

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))

NOTICE OF FILING

PLEASE TAKE NOTICE that on this 26th day of October 2018, I have filed with the Clerk of the Illinois Pollution Control Board, the Illinois Attorney General's Response in Opposition to Vistra Energy Corp.'s Motion For Expedited Consideration in the above-referenced case, a copy of which is hereby served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
By LISA MADIGAN,
Attorney General of the State of Illinois

BY: /s/ Stephen J. Sylvester
STEPHEN J. SYLVESTER
Senior Assistant Attorney General
Illinois Attorney General's Office
69 W. Washington St., 18th Floor
Chicago, IL 60602
(312) 814-2087
ssylvester@atg.state.il.us

SERVICE LIST

Don Brown, Assistant Clerk
Mark Powell, Hearing Officer
Marie Tipsord, Hearing Officer
Illinois Pollution Control Board
100 W. Randolph Street, Suite 11-500
Chicago, IL 60601
don.brown@illinois.gov
Mark.Powell@Illinois.Gov
Marie.Tipsord@Illinois.Gov

Amy C. Antonioli
Joshua R. More
Ryan Granholm
Caitlin Ajax
Schiff Hardin LLP
233 S. Wacker Drive, Suite 6600
Chicago, IL 60606
312-258-5769
aantonioli@schiffhardin.com
jmore@schiffhardin.com
rgranholm@schiffhardin.com
cajax@schiffhardin.com

Greg Wannier
Sierra Club Environmental Law Program
2101 Webster Street, Suite 1300
Oakland, CA 94612
greg.wannier@sierraclub.org

Gina Roccaforte
Dana Vetterhoffer
Antonette R. Palumbo
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
gina.roccaforte@illinois.gov
dana.vetterhoffer@illinois.gov
antonette.palumbo@illinois.gov

Eric Lohrenz
Office of General Counsel
Illinois Department of Natural Resources
One Natural Resources Way
Springfield, IL 62702-1271
217-782-1809
Eric.lohrenz@illinois.gov

Justin Vickers
Jean-Luc Kreitner
Environmental Law and Policy Center
35 E. Wacker Drive, Suite 1600
Chicago, IL 60601
jvickers@elp.org
jkreitner@elp.org

Katherine Hodge
Hepler Broom LLP
4340 Acer Drive
Springfield, IL 62711
khodge@heplerbroom.com

Faith E. Bugel
1004 Mohawk
Wilmette, IL
fbugel@gmail.com

Katy Khayyat
Dept. of Commerce and Economic Opportunity
Small Business Office
500 East Monroe Street
Springfield, IL 62701
Katy.Khayyat@illinois.gov

CERTIFICATE OF SERVICE

I, STEPHEN J. SYLVESTER, an attorney, do certify that on October 26, 2018, I caused the foregoing the Illinois Attorney General's Response in Opposition to Vistra Energy Corp.'s Motion For Expedited Consideration and the Notice of Filing to be served upon the persons listed in the attached Service List by email for those who have consented to email service and by U.S. Mail for all others.

/s/ Stephen J. Sylvester
STEPHEN J. SYLVESTER

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))

**THE ILLINOIS ATTORNEY GENERAL’S RESPONSE
IN OPPOSITION TO VISTRA ENERGY CORP.’S
MOTION FOR EXPEDITED CONSIDERATION**

Pursuant to 35 Ill. Adm. Code § 102, the Illinois Attorney General, on behalf of the People of the State of Illinois (the “People”), hereby submits its comments in response to Vistra Energy Corp.’s (“Vistra”) motion for expedited review in the above-captioned rulemaking docket. For the reasons set forth below, the Board should deny the motion and allow a full opportunity for public comment and hearing prior to proceeding to second notice.

I. Expedited Review Is Not Warranted.

“In acting on a motion for expedited review, the Board will, at a minimum, consider all statutory requirements and whether material prejudice will result from the motion being granted or denied.” 35 Ill. Adm. Code 101.512(b). The Board will only grant a motion for expedited review consistent with available resources. *Id.* at 101.512(c). Any such requests must include, in part, “a complete statement of the facts and reasons for the request.” *Id.* at 101.512(a).

The Board has stated, “[f]or various reasons, [it] cannot expedite consideration of every case or rulemaking proposal.” *In the Matter of: Amendments to 35 Ill. Adm. Code 217, Nitrogen Oxides Emissions*, R11-24, slip op. at 4 (April 11, 2011). The Board must take into account its own limited resources, which has in the past “render[ed] the granting of a motion for expedited review unlikely in all but the most dire circumstances.” *Id.*, quoting *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 has granted motions for expedited review when the State faced the risk of federal sanctions for missing United States Environmental Protection Agency's deadlines or when a regulated entity's permit relief was due to expire. *See Section 27 Proposed Rules for Nitrogen Oxide (MV) 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); *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); *In the Matter of: Petition of Caterpillar Inc. for an Adjusted Standard From 35 Ill. Adm. Code 620.410(A) and 817.106(A)*, AS 13-5, slip op. at 2 (Sept. 15, 2013).

A. Providing Vistra with “regulatory certainty” is not an appropriate basis to grant a motion for expedited review.

The Board has *not* granted motions to expedite when the regulated entities sought to avoid expenditures or were concerned about delay or lack of regulatory certainty. *In the Matter of: Amendments to 35 Ill. Adm. Code 217, Nitrogen Oxides Emissions*, R11-24 (Apr. 11, 2011); *In the Matter of: Proposed Site-Specific NO_x Rule Amendment Applicable to Saint-Gobain Containers, Inc. at 35 Ill. Adm. Code 217.152(B)*, R11-17 (Dec. 2, 2010). *See also In the Matter of: NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217*, R06-22, slip op. at 4 (Apr. 20, 2006) (holding that “even considerable uncertainty does not rise to the level of material prejudice sufficient to allow the Board to grant” a motion to expedite).

In its motion, Vistra contends that granting its motion will “provide Vistra the regulatory certainty necessary to make investment decisions with regard to the MPS fleet,” and that it would “limit the material prejudice to Vistra.” Motion at 2-3, ¶3. The Board should disregard this line of argument, as it has consistently done in previous rulemakings.

B. The Board has already denied relief seeking to expedite this rulemaking.

The Board has previously denied the Illinois Environmental Protection Agency's ("Illinois EPA's") motion to expedite this rulemaking. *In the Matter of: Amendments to 35 Ill. Adm. Code 225.233 Multi-Pollutant Standards (MPS)*, R18-20, slip op. at 6 (Oct. 19, 2017). The Board found that this "rulemaking is not subject to a statutory deadline." *Id.* In addition, the Board found that the claims of material prejudice were unsupported. *Id.* In addition to its unavailing claim of material prejudice concerning providing regulatory certainty, Vistra contends that "expedited consideration will cause no material prejudice" to any other participants. Motion at 3, ¶4. In support of its claim, Vistra states that in "[r]eviewing this record, the Board held that it 'could have proceeded directly to second notice with these substantive changes to the IEPA's original proposal.'" *Id.* citing R18-20, Opinion and Order of the Board at 2 (Oct. 4, 2018). While this is true, it does not tell the whole story.

While the Board denied the Illinois EPA's motion for expedited review, it did commit to "avoiding unnecessary delays in initiating the statutorily prescribed notice and comment process." R18-20, slip op. at 6 (Oct. 19, 2017). Moreover, the Board proceeded to "non-substantive first-notice publication" of the Illinois EPA's proposal and did promptly schedule hearings. *Id.* The Board proceeded to hold three hearings, each lasting two days: January 17 and 18, 2018, in Peoria; March 6 and 7, 2018, in Edwardsville; and April 16 and 17, 2018, in Springfield. R18-20, Opinion and Order of the Board at 2 (Oct. 4, 2018). The Board chose to proceed to second first notice order instead of going directly to second notice "to help ensure that all interested persons have notice of and an opportunity to weigh in on [the Board's] changes" to the Illinois EPA's original proposal. *Id.* at 1. Inherent in the Board's ruling is that its failure to provide additional hearing and comment on the revised proposal would result in prejudice. Therefore, the Board should deny Vistra's

Motion.

- C. The Board has properly conducted this controversial proceeding concerning the impact of increased pollution from Vistra's emissions in a manner designed to allow for broad public participation and the development of a complete record and should continue to do so.**

Vistra claims that “[o]ne hearing, on an expedited basis, will be sufficient to address the Board’s questions and any additional questions and testimony that the participants and the public wish to present regarding the Board’s Proposal.” Motion at 4, ¶5. However, this contention is belied by the record. To date, the Board has “heard 119 (69 at the first hearing, 17 at the second hearing, and 33 at the third hearing) oral public comments during the six hearing days.” R18-20, Opinion and Order of the Board at 6 (Oct. 4, 2018). In addition to the oral public comments, the “Board received 2909 written public comments.” *Id.* In addition, the Board’s decision to proceed to second first notice was “bolstered by the on-going disagreements among the participants over these fundamental issues,¹ as well as by the significance of this rulemaking, reflected in its high degree of public participation.” *Id.* at 1. There is no question the MPS are significant public health and environmental standards with an important place in Illinois environmental regulations. As Illinois EPA’s former Director Douglas Scott stated in testimony before the United States Senate in 2009, the MPS is “one of the most important environmental and public health advances in Illinois in recent decades.”²

Finally, the Hearing Officer has issued an Order pursuant to the Board’s October 4, 2018 Opinion and Order precisely “to establish hearing locations and dates, potential deadlines for

¹ The Board identified these issues as 1) reducing the proposed annual mass caps for both SO₂ and NO_x; and 2) requiring further reduction of those caps when units are permanently shut down (“retired”) or temporarily shut down (“mothballed”). R18-20, Opinion and Order of the Board at 1 (Oct. 4, 2018). Specifically, the Board proposed reducing annual mass-based caps for SO₂ from 55,000 tons per year (“tpy”) to 44,920 tpy and for NO_x from 25,000 tpy to 22,469 tpy. *Id.*

² https://www.epw.senate.gov/public/_cache/files/f/c/fc4c5288-525a-47d6-812c-809d000c617b/01AFD79733D77F24A71FEF9DAFCCB056.july909ussenatedscottwrittentestimony1.pdf at 2.

prefiling of testimony and questions in a prehearing conference on November 8, 2018 at 11:00 a.m.” R18-20, Hearing Officer Order at 1 (Oct. 18, 2018). This prehearing conference will also be used to address any procedural issues the participants raise.” *Id.* Given that the prehearing conference is set for November 8, 2018, the schedule proposed by Vistra in its motion—including a hearing during the week of November 26—is now clearly unworkable. *See, e.g.*, 35 Ill. Adm. Code 101.602(b) (requiring publication of notice of hearings in newspapers of general circulation at least 21 days prior to hearing). The prehearing conference will allow the Board and the participants to develop a schedule that works for *all* participants. Accordingly, the Board should deny Vistra’s motion for expedited review.

II. Conclusion.

For the reasons set forth above, the People respectfully request that the Board deny Vistra’s motion for expedited review in this rulemaking docket and allow the participants and the Hearing

[REMAINDER OF PAGE BLANK; TEXT CONTINUES ON P. 6]

Officer, during the prehearing conference, to develop a schedule that works for *all* participants.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
by LISA MADIGAN, Attorney
General of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/
Asbestos Litigation Division

BY: /s/ Stephen J. Sylvester
STEPHEN J. SYLVESTER
Senior Assistant Attorney General Illinois
Attorney General's Office
69 W. Washington St., 18th Floor
Chicago, Illinois 60602
(312) 814-2087
ssylvester@atg.state.il.us

ANDREW ARMSTRONG, Chief
Environmental Bureau, Springfield
(217) 782-7968
aarmstrong@atg.state.il.us