

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN MATTER OF:)	
)	
)	R 23-18(A)
AMENDMENTS TO 35 ILL. ADMIN. CODE)	(Rulemaking - Air)
PARTS 201, 202 AND 212)	

NOTICE OF FILING

TO: Persons on Attached Service List

PLEASE TAKE NOTICE THAT on the 26th day of October 2023, I caused to be electronically filed with the Clerk of the Illinois Pollution Control Board, via the “COOL” System, Motion for Additional Hearing on behalf of the Illinois Attorney General’s Office for the People of the State of Illinois, true and correct copies of which are attached hereto and hereby served upon you.

PEOPLE OF THE STATE OF ILLINOIS
by KWAME RAOUL
Attorney General
of the State of Illinois

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CERTIFICATE OF SERVICE

I, Jason E. James, an Assistant Attorney General, caused to be served on this 26th day of October 2023, Notice of Filing and Motion for Additional Hearing on behalf of the Illinois Attorney General's Office for the People of the State of Illinois, true and correct copies of which are attached hereto and hereby served upon the persons listed on the Service List via electronic mail or electronic filing, as indicated.

/s/ Jason E. James

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THE ILLINOIS ATTORNEY GENERAL OFFICE’S
MOTION FOR AN ADDITIONAL HEARING

The Illinois Attorney General’s Office, on behalf of the People of the State of Illinois (“People”), submit this motion to the Illinois Pollution Control Board (“Board”) requesting an additional hearing beyond the two scheduled in this rulemaking proceeding, as provided for by 35 Ill. Adm. Code 102.412(b). In a comment filed on October 23, 2023, the Illinois Environmental Protection Agency (“IEPA” or “Agency”) requested that the Board solicit “significant additional data” from each of the proponents of the five separate regulatory proposals. R23-18(A), Agency Comment (Oct. 23, 2023), at 2. The People strongly support the Agency’s request. For reasons explained below, failing to hold an additional hearing allowing the People and other participants to question the rulemaking proponents about this additional information would lead to a substantially incomplete record and result in material prejudice.

I. The People Support the Agency’s Request for Additional Information.

On October 23, 2023, the Agency asked the Board to solicit additional information from the American Petroleum Institute (“API”), Illinois Environmental Regulatory Group (“IERG”), Rain CII Carbon, LLC (“Rain Carbon”), Dynegy Midwest Generation, LLC, Illinois Power Generating Company, and Kincaid Generation, LLC (these three, collectively, “Dynegy”), Midwest Generation, LLC (“MWG”), and East Dubuque Nitrogen Fertilizers, LLC (“EDNF”) (all these parties, collectively, “Proponents”). The Agency also requested time to fully consider

the environmental impact of the Proponents' proposals in light of the additional information. Agency Comment at 27-28. The People support the Agency's request.

As the Agency detailed, "significant additional data would be needed" to evaluate the environmental impacts of the rulemaking proposals and for the Agency to make a complete request that the U.S. Environmental Protection Agency ("USEPA") revise Illinois' State Implementation Plan ("SIP"). Agency Comment at 3. The People agree that this additional information is needed to understand the proposals' air quality impacts and to develop a full record on which each of the five proposals can be sufficiently evaluated. Furthermore, several Proponents seek to change air regulations for facilities within areas of environmental justice concern; a complete record is necessary to ensure that the Proponents' proposals do not further burden these areas with disproportionate environmental harms. *See* R23-18, IERG's Response to the Board's Question at the Feb. 16, 2023 Hearing (Feb. 24, 2023), at 1-2; R23-18(A), Transcript of Sept. 27, 2023 Hearing at 120-22 (Oct. 2, 2023). Without fully reviewing the Agency's requested information, the result could be "regulatory revisions that are not in keeping with requirements of the Clean Air Act." Agency Comment at 2. The People urge the Board to solicit the requested information from Proponents.

II. The People Request a Hearing to Examine the Additional Information.

The Agency has requested a considerable amount of additional information from the Proponents. *See* Agency Comment at 6-27. The People request that the Board schedule an additional hearing after this information has been submitted into the administrative record.

35 Ill. Adm. Code 102.412(b) provides as follows:

- b) If the proponent or any participant wishes to request a hearing beyond the number of hearings specified by the hearing officer, that person must demonstrate, in a motion to the hearing officer, that failing to hold an additional hearing would result in material prejudice to the movant. The

motion may be oral, if made at hearing, or written. The movant must show that he exercised due diligence in his participation in the proceeding and why an additional hearing, as opposed to the submission of written comments under Section 102.208, is necessary.

“Additionally, the Board or the hearing officer will schedule an additional hearing or hearings if it finds that additional hearing will aid the Board on its decision on the proposal.” *In the Matter of: Procedural Rules Revisions*, 35 Ill. Adm. Code 101, 102, 106 (Subparts D, E, and F), R88-5(B) (May 10, 1990), slip op. at 6.

Accordingly, a rulemaking participant requesting an additional hearing must demonstrate that “failing to hold an additional hearing would result in material prejudice to the movant”, that the movant has shown “due diligence”, and that an additional hearing, “as opposed to the submission of written comments,” is necessary. 35 Ill Adm. Code 102.412(b). Below, the People demonstrate that these conditions have been met.

a. The People Will Suffer Material Prejudice in the Absence of an Additional Hearing.

The People have reviewed the Proponents’ rulemaking proposals, have submitted pre-filed questions, have questioned the Proponents at the first hearing, and will participate in the second hearing. However, the People have not had the opportunity to evaluate the additional—not yet provided—information requested by IEPA. While the Agency requested this information of Proponents months ago, Proponents have failed to provide it. Agency Comment at 3. Nor have the People had the opportunity to ask Proponents questions about that additional information or examine remaining gaps that could remain even with that information provided. In particular, the People must have the opportunity to evaluate whether the significant additional information sufficiently delineates the environmental impact from the Proponents’ rulemaking proposals.

Failing to hold a hearing where the People can gather facts and provide comment about the additional information would result in material prejudice particularly in this instance—where Proponents have failed to provide complete information necessary to evaluate the proposal’s environmental impact. This is especially important due to the potential for impacts from this rulemaking on environmental justice communities, as several Proponents have acknowledged. *See* Section I, *infra*.

The Agency has stated that failure to obtain and fully consider the information it has requested could result in regulations that are inconsistent with federal law and threaten adverse environmental impacts. Agency Comments at 2-3. Such a result would materially prejudice the People.

b. The People Have Been Diligent in This Rulemaking.

The People have exercised due diligence in this rulemaking, attending every hearing in both this rulemaking and the underlying R23-18 rulemaking. The People have also filed several comments and posed many questions at previous hearings. An additional hearing is needed to evaluate the information that the Agency has requested; questions of this kind were clearly impossible to pose at earlier hearings and cannot be posed at the second hearing that the Board has scheduled.

c. Written Comments Are Insufficient to Examine the Additional Information.

Just as the first hearing was necessary to allow the People and other participants to ask questions of the Proponents about the information they had provided up to that point, a third hearing is necessary to allow for questions and follow-up on the additional information that the Agency needs the Proponents to provide. Only oral questioning can allow the People and other

participants to inquire about gaps or inconsistencies that may be present in the additional information. Subsequent written comments are inadequate for this purpose.

The Board's rules state that regulatory hearings "are quasi-legislative in nature and the purpose of the hearings is to gather information and comments to guide the Board in its rulemaking process." 35 Ill. Adm. Code 102.100(a). This stated purpose is exactly in line with the Agency's request for additional information. As such, the Board should require the Proponents to supplement the record with that data and information sought by the Agency by a date that it determines to be appropriate and set a third hearing for follow-up questions.

d. Prior Board Practice on Requests for Additional Hearings in R04-21 Supports Setting an Additional Hearing.

In a 2004 rulemaking concerning water quality standards for radium, the Board granted a request for a third hearing. R04-21, Hearing Officer Order (July 14, 2004). In this matter, an environmental contractor in the business of removing radium from drinking water requested a third hearing. R04-21, Motion of WRT Environmental (June 2, 2004). Although the Board accepted the rulemaking proposal for hearing in January 2004, the contractor asserted material prejudice because it did not learn of the proceeding until May 2004; a hearing was necessary to present important information that was not practical to submit via written comment. *Id.* Despite oppositions filed by the City of Joliet (R04-21, City of Joliet's Response (June 14, 2004)) and IEPA (R04-21, IEPA's Response (June 18, 2004)), the Board granted the contractor's request for a third hearing. R04-24, Hearing Officer Order (July 14, 2004). Although the contractor had not attended previous hearings and did not intend to ask follow-up questions to any party, the Board still found it appropriate to hold a third hearing.

The People have clearly demonstrated more due diligence than the contractor in R04-21, who failed to attend earlier hearings despite adequate public notice. Additionally, the People

request a hearing to ask questions about additional information from the Proponents, while the contractor did not. The Board's decision in R04-21 demonstrates that the People's request for a third hearing meets the standard set by Ill. Adm. Code 102.412(b).

III. Conclusion

The Proponents have asked the Board to adopt new rules that would affect the operations of thousands of emissions sources across every part of Illinois, including environmental justice areas. However, they have not provided the information necessary for the Agency to adequately evaluate the proposal's environmental impact or prepare a complete SIP submittal to USEPA. The People urge the Board require the Proponents to provide this information to supplement the record in this proceeding and to schedule a third hearing where the Proponents will be able to answer questions about that additional information.

Respectfully submitted,

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