

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)
)
AMENDMENTS TO) **R18-20**
35 ILL. ADM. CODE 225.233,) **(Rulemaking – Air)**
MULTI-POLLUTANT STANDARDS (MPS))

ILLINOIS MANUFACTURERS’ ASSOCIATION (IMA) REPOSE TO ENVIRONMENTAL ORGANIZATIONS’ MOTION TO STAY

NOW COMES the Illinois Manufacturers’ Association, and pursuant to 35 Ill. Adm. Code § 101.500(d), respectfully submits this response opposing the motion by the Environmental Defense Fund, the Environmental Law and Policy Center, the Natural Resource Defense Council, the Respiratory Health Association and the Sierra Club (collectively, the “Environmental Organizations”) to stay the above-captioned rulemaking proceeding (“Mot. to Stay”).

The Illinois Manufacturers’ Association is a statewide trade organization representing nearly 4,000 companies and facilities located across the state of Illinois. Manufacturers employ 568,000 workers and contribute the single largest share of the state’s economy. Manufacturers are large energy users and this decision could have a profound impact on their operations in addition to the chilling precedent that would be set for future cases.

The IMA is strongly opposed to the motion submitted by the Environmental Organizations’ that would set a dangerous and inappropriate precedent regarding public participation and the Pollution Control Board’s (The Board) authority in rulemaking proceedings. Further, it would grant a precedent that is clearly not provided for in state law. The motion filed by the Environmental Organizations attempts to stay a current

rulemaking proceeding that has been underway for several months. Numerous stakeholders, including the Illinois Environmental Protection Agency (“IEPA”), and the Board, have spent considerable time and effort preparing written testimony and questions and conducting two full days of public hearing. The motion seeks to unfairly delay the proceeding simply because one stakeholder -- Dynegy -- may merge with Vistra Energy Corp. (“Vistra”) later this year. Because Vistra has not participated in this rulemaking proceeding to date, the Environmental Organizations allege that it is “impossible to develop an adequate record at this time” and request a stay. Mot. to Stay at 8.

In effect, the Environmental Organizations is asking the Board to set a very dangerous precedent that this (and potentially future) rulemakings cannot occur because a potential future stakeholder is not participating. In this case, Vistra has no legal ownership or operation interest in the facilities at issue in the rulemaking.

If the Board grants this stay, it will set a precedent that all current and potential future stakeholders participate in the rulemaking process—a requirement not recognized by Illinois law. This will delay and undermine the rulemaking process while limiting the Board’s authority, suggesting that the Board can only complete a rulemaking where it finds that all relevant stakeholders have participated whether such current and potential future stakeholders chose to participate or not. It would create a nearly impossible duty to identify all potentially interested current and potential future stakeholders in rulemakings where there is no clear authority for the Board to compel all possible stakeholders to participate.

Illinois law requires only that the proponent of a regulation participate in the rulemaking process. *See* 45 ILCS 5/27(a) (“[a]ny person filing with the Board a written

proposal for the adoption, amendment, or repeal of regulations shall provide information supporting the requested change[.]” The Board is required to provide an *opportunity* for other parties to be heard, but those parties are not required to participate and the Board is not required to stay a rulemaking if certain parties chose not to do so. *See* 415 ILCS 5/28(a); 35 Ill. Adm. Code §§ 102.108, 102.416.¹

The Agency has followed all proper procedures and all members of the public, including *Vistra*, have been given the opportunity to participate in the rulemaking. As the proponent of the rule change, IEPA is the only party required to participate and the only party that could reasonably request a stay. The involvement of all other interested parties is entirely voluntary. Granting the requested stay based on the lack of participation of one or more potentially interested companies is inappropriate and would undermine the rulemaking process.

Finally, granting a stay based on a prospective event like a merger that may not occur would create precedent by which rulemakings could be stayed based on uncertain future events. Such a holding could act to chill normal merger and acquisition activity involving regulated entities, as both buyers and sellers would face the prospect of disrupting ongoing rulemaking proceedings. Further, the Board and IEPA could find the rulemaking process delayed or even blocked by stay requests whenever a potentially interested stakeholder becomes involved in a merger or acquisition during the pendency of a rulemaking.

Conclusion

¹ Illinois courts have recognized that not all interested parties will participate in Board rulemakings and Section 41(a) of the Illinois Environmental Protection Act allows “any party adversely affected” to seek judicial review of Board orders and other final actions. 415 ILCS 5/41(A); *Salt Institute v. IPCB*, 2016 IL App. (1st) 152003-U, *8-9 (“[B]oth parties recognize that participating in the rulemaking proceedings is not a requirement for standing under section 29(a) of the Act when a challenge is made to a regulation.”).

WHEREFORE, the Illinois Manufacturers' Association respectfully requests that the Board, consistent with the law governing Board rulemaking procedures and in the interest of avoiding the establishment of negative precedent, deny the Environmental Organizations' motion to stay.

Respectfully Submitted,

Mark Denzler

Vice President & COO