

ILLINOIS POLLUTION CONTROL BOARD

May 7, 2009

IN THE MATTER OF:)
)
NITROGEN OXIDE (NO_x) TRADING) R 09-20
PROGRAM SUNSET PROVISIONS FOR) (Rulemaking - Air)
ELECTRIC GENERATING UNITS (EGUs):)
NEW 35 ILL. ADM. CODE 217.751)

Proposed Rule. First Notice.

OPINION AND ORDER OF THE BOARD (by S.D. Lin):

On April 21, 2009, the Illinois Environmental Protection Agency (Agency) filed a proposal for rulemaking under Sections 10, 27 and 28 of the Environmental Protection Act (Act), 415 ILCS 5/10, 27, 28 (2006). The proposal would add a single new section, 35 Ill. Adm. Code 217.751 to 35 Ill. Adm. Code 217.Subpart W. Beginning with any control period in 2009, the new section would “sunset”, or render inapplicable, the provisions of the Nitrogen Oxides (NO_x) Trading Program for electrical generating units (EGUs) found at 35 Ill. Adm. Code 217.Subpart W. But, the Agency proposes that the provisions 35 Ill. Adm. Code 217.Subpart W will remain in effect for violations that occurred in control periods prior to 2009.

The Agency also filed a motion (Mot.) requesting the Board to expedite consideration of the proposal. *See* 415 ILCS 5/28 (2006); 35 Ill. Adm. Code 102.202(g) and 101.512. The motion to expedite requests that the Board cause immediate first notice publication of the proposal under the Administrative Procedure Act (APA), 5 ILCS 100 *et seq.* (2006), without Board comment on the merits and schedule public hearings as soon as possible. Mot. at 2-3. The Board has received no responses to the motions and pursuant to Section 101.500(d), any objection to the granting of the motions is deemed waived. 35 Ill. Adm. Code 101.500(d).

In this order, the Board accepts the proposal for hearing. The Board denies the motion for expedited consideration, but authorizes first-notice publication of the proposal without comment on the proposal’s merits, and directs expeditious scheduling of hearing.

THE PROPOSAL

In the proposal’s six-page statement of reasons (SR), the Agency states that the Board adopted the Part 217 NO_x Trading Program rules in Proposed New 35 Ill. Adm. Code 217. Subpart W, The NO_x Trading Program for Electrical Generating Units, and Amendments to 35 Ill. Adm. Code 211 and 217, R 01-9 (Dec. 21, 2000). SR. at 1. Part 217.Subpart W regulates NO_x emissions from utility boilers or EGUs. Part 217.Subpart W received approval by the United States Environmental Protection Agency (US EPA) as part of the Illinois State Implementation Plan (SIP) for ozone on November 8, 2001. *See* 66 *Fed. Reg.* 56449 (Nov. 8, 2001). Illinois was required to regulate these sources pursuant to USEPA's NO_x SIP Call for

EGUs pursuant to Sections 110(a) (2) and 126 of the federal Clean Air Act (CAA) and 40 CFR 51.121. *See also* 63 *Fed. Reg.* 57356 (Oct. 27, 1998). SR at 1-2. IEPA reports that the emissions reductions helped the two Illinois ozone nonattainment areas in Illinois attain the 1997 8-hour ozone National Ambient Air Quality Standard (NAAQS). In addition, the continued implementation of the federal NO_x Trading Program was required under Phase I of the 8-hour ozone implementation rule. *See* 40 CFR 51.905(f). *Id.* at 2.

On May 12, 2005, USEPA adopted the federal Clean Air Interstate Rule (CAIR) to replace the NO_x SIP Call Trading Program beginning with the 2009 control period and to add two new trading programs addressing annual emissions of NO_x and sulfur dioxide. *See Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone; Revisions to Acid Rain Program; Revisions to the NO_x SIP Call*, 70 *Fed. Reg.* 25162 (May 12, 2005). SR at 2. While the IEPA states that the Board adopted the CAIR rules in the still-pending R06-22 proceeding, in fact the CAIR rules were adopted by the Board in Proposed New Clean Air Interstate Rule (CAIR) SO₂, NO_x Annual and NO_x Ozone Season Trading Programs, 35 Ill. Adm. Code 225, Subparts A, C, D, E and F, R 06-26 (Aug.23, 2007). The CAIR rules, by their terms, were to replace the NO_x Trading rules in 2009. The Illinois CAIR rules were approved by USEPA on October 16, 2007. *See* 72 *Fed. Reg.* 58528 (Oct. 16, 2007). *Id.*

The CAIR provisions as set forth in 35 Ill. Code Part 225.Subpart E include a trading program for control of NO_x emissions during the ozone season that replaces the provisions in Part 217.Subpart W for EGUs beginning with the 2009 control period (May 1 through September 30) and thereafter. Part 225.Subpart E incorporated in large part applicable provisions from the federal CAIR rule as required for federal approval. SR at 2.

After the adoption of Illinois CAIR, the United States Court of Appeals reached a decision on a number of petitions for review it had received concerning the federal CAIR rule. On July 11, 2008, the Court of Appeals vacated the federal CAIR rule in its entirety and remanded the rule to USEPA for revision. *North Carolina v. USEPA*, 531 F.3d 896 (C.A.D.C. Cir. 2008). The court's July 2008 opinion stated that pending the remand of the CAIR program to USEPA, the provisions of the federal NO_x SIP Call Trading Program would remain in place. But, the parties petitioned the court for rehearing on the decision to vacate and requested that the federal CAIR rule be reinstated during the remand. On December 23, 2008, the court granted the rehearing and "unvacated" federal CAIR rule with implementation to begin with the original control period in 2009. *North Carolina v. USEPA*, 550 F.3d 1176 (C.A.D.C. Cir. 2008). SR at 2-3.¹

The Board's Part 217 NO_x Trading Program rules have continued to be in full force and effect. The Agency states that, with the reinstatement of the federal CAIR program, Illinois' EGUs must now comply with two sets of duplicative administrative requirements (*e.g.*, permitting, reporting) for the 2009 ozone season and beyond: namely, the Illinois CAIR rule requirements at Part 225 and the Illinois NO_x Trading Program at Part 217.

¹ There has been no final action by USEPA on its CAIR rules. The Board has never been asked to construe what effect, if any, the status of the federal CAIR rules has on the Board's Part 225 CAIR NO_x rules.

To address and remove this duplication, the Agency proposes to sunset the provisions of the NO_x Trading Program, by adding a new Part 217.751. The full text of the proposed rule is:

Section 217.751 Sunset Provisions

The provisions of this Subpart W shall not apply for any control period in 2009 or thereafter. Noncompliance with the provisions of this Subpart that occurred prior to 2009 is subject to the applicable provisions of this Subpart.

(Source: Added at 33 Ill. Reg. ___ effective _____)

The Agency states that this proposal is consistent with the provisions of 40 CFR 51.123(bb)(1)(i), which provide that states with approved CAIR programs may revise their applicable SIP so that the provisions of the NO_x, SIP Call Trading Program do not apply to affected EGUs. SR at 3.

As to the scope of the rule, the Agency states that the entire State of Illinois was subject to the NO_x, SIP Call and is now subject to CAIR. The proposed regulations will affect existing EGUs. There are approximately 229 existing EGUs that are currently subject to the NO_x SIP Call Trading Program. For the NO_x SIP Call Trading Program, existing units are those that commenced operation before May 1, 2006. Of these units, 170 are gas and oil fired boilers, 59 are coal-fired boilers, and the remainder are gas and oil-fired combustion turbines. SR at 3.

The statement of reasons indicates that the Agency did an electronic e-mail outreach to the 229 existing EGUs that are subject to the Part 217 NO_x Trading Program rules, and has identified no significant issues. SR. at 4-5.

The Agency accordingly concludes that

the rule is being proposed to prevent a burden and replaces a rule that is no longer being implemented by USEPA. The adoption of the proposal will not result in injury or substantial prejudice, nor an abrupt departure from a well established practice. Hence, adoption of this proposal is appropriate to prevent a burden on affected EGUs.

The amendments to Part 217.Subpart W are being proposed to ensure consistency with the CAIR ozone season program and prevent EGUs from being subject to duplicative monitoring, reporting, permitting and recordkeeping requirements. USEPA has stopped allocating NO_x allowances for the NO_x SIP Call Trading Program. As this proposal sunsets regulatory provisions, it would impose no new requirements or costs on affected sources. Hence, the proposal is both technically and economically feasible. SR at 5.

MOTIONS

In its motion to expedite, the Agency requests the Board proceed to first notice under the APA without reaching a decision on the merits, by publishing the regulatory language proposed in this rulemaking proposal only for purposes of first notice. The Agency also requests that the requisite hearings be scheduled as soon as possible. Mot. at 2-3.

In support of this request, the Agency lays out the sequence of events as described above concerning the adoption of the state and federal CAIR and NO_x Trading Program rules, and the actions of the federal court of appeals. The Agency then states that

With the reinstatement of the CAIR program, Illinois' EGUs must now comply with duplicative administrative requirements (e.g., permitting, reporting) for the 2009 ozone season and beyond until the provisions of the NO_x Trading Program are sunsetted; namely, the duplicative requirements that appear in Part 217.Subpart W.

For the reasons stated above, and due to the impending 2009 ozone season control period (May 1, 2009, through September 30, 2009), the regulations need to be adopted in an expedited manner.

In light of the foregoing, it is necessary to expedite review in this matter. Mot. at 2.

DISCUSSION

First, the Board finds that the petition meets the content requirements of 35 Ill. Adm. Code 102.208 and 102.210 and is accepted for hearing.

Lastly, the Board denies the motion for expedited consideration. Requests for expedited review are governed by Section 101.512 of the Board's rules, and must contain, *inter alia*, a complete statement of the facts and reasons for the request. *See* 35 Ill. Adm. Code 101.512. In acting on a motion for expedited review, the Board considers, at a minimum, all statutory requirements and whether or not material prejudice will result from the motion being granted or denied. 35 Ill. Adm. Code 101.512(b). In addition, the Board will only grant a motion for expedited review consistent with available resources. *See* 35 Ill. Adm. Code 101.512(c).

The Board simply cannot expedite every rulemaking. In denying a recent motion for expedited review filed by the City of Galva, the Board stated that its "limited resources in light of its current and future decision deadlines render the granting of a motion for expedited review unlikely in all but the most dire circumstances." In the Matter of: City of Galva Site-Specific Water Quality Standard for Boron Discharges to Edwards River and Mud Creek: 35 Ill. Adm. Code 303.447 and 303.448, R9-11, slip op. at 3 (Feb. 5, 2009). The Board recently granted two Agency motions to expedite NO_x rulemakings, in which the Agency detailed the possibility of USEPA sanctions for failure of the state to remedy deficiencies in the SIP for ozone attainment. In each of these proceedings, the Board found that "USEPA's implementation deadline and the risk of federal NO_x sanctions constitute 'dire circumstances.'" Section 27 Proposed Rules for Nitrogen Oxide (NO_x) Emissions From Stationary Reciprocating Internal Combustion Engines and Turbines: Amendments to 35 Ill. Adm Code Parts 211 and 217, R07-19, slip op. at 4 (Apr.

2, 2009) and In the Matter of: Nitrogen Oxides Emissions from Various Source Categories, Amendments to 35 Ill. Adm. Code Parts 211 and 217, R08-19, slip op. at 4 (Apr. 2, 2009).

Here, the Board does not dispute the fact that the 229 regulated EGUs are subject to two sets of rules, and that the problem must be addressed. As the Agency notes, the ozone season runs from May 1 through September 30. It is clearly impossible for the Board to adopt rules proposed on April 22, 2009 prior to the start of the ozone season, and it may well be problematic as to whether rulemaking can be completed by that time. But, since both USEPA and the Agency recognize the problems that the federal CAIR rules have generated on the federal and state levels, the Board cannot find that the circumstances the Agency presents concerning the sunset of the NO_x Trading Program rules presents “dire circumstances” sufficient to warrant the grant of expedited decision. Moreover, the Board reminds that, in addition to granting Agency motions to expedite rulemakings in the R07-19 and R08-19 proceedings, the Board has also expedited Amendments to 35 Ill. Adm. Code 225: Control of Emissions From Large Combustion Sources (Mercury Monitoring), R09-10 (Nov. 5, 2008) at Agency request.

As a practical matter, the Board can authorize the first-notice publication of this proposal without comment on its merits. This will alert the regulated community to the state’s intentions in this area. The hearing officer is directed to coordinate Illinois Register publication in this docket with publications in dockets R07-19 and R08-19 to avoid any delay in the tight schedules for completion of those dockets. The Board also directs its hearing officer to expeditiously schedule hearings in this docket consistent with the Board’s decision and regulatory hearing calendars and other operational needs; it may prove impossible to hold hearings in this docket before the close of the fiscal year. The Board encourages the hearing officer to dovetail hearings in this docket with those in other air rulemaking dockets to the extent practicable.

ORDER

The Board directs the Clerk to cause the first notice publication of the following rule in the *Illinois Register*:

TITLE 35: ENVIRONMENTAL PROTECTION
 SUBTITLE B: AIR POLLUTION
 CHAPTER I: POLLUTION CONTROL BOARD
 SUBCHAPTER C: EMISSION STANDARDS AND LIMITATIONS
 FOR STATIONARY SOURCES

PART 217
 NITROGEN OXIDES EMISSIONS
 SUBPART A: GENERAL PROVISIONS

Section	
217.100	Scope and Organization
217.101	Measurement Methods
217.102	Abbreviations and Units
217.103	Definitions

217.104 Incorporations by Reference

SUBPART B: NEW FUEL COMBUSTION EMISSION SOURCES

Section

217.121 New Emission Sources

SUBPART C: EXISTING FUEL COMBUSTION EMISSION SOURCES

Section

217.141 Existing Emission Sources in Major Metropolitan Areas

SUBPART K: PROCESS EMISSION SOURCES

Section

217.301 Industrial Processes

SUBPART O: CHEMICAL MANUFACTURE

Section

217.381 Nitric Acid Manufacturing Processes

SUBPART Q: STATIONARY RECIPROCATING INTERNAL COMBUSTION
ENGINES AND TURBINES

Section

217.386 Applicability
217.388 Control and Maintenance Requirements
217.390 Emissions Averaging Plans
217.392 Compliance
217.394 Testing and Monitoring
217.396 Recordkeeping and Reporting

SUBPART T: CEMENT KILNS

Section

217.400 Applicability
217.402 Control Requirements
217.404 Testing
217.406 Monitoring
217.408 Reporting
217.410 Recordkeeping

SUBPART U: NO_x CONTROL AND TRADING PROGRAM FOR
SPECIFIED NO_x GENERATING UNITS

Section

217.450 Purpose
217.452 Severability
217.454 Applicability
217.456 Compliance Requirements
217.458 Permitting Requirements

217.460	Subpart U NO _x Trading Budget
217.462	Methodology for Obtaining NO _x Allocations
217.464	Methodology for Determining NO _x Allowances from the New Source Set-Aside
217.466	NO _x Allocations Procedure for Subpart U Budget Units
217.468	New Source Set-Asides for “New” Budget Units
217.470	Early Reduction Credits (ERCs) for Budget Units
217.472	Low-Emitter Requirements
217.474	Opt-In Units
217.476	Opt-In Process
217.478	Opt-In Budget Units: Withdrawal from NO _x Trading Program
217.480	Opt-In Units: Change in Regulatory Status
217.482	Allowance Allocations to Opt-In Budget Units

SUBPART V: ELECTRIC POWER GENERATION

Section	
217.521	Lake of Egypt Power Plant
217.700	Purpose
217.702	Severability
217.704	Applicability
217.706	Emission Limitations
217.708	NO _x Averaging
217.710	Monitoring
217.712	Reporting and Recordkeeping

SUBPART W: NO_x TRADING PROGRAM FOR ELECTRICAL GENERATING UNITS

Section	
217.750	Purpose
<u>217.751</u>	<u>Sunset Provisions</u>
217.752	Severability
217.754	Applicability
217.756	Compliance Requirements
217.758	Permitting Requirements
217.760	NO _x Trading Budget
217.762	Methodology for Calculating NO _x Allocations for Budget Electrical Generating Units (EGUs)
217.764	NO _x Allocations for Budget EGUs
217.768	New Source Set-Asides for “New” Budget EGUs
217.770	Early Reduction Credits for Budget EGUs
217.774	Opt-In Units
217.776	Opt-In Process
217.778	Budget Opt-In Units: Withdrawal from NO _x Trading Program
217.780	Opt-In Units: Change in Regulatory Status
217.782	Allowance Allocations to Budget Opt-In Units

SUBPART X: VOLUNTARY NO_x EMISSIONS REDUCTION PROGRAM

Section	
217.800	Purpose
217.805	Emission Unit Eligibility
217.810	Participation Requirements
217.815	NO _x Emission Reductions and the Subpart X NO _x Trading Budget
217.820	Baseline Emissions Determination
217.825	Calculation of Creditable NO _x Emission Reductions
217.830	Limitations on NO _x Emission Reductions
217.835	NO _x Emission Reduction Proposal
217.840	Agency Action
217.845	Emissions Determination Methods
217.850	Emissions Monitoring
217.855	Reporting
217.860	Recordkeeping
217.865	Enforcement
APPENDIX A	Rule into Section Table
APPENDIX B	Section into Rule Table
APPENDIX C	Compliance Dates
APPENDIX D	Non-Electrical Generating Units
APPENDIX E	Large Non-Electrical Generating Units
APPENDIX F	Allowances for Electrical Generating Units
APPENDIX G	Existing Reciprocating Internal Combustion Engines Affected by the NO _x SIP Call

Authority: Implementing Sections 9.9 and 10 and authorized by Sections 27 and 28.5 of the Environmental Protection Act [415 ILCS 5/9.9, 10, 27 and 28.5 (2004)].

Source: Adopted as Chapter 2: Air Pollution, Rule 207: Nitrogen Oxides Emissions, R71-23, 4 PCB 191, April 13, 1972, filed and effective April 14, 1972; amended at 2 Ill. Reg. 17, p. 101, effective April 13, 1978; codified at 7 Ill. Reg. 13609; amended in R01-9 at 25 Ill. Reg. 128, effective December 26, 2000; amended in R01-11 at 25 Ill. Reg. 4597, effective March 15, 2001; amended in R01-16 and R01-17 at 25 Ill. Reg. 5914, effective April 17, 2001; amended in R07-18 at 31 Ill. Reg. 14254, effective September 25, 2007; amended in R07-19, at 33 Ill. Reg. _____, effective _____, amended in R08-19, at 33 Ill. Reg. _____, effective _____; amended in R09-20 at 33 Ill. Reg. _____, effective _____.

SUBPART W: NO_x TRADING PROGRAM FOR ELECTRICAL GENERATING UNITS

Section 217.751 Sunset Provisions

The provisions of this Subpart W shall not apply for any control period in 2009 or thereafter. Noncompliance with the provisions of this Subpart that occurred prior to 2009 is subject to the applicable provisions of this Subpart.

(Source: Added at 33 Ill. Reg. ___ effective _____)

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on May 7, 2009, by a vote of 5-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal stroke at the end.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board