompliant emissions that occurred. . .
3) For a regulated NSR pollutant, when a project involved multiple emissions units, only one consecutive 24-month period *must* be used to determine . . .
4) The average rate *shall* not be based on any consecutive 24-month period . . .

(*emphasis added*). Meanwhile, the First Notice Version would offer the exact opposite usage of "shall" and "must":

1) The average rate *must* include fugitive emissions to the extent quantifiable . . .
2) The average rate *must* be adjusted downward to exclude any noncompliant emissions that occurred . . .
3) For a regulated NSR pollutant, when a project involved multiple emissions units, only one consecutive 24-month period *shall* be used to determine . . .
4) The average rate *must* not be based on any consecutive 24-month period . . .

(*emphasis added*). A review of the federal PSD rules with the First Notice Version of Section 204.240(b)(1) through (5) also reveals that the First Notice Version differs from the federal PSD rules. See also, proposed 35 Ill. Adm. Code 204.240(c) and (d).

consistency with the federal PSD rules. The following sections of Part 204 should be revised to be consistent with the federal PSD rules.

- 35 Ill. Adm. Code 204.230(b)(3) – change "that" back to "such"
- 35 Ill. Adm. Code 204.250(c) – reinsert "such"
- 35 Ill. Adm. Code 204.280 – in two instances change "that" back to "such" and in two instances change "the" back to "such"
- 35 Ill. Adm. Code 204.350(b)(2)(A) – change "those" back to "such"
- 35 Ill. Adm. Code 204.350(b)(2)(C) – in two instances change "the" back to "such" and in one instance change "that" back to "such"
- 35 Ill. Adm. Code 204.380(a) – change "the" back to "such"
- First Notice Version of 35 Ill. Adm. Code 204.400(b)(2) (Agency proposed 35 Ill. Adm. Code 204.400) – change "that" back to "such"
- 35 Ill. Adm. Code 204.490(c)(6) – change "that" back to "such"
- 35 Ill. Adm. Code 204.530(b) – change "that" back to "such"
- 35 Ill. Adm. Code 204.610(a)(1) – reinsert "such"
- 35 Ill. Adm. Code 204.620(c)(3) – change "those" back to "such"
- 35 Ill. Adm. Code 204.800(e) - change "the" back to "such"
- 35 Ill. Adm. Code 204.810(a) – change "this" back to "such"
- 35 Ill. Adm. Code 204.920(c) – change "that" back to "such an"
- 35 Ill. Adm. Code 204.930(b)(4) – in three instances change "the" back to "such"
- 35 Ill. Adm. Code 204.930(d)(2) – change "The" back to "Such"
- 35 Ill. Adm. Code 204.930(e) – change "the" back to "such" and reinsert "any such"
- 35 Ill. Adm. Code 204.1120(b) – change "the" back to "such"

- 35 Ill. Adm. Code 204.1130(a)(3) – reinsert "such"
- 35 Ill. Adm. Code 204.1200(a) – in three instances change "the" back to "such" and reinsert the last deleted "such"
- 35 Ill. Adm. Code 204.1200(b) – in change "the" back to "such" and in two instances change "those" back to "such"
- 35 Ill. Adm. Code 204.1200(d) – in two instances change "the" back to "such"
- 35 Ill Adm Code 204.1200(e) – in three instances change "the" back to "such" and in one instance change "those" back to "such"
- 35 Ill. Adm. Code 204.1200(f) - in three instances change "the" back to "such"
- 35 Ill. Adm. Code 204.1200(h) – change "the" back to "such"
- 35 Ill. Adm. Code 204.1300 - change "the" back to "such"
- First Notice Version of 35 Ill. Adm. Code 204.1400(a) (Agency proposed 35 Ill. Adm. Code 204.1400) – change "that" back to "such"
- First Notice Version of 35 Ill. Adm. Code 204.1400(b)(3) (Agency proposed 35 Ill. Adm. Code 204.1400(a)(3)) – change "that" back to "such"
- 35 Ill. Adm. Code 204.1400(f) (Agency proposed 35 Ill. Adm. Code 204.1400(e)) – in three instances change "the" back to "such"
- 35 Ill. Adm. Code 204.1500(b)(2) – change "That" back to "Such"
- First Notice Version of 35 Ill. Adm. Code 204.1830(h) (Agency proposed 35 Ill. Adm. Code 204.1830(a)(8)) – change "The" back to "Such"
- 35 Ill. Adm. Code 204.1850(a)(1) – change "the" back to "such"
- 35 Ill. Adm. Code 204.1850(d) – change "the" back to "such"
- 35 Ill. Adm. Code 204.1860(a) – reinsert "such"

- 35 Ill. Adm. Code 204.1870(a)(1) – change "The" back to "Such"
- 35 Ill. Adm. Code 204.1890 – change "the" back to "such"
- 35 Ill. Adm. Code 204.1900(c) – change "that" back to "such"

Insertion of Commas and Removal of Commas

In the First Notice Version of proposed Part 204, in numerous instances, commas were either inserted or removed from the text of the Agency's regulatory proposal. While the changes may appear to the casual observer as merely grammatical, these changes alter substantive provisions of the proposal or create unnecessary ambiguity in language taken from the federal program as it currently exists in 40 CFR 52.21.

While commas are useful to set out words and phrases in a sentence that are informative or illustrative, the practice is not encouraged under common rules of punctuation if the result is meant to alter the basic meaning of the words or phrases. *See generally*, COMMA ABUSE: A COMMA CAN CAUSE TROUBLE BY ITS ABSENCE, ITS PRESENCE, ITS INCORRECT PLACEMENT, Jacquelyn H. Slotkin, Perspectives: Teaching Legal Research & Writing, 4 No. 1 Perspective: Teaching Legal Res. & Writing 16 (Fall, 1995). In many instances, the revisions reflected in the revised proposal purport to change certain words, phrases or clauses that are essential to program implementation or, conversely, introduce uncertainty into the meaning of words, phrases or clauses.

In this proceeding, insertion of a comma in relevant text will separate words or phrases to create a pause in sentence structure, giving the appearance that the words or phrases are modifying a preceding word, phrase or clause (noun or object) instead of being given their independent meaning. Conversely, removal of commas in relevant text will eliminate a pause in sentence structure that was meant only for illustrative purposes, resulting in a new or different

meaning being given to mere modifying terms. Both types of revisions will hinder achievement of the General Assembly's mandate in Section 9.1(c) of the Act.

The reasoning or justification for these changes in the proposal is not self-evident, though it can be presumed they were meant to clarify and not change the substance of the proposal. Given the General Assembly's directive to meet the requirements of the congressional enactment and the inherent complexities of the federal PSD program, it is more prudent to mirror the language of the federal PSD rules, commas and all, rather than risk contradictions or ambiguities in this rulemaking. As a consequence of these grammatical changes and others, permitting and legal staff of the State of Illinois have spent many hours reviewing the removal or insertion of commas in language taken from the federal PSD program as was originally proposed for Part 204. The Agency recommends the following commas be included or deleted to be consistent with the language taken from the federal PSD program as memorialized in the Agency's original proposal:

- 35 Ill. Adm. Code 204.380 – Remove additional commas placed around "individually" in two places and remove additional commas placed around "due to emissions from all"
- 35 Ill. Adm. Code 204.490 – Remove additional commas placed around "or change in the method of operation of"
- 35 Ill. Adm. Code 204.510(c) – Remove additional commas placed around "for any of the purposes of"
- 35 Ill. Adm. Code 204.550(a)(1) – Remove additional commas placed around "or change in the method of operation of"

- First Notice Version 35 Ill. Adm. Code 204.550(b)(2) (Agency proposed 35 Ill. Adm. Code 204.550(b)(3)) – Remove additional comma placed before "for the source under 40 CFR 52.21"
- 35 Ill. Adm. Code 204.550(e)(2) – Remove additional commas placed around "as a practical matter"
- 35 Ill. Adm. Code 204.590 – Remove additional commas placed around "or change in the method of operation of"
- 35 Ill. Adm. Code 204.610(a)(2) – Remove additional commas placed around "for purposes of this Part"
- 35 Ill. Adm. Code 204.610(a)(2)(C) – Remove additional commas placed around "or USEPA demonstrates"
- 35 Ill. Adm. Code 204.610(a)(2)(D) – Remove additional commas placed around "or USEPA demonstrates"
- 35 Ill. Adm. Code 204.620(b) – Remove additional commas placed around "to or functionally equivalent to"
- 35 Ill. Adm. Code 204.660(c) – Reinsert comma before the Agency's proposed language "which would construct within 10 kilometers"
- 35 Ill. Adm. Code 204.700 – Reinsert comma before the Agency's proposed language "and that such a control requirement has taken effect"
- 35 Ill. Adm. Code 204.800(d)(5) – Remove comma after "as applicable"
- 35 Ill. Adm. Code 204.860(d) – Remove additional commas placed around "as they relate to any maximum increase for a Class II area"
- 35 Ill. Adm. Code 204.930(b) – Remove comma placed after "Class II"

- 35 Ill. Adm. Code 204.930(c)(4) – Remove commas placed after "Section 204.1120" and after "as was practicable"
- 35 Ill. Adm. Code 204.1340(d) – Remove additional commas placed around "on a public website identified by it"
- First Notice Version 35 Ill. Adm. Code 204.1400(g)(2) (Agency proposed 35 Ill. Adm. Code 204.1400(f)(2)) – Insert comma removed after "'significant emissions increase'" and after "(without reference to the amount that is a significant net emissions increase)"
- First Notice Version 35 Ill. Adm. Code 204.1400(h) (Agency proposed 35 Ill. Adm. Code 204.1400(g)) – Remove additional commas placed around "or USEPA"
- 35 Ill. Adm. Code 204.1500(a) – Remove additional commas placed around "in writing no later than the close of the public comment period under 35 Ill. Adm. Code 252"
- 35 Ill. Adm. Code 204.1500(c)(1) – Remove additional commas placed around "by the specified date"
- 35 Ill. Adm. Code 204.1500(d) – Remove comma placed after "within the specified time period"
- 35 Ill. Adm. Code 204.1600(b) – Remove additional commas placed around "or change in the method of operation" and insert commas back around "meets the requirements in this Subpart"
- 35 Ill. Adm. Code 204.1620 – Remove additional commas placed around "or have the potential to emit"

- 35 Ill. Adm. Code 204.1720 – Remove additional commas placed around "or change in the method of operation of"
- 35 Ill. Adm. Code 204.1730 – Remove comma placed after "Agency"
- 35 Ill. Adm. Code 204.1760 – Remove comma placed after "available"
- 35 Ill. Adm. Code 204.1790(c) – Remove additional commas placed around "based on a 12-month rolling total for each month"
- 35 Ill. Adm. Code 204.1800(a)(7) – Remove comma placed after "for each emissions unit under the PAL"
- 35 Ill. Adm. Code 204.1820(a) – Insert comma removed after "[w]hen establishing the actuals PAL level"
- First Notice Version 35 Ill. Adm. Code 204.1830(c) (Agency proposed 35 Ill. Adm. Code 1830(a)(3))– Remove comma placed after "[s]pecification in the PAL permit that"
- First Notice Version 35 Ill. Adm. Code 204.1830(f) (Agency proposed 35 Ill. Adm. Code 1830(a)(6))– Remove comma placed after "based on 12-month rolling total"
- 35 Ill. Adm. Code 204.1840(b)(2)(B) – Insert comma removed after "[r]educe the PAL consistent with any other requirement"
- 35 Ill. Adm. Code 204.1850(d) – Remove additional commas placed around "or change in the method of operation of"
- 35 Ill. Adm. Code 204.1850(e) – Remove comma placed after "or prior to the PAL effective period"
- 35 Ill. Adm. Code 204.1880(c)(3) – Insert commas removed around the Agency's proposed language "which is used in or at the emissions unit"

Parenthetical Plural Nouns

All parenthetical plural nouns were eliminated in Part 204 and were replaced with plural nouns. In order to indicate that the requirement applies to one or more members of the category and further, for consistency with the federal PSD rules and for clarity, the parenthetical plural nouns should be included in the following sections.

- 35 Ill. Adm. Code 204.260(b) – change "increases" to "increase(s)"
- 35 Ill. Adm. Code 204.420(a)(2)(B) – change "structures" to "structure(s)" in two places
- 35 Ill. Adm. Code 204.620(c) – change "parameters" to "parameter(s)"
- 35 Ill. Adm. Code 204.620(c)(1) – change "parameters" to "parameter(s)"
- 35 Ill. Adm. Code 204.620(c)(2) – change "parameters" to "parameter(s)"
- 35 Ill. Adm. Code 204.620(c)(3) – change "parameters" to "parameter(s)" in five places
- 35 Ill. Adm. Code 204.620(c)(3) – change "units" to "unit(s)"
- 35 Ill. Adm. Code 204.620(c)(4) – change "parameters" to "parameter(s)"
- 35 Ill. Adm. Code 204.620(c)(5) – change "parameters" to "parameter(s)"
- 35 Ill. Adm. Code 204.800(d)(2) – change "types" to "type(s)"
- 35 Ill. Adm. Code 204.800(d)(4) – change "units" to "unit(s)"
- 35 Ill. Adm. Code 204.930(d)(2) – change "States" to "State(s)"
- 35 Ill. Adm. Code 204.1400(a) – change "units" to "unit(s)"
- 35 Ill. Adm. Code 204.1400(b)(2) – change "units" to "unit(s)"
- 35 Ill. Adm. Code 204.1660 – change "values" to "value(s)"
- 35 Ill. Adm. Code 204.1820(a) – change "levels" to "level(s)"

- 35 Ill. Adm. Code 204.1820(a) – change "dates" to "date(s)"
- 35 Ill. Adm. Code 204.1820(a) – change "requirements" to "requirement(s)"
- 35 Ill. Adm. Code 204.1820(a) – change "units" to "unit(s)"
- 35 Ill. Adm. Code 204.1850(b) – change "units" to "unit(s)"
- 35 Ill. Adm. Code 204.1870(a)(1) – change "units" to "unit(s)"
- 35 Ill. Adm. Code 204.1870(a)(2) – change "units" to "unit(s)"
- 35 Ill. Adm. Code 204.1870(a)(3) – change "units" to "unit(s)" in two places
- 35 Ill. Adm. Code 204.1880(e)(1) – change "parameters" to "parameter(s)"
- 35 Ill. Adm. Code 204.1880(h) – change "parameters" to "parameter(s)"
- 35 Ill. Adm. Code 204.1880(h)(1) – change "values" to "value(s)"
- 35 Ill. Adm. Code 204.1880(h)(1) – change "points" to "point(s)"
- 35 Ill. Adm. Code 204.1880(h)(2) – change "parameters" to "parameter(s)"

Typographical Errors

In addition, the following errors appear to have occurred inadvertently when the Agency's proposal was converted into the First Notice Version. The Agency recommends that the errors be corrected in the Second Notice Version. In the following sections and/or subsections, the Agency's proposal referenced various provisions of 42 United States Code (USC). In these sections and/or subsections, the First Notice version does not reference 42 USC but rather references 43 USC. The correct reference is 42 USC. The references to 43 USC must be corrected to 42 USC in the following sections and/or subsections:

- 35 Ill. Adm. Code 204.250(a)
- 35 Ill. Adm. Code 204.490(c)(3)
- 35 Ill. Adm. Code 204.520(b)(1)

- 35 Ill. Adm. Code 204.610(b)
- 35 Ill. Adm. Code 204.610(c)
- 35 Ill. Adm. Code 204.610(e) – two references
- 35 Ill. Adm. Code 204.630(c)
- 35 Ill. Adm. Code 204.690
- 35 Ill. Adm. Code 204.800(a)
- 35 Ill. Adm. Code 204.860(a)(2)(AA)
- 35 Ill. Adm. Code 204.860(b) – two references

Comments Particular to Specific Conditions

Part 101

Section 101.202 – Definition of "OSFM record"

The Illinois EPA observes that the definition of "OSFM record" inadvertently referenced "OFSM" in one instance. The definition of "OSFM record" should read "a record of final OSFM decision, as kept by the OSFM, of those documents of the *OSFM . . .*" (*emphasis added*).

Part 203

Section 203.207

For 35 Ill. Adm. Code Part 203, Major Stationary Sources Construction and Modification or MSSCAM, the Agency proposed to update Part 203 by adding two references to Part 204 in Section 203.207, Major Modification of a Source. Section 203.207 generally provides that a "major modification of a source" is a "physical change or change in the method of operation" of a stationary source that would result in a significant net emissions increase of any pollutant for which the area is designated nonattainment. Subsection (c) of this Section identifies certain changes to a source or emission unit that do not constitute "a physical change or change in the

method of operation." The Agency proposed that the references to Part 204 be added in 203.207(c)(5)(A) and (c)(6).

The Agency only proposed revisions to Part 203 to include references to new Part 204. However, changes to already USEPA-approved language in Part 203 that is now part of Illinois' SIP were also proposed in the First Notice Version. Similar to Part 204, "must" replaced "shall" in 35 Ill. Adm. Code 203.207(c) of the First Notice Version. In addition, "such" was similarly replaced with a variety of words in 35 Ill. Adm. Code 203.207(c), (d) and (e) of the First Notice Version.[19] Notably, the language of subsection (c)(6) has historically read "[a]n increase in the hours of operation or in the production rate, unless *such change* is prohibited under any enforceable permit condition . . ." (*emphasis added*). The First Notice Version revised "such change" to "that increase", inconsistent with the language of 40 CFR 51.165(a)(1)(v)(C)(6). Notably, the historic language of 35 Ill. Adm. Code 203.207(c)(6) is consistent with the requirements for a SIP submittal as set forth in 40 CFR Part 51.165 and has already been approved by USEPA.

As Part 203 currently exists in Illinois, it has been found by the USEPA to meet the requirements of 40 CFR 51.165 for SIP approval of a program satisfying Section 172(c)(5) and 173 of the CAA. To the extent that these changes may alter Part 203 in a way that is contradictory to USEPA's requirements in 40 CFR 51.165 they threaten the historic approval of Part 203 as part of Illinois' SIP. In any case, gratuitous changes to Part 203 may act to complicate and delay USEPA's review of Part 204 and its replacement of the federal PSD rules in Illinois. This is because Part 203 must also satisfy USEPA's requirements and all changes that are made to Part 203 will also need to be reviewed by USEPA for its approval.

[19] "Such" was replaced in three instances each in Sections 203.207(c)(5)(A), 203.207(d) and 203.207(e).

Part 204

Section 204.350[20]

Section 204.350(a)(3) would provide the definition for "Dispersion technique" to mean any technique that attempts to affect a pollutant's concentration in the ambient air by increasing final exhaust gas plume rise by manipulating various parameters or other selective handling of exhaust gas streams so as to increase the exhaust gas plume rise. The First Notice Version split the third type of "dispersion technique" definition, *i.e.*, manipulation of exhaust gas flow rate as it affects dispersion, into Section 204.350(a)(3)(A) through (C). The Agency observes that the first words of these new subsections are not capitalized.

Section 204.380[21]

In Section 204.380, the Agency's proposal referred to the definition of good engineering practice stack height in Section 204.420. In these sections and/or subsections, the First Notice version does not reference Section 204.420 but rather refers to 204.430. The first incorrect reference appears in Section 204.380. The reference should be to Section 204.420(c) rather than Section 204.430(c).

In subsection (a) the reference should be to Section 204.420(b) rather than Section 204.430(b).

In subsection (b) the reference should be to Section 204.420(b) rather than Section 204.430(b).

In subsection (c) the two references should be to Section 204.420(b) rather than Section 204.430(b).

[20] 40 CFR 51.100(hh).

[21] 40 CFR 51.100(kk).

Section 204.400[22]

Section 204.400 provides the definition of "Federally enforceable" consistent with the federal PSD rules. "Federally enforceable" means all limitations and conditions that are enforceable by USEPA including those requirements developed under set programs, *i.e.,* federal regulations, within the SIP, and certain permit programs. The First Notice Version split this definition into subsections, presumably to provide further clarity to the definition. Unfortunately, these changes have created unnecessary ambiguity in a critical definition borrowed from the federal PSD rules. The definition as proposed in the First Notice Version creates inappropriate groupings and further emphasizes "federally enforceable" limitations developed under certain programs over other programs. The Agency recommends that the definition of "Federally enforceable" be consistent with the meaning of this term in the federal PSD rules as reflected in the Agency's initial proposal.

Section 204.490[23]

Section 204.490 provides the definition for "Major modification". Subsection (a) generally provides that "Major modification" would mean any physical change in or change in the method of operation of a major stationary source that would result in a significant emissions increase of a regulated NSR pollutant other than greenhouse gases; and a significant net emissions increase of that pollutant from the major stationary source. While the Agency previously discussed the introduction or removal of certain commas in the First Notice Version,

[22] 40 CFR 52.21(b)(17).

[23] 40 CFR 52.21(b)(2).

the Agency would like to highlight the confusion that changes to punctuation would create in this critical definition to PSD permitting.[24]

The First Notice Version would define "Major modification" to mean "any physical change in, or change in the method of operation of, a major stationary source that would result in . . ." The insertion of commas around "or change in the method of operation of" have created a phrase when one did not previously exist in the underlying federal PSD rules. The new phrase in the First Notice Version suggests that the information contained inside the commas does not alter the basic meaning of the sentence. This is not correct. The information contained inside the new phrase, "or change in the method of operation," is information necessary to define "Major modification" and would alter the basic meaning of this critical definition.[25] In this regard, either a "physical change" to a source or a "change in the method of operation" may be a major modification. A "change in the method of operation" is not an alternative term for a "physical change".

In subsection (b), the First Notice Version does not include the phrase "(as defined in Section 204.670)" after "[a]ny significant emissions increase". While the First Notice Version includes "(as defined in Section 204.670)" after "[a]ny significant emissions increase" in

[24] The Agency does not have the resources to address in detail each point in the First Notice Version where the addition or removal of a comma would alter the requirements of Part 204 compared to the requirement in the federal PSD program. However, given the significance of this particular definition to PSD permitting, the Agency chose to highlight the problem caused by the changes in punctuation made in the First Notice Version especially as it pertains to the definition of "Major modification".

[25] The First Notice Version created the same problematic phrase, *i.e.,* or change in the method of operation, in Sections 204.550(a)(1), 204.590, 204.1600(b), 204.1720 and 204.1850(d). The First Notice Version created a similar phrase in the Public Participation requirements of Section 204.1320, providing that "[p]rior to the initial issuance, or a modification of, a permit issued under this Part . . ."

However, the First Notice Version did not insert commas around the phrase "or change in the method of operation" where it appears elsewhere in Part 204, including subsection (c) of 204.490. *See also,* Section 204.340 and Section 204.1100(c).

subsection (a), the Agency recommends reinserting this phrase in (b) as well for clarity and consistency with the federal PSD rules.

In subsection (c), nine activities are specified that are not considered a physical change or change in the method of operation. In subsection (c)(5)(A) and (B), the First Notice Version deleted the introductory phrase "[t]he source" in each subsection. While these nine activities are addressing a modification in the present, subsection (c)(5)(A) is discussing a source's ability to accommodate in the past. The removal of the phrase "[t]he source" in subsection (c)(5)(A) of the First Notice Version eliminates this distinction as has been historically made in the federal PSD rules. The removal of the phrase "[t]he source" in subsection (c)(5)(B) of the First Notice Version eliminates the distinction between a permit issued to the particular source and any issued permit. The Agency recommends that subsection (c)(5) in the definition of "Major modification" be consistent with the federal PSD rules.

At the end of subsection (c)(8) of the First Notice Version, the term "and" replaced the term "or" just prior to subsection (c)(9). The term "or" is typically used to denote alternative provisions, *i.e.,* meaning that any of the provisions may be met. The term "and" typically means that all the provisions must be met. *See generally, Cambridge English Dictionary.* The replacement of "or" by "and" at the end of subsection (c)(8) in the First Notice Version would change the meaning of subsection (c). In the federal PSD rules, if any of the listed nine exclusions are met, the planned activity would not constitute a physical change or change in the method of operation. However, the First Notice Version suggests that all nine of these exclusions must be met to for a planned activity to not be considered a physical change or change in the method of operation. The Agency recommends that subsection (c)(8) be consistent with the federal PSD rules.

In subsection (c)(9) of the First Notice Version, an "of" following "potential to emit" has been deleted so that subsection (c)(9) now reads as follows: "provided that the project does not result in an increase in the potential to emit any regulated pollutant emitted by the unit." The removal of the term "of" in the First Notice Version has, in effect, changed the phrase "potential to emit" from a noun in the federal PSD rules to a verb in the First Notice Version. The Agency recommends that subsection (c)(9) be consistent with the federal PSD rules.

Section 204.510[26]

Section 204.510 defines the term "Major stationary source". Subsection (c) provides that the fugitive emissions of a stationary source shall not be included in determining whether it is a major stationary source, unless the source belongs to one of the categories of stationary sources set forth in subsection (c). Consistent with the federal PSD rules, the Agency proposed that "[t]he fugitive emissions of a stationary source shall not be included in determining for any of the purposes *of this Section* whether it is a major stationary source . . ." (*emphasis added*). The First Notice Version does not include the phrase "of this Section" in subsection (c). After further review, the Agency understands that the reference to "of this Section" in the federal PSD rules refers to the entirety of 40 CFR 52.21, as it is a section in the Code of Federal Regulations. The corresponding reference in Section 204.510 should be Part 204. The Agency recommends that the phrase "of this Part" be included in subsection (c) for consistency with the federal PSD rules. In the absence of this phrase, the provisions for fugitive emissions that are applicable for the definition of "major stationary source" in Part 204 could be inappropriately not applied to other provisions in Part 204. Alternatively, they could be inappropriately applied to other aspects of the Board's rules.

[26] 40 CFR 52.21(b)(1).

Section 204.520[27]

The definition of "Minor source baseline date" is included within proposed Section 204.520. Subsection (b)(1) generally provides that the baseline date is established for each pollutant for which increments have been established if the area where the proposed source or modification would construct is designated attainment or unclassifiable for the pollutant on the date of the complete application. In the underlying provision in the federal PSD rules, the baseline date has been established "if [t]he area in which the proposed source or modification *would construct* is designated as attainment or unclassifiable . . ." (*emphasis added*). The First Notice Version instead uses the following language "if [t]he area in which the proposed source or modification *would be constructed* is designated as attainment or unclassifiable . . ." (*emphasis added*). Subsection (b) in the First Notice Version personifies the "proposed source or modification" whereas the federal PSD rules have historically personified the applicant or application. The Agency recommends that subsection (b)(1) be consistent with the underlying federal PSD rule.

Section 204.550[28]

Section 204.550 provides the definition for "Net emissions increase". Subsection (b) identifies when an increase or decrease in actual emissions is contemporaneous with the increase from the particular change. There is a long line of national precedent that relies upon the specific language of the definition of this term in the federal PSD rules. Any deviation from the language of the federal PSD rules, such as the reformatting of this subsection as occurred in the First

[27] 40 CFR 52.21(b)(14)(ii-iv).

[28] 40 CFR 52.21(b)(3).

Notice Version would create ambiguity and potential confusion. The Agency recommends that subsection (b) be made consistent with the Agency's proposal.

In addition as related to First Notice Version subsection (b)(2), the relevant provision of the federal PSD rules provide "[a]n increase or decrease in actual emissions is creditable only if the reviewing authority has not relied on it in issuing a permit for the source under 40 CFR 52.21 or this Part, *which permit* is in effect when the increase in actual emissions from the particular change occurs." (*emphasis added*). The language in the First Notice Version would not specify "which permit is in effect" but merely refers to "that is in effect". The Agency recommends that "which permit" be included in First Notice Version subsection (b)(2) (Agency subsection (b)(3)) for clarity and consistency with the federal PSD rules.

Finally, as related to subsection (f) of the First Notice Version, the relevant provision in the federal PSD rules provides "[a]ny emissions unit that replaces an existing emissions unit that requires shakedown, becomes operational only after a reasonable shakedown period, *not to exceed 180 days*." (*emphasis added*). The last phrase in the First Notice Version read "which shall not exceed 180 days." Given the significance of the shakedown period, the Agency recommends that subsection (f) be consistent with the underlying PSD rules.

Section 204.600[29]

Section 204.600 provides a definition of "Projected actual emissions". The portion of the federal PSD rules that is the origin of subsection (b) provides that in performing any analysis of the projected emissions that result from the proposed change, the owner or operator of the major stationary source shall consider all relevant information, including but not limited to that detailed in subsection (b)(1); shall include fugitive emissions to the extent quantifiable and emissions

[29] 40 CFR 52.21(b)(41).

associated with startups, shutdowns, and malfunctions; and shall exclude in calculating any increase in emissions that results from the particular project, that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions and that are also unrelated to the particular project, including any increased utilization due to product demand growth. In lieu of using the aforementioned method, the owner or operator of the major stationary source may elect to use the emissions unit's potential to emit as its projected actual emissions.

The First Notice Version reformatted the federal definition, apparently to avoid repeating the term "shall" (which the First Notice Version changed to "must"). This reformatting would create inconsistency with a critical definition from the federal PSD rules. The Agency recommends that the definition of "Projected actual emissions" be consistent with the federal PSD rules.

Section 204.610[30]

Section 204.610 provides a definition of "Regulated NSR pollutant". "Regulated NSR pollutant" would mean those pollutants identified in subsections (a) through (d). Subsection (a) includes any pollutant for which a NAAQS has been promulgated and for purposes of $PM_{2.5}$ emissions and PM_{10} emissions, includes emissions from a source or activity that are emitted in gaseous form but condense to form particulate matter at ambient temperatures. Condensable PM shall be included in applicability determinations and in establishing emissions limitations for $PM_{2.5}$ and PM_{10} in PSD permits on or after January 1, 2011. Subsection (a) further provides that

[30] 40 CFR 52.21(b)(50).

a "Regulated NSR pollutant" includes any pollutant identified under subsection (a)(2) as a constituent or precursor for a pollutant for which a NAAQS has been promulgated.[31]

In subsection (a)(1), the Agency proposed, in part, as follows:

> On or after January 1, 2011, *such* condensable PM *shall be* accounted for in applicability determinations and in establishing emissions limitations for $PM_{2.5}$ and PM_{10} in PSD permits. Compliance with emissions limitations for $PM_{2.5}$ and PM_{10} issued prior to *this* date *shall not be* based on condensable PM unless required by the terms and conditions of the permit or the applicable implementation plan.

(*emphasis added*). Meanwhile, the First Notice Version provides:

> On or after January 1, 2011, condensable PM *was required to be* accounted for in applicability determinations and in establishing emissions limitations for $PM_{2.5}$ and PM_{10} in PSD permits. Compliance with emissions limitations for $PM_{2.5}$ and PM_{10} issued prior to *that* date *were not* based on condensable PM unless required by the terms and conditions of the permit or the applicable implementation plan.

(*emphasis added*). Under the federal PSD rules, condensable PM shall be included in applicability determinations and in establishing emissions limitations for $PM_{2.5}$ and PM_{10} in PSD permits on or after January 1, 2011. However, the First Notice Version suggests that condensable PM is no longer included in applicability determinations. Similarly, under the federal PSD rules, compliance with PM limits issued prior to January 1, 2011, is not be based on condensable PM. However, the First Notice Version suggests that condensable PM may or may not be included when determining compliance with historic limits for PM_{10} or $PM_{2.5}$. The language is not clear. The differences between the federal PSD rules and the First Notice Version are significant. The Agency requests that Section 204.610(a)(1) not deviate from the language in the federal PSD rules.

[31] The relevant provision of the federal PSD rules expressly provide that "[a]ny pollutant for which *a* NAAQS has been promulgated." (*emphasis added*). The First Notice Version changes the "a" to "an" mistaking "NAAQS" for an initialism. While initialisms that begin with the letter "N" require "an" because they begin with a vowel sound, acronyms differ. NAAQS is an acronym, *i.e.*, NAAQS is pronounceable word. An "a" precedes an acronym rather than "an" and is appropriate in this instance. The Agency recommends that "a" be used before "NAAQS".

In subsection (a)(2)[32], the federal PSD rules provide for "[a]ny pollutant identified under this subsection as a constituent . . ." The First Notice Version inserted a reference to (a) after "subsection". The insertion referencing subsection (a) is not consistent with the federal PSD rules. If a reference is necessary, the appropriate reference would be subsection (a)(2).[33]

Section 204.620[34]

The definition of "Replacement unit" from the federal PSD rules, as addressed in Section 204.620, would mean an emissions unit for which certain criteria, as listed in subsections (a) through (d), are met. Relevant to this discussion, subsection (c) provides that the replacement must not alter the basic design parameter(s) of the process unit and addresses how a process unit's basic design parameters shall be determined. In subsection (c)(3), the Agency proposed:

> If the owner or operator believes the basic design parameter*(s)* in subsections (c)(1) and (c)(2) of this Section *is* not appropriate for a specific industry or type of process unit, the owner or operator may propose to the Illinois EPA *an* alternative basic design parameter*(s)* for the source's process unit*(s)*. If the Illinois EPA approves *of the* use of *an* alternative basic design parameter*(s)*, the Illinois EPA shall issue a permit that is legally enforceable, records *such* basic design parameter*(s)* and requires the owner or operator to comply with *such* parameter*(s)*.

(*emphasis added*).

The First Notice Version proposes a variety of changes to this language found in the federal PSD rules; these changes appear to have been proposed as grammatical "fixes" after replacing all parenthetical plural nouns with plural nouns. The First Notice Version proposes as follows:

> If the owner or operator believes the basic design parameters in subsections (c)(1) and (c)(2) *are* not appropriate for a specific industry or type of process unit, the owner or

[32] In subsection (a)(2), the First Notice Version changes the "a" to "an" prior to "NAAQS". For the reasons discussed above, the Agency recommends that "a" be used before "NAAQS".

[33] The Agency also observes subsections (a)(2)(A) and (a)(2)(C) of the First Notice Version use the word "NOx" rather than "NO_x".

[34] 40 CFR 52.21(b)(33).

> operator may propose to the Agency alternative basic design parameters for the source's process units. If the Agency approves use of alternative basic design parameters, the Agency shall issue a permit that is legally enforceable, records the basic design parameters and requires the owner or operator to comply with *those* parameters.

(*emphasis added*).

As previously discussed, in order to indicate that the requirement applies to one or more members of the category and further, for consistency with the federal PSD rules, the Agency recommends restoring all parenthetical plural nouns and undoing all corresponding grammatical "fixes" in subsection (c)(3).

Section 204.630[35]

The definition of "Repowering" from the federal PSD rules as addressed in subsection (a) of Section 204.630 would mean replacement of an existing coal-fired boiler with any of the listed clean coal technologies or, as determined by USEPA, in consultation with the US Secretary of Energy, and any other technology capable of controlling multiple combustion emissions simultaneously with improved boiler or generation efficiency and with significantly greater waste reduction relative to the performance of technology in widespread commercial use as of November 15, 1990. The First Notice Version would divide the definition of "repowering" into two parts effectively making the definition mean two things by stating that "Repowering also means . . ." The Agency recommends that the definition of "repowering" be consistent with the federal PSD rules.

Section 204.660[36]

[35] 40 CFR 52.21(b)(37).

[36] 40 CFR 52.21(b)(23).

This Section provides a definition for "Significant".[37] "In subsection (c), the Agency proposed that notwithstanding subsection (a), "Significant" would mean any emissions rate or any net emissions increase associated with a major stationary source or major modification, that would construct within 10 kilometers of a Class I area, and have an impact equal to or greater than 1 $\mu g/m^3$ (24-hr average). The relevant language of the federal PSD rules is "means any emissions rate or any net emissions increase associated with a major stationary source or major modification, *which* would *construct* within 10 kilometers of a Class I area . . ." (*emphasis added*). The First Notice Version instead states that "means any emissions rate or any net emissions increase associated with a major stationary source or major modification *that* would *be* construct*ed* within 10 kilometers of a Class I area . . ." (*emphasis added*). The language of subsection (c) in the First Notice Version personifies the activity whereas the language of the federal PSD rules has historically personified the major stationary source or major modification. The Agency recommends that subsection (c) be consistent with the underlying federal PSD rules.

Section 204.700[38]

This Section provides a definition for "Subject to regulation". "Subject to regulation" would generally mean, for any air pollutant, that the pollutant is subject to either a provision in the CAA, or a regulation codified by the USEPA that requires control of the quantity of emissions of that pollutant, and that such a control requirement has taken effect to limit or

[37] "Significant" would mean, in reference to a net emissions increase or the potential of a source to emit those pollutants identified by subsection (a), a rate of emissions that would equal or exceed any of the rates specified in this same subsection (a). One pollutant identified in proposed subsection (a) is "NO_x". The First Notice Version refers to "NOx" three times. The appropriate reference is "NO_x".

While discussing $PM_{2.5}$ in subsection (a), the Agency proposed an emissions rate of "10 tpy of direct $PM_{2.5}$ emissions". The Agency observes that the First Notice Version does not contain a space between $PM_{2.5}$ and emissions.

[38] 40 CFR 52.21(b)(49).

restrict the quantity of emissions of that pollutant released from the regulated activity. To this end, Section 204.700, included the following language "that requires actual control of the quantity of emissions of that pollutant, *and that such a* control requirement has taken effect and is operative to control . . ." (*emphasis added*). Meanwhile, the First Notice Version proposes "that requires actual control of the quantity of emissions of that pollutant *when the* control requirement has taken effect and is operative to control . . ." (*emphasis added*). The use of the word "when" in lieu of "that" would be inconsistent with the underlying federal PSD rules. As a different word would be used, it is not apparent that this provision would always have the same meaning as the relevant provision in the federal PSD rules. Given the nuanced nature of this definition, the Agency recommends that the term "Subject to regulation" be defined consistent with the federal PSD rules.

Section 204.800[39]

This Section addresses the applicability of Part 204 to a proposed major source or major modification. In particular, subsection (c) provides that no new major stationary source or major modification to which the requirements of Sections 204.810, 204.820, 204.830, 204.840, 204.850, 204.1100, 204.1110, 204.1120, 204.1130, 204.1140, and 204.1200 apply shall begin actual construction without a permit indicating that the source or modification will meet those requirements. While the Agency's proposal expressly included the applicable regulatory requirements in subsection (c), the First Notice Version merely references the requirements in subsection (b). The First Notice Version provides that "[n]o new major stationary source or major modification to which *those* Sections apply . . ." (*emphasis added*). Given these regulatory references do not appear earlier in subsection (c) but only appear in subsection (b), the

[39] 40 CFR 52.21(a)(2).

reference to "those Sections" in subsection (c) of the First Notice Version would not be clear. For clarity, the Agency recommends that the applicable regulatory requirements be identified in subsection (c).

Section 204.810[40]

Section 204.810 requires an owner or operator of a proposed major stationary source or major modification to submit all information necessary to perform any analysis or make any determination required under Part 204. In particular, subsection (a) provides that for purposes of Sections 204.1100, 204.1110, 204.1130, and 204.1140, an owner or operator shall submit a description of the nature, location, design capacity, and typical operating schedule of the source or modification, including specifications and drawings showing design and plant layout; a detailed construction schedule; and a detailed description as to what system of continuous emission reduction is planned, emission estimates, and other information as necessary to determine that BACT, as applicable, would be applied.

The Agency proposed the following language in subsection (a), "[w]ith respect to a source or modification to which Sections 204.1100, 204.1110, 204.1130, and 204.1140 apply, *such* information *shall* include . . ." (*emphasis added*). The First Notice Version revised this language to read as follows: "[w]ith respect to a source or modification to which Sections 204.1100, 204.1110, 204.1130, and 204.1140 apply, *this* information includes . . ." (*emphasis added*). Given the revisions suggested by the First Notice Version would appear to relax the requirements that have been historically administered in Illinois by means of the federal PSD rules, the Agency recommends that subsection (a) be consistent with the federal PSD rules.

[40] 40 CFR 52.21(n).

Section 204.850[41]

Section 204.850, "Relaxation of a Source-Specific Limitation", provides that at such time that a source or modification becomes a major stationary source or major modification solely due to a relaxation of any enforceable limitation established after August 7, 1980, on the capacity of the source or modification to emit a pollutant, then the requirements of Sections 204.810, 204.820, 204.830, 204.840, 204.850, 204.1100, 204.1110, 204.1120, 204.1130, 204.1140, 204.1200, and 204.1400 shall apply to the source or modification as though construction had not yet commenced on the source or modification.

Consistent with the relevant provision in the federal PSD rules, the Agency proposed "[*a*]*t such time that* a particular source or modification becomes a major stationary source or modification . . ." (*emphasis added*). Meanwhile, the introductory phrase in the First Notice Version reads "*[w]hen* a particular source or modification becomes a major stationary source or modification . . ." (*emphasis added*). Inconsistent with the federal PSD rules, the First Notice Version suggests that a source-specific limitation will inevitably be relaxed, *i.e.,* a particular source or modification will inevitably become a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation. The federal PSD rules makes no such suggestion in the regulatory language providing that "[a]t such time . . ." The Agency recommends that Section 204.850 be consistent with the underlying federal PSD rules.

Section 204.860[42]

This Section provides a variety of exemptions to the requirements of Part 204. In particular, subsection (c) provides that the requirements of Sections 204.1110, 204.1130, and

[41] 40 CFR 52.21(r)(4).

[42] 40 CFR 52.21(i).

204.1140 do not apply to a major stationary source or major modification for a particular pollutant, if the allowable emissions of that pollutant from the source, or the net emissions increase of that pollutant from the modification would not impact a Class I area and no area where an applicable increment is known to be violated, and would be temporary. Consistent with the federal PSD rules, the Agency proposed in subsection (c) that "*[t]he requirements of* Section 204.1110, 204.1130, and 204.1140 shall not apply . . ." (*emphasis added*). Meanwhile, the First Notice Version states "Sections 204.1110, 204.1130, and 204.1140 *do* not apply . . ." (*emphasis added*). The First Notice Version is inconsistent with both the federal PSD rules and the introductory clause at the beginning of subsection (b) of the same section. The Agency recommends that subsection (c) of Section 204.860 be consistent with the underlying federal PSD rules.

Section 204.920[43]

In subsection (b) of Section 204.920, "Restrictions on Area Classifications", areas that were redesignated Class I under the regulations promulgated before August 7, 1977, shall remain Class I, but may be redesignated as provided in Part 204. The Agency's proposal offered the following language:

> Areas *which were* redesignated as Class I under regulations promulgated before August 7, 1977, shall remain Class I, but may be redesignated as provided in this Part.

(*emphasis added*). Subsection (b) of the First Notice Version does not include the italicized language of the proposal, *i.e.,* the words "which were". The First Notice language is less clear; the Agency recommends that the italicized language be included for clarity.

Subsection (d) of Section 204.920 describes certain areas that may only be redesignated Class I or II. Consistent with the federal PSD rules, the Agency proposed that "[t]he following

[43] 40 CFR 52.21(e).

areas *may* be redesignated only as Class I or II" and then delineated those areas that may only be redesignated Class I or II in subsection (d)(1) and (d)(2). (*emphasis added*). In the First Notice Version, the word "shall" replaced the word "may". The use of the word "shall" in the First Notice Version suggests that the redesignation is mandatory when that is not, in fact, the case under the federal PSD rules. Nor is "shall" necessary given subsection (d)(1) and (d)(2) identifies the criteria for redesignation. The Agency recommends that subsection (d) of Section 204.920 be consistent with the federal PSD rules.

Section 204.930[44]

Subsection (a) of Section 204.930, "Redesignation", provides that as of the initial effective date of Part 204, all areas of the State except as provided by Section 204.920 are designated Class II as of December 5, 1974. Redesignation (except as precluded by Section 204.920) may be proposed by the State or Indian Governing Bodies. The Agency's proposal mirrored the applicable federal PSD rules providing that any redesignation requests may be proposed by the State or Indian Governing Bodies. However, the First Notice Version does not include Indian Governing Bodies as an entity that may make a redesignation request to USEPA for approval. This approach is not only inconsistent with the applicable federal PSD rules but inconsistent with the approach taken by the First Notice Version concerning Indian Governing Bodies, in subsections (c), (d) and (f) of Section 204.930. The Agency recommends that Indian Governing Bodies be included for consistency in subsection (a).

Subsection (e) of Section 204.930 provides that the USEPA shall disapprove, within 90 days, a proposed redesignation if it finds, after appropriate public notice, that it does not meet the procedural requirements of this Section or is inconsistent with Section 204.920. The Agency's

[44] 40 CFR 52.21(g).

proposal in subsection (e) concluded that "[i]f *any such* disapproval occurs, the classification of the area *shall* be that which was in effect prior to the redesignation *which was disapproved.*" (*emphasis added*). The First Notice Version instead provides that "[i]f disapproval occurs, the classification of the area *will* be that which was in effect prior to the *proposed* redesignation." (*emphasis added*). The deviation from the language of the federal PSD rules as suggested by First Notice Version would create ambiguity. For clarity, the Agency recommends that subsection (e) be consistent with the federal PSD rules.

Section 204.1000[45]

In subsection (a) of Section 204.1000, "Stack Heights", the degree of emission limitation required for control of any air pollutant under Part 204 shall not be affected by so much of the stack height of any source in excess of good engineering practice or any other dispersion technique. The relevant provision in the federal PSD rules provide that the degree of emission limitation "shall not be affected in any manner by . . . *so much of* the stack height of any source that exceeds good engineering practice . . ." (*emphasis added*). The First Notice Version deviated from the federal language providing instead "any portion of . . ." the stack height. This language is not consistent with the federal PSD rules, and for consistency with the federal PSD rules, the Agency recommends that "so much of" be used.

Section 204.1120[46]

Subsection (b) of Section 204.112, "Air Quality Models", provides that where an air quality model specified in 40 CFR Part 51, Appendix W is inappropriate, the model may be

[45] 40 CFR 52.21(h).

[46] 40 CFR 52.21(l).

modified or another model substituted subject to the requirements of this subsection. Pertinent to this discussion is the following language offered by the Agency:

> *Such a* modification or substitution *of a model* may be made on a case-by-case basis or, *where* appropriate, on a generic basis for a specific state program. Written approval of the USEPA must be obtained for any modification or substitution. In addition, use of a modified or substituted model *must be* subject to notice and opportunity for public comment *under procedures set forth in* 35 Ill. Adm. Code Part 252.

(*emphasis added*). In lieu of the above language, the First Notice Version proposes as follows:

> *The* modification or substitution may be made on a case-by-case basis or, *when* appropriate, on a generic basis for a specific State program. Written approval of USEPA must be obtained for any modification or substitution. In addition, use of a modified or substituted model *is* subject to notice and opportunity for public comment *(*35 Ill. Adm. Code Part 252*)*.

(*emphasis added*). The deviation from the language in the federal PSD rules as suggested by First Notice Version, *i.e.,* not including the phrase "of a model" and replacing "where" with "when", would create ambiguity. Most significantly, the term "modification" has particular meaning in federal PSD permitting, *e.g.*, proposed definition of Major Modification in Section 204.490. Consequently, the term "modification" should not be used elsewhere within Part 204 without additional clarifying language, *i.e.*, with the phrase "of the model". For clarity, the Agency recommends that subsection (b) be made consistent with the federal PSD rules.

Section 204.1130[47]

Subsection (a) of Section 204.1130 details the information on ambient air quality that must be submitted in an application for a permit under Part 204. An analysis of the ambient air quality in the area that the proposed major stationary source or major modification would affect shall be included in an application. Subsection (a)(1) further delineates that this includes an analysis for each pollutant that a new source would have the potential to emit in a significant

[47] 40 CFR 52.21(m).

amount and for each pollutant for which a major modification would result in a significant net emissions increase consistent with the federal PSD rules. In subsection (a)(1)(B), the Agency proposed that "[f]or the modification, each pollutant for which *it would result in* a significant net emissions increase." (*emphasis added*). However, the First Notice Version would provide that "[f]or the modification, each pollutant for which a significant net emissions increase *would result.*" (*emphasis added*). In the federal PSD rules, "it would result in" refers to the modification but the language of the First Notice Version would no longer refer to the modification. This language is not consistent with the federal PSD rules, and the Agency recommends that subsection (a)(1)(B) be made consistent with the federal PSD rules.[48]

Section 204.1200[49]

Subsection (a) of Section 204.1200, "Additional Requirements for Sources Impacting Federal Class I Areas", details the obligations on the Agency for notice relative to the Federal Land Managers for federal Class I areas. Notably, the Agency is required to provide appropriate and timely written notice of any permit application for a proposed major stationary source or major modification, the emissions from which may affect a federal Class I area, to the Federal Land Manager and the Federal official with direct responsibility for the management of such lands. The Agency shall also provide the Federal Land Manager and the Federal official with a timely copy of the draft permit.

[48] Subsection (a)(2) provides that for those pollutants without a NAAQS, the analysis shall contain air quality monitoring data the Agency deems necessary to assess ambient air quality for that pollutant. In subsection (a)(3), for those pollutants with a standard, the analysis shall contain appropriate continuous air quality monitoring data. The First Notice Version changes "such a standard" to "an NAAQS". In altering this language, the First Notice Version uses "an" prior to "NAAQS". For the reasons already discussed above, the Agency recommends that "a" be used before "NAAQS".

[49] 40 CFR 52.21(p).

In subsection (a), the Agency provided that "[s]uch notification . . . shall be *given* within 30 days of receipt . . ." (*emphasis added*). Meanwhile, the Federal Notice language provides that "[t]he notification . . . shall be *issued* within 30 days after receipt . . ." (*emphasis added*).[50] While this revision may appear inconsequential, the term "issue" has particular meaning in PSD permitting. The term "issue" is reserved for the act of "issuing" a permit by the permitting authority. Significantly, the issuance of a permit affords the applicant with the required authority to act and, if deemed appropriate by the applicant, the ability to file an appeal of any terms included within any issued permit. The word "issued" should not be used when the Agency is merely required to give notice to the Federal Land Manager. The Agency recommends that subsection (a) be made consistent with the federal PSD rules.

Subsection (a) also provided that "[t]he Illinois EPA shall provide the Federal Land Manager and *such* Federal officials with a copy of the preliminary determination required under 35 Ill. Adm. Code Part 252 . . ." (*emphasis added*). The First Notice Version changed "such" to "relevant". While the Agency previously discussed the challenges presented by the approach taken in the First Notice Version with the term "such", the Agency did not previously highlight the ambiguity that may be inherent with the term "relevant". In certain contexts, the term "relevant" may leave subject to interpretation what or who is or is not "relevant". For clarity in this provision, the Agency recommends that the word "such" be used, and not "relevant".

Finally, the Agency must take a moment to highlight what not using the term "such" would do to the last sentence in subsection (a). Subsection (a) originally provided that "the Illinois EPA shall also notify all affected Federal Land Managers within 30 days of receipt of

[50] In certain instances, Section 204.1200 of the First Notice Version replaces "shall" with "must". The First Notice Version also alters the word "such" in Section 204.1200. The Agency previously offered concerns over this approach.

any advance notification of any *such* permit application." Meanwhile, the First Notice Version removed the term "such". The federal PSD rules requires the Agency to notify all affected Federal Land Managers within 30 days of receipt of any advance notice of any application for a proposed major stationary source or major modification, the emissions from which may affect a Class I area. However, the First Notice Version would have the Agency notifying all affected Federal Land Managers within 30 days of receipt of any advance notice of *any* application for a proposed major stationary source or major modification. The Agency requests that the word "such" be included in this provision.[51]

Subsection (f) would authorize the Governor to grant a variance from such alternative maximum allowable increase for SO_2 set forth within subsection (e) subject to the variance not adversely affecting air quality related values and concurrence by the Federal Land Manager. Subsection (f) details the applicable procedural requirements and in the event such a variance is granted, including that the Agency shall issue a permit to such source or modification pursuant to the requirements of subsection (h), provided that the applicable requirements of this Part are otherwise met. The relevant provision in the federal PSD rules provide that "[i]f such variance is granted, the Illinois EPA shall issue a permit *to* such source or modification . . ." (*emphasis added*). The First Notice Version instead states that "[i]f such variance is granted, the Agency shall issue a permit *for* such source or modification . . ." (*emphasis added*). In order to make

[51] As related to impacts on a Federal Class I area, subsection (e) would authorize the Agency to issue the permit where the owner or operator of a proposed source or modification demonstrates to the Federal Land Manager that the emissions from such source or modification would have no adverse impact on the air quality related values, notwithstanding that the change in air quality from such project would cause or contribute to concentrations which would exceed the maximum allowable increases for a Class I area. Provided the applicable requirements of Part 204 are met, the Agency may issue the permit to include emission limitations necessary to assure that emissions of SO_2, $PM_{2.5}$, PM_{10}, and NO_x would not exceed the alternative maximum allowable increases for such pollutants set forth within this subsection. One pollutant identified subsection (e) by the Agency includes "NO_x". The First Notice Version makes reference to "NOx" in subsection (e). The appropriate reference is "NO_x".

clear that the Agency is issuing a permit "to such source or modification" rather than "for such source or modification", the Agency requests that "to" be used.

Section 204.1400[52]

In Section 204.1400, "Recordkeeping and Reporting Requirements for Certain Projects at Major Stationary Sources", the requirements of Section 204.1400 apply if a "reasonable possibility" exists, based on the criteria specified later in proposed Section 204.1400(f), that a project that is not projected to be a major modification for a pollutant may nevertheless result in a major modification. It is only applicable when the owner or operator elects to use the method in Sections 204.600(b)(1) through (b)(3) (First Notice Version Section 204.600(b)(1)) for calculating projected actual emissions after the project.

The relevant provisions of the federal PSD rules have been and continue to be the subject of judicial review. Any deviation from this language as would occur by the reformatting of this subsection in the First Notice Version would create ambiguity and potential confusion. Inconsistent with the federal PSD rules, the First Notice Version changed the first paragraph from an introductory paragraph to a subsection (a). Such an approach is inconsistent with the federal PSD rules as the remaining subsections of 204.1400 were meant to be subordinate to the introductory paragraph.[53] As a consequence, the First Notice Version renumbers the remainder of the subsections in Section 204.1400 and, in certain instances, changes the references to the various subsections or neglects to appropriately change the references throughout Section 204.1400. Essentially each cross-reference in the First Notice Version is incorrect. Rather than attempting to correct each reference in Section 204.1400 in the First Notice Version, the Agency

[52] 40 CFR 52.21(r)(6-7).

[53] Elsewhere in the First Notice Version, introductory paragraphs remain in the text of the regulation. *See,* 35 Ill. Adm. Code 220, 240 and 320.

recommends that the formatting of Section 204.1400 be made consistent with the federal PSD rules.

In the introductory paragraph of the Agency's proposal (subsection (a) of the First Notice Version), the relevant language provides that "[e]xcept as otherwise provided in subsection (f)(2) of this Section, *the provisions of* this Section apply with respect to any regulated NSR pollutant . . ." (*emphasis added*). In lieu of the Agency's proposal, the First Notice Version offers that "[e]xcept as otherwise provided in subsection (f)(2) of this Section, this Section apply*ies* with respect to any regulated NSR pollutant . . ." (*emphasis added*). In this regard, it is noteworthy that the entirety of this Section will never apply to the owner or operator or a modification. This is because it establishes different requirements for electric utility steam generating units and for other units. For consistency, the Agency recommends that the provisions be consistent with the federal PSD rules.

In subsection (f) of the Agency's proposal (subsection (g) of the First Notice Version), "reasonable possibility" is defined for purposes of Section 204.1400. If the projected increase in emissions of a pollutant is 50 percent or more of the relevant significant emission increase, a "reasonable possibility" is presumed to exist. If the sum of the projected increase plus the amount excluded pursuant to Section 204.600(b)(3) is at least 50 percent of the significant emission rate, a "reasonable possibility" is also presumed to exist but the source must only keep the records specified by Section 204.1400(a). Subsection (f)(2) provided the following language:

> A projected actual emissions increase that, added to the amount of emissions excluded under Section 204.600(b)(3), sums to at least 50 percent of the amount that is a "significant emissions increase," *as defined under Section 204.670* (without reference to the amount that is a significant net emissions increase), . . .

(*emphasis added*). The First Notice version deletes the italicized reference to Section 204.670. By this deletion, it is not clear what the subsequent parenthetical, *i.e.,* without reference to the

amount that is a significant net emissions increase, is referring to in the regulatory language. The Agency requests that the definition of "reasonable possibility" be made consistent with the federal PSD rules.

In subsection (g) of the Agency's proposal (subsection (h) of the First Notice Version), the owner or operator of the source shall make the information required by this Section available for review upon a request for inspection by the Agency or USEPA or by a request by the general public to the Agency. While the Agency's proposal was based on the federal PSD rules, the recordkeeping requirements of this subsection necessarily had to be tailored to state recordkeeping requirements. In this vein, the Agency offered the following language in subsection (g):

> The owner or operator of the source *shall* make the information required to be documented and maintained pursuant to this Section available for review upon a request for inspection by the Illinois EPA or USEPA or the general public *pursuant to the requirements contained in* Section 39.5(8)(e) of the Act.

(*emphasis added*). The First Notice Version replaces "pursuant to the requirements contained in" with the term "under". The term "under" suggests that the general public possesses the authority to request documents under Section 39.5(8)(e). That is not the case and, as such, the Agency tailored language authorizing all parties, including the general public, to request documents pursuant to the requirements of Section 39.5(8)(e) of the Act. The language of the First Notice Version no longer affords the public this ability and, for this reason, the Agency recommends that its proposed language be included in subsection (g).

Section 204.1500[54]

[54] 40 CFR 52.21(v).

Consistent with the language of the federal PSD rules, subsection (a) of Section 204.1500, addressing the approval of a system of innovative control technology as an alternative to BACT, read that:

> An owner or operator of a proposed major stationary source or major modification may request the Illinois EPA in writing no later than the close of the comment period under 35 Ill. Adm. Code Part 252 *to* approve a system of innovative control technology.

(*emphasis added*). In addition to inserting additional commas, the First Notice Version deletes the word "to" in Section 204.1500. While the word "to" in the proposal may not appear significant, this "to" refers to the request; without this "to", the language in the First Notice Version refers to the Agency. The Agency recommends that "to" be used for clarity and consistency with the federal PSD rules.

Section 204.1600[55]

Section 204.1600 provides Applicability provisions for Plantwide Applicability Limitations (PALs). Subsection (a) would have authorized the Agency to approve the use of actuals PALs for any existing major stationary source if the PALs meet the requirements in Subpart K (the portion of Part 204 that addresses PAL permits). The Agency proposed that "[t]he term 'PAL' shall mean 'actuals PAL' throughout this Subpart." While the Agency previously discussed the use of "must" and other changes made in lieu of "shall" in the First Notice Version, these revisions in the First Notice Version presumably are what prompted grammatical changes elsewhere to the accompanying regulatory text. For instance, in Section 204.1600, the deletion of "shall" presumably prompted the inclusion of "means" rather than "mean". For consistency with the federal PSD rules, the Agency would request that all

[55] 40 CFR 52.21(aa).

accompanying grammatical revisions prompted by changes to the term "shall" in the First Notice Version be made consistent with the Agency's proposal and the federal PSD rules.

Section 204.1610[56]

In Section 204.1610, definitions for certain terms used in Subpart K were proposed consistent with the federal PSD rules. In so doing, the Agency provided that "[w]hen a term is not defined in these sections, it shall have the meaning *given* in this Part . . ." (*emphasis added*). In lieu of "given", the First Notice Version uses the term "ascribed". "Ascribed" is not a word used in the federal PSD rules, perhaps this is because "ascribed", in most simple terms, does not equate to "mean". *Accord., Cambridge English Dictionary* ("ascribed" is "to consider something to be caused, created or owned by someone or something"). For clarity, and for consistency with the federal PSD rules, the Agency recommends that the word "given" be used rather than "ascribed".

Section 204.1630[57]

In Section 204.1630, the definition of "Allowable emissions" for purposes of Subpart K, would mean the definition of "allowable emissions" as defined in Section 204.230 except that it shall be calculated considering any emissions limitation that is enforceable as a practical matter on the emissions unit's potential to emit. The definition of "Allowable emissions" from the federal PSD rules as addressed in the section begins "'Allowable emissions' *means 'allowable emissions' as defined* in Section 204.230 . . ." (*emphasis added*). Meanwhile, the introduction to the definition of "Allowable emissions" in the First Notice Version states "'Allowable emissions' *has the meaning ascribed* in Section 204.230 . . ." (*emphasis added*). For the reasons

[56] 40 CFR 52.21(aa).

[57] 40 CFR 52.21(aa).

discussed above, the Agency recommends that the word "means" be used rather than "has the meaning ascribed".

Section 204.1670

The definition of "'Lowest achievable emission rate' or 'LAER'" as addressed in Section 204.1670 "shall have the meaning *given* by the provisions at 35 Ill. Adm. Code 203.301(a)." (*emphasis added*). The First Notice Version uses the word "ascribed" rather than "given". For the reasons already discussed, the Agency recommends that "given" be used rather than "ascribed".

Section 204.1760[58]

Section 204.1760 provides a definition for "'Reasonably Achievable Control Technology' or 'RACT'". Consistent with the federal PSD rules, RACT would mean devices, systems, process modifications, or other apparatus or techniques that are reasonably available taking into account the necessity of imposing such controls, the impacts of such controls and alternative means to attain and maintain a NAAQS. Consistent with the federal PSD rules, subsections (a) and (b) included language addressing "[t]he necessity of imposing *such controls* . . ." and "[t]he social, environmental, and economic impact of *such controls* . . .", respectively. (*emphasis added*). In both instances that the federal PSD rules use the phrase "such controls", the First Notice Version inserts "RACT" in place of this phrase. By so doing, the First Notice Version makes both statements circular, *i.e.,* "RACT means . . . RACT." For clarity, the Agency recommends using the phrase "such controls" in both subsections (a) and (b).

Similar to the relevant provision in the federal PSD rules, subsection (c) provided that "[a]lternative means of providing for attainment and maintenance of *such standard*." (*emphasis*

[58] 40 CFR 51.100(o).

added). In lieu of "such standard", the First Notice Version incorrectly refers to "RACT". The "standard" that is being referred to in this provision is a national ambient air quality standard. For accuracy and clarity, the Agency recommends using the phrase "such standard" in subsection (c) rather than "RACT".

Section 204.1830[59]

Section 204.1830 provides the information that would be required to be included in a PAL permit. In particular, upon expiration of the PAL, the source is subject to Section 204.1850. Subsection (a)(5) offered a "requirement that, once the PAL expires, the major stationary source is subject to *the requirements of* Section 204.1850." (*emphasis added*). In what has become proposed subsection (e), the phrase "the requirements of" would be removed in the First Notice Version. Given how Section 204.1850 has been drafted, *i.e.*, referencing procedures of other sections, the Agency recommends that the phrase "the requirements of" should be used in Section 204.1830 consistent with the federal PSD rules.

Section 204.1830 also requires that a PAL permit contain a requirement to monitor all emissions units in accordance with Section 204.1880. In proposed subsection (a)(7), the Agency included a "requirement that the major stationary source owner or operator monitor all emissions units in accordance with *the provisions under* Section 204.1880." (*emphasis added*). In what has become proposed subsection (g), the phrase "the provisions under" would be removed in the First Notice Version. Given how Section 204.1880 has been drafted, *i.e.*, referencing procedures of other sections, the Agency recommends that the phrase "the provisions under" should be used in Section 204.1830 consistent with the federal PSD rules.

[59] 40 CFR 52.21(aa).

Further, Section 204.1830 requires that a PAL permit contain a requirement to retain records required by Section 204.1890 on site. Consistent with the federal PSD rules, subsection (a)(8) provided a "requirement to retain the records required *under* Section 204.1890 *on site*". (*emphasis added*). In what has become subsection (h), this language would be replaced with a "requirement to retain *on site* the records required *by* Section 204.1890" in the First Notice Version. (*emphasis added*). The language of the federal PSD rules focuses on the requirement to retain records. Meanwhile, the First Notice Version shifts the focus from the requirement to retain records to what is happening on site. For clarity and consistency with the federal PSD rules, the Agency recommends that subsection (h) of the First Notice Version use the phrase, "required under Section 204.1890 on site".

Section 204.1840[60]

Section 204.1840 would provide 10 years as the effective period for a PAL in subsection (a) and specifies the conditions in subsection (b) under which the Agency must or may reopen a PAL permit. Relevant to this discussion is the language of subsection (b)(1)(C) where the Agency proposed "[r]evise the PAL to reflect an increase in the PAL *as provided under* Section 204.1870." (*emphasis added*). The First Notice Version revises this language to "[r]evise the PAL to reflect an increase in the PAL *(see Section* 204.1870*)*." (*emphasis added*). For consistency with the federal PSD rules, the Agency requests that the reference to Section 204.1870 be made "as provided under".

Section 204.1860[61]

[60] 40 CFR 52.21(aa).

[61] 40 CFR 52.21(aa).

Section 204.1860 would provide procedures before a request to renew a PAL can be approved. Subsection (d) provides that in determining whether and how to adjust the PAL, the Agency shall consider subsections (d)(1) and (2). Subsection (d)(1) provides if the new value of the PAL, as calculated in the same manner as the existing PAL, would be 80 percent or more of the existing PAL, the PAL may be renewed at the same level. Subsection (d)(2) provides that the Agency has the discretion to set the value of the new PAL at a level it determines to be more representative of the source's baseline actual emissions or that it determines to be more appropriate considering certain relevant factors. In no case may any PAL adjustment fail to comply with subsection (d)(3).

The First Notice Version reformats subsection (d). After labelling subsection (d), PAL Adjustment, the First Notice Version converts what had been subsection (d) into a new (d)(1). Subsections (d)(1) and (d)(2) become subsections (d)(1)(A) and (B) in the First Notice Version. Finally, what had previously been labelled subsection (d)(3) becomes (d)(2) in the First Notice Version. The reformatting of this subsection in the First Notice Version has already created ambiguity and confusion. For instance, the reformatting has created a circular condition that did not previously exist in the federal PSD rules. In subsection (d)(1) of the First Notice Version, this requirement provides "[i]n determining whether and how to adjust the PAL, the Agency shall consider the options outlined in subsections *(d)(1)* and (d)(2)." (*emphasis added*). This statement referencing subsection (d)(1) is now made in subsection (d)(1). In another instance, the following sentence in subsection (d)(1) of the First Notice Version provides "[h]owever, in no case may any such adjustment fail to comply with subsection *(d)(3)*." (*emphasis added*). Given the reformatting that took place in the First Notice Version, subsection (d)(3) no longer

exists in Section 204.1860. The Agency recommends that subsection (d) be consistent with the federal PSD rules.

In addition, in proposed subsection (d)(2), this subsection concluded with "or other factors *as* specifically identified by the Illinois EPA in its written rationale." (*emphasis added*). In what is now subsection (d)(1)(B), the word "as" would be removed in the First Notice Version. For consistency with the federal PSD rules, the Agency recommends that "as" be used.

Section 204.1870[62]

Section 204.1870 would provide what conditions must be met to increase a PAL emission limitation. Relevant to this discussion is the introductory phrase in subsection (a)(2) where the Agency proposed that "[a]s part of *this* application, the major stationary source owner or operator shall demonstrate. . ." (*emphasis added*). The First Notice Version changes the term "this" to "the" in this introductory phrase. Given this is the introductory phrase at the beginning of a new subsection, "this application" is clearer than a reference to "the application." The Agency recommends that "this" be used for clarity at the beginning of subsection (a)(2).

Section 204.1900[63]

Section 204.1900 would provide the reporting and recordkeeping obligations a PAL source must meet during the PAL effective period. Consistent with the federal PSD rules, the owner or operator shall submit semi-annual monitoring reports and prompt deviation reports, meeting the requirements in subsections (a) through (c), to the Agency in accordance with the Clean Air Act Permit Program (CAAPP). Subsection (a) details the informational requirements for the semi-annual report that shall be submitted to the Agency within 30 days of the end of

[62] 40 CFR 52.21(aa).

[63] 40 CFR 52.21(aa).

each reporting period. Subsection (a)(6) specified certain information that must be included in the semi-annual report, specifically:

> A notification of a shutdown of any monitoring system, whether the shutdown was permanent or temporary, the reason for the shutdown, the anticipated date that the monitoring system will be fully operational or replaced with another monitoring system, *and* whether the emissions unit monitored by the monitoring system continued to operate, and the calculation of the emissions of the pollutant or the number determined by method included in the permit, *as provided by* Section 204.1880(g).

(*emphasis added*). The italicized "and" included in the federal PSD rules was not included within subsection (a)(6) of the First Notice Version. For consistency with the applicable federal PSD rules, the Agency requests that this "and" be used in subsection (a)(6).

Finally, in the First Notice Version, the reference to Section 204.1880(g) has been altered from the Agency's proposal, *i.e.,* no longer states "as provided by Section 204.1880(g) but "(see Section 204.1880(g))." The Agency requests that the reference to Section 204.1880(g) be made consistent with the federal PSD rules.

WHEREFORE, for the reasons stated above the Agency respectfully submits the above comments and requests that the Board clarify its final opinion and order consistent with the Agency's comments offered herein.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: Sally Carter

Sally Carter
Assistant Counsel
Division of Legal Counsel

DATED: May 4, 2020

1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
217/782-5544

STATE OF ILLINOIS)
) **SS**
COUNTY OF SANGAMON)
)

CERTIFICATE OF SERVICE

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

I have electronically served the attached **ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S MOTION FOR WAIVER OF REQUIREMENTS** and **ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S COMMENTS REGARDING THE FIRST NOTICE VERSION OF THE PROPOSED RULES** upon the persons on the attached Service List.

My e-mail address is sally.carter@illinois.gov.

The number of pages in the e-mail transmission is 68.

The e-mail transmission took place before 5:00 p.m. on May 4, 2020.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Sally Carter

Sally Carter
Assistant Counsel
Division of Legal Counsel

Dated: May 4, 2020

1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
217/782-5544

SERVICE LIST

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

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

Jason James
Assistant Attorney General
Office of the Attorney General
69 W. Washington St, Suite 1800
Chicago, IL 60602
KPamenter@atg.state.il.us

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

N. LaDonna Driver
4340 Acer Grove Dr.
Springfield, IL 62711
LaDonna.Driver@heplerbroom.com

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

Daryl Grable
Chicago Legal Clinic, Inc.
211 W. Wacker Dr, Suite 750
Chicago, IL 60606
dgrable@clclaw.org

Tim Fox
Illinois Pollution Control Board
100 W. Randolph Suite 11-500
Chicago, IL 60601
tim.fox@illinois.gov