

ILLINOIS POLLUTION CONTROL BOARD  
October 7, 2010

IN THE MATTER OF: )  
)  
10-YEAR FEDERALLY ENFORCEABLE ) R10-21  
STATE OPERATING PERMITS (FESOP): ) (Rulemaking -Air)  
AMENDMENTS TO 35 ILL. ADM. CODE )  
201.162 )

Proposed Rule. Second Notice.

OPINION AND ORDER OF THE BOARD (by C.K. Zalewski):

The Board today adopts for second notice a proposal extending the maximum term that the Illinois Environmental Protection Agency (Agency or IEPA) could issue a Federally Enforceable State Operating Permit (FESOP) from five years to ten. On April 20, 2010, the Agency filed a proposal for amendments to the Board's air rules pursuant to the general rulemakings provisions of Section 27 of the Illinois Environmental Protection Act (Act), 415 ILCS 5/27 (2008) and the Board's procedural rules at 35 Ill. Adm. Code 102. The sole provision of the air rules to be amended is Section 201.162, codified at 35 Ill. Adm. Code 201.162.

In a June 17, 2010 opinion and order, to expedite this rulemaking, the Board authorized first notice publication of the rules as proposed without commenting on the merits of the IEPA proposal. First notice of the proposed rules appeared in the July 2, 2010 *Illinois Register*. See 34 Ill. Reg. 8508 (July 2, 2010).

By today's action, the Board adopts this second-notice order, and directs that the proposed rule be submitted to the Joint Committee on Administrative Rules (JCAR) for its review under the Administrative Procedure Act (APA), 415 ILCS 5/100 *et. seq.* (2008). The Board finds that this record demonstrates that the proposed rule if adopted is technically feasible, economically reasonable, and, in the words of Section 27(b) of the Act, will have no "adverse impact on the people of the state of Illinois." 415 ILCS 5/27(b) (2008). The second notice proposal contains no substantive changes from the first notice proposal.

In the opinion below, the Board first describes the details of the proposal filed by the Agency. The Board then provides the procedural history of the rulemaking to date, before summarizing the testimony of the sole witness, Bob Bernoteit, manager of the Agency's FESOP unit. The Board next provides analysis and conclusion on the rulemaking. Finally, the Board order directs the Clerk to file proposed amendments with the Joint Committee on Administrative Rules for second-review under the Illinois Administrative Procedure Act (APA) (*see* 5 ILCS 100/5-40(c) (2008)).

## THE PROPOSAL

By way of background, on December 17, 1992, the United States Environmental Protection Agency (USEPA) approved the provisions of the Illinois (FESOP) program as part of the State Implementation Plan (SIP) for meeting the goals of the Federal Clean Air Act (CAA). USEPA found that Illinois' FESOP program met all five criteria for approving a state operating permit program as part of a SIP. Among other things, these criteria require that

terms of the (FESOP) permit and its renewal must be legally enforceable; the terms and conditions of the permit must be at least as stringent as any other applicable limitation or requirement contained in the SIP or enforceable by the SIP or waive any requirements that are federally enforceable (*e.g.*, standards established under section 111 or 112 of the Clean Air Act); the limitations, controls and requirements in the permit must be permanent, quantifiable and otherwise enforceable as a practical matter; and the permits must be issued pursuant to public participation. *Id.*

USEPA restated its approval . . . when it approved the Clean Air Act Permit Program ("CAAPP") pursuant to Section 39.5 of the Act. Subsection 3.3(c) of Section 39.5 of the Act, gives the Illinois EPA the authority to issue FESOPs for the purposes of limiting a sources potential to emit pursuant to the Illinois EPA's general authority to issue state permits under Section 39(a) of the Act. SR at 1-2.

Board rules for issuance of state air pollution control permits are codified at 35 Ill. Adm. Code 201. Section 201.162 specifies the duration that permits can be issued as either subject to Section 201.169 (perpetual permits) or five years. This proposal seeks to extend the term of State operating permits from five to ten years. This proposal does not change the term of perpetual permits issued pursuant to Section 201.169 or CAAPP permits issued pursuant to Section 39.5 of the Act. SR at 2.

The Agency relates that two other states have adopted or are in the process of adopting rules extending the term of FESOPs from five to ten years; final USEPA approval for Indiana's rule was published at 74 *Fed.Reg.* 51240 (Oct. 6, 2009). SR at 3, and Att. A.

The Agency explains that FESOP sources are located throughout the state, and that the proposed rules will affect approximately 800 sources that that have applied for or obtained FESOPs. SR at 4 and Att. B. The Agency explains that IEPA has averaged 61 new FESOP applications each year since the year 2000 and 66 FESOP renewal applications each year over the last ten years. If the proposal is adopted,

when these applications come in and are reviewed, at the discretion of the Illinois EPA, the permits will be granted for a term of ten years. The Illinois EPA may choose to issue a FESOP for a term shorter than ten years. FESOPs that are issued for a term shorter than ten years include situations in which the source may have been out of compliance with the applicable requirements prior to issuance of the

FESOP and need to perform additional performance testing to demonstrate or confirm compliance with the applicable requirements. SR at 3.

The Agency explains that the amendments are “expected to reduce administrative costs of the permitting process for both the affected sources and the Illinois EPA.” SR at 5. The Agency states that its outreach to affected sources included e-mail in January 2010, as well as a notice on its website. The Agency states that in response, it received three oral comments. Two of these supported the proposal, while one expressed a concern.

### **PROCEDURAL HISTORY**

The Agency filed this proposal on April 20, 2010. By order of May 6, 2010, the Board accepted the proposal for hearing, and by order of June 17, 2010, the Board authorized first-notice publication in the *Illinois Register*. A June 9, 2010 hearing officer order set hearings for July 8, 2010 in Chicago and July 21, 2010 in Springfield, and also set deadlines for the pre-filing of testimony.

In a letter dated June 24, 2010, the Board requested the Director of the Department of Commerce and Economic Opportunity (DCEO) to prepare an economic impact study (EcIS) concerning this rulemaking as required by Section 27(b) of the Act. 415 ILCS 5/27(b) (2008). In the letter, the Board explained the circumstances of the rule, the hearing schedule established, and the Board’s desire not to hold a third hearing. The Board requested a DCEO response no later than June 30, 2010. DCEO responded in a letter dated July 19, 2010, declining the Board’s request, stating that the Department was unable to undertake the economic impact study “at this time”.

First notice of the proposed rules appeared in the July 2, 2010 *Illinois Register*. See 34 Ill. Reg. 8508(July 2, 2010). Accordingly, the 45-day APA written public comment period extended through August 16, 2010.

The first hearing was held in Chicago on July 8, 2010, conducted by Hearing Officer Kathleen M. Crowley. Representatives from the Board and the Agency were in attendance. The Agency presented testimony timely pre-filed on June 29, 2010, by Mr. Bob Bernoteit. Mr. Bernoteit has been the manager of the FESOP Unit at the Agency in the Division of Air Pollution Control Permit Section since 2004. This testimony was also entered into the record as Exhibit 1. 7/08/10 at Tr. 7. Hearing Officer Crowley asked questions regarding listing the expiration date on the face of the permit, costs associated with applying for FESOP renewal permits, and the expected effect the proposal would have on the Agency’s workload. 7/08/10 at Tr. 8-10.

The second hearing was held on July 21, 2010, in Springfield, conducted by Hearing Officer Webb<sup>1</sup>. Only Counsel for the Agency and representatives from the Board were present.

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<sup>1</sup> Hearing Officer Crowley explained that the second hearing might be conducted by Springfield-based Hearing Officer Carol Webb, to economize on Board travel expenses. 7/08/10 Tr. at 10.

One of the specific purposes of the rule was to accept testimony concerning economic effects of the proposal and the DCEO's decision not to perform an EcIS. No further testimony was pre-filed or presented at hearing by any person, and no questions were asked. 7/08/10 at Tr. 6.

Section 102.108(b) of the Board's procedural rules also provides that the Board will accept comments for 14 days after the receipt of the hearing transcript, or at any other date set by the hearing officer. Based on the expected August 2, 2010 date for transcript receipt and the Board's meeting schedule, the close of the comment period was set for August 20, 2010. 7/21/10 Tr. at 7. No post hearing comments were filed with the Board.

### **HEARING TESTIMONY**

The only witness that testified was Bob Bernoteit from the Agency. Mr. Bernoteit has been employed since February 2004, as the manager of the FESOP Unit in the Division of the Air Pollution Control Permit Section at the Agency. Exh. 1 at 1.

Mr. Bernoteit testified that the proposal extends the maximum term that a FESOP may be issued from five to ten years and that the Illinois EPA retains the discretion that is currently under Section 201.162 to issue permits for a term that is shorter than the maximum term. Under the proposal, the term for CAAPP permits issued pursuant to Section 39.5 of the Act, except for sources exempted from CAAPP pursuant to subsection 1.1 of Section 39.5 of the Act would remain five years as required by statute. 415 ILCS 5/39.5(1.1). Further, owners or operators of sources not subject to CAAPP or requiring a FESOP would remain subject to the requirements of Section 201.169, which grants permits indefinitely. Mr. Bernoteit further testified that two other states have adopted or are in the process of adopting rules extending the term of FESOPs from five to ten years. The State of Indiana received final approval of their rule on October 6, 2009. 74 *Fed. Reg.* 51240. Exh. 1 at 1.

Mr. Bernoteit explained that the IEPA averaged 61 new FESOP applications each year since the year 2000 and 66 FESOP renewal applications each year over the last ten years. If the proposal is adopted, when these applications come in and are reviewed, the permits will be granted for a term of up to ten years. The IEPA may choose to issue a FESOP for a term shorter than ten years. FESOPs that are issued for a term shorter than ten years may result from situations in which the source may have been out of compliance with the applicable requirements prior to issuance of the FESOP and where the source needs to perform additional performance testing to demonstrate or confirm compliance with the applicable requirements. Exh. 1 at 1-2.

Mr. Bernoteit further testified that granting FESOPs for a longer term will not affect the implementation of air pollution control programs or enforcement of air quality standards in the State of Illinois. Sources must comply with all applicable requirements of the Board's rules or the Act, regardless of the length of a FESOP's term of the time of its issuance. Exh. 1 at 2.

FESOPs generally contain limits on the operations of the source which effectively restrict the source's potential to emit. Draft FESOP permits undergo public notice and are subject to

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public comments. A FESOP does not impact any previously or newly applicable substantive requirements of the Act, the Board's rules or the CAA, such as a new maximum achievable control technology standard under Section 112 of the CAA. Such requirements remain independently enforceable. Similarly, owners and operators of FESOP sources will still need to meet all applicable requirements under the Act, including those related to new construction. Therefore, Mr. Bernoteit explained, an extension of the term for an initial or a renewal of a FESOP from five to ten years does not delay an owner or operator's obligation to comply with all applicable requirements. Exh. 1 at 3. Concerning economic reasonableness and technical feasibility, Mr. Bernoteit testified that the entire State of Illinois will be affected, as no single region contains all FESOP sources. The proposed regulations will affect all of the approximately 800 sources in Illinois that have either applied for or have obtained a FESOP. Exh. 1 at 3.

Mr. Bernoteit believes that this proposal will have a positive economic impact on affected sources by reducing time spent on permit renewal applications. This proposal will also reduce the costs of the IEPA associated with the time and effort required for processing these permit renewal applications. While sources with FESOP permits represent only a small amount of emissions in Illinois, they require a large proportion of the IEPA's permitting resources. The reduced frequency of these renewals is expected to provide a significant time savings for the IEPA. Within five years of adoption of this proposal, IEPA anticipates that the workload related to FESOP renewals will decrease by approximately 10%. Exh. 1 at 4.

In sum, Mr. Bernoteit concluded that the proposal imposes no new regulatory requirements on affected sources. The amendments to Section 201.162 merely extend the duration of FESOPs. The amendments are expected to reduce administrative costs of the permitting process for both affected sources and the IEPA. As this proposal imposes no new requirements or costs on affected sources, in IEPA's opinion, the proposal is both technically and economically feasible. Exh. 1 at 4.

At the first hearing, the hearing officer asked a few questions of Mr. Bernoteit. Mr. Bernoteit verified that FESOP permits will continue to list the expiration date on the face of the permit, so that a source will clearly know the term of the permit issued to him. 7/8/10 Tr. at 8. As to the cost of preparing FESOP renewal applications, Mr. Bernoteit opined that this cost should be about \$200 each, since these are "straightforward", two-page applications. 7/8/10 Tr. at 9. If the proposal is adopted, the Agency expects a 5% decrease in its workload within five years, resulting in savings in processing, manpower, and so on. 7/8/10 Tr. at 10.

At the second hearing, Mr. Bernoteit presented no new testimony, and no questions were asked of him. Mr. Bernoteit's pre-filed testimony for the first hearing was the only exhibit submitted by the Agency in this proceeding.

## **DISCUSSION**

The facts presented here are clear and uncontested. In contrast to most proposals filed with the Board, this rulemaking involves a single section and a single issue, posing a simple question: should the Agency have the option of issuing FESOPs for ten years in appropriate cases? In light of the testimony and uncontroverted support of the change, the Board finds that

the answer is clearly “yes.” Indeed, two other states have adopted or are in the process of adopting rules extending the term of FESOPs from five to ten years; final USEPA approval for Indiana’s rule was published at 74 *Fed.Reg.* 51240 (Oct. 6, 2009).

As described above, the Agency presented clear and uncontested testimony from Mr. Bob Bernoteit from the Agency’s Division of the Air Pollution Control Permit Section explaining the expected reduction of administrative resources and costs to both the affected sources with a 5% decrease of workload of FESOP renewals for the Agency within five years of the adoption of the proposal.

Accordingly, the Board finds that the facts presented in support of the Agency’s proposal are uncontroverted and that the proposal will have a positive economic impact on affected sources by reducing time spent on permit renewal applications. The proposal will also reduce the costs to the IEPA associated with the time and resources required for processing the numerous permit renewal applications.<sup>2</sup>

Meanwhile, the Board finds that IEPA’s granting FESOPs for a longer term will not affect the implementation of air pollution control programs or enforcement of air quality standards in the State of Illinois and is compliant with all applicable federal standards. To be sure, as this proposal sunsets regulatory provisions, the proposal would impose no new requirements or costs on associated affected sources. The Board accordingly finds that this record demonstrates that the proposed rule if adopted is technically feasible, economically reasonable, and, in the words of Section 27(b) of the Act, will have no “adverse economic impact on the people of the state of Illinois.” 415 ILCS 5/27(b) (2008).

For all of the foregoing reasons, the Board adopts the proposed Section 201.162 set forth below for second-notice review by JCAR under the APA. The rule text itself is substantively unchanged since first-notice publication.

### **ORDER**

The Board directs the Clerk to submit the following proposed rules to the Joint Committee on Administrative Rules for its second notice review under the APA.

TITLE 35: ENVIRONMENTAL PROTECTION  
SUBTITLE B: AIR POLLUTION  
CHAPTER I: POLLUTION CONTROL BOARD  
SUBCHAPTER a: PERMITS AND GENERAL PROVISIONS

PART 201  
PERMITS AND GENERAL PROVISIONS

SUBPART A: DEFINITIONS

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<sup>2</sup> The Board notes that reduction of the number of FESOP applications could potentially result in reduction of the number of appeals of IEPA FESOP permitting decisions to the Board.

Section	
201.101	Other Definitions
201.102	Definitions
201.103	Abbreviations and Units
201.104	Incorporations by Reference

#### SUBPART B: GENERAL PROVISIONS

Section	
201.121	Existence of Permit No Defense
201.122	Proof of Emissions
201.123	Burden of Persuasion Regarding Exceptions
201.124	Annual Report
201.125	Severability
201.126	Repealer

#### SUBPART C: PROHIBITIONS

Section	
201.141	Prohibition of Air Pollution
201.142	Construction Permit Required
201.143	Operating Permits for New Sources
201.144	Operating Permits for Existing Sources
201.146	Exemptions from State Permit Requirements
201.147	Former Permits
201.148	Operation Without Compliance Program and Project Completion Schedule
201.149	Operation During Malfunction, Breakdown or Startups
201.150	Circumvention
201.151	Design of Effluent Exhaust Systems

#### SUBPART D: PERMIT APPLICATIONS AND REVIEW PROCESS

Section	
201.152	Contents of Application for Construction Permit
201.153	Incomplete Applications (Repealed)
201.154	Signatures (Repealed)
201.155	Standards for Issuance (Repealed)
201.156	Conditions
201.157	Contents of Application for Operating Permit
201.158	Incomplete Applications
201.159	Signatures
201.160	Standards for Issuance
201.161	Conditions
201.162	Duration
201.163	Joint Construction and Operating Permits

201.164	Design Criteria
201.165	Hearings
201.166	Revocation
201.167	Revisions to Permits
201.168	Appeals from Conditions
201.169	Special Provisions for Certain Operating Permits
201.170	Portable Emission Units

#### SUBPART E: SPECIAL PROVISIONS FOR OPERATING PERMITS FOR CERTAIN SMALLER SOURCES

Section	
201.180	Applicability (Repealed)
201.181	Expiration and Renewal (Repealed)
201.187	Requirement for a Revised Permit (Repealed)

#### SUBPART F: CAAPP PERMITS

Section	
201.207	Applicability
201.208	Supplemental Information
201.209	Emissions of Hazardous Air Pollutants
201.210	Categories of Insignificant Activities or Emission Levels
201.211	Application for Classification as an Insignificant Activity
201.212	Revisions to Lists of Insignificant Activities or Emission Levels

#### SUBPART G: EXPERIMENTAL PERMITS (Reserved)

#### SUBPART H: COMPLIANCE PROGRAMS AND PROJECT COMPLETION SCHEDULES

Section	
201.241	Contents of Compliance Program
201.242	Contents of Project Completion Schedule
201.243	Standards for Approval
201.244	Revisions
201.245	Effects of Approval
201.246	Records and Reports
201.247	Submission and Approval Dates

#### SUBPART I: MALFUNCTIONS, BREAKDOWNS OR STARTUPS

Section	
201.261	Contents of Request for Permission to Operate During a Malfunction, Breakdown or Startup



- 201.262 Standards for Granting Permission to Operate During a Malfunction, Breakdown or Startup
- 201.263 Records and Reports
- 201.264 Continued Operation or Startup Prior to Granting of Operating Permit
- 201.265 Effect of Granting of Permission to Operate During a Malfunction, Breakdown or Startup

#### SUBPART J: MONITORING AND TESTING

- Section
- 201.281 Permit Monitoring Equipment Requirements
- 201.282 Testing
- 201.283 Records and Reports

#### SUBPART K: RECORDS AND REPORTS

- Section
- 201.301 Records
- 201.302 Reports

#### SUBPART L: CONTINUOUS MONITORING

- Section
- 201.401 Continuous Monitoring Requirements
- 201.402 Alternative Monitoring
- 201.403 Exempt Sources
- 201.404 Monitoring System Malfunction
- 201.405 Excess Emission Reporting
- 201.406 Data Reduction
- 201.407 Retention of Information
- 201.408 Compliance Schedules

- 201.APPENDIX A Rule into Section Table
- 201.APPENDIX B Section into Rule Table
- 201.APPENDIX C Past Compliance Dates

AUTHORITY: Implementing Sections 10, 39, and 39.5 and authorized by Section 27 of the Environmental Protection Act [415 ILCS 5/10, 27, 39, and 39.5].

SOURCE: Adopted as Chapter 2: Air Pollution, Part I: General Provisions, in R71-23, 4 PCB 191, filed and effective April 14, 1972; amended in R78-3 and 4, 35 PCB 75 and 243, at 3 Ill. Reg. 30, p. 124, effective July 28, 1979; amended in R80-5, at 7 Ill. Reg. 1244, effective January 21, 1983; codified at 7 Ill. Reg. 13579; amended in R82-1 (Docket A) at 10 Ill. Reg. 12628, effective July 7, 1986; amended in R87-38 at 13 Ill. Reg. 2066, effective February 3, 1989; amended in R89-7(A) at 13 Ill. Reg. 19444, effective December 5, 1989; amended in R89-7(B) at 15 Ill. Reg. 17710, effective November 26, 1991; amended in R93-11 at 17 Ill. Reg. 21483,

effective December 7, 1993; amended in R94-12 at 18 Ill. Reg. 15002, effective September 21, 1994; amended in R94-14 at 18 Ill. Reg. 15760, effective October 17, 1994; amended in R96-17 at 21 Ill. Reg. 7878, effective June 17, 1997; amended in R98-13 at 22 Ill. Reg. 11451, effective June 23, 1998; amended in R98-28 at 22 Ill. Reg. 11823, effective July 31, 1998; amended in R02-10 at 27 Ill. Reg. 5820, effective March 21, 2003; amended in R05-19 and R05-20 at 30 Ill. Reg. 4901, effective March 3, 2006; amended in R07-19 at 33 Ill. Reg. 11965, effective August 6, 2009; amended in R10-21 at 34 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_.

#### SUBPART D: PERMIT APPLICATIONS AND REVIEW PROCESS

##### Section 201.162 Duration

- a) No operating permit shall be valid longer than ten ~~five~~ years or such shorter period as the Agency may specify in the operating permit as necessary to accomplish the purposes of the Act and this Chapter, unless the source is subject to:
  - 1) Section 201.169 of this Subpart; or
  - 2) Section 39.5 of the Act, except for sources exempt pursuant to ~~subsection 4.1~~ of Section 39.5(1.1).
- b) Applications for renewal of an operating permit shall be submitted to the Agency at least 90 days prior to the expiration of the prior permit, and shall conform to Sections 201.157, 201.158 and 201.159. The standards for issuance of renewal of operating permits shall be as set forth in Section 201.160.

(Source: Amended at 34 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_)

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on October 7, 2010 by a vote of 5-0.



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John T. Therriault, Assistant Clerk  
Illinois Pollution Control Board

