

ILLINOIS POLLUTION CONTROL BOARD
October 19, 2000

IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO 35 ILL. ADM.) R01-16
CODE 217.SUBPART V, ELECTRIC POWER) (Rulemaking – Air)
GENERATION)

Proposed Rule. First Notice

OPINION OF THE BOARD (by M. McFawn):

On October 16, 2000, the Illinois Environmental Protection Agency (Agency) filed a proposal to amend Subpart V of 35 Ill. Adm. Code 217: Electric Power Generation. The proposed regulations include a rate based emission limit and other controls for nitrogen oxides (NO_x) from fossil fuel-fired electrical generating units (EGUs). The controls are to be effective during the period May 1 through September 30 of each year, beginning in 2003. As explained below, the Agency is proposing these amendments because the State is required to submit to the United States Environmental Protection Agency (USEPA) NO_x control strategies necessary to demonstrate attainment of the 1-hour National Ambient Air Quality Standard for ozone (NAAQS) by May 1, 2003, in the Metro East/St. Louis moderate nonattainment area (NAA). Failure to do so could result in sanctions on the State of Illinois (State) by the USEPA under the Clean Air Act Amendments of 1990 (CAA) (42.U.S.C.7401 *et seq.* (1990)).

For that reason, as further explained below, the Agency filed this rulemaking proposal pursuant to Section 28.5 of the Environmental Protection Act (Act) (415 ILCS 5/28/5). Section 28.5 specifically provides for “fast track rulemaking” by the Board to promulgate rules that are required to be adopted under the CAA. In accordance with the procedures in Section 28.5, most specifically Section 28.5(f), the Board will adopt today the proposed amendments for first-notice publication in the *Illinois Register* under the Illinois Administrative Procedure Act (5 ILCS 100 (1998)) without commenting on the merits of the proposal. These proposed amendments are set forth in a separate Board order for administrative ease of handling.

In its Statement of Reasons, the Agency explained that the amendments to Subpart V of Part 217 are intended to meet several obligations of the State under the federal CAA. Section 107(a) of the CAA (42 U.S.C. § 7407(a) (1990)) imposes on the State the primary responsibility for ensuring that Illinois meet the NAAQS for ozone. The State is required thereunder to submit a state implementation plan (SIP) that specifies emission limitations, controls, and other measures necessary for the attainment, and enforcement of the NAAQS for ozone in this state.

Originally the Agency had intended to satisfy these obligations with the rulemaking 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 (July 13, 2000), R01-9, filed with the Board on July 11, 2000. On August 30, 2000, the United States Court of Appeals for the D.C Circuit issued an order that changed the implementation date incorporated into R01-09 from May 1, 2003, to May 31, 2004. See Michigan v. EPA No. 98-1497, 2000 WL 180650 (D.C. Cir. 2000). Subsequently, the Agency moved to amend its proposal in R01-9 changing, among other things, the implementation date for Subpart W from May 1, 2003, to May 31, 2004. Because the State is required to submit control strategies necessary to demonstrate attainment of the 1-hour NAAQS for the Metro-East/St. Louis NAA by May 1, 2003, this obligation can no longer be satisfied by Subpart W due to its newly proposed later implementation date of May 31, 2004.

The Agency explains that the purposes of the Subpart V proposed amendments are twofold. First, the proposal is intended to satisfy the State’s SIP obligations for the Metro-East/St. Louis NAA. Second, it is intended to comply with representations by the State to the U.S. District Court for the District of Columbia in a case brought by the Sierra Club against the USEPA in 1998. The Sierra Club’s complaint alleges that USEPA failed to perform certain nondiscretionary duties under the CAA regarding failure of the Metro-East/St. Louis NAA to achieve attainment.¹ Shortly thereafter, on March 19, 1999, USEPA published a proposed rule entitled “Clean Air Reclassification and Notice of Potential Eligibility for Attainment Date Extension, Missouri and Illinois, St. Louis Nonattainment Area; Ozone” (Extension Policy).² In the proposed

¹ The Sierra Club and the Missouri Coalition (Sierra Club) for the Environment filed this complaint on November 11, 1998. Civil Action Nos. 98-2733 and 99-388. These actions are still pending. As of the date of this order, the Court has not yet ruled on a motion by the Sierra Club for summary judgement.

² Under the Extension Policy, the State has agreed to submit adopted rules to USEPA no later than December 31, 2000. The Agency has represented that USEPA understands that these amendments will not be adopted until after this date has passed, and the USEPA will accept the continued progress made in these proceedings as satisfying the State’s obligation to submit adopted rules.

rule, USEPA found that the Metro-East/St. Louis NAA had not met the attainment date applicable to moderate NAAs, and that upon a final finding of nonattainment, the area would by operation of law be reclassified to a serious ozone NAA. 64 Fed. Reg. 13384 (March 18, 1999). USEPA also proposed to offer final action in this proposed finding of non-attainment based upon its Extension Policy.

In October 1999, the State committed in a draft supplement to its attainment SIP for the Metro-East NAA to implement statewide reductions of NO_x from sources within the State. The State submitted this supplemental attainment SIP to USEPA in February 2000. The State's adopted rules are due to the USEPA by December 31, 2000. These proposed amendments to Subpart V of Part 217 are necessary to fulfill the representations made in this draft supplement.

In sum, this rulemaking will allow Illinois to:

1. submit control strategies necessary to demonstrate attainment of the 1-hour ozone National Ambient Air Quality Standard (NAAQS) for the Metro-East/St. Louis moderate ozone nonattainment area (NAA); and
2. satisfy Illinois' obligation to submit adopted rules to USEPA under the Extension Policy

Again, the adoption by the Board of these amendments is authorized under Section 28.5 of the Act (415 ILCS 5/28.5 (1998)). Section 28.5 provides for "fast track" adoption of certain regulations necessary for compliance with the CAA.

With the opening of this docket, the Board currently has four NO_x rulemakings pending. The Agency has previously filed two regulatory proposals in response to the NO_x SIP Call, 63 Fed. Reg. 57356 (October 27, 1998). See also 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 (July 13, 2000), R01-9, and Proposed New 35 Ill. Adm. Code 217.Subpart T, Cement Kilns, and Amendment to 35 Ill. Adm. Code 211 and 217, (August 24, 2000), R01-11. At the same time it filed this proposal, the Agency also filed a third regulatory proposal to add Subparts U and X to Part 217, and make various amendments to Part 211. See Proposed New 35 Ill. Adm. Code 217.Subpart U, No_x Control And Trading Program For Specified No_x Generating Units, Subpart X, Voluntary No_x Emissions Reduction Program, and Amendments to 35 Ill. Adm. Code 211 (October 19, 2000), R01-17.

PROCEDURAL MATTERS

Agency Motion for Alternative Filing Requirements

Along with the proposal, the Agency filed a motion to waive the filing requirements at 35 Ill. Adm. Code 101.103(b) and 102.120. First, the Agency requests that the Board waive the requirement that the Agency provide an entire copy of the proposal to the Attorney General's Office and the Department of Natural Resources (DNR). The Agency assures the Board that it discussed the matter with both the Attorney General's Office and the DNR and that both agreed that the Agency does not need to supply their offices with a copy of the entire proposal, provided that both offices are notified that a proposal has been made and where the proposal can be reviewed (Mot. for Waiver of Req. at 2).

Second, the Agency requests that it be allowed to submit fewer copies of the documents required pursuant to 35 Ill. Adm. Code 102.120 and Section 28.5(e)(7) of the Act. Pursuant to Section 102.120 of the Board's procedural rules the Agency is required to file an original and nine copies of the proposal with the Board. The Agency asks that it be allowed to file instead one original and four complete copies of the proposal, in addition to five partial copies that consists of the following: the pleadings, the applicable federal guidance documents, and the text of the proposed rules absent supporting exhibits. Furthermore, the Agency requests that it be required to provide the Board with less than the original and nine copies of documents it is required to file pursuant to Section 28.5(e)(7) of the Act. The Agency is required by that Section of the Act to file the documents it relied on in development of the proposal and intends to rely on at hearing. 415 ILCS 5/28.5(e)(7). Instead, the Agency proposes that it be allowed to provide the Board with five copies of each of 11 documents listed as items (d) through (o) in paragraph 4 of its motion, and that it file no copies of three additional documents (Mot. for Waiver of Req. at

2). Those three documents are the Clean Air Act, the Environmental Protection Act, and Title 35 of the Illinois Administrative Code. The Agency requests a complete waiver for the three documents (listed as items (a) through (c) in paragraph 4 of its motion because those documents are readily accessible to the Board. *Id.* at 4.

The Board grants the Agency's motion. The Agency does not need to file a copy of the regulatory proposal with the Attorney General's office or the DNR. The Board notes that the Clerk of the Board will send a copy of this opinion and accompanying order that contains the proposed amendments to both offices. The Board accepts the Agency's proposal to file one original and four complete copies of its proposal, and five partial copies of the supporting documents. The Board also reduces the number of supporting documents otherwise required to the number requested in the Agency's motion.

Consecutive Hearings

As mentioned above, the Agency filed R01-17, a proposal to add Subparts U and X to Part 217, and amend Part 211, on the same day that it filed this rulemaking proposal. See Proposed New 35 Ill. Adm. Code 217.Subpart U, No_x Control And Trading Program For Specified No_x Generating Units, Subpart X, Voluntary No_x Emissions Reduction Program, and Amendments to 35 Ill. Adm. Code 211 (October 19, 2000), R01-17. The Board is issuing separate first notices for these rulemakings. Because the two proposals both address No_x controls and the participants interested in each proceeding overlap to a certain extent, the Board will hold the hearings in both matters consecutively.

Scheduling Constraints

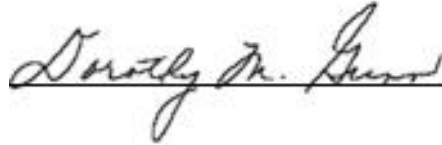
Pursuant to Section 28.5 of the Act (415 ILCS 5/28.5 (1998)), the Board is required to proceed within set timeframes toward the adoption of the regulation. The Board has no discretion to adjust these timeframes under any circumstances. Today the Board adopts this proposal for first-notice publication in the *Illinois Register* under the Illinois Administrative Procedure Act (5 ILCS 100 (1998)) without commenting on the merits of the proposal. The following schedule indicates the dates on which the Board will act as provided in Section 28.5 of the Act (415 ILCS 5/28.5 (1998)):

First Notice	on or before October 30, 2000
First Hearing	on or before December 10, 2000
Second Hearing	on or before January 9, 2001
Third Hearing (if necessary)	on or before January 23, 2001
Second Notice	
(if 3rd hearing is canceled)	on or before February 23, 2001
(if 3rd hearing is held)	on or before March 15, 2001
Final Adoption	21 days after receipt of JCAR certificate of no objection

The third hearing may be canceled if unnecessary, as specified at Section 28.5(g)(3). The Board will proceed in this matter as required by Section 28.5 of the Act (415 ILCS 5/28.5 (1998)) and as discussed in the Board's resolutions regarding Section 28.5 of the Act. See RES 92-2 (October 28, 1992, and December 3, 1992).

In conclusion, the Board adopts this proposal for first-notice publication in the *Illinois Register* under the Illinois Administrative Procedure Act (5 ILCS 100 (1998)) without commenting on the merits of the proposal or any substantive change to the proposal filed by the Agency. The Agency's motions to modify the filing requirements found at Sections 101.103(b) and 102.120 are granted. Additional detail about the proceeding and the hearings will be contained in a hearing officer order that will be issued shortly.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion was adopted on the 19th day of October 2000 by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board