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NOTICE OF ADOPTED RULES

TITLE 35: ENVIRONMENTAL PROTECTION  
SUBTITLE A: GENERAL PROVISIONS  
CHAPTER II: ENVIRONMENTAL PROTECTION AGENCY

PART 187  
REGULATORY INNOVATION PROJECTS

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187.416      Renewal of an EMSA

AUTHORITY: Implementing and authorized by Section 52.3 of the Environmental Protection Act [415 ILCS 5/52.3].

SOURCE:     Adopted at 22 Ill. Reg. \_\_\_\_\_, effective \_\_\_\_\_, 1998.

SUBPART A: PURPOSE; DEFINITIONS AND GENERAL PROVISIONS

Section 187.100    Purpose

The purpose of this Part is to implement a voluntary pilot program pursuant to Section 52.3 of the Act by which the Agency may enter into Environmental Management System Agreements or EMSAs with persons regulated under the Act to implement innovative environmental measures, even if one or more of the terms of such agreements are inconsistent with otherwise applicable statutes or regulations of the State.

Section 187.102    Definitions

For purposes of this Part, the words and terms used in this Part shall have the meanings given below. Words and terms not defined in this Part, if defined in the Act, shall have the meanings as ascribed in the Act.

"Act" means the Environmental Protection Act [415 ILCS 5].

"Agency" means the *Environmental Protection Agency established by the Act*. (Section 3.08 of the Act).

"Director" means the Director of the Illinois Environmental Protection Agency.

"Environmental Management System" means the system by which an entity achieves continuous environmental improvement by integrating environmental management into on-going business planning and manages environmental performance, including, but not limited to, environmental management systems implementing International Organization for Standardization (ISO) 14001 standard.

"Environmental Management System Agreement (EMSA)" means the agreement between the Agency and a sponsor that describes the innovative environmental measures to be implemented, schedules for attaining goals, and mechanisms for

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accountability.

"Innovative Environmental Measures" means any procedures, practices, technologies or systems that pertain to environmental management and are expected to improve environmental performance when applied.

"Pilot Program" means the program described in this Part that allows the use of EMSAs to promote innovative environmental measures.

"Pilot Project" means an innovative environmental project covering one or more designated facilities, designed and implemented in the form of an EMSA executed by the Agency and a sponsor in accordance with this Part.

"Sponsor" means the proponent of a pilot project that enters into an EMSA with the Agency.

Section 187.104      Relation to Other Rules and Regulatory Innovation Programs

- a) The provisions of this Part shall apply to any pilot project developed pursuant to Section 52.3 of the Act.
- b) Nothing in this Part shall be construed to modify or alter any federal environmental statute or regulation applicable to a pilot project or its sponsor, owner or operator. An EMSA that seeks to modify or alter a federal environmental statute or regulation applicable to a pilot project or its sponsor, owner or operator must follow any procedures applicable under such law.
- c) No EMSA entered into by the Agency may allow a participant in the pilot program to cause air or water pollution or an unauthorized release in violation of the Act.
- d) Nothing in this Part shall be construed to affect any fees that a sponsor or an owner or operator of a facility covered by an EMSA may be subject to under any State or federal environmental statute or regulation.
- e) *Nothing in this Section shall limit the authority or ability of a State's Attorney or the Attorney General to proceed pursuant to Section 43(a) of the Act, or to enforce Section 44 or 44.1 of the Act, except that for the purposes of enforcement under Section 43(a), 44 or 44.1, an EMSA shall*

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*be deemed to be a permit issued under the Act to engage in activities authorized under the EMSA . (Section 52.3-4(e) of the Act)*

Section 187.106     Public Access to Pilot Program Correspondence

The Agency shall record and maintain a list of all correspondence sent and received by the Agency relating to participation in the pilot program, and such information, to the extent it does not constitute confidential business or trade secret information, shall be made available for review by the public.

Section 187.108     Confidential Business and Trade Secret Information

To the extent practicable, the Agency shall not designate EMSA related data as confidential business or trade secret information. A sponsor must identify any information in a pilot project document, including an EMSA, that it claims constitutes confidential business or trade secret information, and must justify such claim in accordance with 35 Ill. Adm. Code 120 and 2 Ill. Adm. Code 1827.

SUBPART B: PARTICIPATION IN PILOT PROGRAM

Section 187.200     Nature and Duration of Pilot Program

- a) It is within the sole discretion of the Agency to enter into an EMSA under this Part.
- b) The Agency may reject a proposed pilot project at any time prior to execution of an EMSA, and any decision by the Agency to reject a proposed pilot project is not appealable. (See Section 52.3-1(c) of the Act.)
- c) EMSAs under this Part must be initially executed on or before December 31, 2001, and shall be for a term not to exceed 5 years. An EMSA executed on or before December 31, 2001, may, in the Agency's discretion, be renewed for additional periods not to exceed 5 years per renewal.

Section 187.202     Eligibility for Participation

- a) Except as provided in subsection (b) of this Section, any person subject to a requirement of the Act or a regulation promulgated thereunder may

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participate in the pilot program.

- b) The following persons shall not be eligible to participate in the pilot program:
  - 1) Any person that is currently subject to an environmental enforcement action under the Act or regulations promulgated thereunder;
  - 2) Any person that has failed to renew any permit, or submit a complete Clean Air Act Permit Program permit application, as may be required by the Act or regulations promulgated thereunder; and
  - 3) Any person that has failed to pay a required fee or penalty to the State of Illinois.
- c) In determining whether a person is eligible to participate in the pilot program, the Agency may consider the person's past environmental performance, including, but not limited to, pre-enforcement and enforcement actions and previously adjudicated violations.

SUBPART C: STAKEHOLDER INVOLVEMENT

Section 187.300 Stakeholder Involvement

An EMSA shall provide for productive stakeholder involvement in a pilot project's development and implementation. The nature and extent of stakeholder involvement will be determined on a case by case basis, and will be fully described in an EMSA.

Section 187.302 Stakeholder Group, Members

- a) A stakeholder group assembled by a sponsor shall represent a cross-section of persons interested in a proposed pilot project, and may include, though need not be limited to, representatives from:
  - 1) Community groups, including citizen groups interested in environmental, economic or sustainable development issues;
  - 2) Economic and business groups, including trade associations and labor organizations;

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- 3) Academic institutions;
  - 4) Religious organizations; and
  - 5) Federal, State and local governmental entities.
- b) Any person interested in a proposed pilot project who has not been selected by a sponsor to participate in the stakeholder group assembled for the proposed pilot project may so notify the Agency. The Agency shall consider this notification in determining whether to enter into an EMSA with the sponsor.

Section 187.304 Sponsor Obligations

- a) If a proposed pilot project is technically complex, the sponsor of the pilot project may be required to provide technical or other assistance, at the sponsor's expense, in order to promote informed participation by members of the stakeholder group. Any such technical assistance shall be provided by persons that are acceptable to both the sponsor and the stakeholder group.
- b) A sponsor of a pilot project shall establish, in cooperation with the stakeholder group, an on-going communication process in order to keep the stakeholder group informed regarding the status of the pilot project. The process shall include, at a minimum, annual meetings and periodic distribution of performance information that clearly conveys the progress of the pilot project, problems that have been encountered and any corrective action that has been taken in response thereto. Information pertinent to the pilot project shall be communicated in a clear and understandable manner. Scientific and other complex information should be explained in a manner that provides for productive stakeholder involvement.

SUBPART D: PROCEDURES

Section 187.400 Letter of Intent; Agency Response

- a) In order to initiate the process of entering into an EMSA, the sponsor of a proposed pilot project shall submit a letter of intent to the Director that shall include:

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- 1) A general description of the proposed pilot project;
  - 2) Identification of each environmental statute, regulation and permit that is applicable to the proposed pilot project and any permit appeals, variances, or adjusted standard petitions which are currently applicable to the proposed pilot project or are pending before the Illinois Pollution Control Board or any court;
  - 3) A statement by the sponsor regarding the compliance status of the proposed pilot project and its sponsor, owner and operator with all applicable State and federal environmental statutes and regulations. Any changes to the compliance status of the proposed pilot project and its sponsor, owner and operator during development of an EMSA must be promptly reported to the Agency; and
  - 4) Identification of persons or groups whom the sponsor believes should serve as members of the stakeholder group in the development and implementation of the proposed pilot project.
- b) The Agency shall respond in writing to a letter of intent within 60 days after receipt of such letter. Such response shall include a determination of whether the letter of intent contains the information required by subsection (a) of this Section, as well as a determination whether development of an EMSA for the proposed pilot project is warranted.
- 1) If the Agency determines that the letter of intent does not contain information required by subsection (a) of this Section, it may identify such information and provide the sponsor with an opportunity to revise and resubmit the letter of intent.
  - 2) If the Agency determines that the proposed pilot project, as described in the letter of intent, does not warrant development of an EMSA, it shall state the basis for its decision.
  - 3) If the Agency determines that the proposed pilot project, as described in the letter of intent, contains the information prescribed by subsection (a) of this Section and warrants development of an EMSA, it shall notify the sponsor that it may proceed with development of a draft EMSA.

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Section 187.402    Development of an EMSA

- a)    The Agency and the sponsor shall decide upon an acceptable development schedule for the EMSA and the proposed pilot project.
  
- b)    A sponsor shall submit to the Director a draft EMSA. At a minimum, the draft EMSA shall include:
  - 1)    Identification of the sponsors;
  
  - 2)    Identification of all State and federal environmental statutes and regulations applicable to the proposed pilot project and the owner or operator of the proposed pilot project;
  
  - 3)    Identification of any State or federal environmental statutes and regulations which are inconsistent with the terms of the draft EMSA and would cease to be applicable should the EMSA be approved;
  
  - 4)    A description of the innovative environmental measures being proposed as part of the pilot project;
  
  - 5)    An explanation of the manner in which the proposed pilot project will achieve the stated purposes in subsection (b) of Section 52.3-1 of the Act;
  
  - 6)    Identification of those members of the general public, representatives of local communities, and environmental groups who have an interest in the proposed pilot project;
  
  - 7)    A description of the manner in which the EMSA will provide for productive involvement by the stakeholder group in the design and implementation of the proposed pilot project;
  
  - 8)    A description of the measures or techniques that will be used to demonstrate ongoing compliance with the EMSA, including, at a minimum, an annual evaluation of the pilot project;
  
  - 9)    Terms and conditions for voluntary termination of the pilot project; and



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- 10) An explanation of the process by which statutory or regulatory environmental requirements that become applicable to the pilot project or its sponsor, owner or operator after the effective date of the EMSA shall be addressed.
- c) Upon submittal of the initial draft EMSA, a sponsor shall provide an executive summary of the initial draft EMSA and proposed pilot project described and submitted in accordance with subsection (b) of this Section to the following persons and inform them that they may obtain the complete document from either the Agency or the sponsor:
  - 1) Members of the Illinois General Assembly representing the legislative districts in which the pilot project is located;
  - 2) The Illinois Attorney General; and
  - 3) The State's Attorney of the county in which the pilot project is located.
- d) A sponsor shall provide notice, by publication on a single date in a newspaper of general circulation in the area in which the proposed pilot project is located, that it has submitted an initial draft EMSA for consideration by the Agency. Such notice shall include a statement that interested persons may contact the sponsor to request that they be named to the stakeholder group in the development and implementation of the proposed pilot project. The notice shall be provided within 7 calendar days from the date the initial draft EMSA has been submitted to the Agency in accordance with subsection (b) of this Section.
- e) The Agency shall give preference to and allow greater incentives in an EMSA for pilot projects that include provisions for operating sustainably through continuous improvements in products and processes. Desirable components of a pilot project include, but are not limited to, the following:
  - 1) Incorporating source reduction into core business practices;
  - 2) Avoiding the production of waste and pollution in products and processes;
  - 3) Accounting for total environmental impact throughout the life cycle

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of products and services;

- 4) Improving efficiency in the use of raw materials, energy, water or other resources;
  - 5) Employing planning processes or techniques to identify source reduction and product stewardship opportunities;
  - 6) Training and encouraging employees to identify opportunities for environmental improvement;
  - 7) Protecting and enhancing natural resources; and
  - 8) Ensuring that information and reporting systems track progress toward goals and document improvements.
- f) The Agency shall encourage the development and use of Environmental Management Systems as part of a pilot project.
- g) The Agency shall reject proposed pilot projects that generate adverse environmental consequences, particularly those stimulating intermedia pollutant transfers without providing a net environmental gain.

Section 187.404 Public Notice, Comment and Hearing

Prior to entering into an EMSA, the Agency shall provide notice to the public, including an opportunity for public comment and hearing in accordance with the procedures set forth at 35 Ill. Adm. Code 164. All costs associated with such notice, comment and hearing shall be paid by the sponsor of the proposed pilot project. Public comments on a proposed pilot project and an EMSA may be submitted to the Agency at any time prior to the public notice and comment and hearing provided for by 35 Ill. Adm. Code 164.

Section 187.406 Criteria for Approval of an EMSA

- a) In accordance with Section 52.3-1 of the Act, the Agency may approve an EMSA only if the sponsor demonstrates that the proposed pilot project would:
  - 1) *Achieve emissions reductions or reductions in discharges or wastes beyond the otherwise applicable statutory and regulatory*

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*requirements through pollution prevention or other suitable means;  
or*

2) *Achieve real environmental risk reduction or foster environmental compliance by other persons regulated under the Act in a manner that is clearly superior to the existing regulatory means.*

- b) An EMSA under this Part shall contain adequate provisions to ensure that its terms and conditions are performed by the sponsor. Performance of the terms and conditions of an EMSA must be measurable and verifiable, and shall be monitored, documented and reported by a sponsor in a clear and complete manner.

Section 187.408 Execution of an EMSA

- a) An EMSA developed in accordance with this Part, and which has been approved by the Director, shall become effective upon signature by the sponsor and the Director.
- b) An EMSA shall operate in lieu of all applicable environmental requirements under Illinois statutes, regulations, and existing permits that are identified in the EMSA. Any environmental statute, regulation or condition in an existing permit that differs from a term or condition in an EMSA shall cease to apply from the effective date of an initial or renewed EMSA until it is terminated or expires.
- c) An EMSA executed in accordance with this Part shall be made publicly available and shall be distributed to all members of the stakeholder group.

Section 187.410 Performance Assurance

- a) The Agency is authorized to monitor compliance with the EMSA and may access and enter the facilities, buildings or property that are the subject of the pilot project for purposes of monitoring compliance, and to require such recordkeeping and reporting as it deems appropriate, including a final report assessing the environmental, regulatory and economic results of the pilot project.
- b) The sponsor of an EMSA shall specify the manner in which performance of the terms and conditions of an EMSA shall be assured. The Agency

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shall consider the following in determining whether an EMSA contains adequate provisions to assure performance:

- 1) The technical complexity of the proposed pilot project;
  - 2) The environmental risk associated with the proposed pilot project;  
and
  - 3) The uncertainty that the proposed innovative environmental measures authorized by the EMSA will be successful.
- c) A sponsor's performance of the terms and conditions of an EMSA shall be assessed not less than annually, and such assessment may include an evaluation of the sponsor's performance by a third party acceptable to the Agency and qualified to make such an evaluation.
- d) Notification of Nonperformance
- 1) A sponsor shall notify the Agency and all members of the stakeholder group of any nonperformance of a term or condition of an EMSA. A notification under this subsection (d) shall include a description of any activity performed by the sponsor to cure or mitigate the effects of the nonperformance.
  - 2) The Agency shall investigate and monitor a sponsor to determine whether the sponsor has responded adequately to any nonperformance, and shall notify all members of the stakeholder group of the results of its investigation.
- e) Upon identification of nonperformance of the terms or conditions of an EMSA, the Agency may, consistent with this Part, enforce the terms of such EMSA.
- f) An EMSA may contain provisions for alternative dispute resolution.

Section 187.412    Modification of an EMSA

- a) An EMSA executed under this Part may be amended by mutual agreement between the Agency and a sponsor, provided all members of the stakeholder group have received prior written notice and an

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opportunity to comment on a proposed modification to the EMSA. An EMSA may be amended without public notice as specified under Section 187.402(d) or 187.404 of this Part.

- b) Either the Agency or a sponsor may request modification of an EMSA at any time. If an agreement cannot be reached on a proposed modification within 60 calendar days, the party requesting the proposed modification may initiate proceedings to terminate the EMSA.

Section 187.414 Termination of an EMSA

- a) Termination by the Agency
  - 1) *In the case of deficient performance of any term or condition in an EMSA that prevents achievement of the stated purposes in subsection (b) of Section 52.3-1 of the Act, the Agency may terminate the EMSA and the owner or operator of a pilot project may be subject to enforcement in accordance with the provisions of Section 31 or 42 of the Act. (Section 52.3-4(b) of the Act)*
  - 2) *If the EMSA is terminated pursuant to this subsection (a), the owner or operator of a pilot project shall have sufficient time to apply for and receive any necessary permits to continue the operations in effect during the course of the EMSA. Any such application shall also be deemed a timely and complete application for renewal of an existing permit under applicable law. (Section 52.3-4(c) of the Act)*
  - 3) *The Agency shall follow procedures for involuntary termination established by the Board.*
- b) Termination by the Sponsor
  - 1) A sponsor may terminate an EMSA at any time upon written notice to the Agency and members of the stakeholder group. Notice must be given at least 90 days prior to termination; provided, however, that a sponsor may, with the Agency's approval, immediately terminate an EMSA upon notice to the Agency if continuing to operate under the EMSA would cause air or water pollution or an unauthorized release in violation of the Act.

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- 2) Upon termination of an EMSA pursuant to this subsection (b), a sponsor shall be subject to, and shall comply with, all applicable State, federal and local environmental statutes, regulations and ordinances.

Section 187.416      Renewal of an EMSA

- a) The Agency's authority to execute initial EMSAs under the Act and this Part shall expire on December 31, 2001. An initial agreement may be renewed for additional periods of up to 5 years after December 31, 2001, if the Agency finds the EMSA continues to meet applicable requirements and the purposes of Section 52.3-1 of the Act.
- b) In determining whether to renew an EMSA initially executed prior to December 31, 2001, the Agency shall consider all relevant factors, including but not limited to:
  - 1) The environmental, regulatory and economic results of the pilot project during the initial term of the EMSA;
  - 2) The likelihood that renewal of the EMSA will advance the purposes of Section 52.3-1 of the Act; and
  - 3) Stakeholder satisfaction with the pilot project.
- c) It shall be within the sole discretion of the Agency to renew an EMSA initially executed prior to December 31, 2001, and its decision shall not be appealable. A sponsor may request that the Agency hold a public hearing on its decision to deny a renewal application, to be held at the sponsor's sole cost and expense; however, it is within the sole discretion of the Agency to hold a hearing on the denial of a renewal application.
- d) Prior to renewing an EMSA under this Section, the Agency shall comply with the public notice, comment and hearing provisions of Section 187.404 of this Part.
- e) A sponsor requesting to renew an EMSA shall submit its renewal application to the Agency no later than 6 months prior to the expiration of the initial EMSA. The Agency shall have 60 days after receipt to accept or reject a renewal application. The Agency's failure to notify an

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applicant that it has accepted a renewal application shall be deemed a rejection of the renewal application. If the Agency rejects the renewal application, the pilot project and its owner or operator shall be in compliance with all environmental laws, regulations and ordinances applicable to the pilot project and its owner or operator within 6 months after expiration of the initial EMSA.