

ILLINOIS POLLUTION CONTROL BOARD
September 30, 2013

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STATE OF ILLINOIS
Pollution Control Board

IN THE MATTER OF:)
)
VAPOR RECOVERY RULES:) R13-18
AMENDMENTS TO 35 ILL. ADM. CODE) (Rulemaking - Air)
PARTS 201, 218, and 219)

HEARING OFFICER ORDER

In this order, the hearing officer decides whether to allow two late-filed public comments into the record for the Board's consideration. The public comments were filed some 60 days after the scheduled close of the comment period by ARID Technologies, Inc. (ARID), a Wheaton, Illinois designer and manufacturer of vapor processors. The rulemaking proponent, the Illinois Environmental Protection Agency (IEPA), opposes allowing ARID's public comments into the record, as do the Illinois Petroleum Marketers Association and the Illinois Association of Convenience Stores (collectively, IPMA).

For the reasons below, the hearing officer allows ARID's public comments into the record for the Board's consideration and directs IEPA to file a responsive public comment for receipt by the Clerk's Office no later than October 11, 2013. Any other participant may also file a public comment in response to ARID's public comments, which comment likewise must be received by the Clerk's Office no later than October 11, 2013. In so ruling, the hearing officer does not contemplate granting any further extensions of the public comment period.

This order provides the relevant procedural history of the rulemaking before turning to ARID's motion to allow its late public comments and IEPA's motion to strike them.

Procedural History

On March 18, 2013, IEPA filed a rulemaking proposal to amend the Board's air pollution rules at 35 Ill. Adm. Code 201, 218, and 219. On April 4, 2013, the Board accepted IEPA's proposal for hearing. The proposal includes the phase out of Stage II vapor recovery systems at the pump nozzles of gasoline dispensing facilities (GDFs) in the Chicago ozone nonattainment area (NAA). The phase out is based upon (1) widespread use of on-board refueling vapor recovery (ORVR) in highway motor vehicles and (2) decreased emission reductions resulting from simultaneously using ORVR and incompatible Stage II systems.

In its April 4, 2013 order, the Board also granted IEPA's motion for expedited review, finding that "the emission reduction benefits for the State and economic savings for affected [GDFs], as described by IEPA, justify establishing a January 1, 2014 starting date to phase out the Chicago NAA Stage II program." Vapor Recovery Rules: Amendments to 35 Ill. Adm. Code Parts 201, 218, and 219, R13-18, slip op. at 3 (Apr. 4, 2013). In granting the motion for

expedited review, the Board stated that it would, subject to available resources, “endeavor to adopt final rules by the end of this calendar year.” *Id.*

In accord with expedited review, the Board’s April 4, 2013 order adopted IEPA’s proposed amendments for first notice without Board comment on their merits. First-notice publication of the amendments appeared in the *Illinois Register* on May 10, 2013 (37 Ill. Reg. 6028 (Part 201); 37 Ill. Reg. 6054 (Part 218); 37 Ill. Reg. 6083 (Part 219)). The Board conducted two public hearings: the first in Springfield on May 8, 2013; and the second in Chicago on June 5, 2013.

A deadline of July 8, 2013, for filing public comments was established at the end of the second hearing and reiterated in a June 17, 2013 order of the hearing officer. On the date of the filing deadline, IPMA filed a public comment proposing significant changes to the first-notice amendments. IPMA had not previously participated actively in the rulemaking. The hearing officer issued an order on July 16, 2013, directing IEPA to file a public comment responsive to IPMA’s public comment by July 31, 2013. Hearing Officer Order, R13-18 at 1 (July 16, 2013). IEPA filed a public comment on July 31, 2013.

On September 9, 2013, ARID sent an email message with attachments to the Board’s Clerk. The Clerk designated the submittal as public comment four (PC4) and in the R13-18 docket sheet, noted that the submittal was accompanied by ARID’s request to accept the late submission (ARID Mot.). On September 10, 2013, ARID sent another email message with an attachment to the Board’s Clerk. This email message described the attachment as a “follow-on” to ARID’s September 9, 2013 submittal, and the Clerk docketed the September 10, 2013 submittal as an addendum to PC4.

On September 16, 2013, IEPA filed a motion to strike (IEPA Mot. Str.) ARID’s PC4, including the addendum. In turn, ARID submitted an email message to the Clerk on September 20, 2013, opposing IEPA’s motion to strike (ARID Resp.). On September 18, 2013, IPMA filed a response (IPMA Resp.) opposing ARID’s request that PC4 be accepted into the record. On September 23, 2013, ARID sent an email message with attachments to the Clerk, which was docketed as public comment five (PC5).

ARID’s Motion to Accept Late Public Comment

ARID’s Motion

ARID makes a “request that our filing [PC4] be accepted late into the record as we recently became aware of this matter before the IPCB.” ARID Mot. at 1. ARID represents that it has been “involved in GDF vapor recovery technology for the past 20 years” and that its submissions “contribute technical data and information on this issue. *Id.* at 2.

IPMA's Response in Opposition

IPMA argues that accepting PC4 “and subsequent responses to it” may delay final action in the rulemaking beyond the proposed January 1, 2014 effective date for the amendments. IPMA Resp. at 1. This, continues IPMA, would result in “additional expenses to [GDF] owners either in the delay in opening new gasoline refueling facilities . . . or in the continued maintenance expenses for existing stations with Stage II equipment.” *Id.* IPMA urges the Board to disregard ARID's late comment and proceed as expeditiously as possible to adopt the proposed revisions, adding that “the decommissioning of Stage II equipment in a timely manner will . . . reduce excess emissions from the use of incompatible [Stage II and ORVR] equipment, thereby improving air quality.” *Id.*

IEPA's Motion to Strike ARID's Public Comment

IEPA's Motion

IEPA first argues that ARID's PC4 should be stricken from the record because it was not properly filed or served. IEPA Mot. Str. at ¶8. Next, IEPA asserts that ARID's public comment should be stricken because it was submitted over two months after the hearing officer's deadline of July 8, 2013, for filing public comments. *Id.* at ¶9. Third, IEPA reminds that to accommodate a January 1, 2014 effective date for the amendments, the Board granted IEPA's motion for expedited review. *Id.* at ¶10. According to IEPA:

If ARID's public comment is erroneously accepted and debated, it will delay the adoption of this rulemaking substantially such that a January 1, 2014 effective date will most certainly not be possible. If this occurs, the State and its citizens will be materially prejudiced as it relates to the emissions disbenefit of maintaining the Stage II program, and affected sources will be materially prejudiced through the existing requirement to install expensive and unnecessary [Stage] II equipment at gasoline stations and incur the costs of maintaining such systems. *Id.*

Fourth, IEPA maintains that ARID seeks a “new regulatory program - an enhanced Stage II program,” unsupported by record evidence and without being subjected to public notice, comment, or hearing. *Id.* at ¶11. Lastly, if ARID's public comment is allowed, IEPA asks for the opportunity to respond to the merits of ARID's public comment. *Id.*

ARID's Response in Opposition

ARID's president and founder, Ted Tiberi, states that he is a chemical engineer, not an attorney. ARID Resp. at 1. Mr. Tiberi suspects that ARID is the “lone dissenter” on the proposal to decommission Stage II vapor recovery systems. *Id.* It is his hope that a “democratic process” will prevail, allowing the Board to consider ARID's comments. *Id.*

ARID reiterates that it had previously been unaware of this rulemaking. ARID Resp. at 1. ARID maintains that its submittals were made to the Clerk by email to expedite their arrival. *Id.* Regarding IEPA's concerns over expedited rule adoption, ARID argues that "the sooner Stage II controls are removed, the sooner the refueling emissions will be *increased* in the State of Illinois; the sooner Stage II vapor recovery is enhanced, the sooner gasoline vapor emissions will be *decreased* in Illinois." *Id.* (emphasis in original). ARID also takes issue with IEPA characterizing ARID as seeking a new regulatory program. ARID asserts that it is "simply stating a means to enhance an *existing* program as an alternative to *abolishing* such a program." *Id.* (emphasis in original).

Hearing Officer's Rulings

ARID moves that its PC4, though late, be accepted into the record for Board consideration. IPMA opposes ARID's motion and IEPA moves to strike PC4. As an initial matter, the hearing officer construes both ARID's motion to add and IEPA's motion to strike as encompassing not only PC4, but also PC5, though this was not made explicit by either ARID or IEPA. The hearing officer does so in the interest of administrative efficiency and to avoid undue delay. Generally, the reasons ARID seeks to add PC4 to the record also apply to PC5, and the reasons IEPA seeks to strike PC4 from the record also apply to PC5.

ARID's public comments were submitted by email to the Clerk. This form of filing is not necessarily improper. The Board's procedural rules allow for "[f]iling by electronic transmission . . . with the prior approval of the Clerk . . .," which was the case here. 35 Ill. Adm. Code 101.302(d).

It is uncontested, however, that ARID's public comments were untimely and unaccompanied by the requisite proof of service. *See* Hearing Officer Order, R13-18 at 1 (July 17, 2013); 35 Ill. Adm. Code 101.304(d), 102.108(c). Despite this non-compliance, ARID's comments can be considered by the Board if such consideration is necessary to prevent material prejudice. The Board's procedural rules state:

Comments that are not timely filed or properly served will not be considered, except as allowed by the hearing officer or the Board to prevent material prejudice. 35 Ill. Adm. Code 102.108(d).

In its comments, ARID opposes requiring the removal of Stage II vapor recovery systems. ARID claims that if the Board adopts the Stage II decommissioning amendments, emissions of volatile organic compounds from GDFs will *increase*, not decrease as IEPA maintains. PC4 at 2. According to ARID, IEPA failed to adequately take into account emissions resulting from (1) underground storage tank (UST) "breathing losses" (PC5 at 1) and (2) refueling non-road fuel tanks lacking ORVR (*e.g.*, gas cans, motorcycles, boats, snowmobiles) (PC4 at 1). ARID advocates requiring that Stage II equipment be "enhanced" with UST vapor processors, a "largely overlooked" option which the company asserts would minimize emissions and "yield[] a favorable economic payback for the GDF owner." PC4 at 2.

Consistent with its grant of IEPA's motion for expedited review, the Board adopted IEPA's proposed amendments for first notice without commenting on their merits. This time-saving step would, in the ordinary course of rulemaking, be followed by a second-notice order, after which the Board is permitted to make substantive rule changes only in response to suggestions of the Joint Committee on Administrative Rules. *See* 5 ILCS 100/5-40(c) (2012); 35 Ill. Adm. Code 102.606. Accordingly, if ARID's public comments are not allowed and the Board proceeds to second notice, the company would have no other chance during this rulemaking to weigh in with the Board.

In addition, ARID's comments contemplate keeping Stage II equipment in place, but the first-notice amendments would allow the decommissioning of Stage II equipment to commence on January 1, 2014. It would accordingly be of little practical use to simply advise ARID that it can instead file its own rulemaking proposal to advocate enhancing Stage II equipment. Neither IEPA nor IPMA suggest that the issues posed by ARID's public comments are irrelevant. Because those issues are not otherwise articulated in this rulemaking record, disallowing the comments would deprive the Board of potentially significant information.

Under these circumstances, the hearing officer finds that not allowing Board consideration of ARID's comments poses a substantial risk of material prejudice. *See Clean-Up Part III Amendments to 35 Ill. Adm. Code Parts 211, 218, and 219, R04-20, Technical Corrections to Formulas in 35 Ill. Adm. Code 214 "Sulfur Limitations", R04-12 (consol.)*, slip op. at 5 (Apr. 21, 2005) (accepting public comment filed 1.5 months late by company previously unaware of rulemaking).

Admittedly, there have been numerous public notices of this rulemaking, with corresponding opportunities for ARID to have participated in a timely manner. The hearing officer, however, has no reason to believe that ARID failed to act promptly upon learning of this proceeding. Further, allowing ARID's public comments, even with a period of time for IEPA and other participants to respond, does not in itself jeopardize Board adoption of final rules by the end of this calendar year. Moreover, when rulemaking, the Board acts in a quasi-legislative capacity, and therefore generally allows items into the record more liberally than it does in adjudicatory proceedings. *See Proposed Site Specific Regulation Applicable to Ameren Energy Generating Co., Elgin, Amending 35 Ill. Adm. Code Part 901, R04-11*, slip op. at 3 (June 3, 2004) ("the Board is generally more liberal in adding to the record in a regulatory context than in an adjudicatory context"); *id.* at 2, 4 (May 6, 2004) (granting post-hearing motion to supplement record).

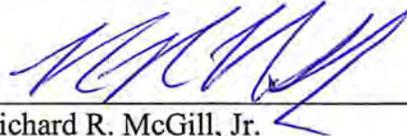
For the above reasons, the hearing officer denies IEPA's motion to strike and grants ARID's motion to accept the late-filed PC4 and PC5 for Board consideration. On his own motion, however, the hearing officer strikes a video file attachment that ARID submitted (as part of PC4 on September 9, 2013) because the video is not readily viewable. PC4, so amended, is 87 pages in length, including its 2-page addendum filed on September 10, 2013. Both PC4 and PC5 are available in the Clerk's Office and on the Clerk's Office On-Line (COOL) on the Board's website (www.ipcb.state.il.us).

As requested by IEPA should ARID's public comments be accepted, the hearing officer directs IEPA to file a public comment that is responsive to PC4 and PC5. IEPA must file its comment with the Clerk no later than October 11, 2013. By the same deadline, any other participant may also file a public comment in response to ARID's comments. The "mailbox rule" (35 Ill. Adm. Code 101.300(b)(2)) does not apply to these filings. Therefore, the Clerk must receive the public comments by 4:30 p.m. on Friday, October 11, 2013. The public comments may be filed through COOL. The public comments must be served on those persons on the R13-18 service list, which is available on COOL.

The hearing officer also directs IEPA to address in its public comment the following: As IEPA maintains that current registration requirements (35 Ill. Adm. Code 218.583(e), 219.583(e)) should be repealed as redundant, please supply citations to the other provisions (*e.g.*, Office of the State Fire Marshal regulations) already requiring that regulators be provided with the information called for by the registration requirements, including the information regarding pressure/vacuum (P/V) relief valves for tank vent pipes. *See* 60 Fed. Reg. 5318 (Jan. 27, 1995); 15% ROP Plan Control Measures for VOM Emissions - Part I: Pressure/Vacuum Relief Valves and 7.2 RVP (Amendments to 35 Ill. Adm. Code 201, 211, 218, and 219), R94-12 (Sept. 15, 1994). For any information called for by the current registration requirements that is not otherwise required to be reported to regulators, IEPA is directed to explain why it is unnecessary for regulators to be notified of such information.

Finally, to allow the Board the opportunity to complete the rulemaking by the end of this calendar year pursuant to the Board's April 4, 2013 grant of IEPA's motion for expedited review, the hearing officer does not contemplate further extending the public comment period.

IT IS SO ORDERED.



Richard R. McGill, Jr.
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601
(312) 814-6983
richard.mcgill@illinois.gov