

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
NOx TRADING PROGRAM:) R06-22
AMENDMENTS TO 35 ILL.) (Rulemaking - Air)
ADM. CODE PART 217)

NOTICE OF FILING

TO: Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA ELECTRONIC MAIL)

John C. Knittle, Esq.
Hearing Officer
Illinois Pollution Control Board
2125 South First Street
Champaign, Illinois 61820
(VIA FIRST CLASS MAIL)

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board a **MOTION FOR LEAVE TO FILE A REPLY TO RESPONSE TO MOTION FOR EXPEDITED REVIEW** and **REPLY TO RESPONSE TO MOTION FOR EXPEDITED REVIEW**, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: /s/ Katherine D. Hodge
One of Its Attorneys

Dated: March 31, 2006

Katherine D. Hodge
N. LaDonna Driver
HODGE DWYER ZEMAN
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

CERTIFICATE OF SERVICE

I, Katherine D. Hodge, the undersigned, hereby certify that I have served the attached MOTION FOR LEAVE TO FILE A REPLY TO RESPONSE TO MOTION FOR EXPEDITED REVIEW and REPLY TO RESPONSE TO MOTION FOR EXPEDITED REVIEW upon:

Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Kathleen C. Bassi, Esq. (kbassi@schiffhardin.com)
Schiff Hardin, LLP
6600 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606-6473

via electronic mail on March 31, 2006; and upon:

John C. Knittle, Esq.
Hearing Officer
Illinois Pollution Control Board
2125 South First Street
Champaign, Illinois 61820

Rachel L. Doctors, Esq.
Assistant Counsel
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Post Office Box 19276
Springfield, Illinois 62794-9276

William Richardson, Esq.
Chief Legal Counsel
Illinois Department of Natural Resources
One Natural Resources Way
Springfield, Illinois 62702-1271

by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois, on March 31, 2006.

/s/ Katherine D. Hodge
Katherine D. Hodge

IERG:001/R Dockets/Fil/r06-22/COS – Motion for Leave and Reply

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
) R06-22
NO_x TRADING PROGRAM:) (Rulemaking – Air)
AMENDMENTS TO)
35 ILL. ADM. CODE PART 217)

**MOTION FOR LEAVE TO FILE A REPLY
TO RESPONSE TO MOTION FOR EXPEDITED REVIEW**

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP (“IERG”), by its attorneys, HODGE DWYER ZEMAN, and pursuant to Section 101.500(e) of the Illinois Pollution Control Board’s (“Board”) procedural rules, 35 Ill. Admin. Code § 101.500(e), moves the Board for leave to file its Reply (the “Reply”) to the Illinois Environmental Protection Agency’s (the “Illinois EPA”) Response to IERG’s Motion for Expedited Review (the “Response”).

1. On January 19, 2006, the Illinois EPA filed proposed rule change R06-22, NO_x Trading Program: Amendments to 35 Ill. Admin. Code Part 217 (the “Proposal”), with the Board.

2. The Illinois EPA indicated that “. . . several areas of the rule need to be updated to reflect changes in ownership of companies and changes in fixed allocations, to simplify the administration of the program, and to address issues that have arisen since the program was implemented . . .”. Illinois EPA’s Statement of Reasons (“SOR”) at 2.

3. The Illinois EPA concluded the SOR by stating that it “. . . respectfully requests that the Board expeditiously adopts [sic] these rules for the State of Illinois.” SOR at 22. (Emphasis added.)

4. In keeping with the Illinois EPA's request to the Board, IERG filed a Motion for Expedited Review on March 13, 2006 (the "Motion").

5. On March 27, 2006, the Illinois EPA filed the Response which requested that the Board deny the Motion. Response at 1.

6. Under the Board's procedural rules, a moving party is not entitled to file a reply, except as permitted by the Board or the Hearing Officer to prevent material prejudice. 35 Ill. Admin. Code § 101.500(e).

7. IERG believes that the Illinois EPA's Response, inter alia, incorrectly alleges misrepresentations by IERG, provides an inaccurate interpretation of its proposed changes to Part 217, misstates the history of previous NOx allocations, and is inconsistent with its Proposal.

8. Allowing IERG to file the Reply would avoid material prejudice that would result if the Response was allowed to stand containing incorrect allegations of misrepresentations by IERG, inaccurate interpretations of the Illinois EPA's proposed changes to Part 217, misstatements regarding the history of previous NOx allocations and a misunderstanding of the concept of material prejudice.

WHEREFORE, for the above and foregoing reasons, ILLINOIS ENVIRONMENTAL REGULATORY GROUP, respectfully requests that the Illinois Pollution Control Board grant it leave to file its Reply to the Illinois Environmental Protection Agency's Response to Motion for Expedited Review.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP

By: /s/ Katherine D. Hodge
One of Its Attorneys

Date: March 31, 2006

Katherine D. Hodge
N. LaDonna Driver
HODGE DWYER ZEMAN
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

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IN THE MATTER OF:)
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NO_x TRADING PROGRAM:) R06-22
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35 ILL. ADM. CODE PART 217)

**REPLY TO RESPONSE TO
MOTION FOR EXPEDITED REVIEW**

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP (“IERG”), by its attorneys, HODGE DWYER ZEMAN, and pursuant to Section 101.500(e) of the Illinois Pollution Control Board’s (“Board”) procedural rules, 35 Ill. Admin. Code § 101.500(e), submits this Reply (this “Reply”) to the Illinois Environmental Protection Agency’s (the “Illinois EPA”) Response to IERG’s Motion for Expedited Review (the “Response”).

1. On January 19, 2006, the Illinois EPA filed proposed rule change R06-22, NO_x Trading Program: Amendments to 35 Ill. Admin. Code Part 217 (the “Proposal”), with the Board.
2. IERG filed a Motion for Expedited Review on March 13, 2006 (the “Motion”).
3. On March 27, 2006, the Illinois EPA filed the Response which requested that the Board deny the Motion. Response at 1.
4. Concurrently with this Reply, IERG has filed a Motion for Leave to File a Reply to Response to Motion for Expedited Review.

**INCONSISTENCIES BETWEEN THE
PROPOSAL AND THE RESPONSE**

5. The Proposal was filed by the Illinois EPA.

6. In the Proposal, the Illinois EPA indicated that “. . . several areas of the rule need to be updated to reflect changes in ownership of companies and changes in fixed allocations, to simplify the administration of the program, and to address issues that have arisen since the program was implemented . . .”. Illinois EPA’s Statement of Reasons (“SOR”) at 2.

7. The Illinois EPA concluded the SOR by stating that it “. . . respectfully requests that the Board expeditiously adopts [sic] these rules for the State of Illinois.” SOR at 22. (Emphasis added.)

8. The Illinois EPA now claims that it would be materially prejudiced by expediting this rulemaking because it has subsequently filed an additional rulemaking and plans to file additional rulemakings. See Response at paragraphs 2 and 3.

9. The Illinois EPA certainly would have known at the time that the Proposal was filed that it intended to file additional rules within a short period of time. Since the Illinois EPA is the party that filed the Proposal, indicated that the rule changes were needed for legitimate purposes and initially requested that the Board expeditiously adopt the rule changes; it is now inconsistent for the Illinois EPA to claim that it would be materially prejudiced if this rulemaking proceeding is expedited.

ALLEGATIONS OF MISREPRESENTATION

10. The Illinois EPA asserts that IERG has made the “dubious claim” on page 1 of the Motion that “the relevant amendments concerning allocations of NO_x Allowances may impact the allocations for the 2006 season.” Response at paragraph 5.

11. In actuality, on page 1 of the Motion, IERG does not claim that any 2006 allocation would be impacted. IERG, instead, indicated that the rules should be finalized before the end of the 2006 season so that the rules would be applicable to the 2006 season. See Motion at paragraph 4. The proposed changes include provisions that exempt certain units, incorporate new federal rules by reference and make other changes to the NO_x trading program that will affect IERG member companies for the 2006 season. IERG reiterates its initial point that the proposed changes should be in effect for the 2006 season.

12. The Illinois EPA also claims that IERG made a misrepresentation regarding the substance of the confiscation provisions in the Proposal by making a “characterization” that allowances already issued could be confiscated by the Illinois EPA under the proposed confiscation provisions. See Response at paragraph 6. Although this Reply is not the proper forum to discuss the substance of the Proposal, IERG must briefly address the Proposal to dispel the Illinois EPA’s allegations of misrepresentation.

13. The Proposal states that the Illinois EPA will allocate certain allowances “listed in Appendix E to different budget units” unless the owner or operator of units that have been shutdown or sold transferred the allowances to another Illinois source and notified the Illinois EPA “within two years after the date that the Agency was required to

make a NOx allocation to the source or budget unit . . .”. See proposed Section 217.462(d). (Emphasis added.)

14. The Illinois EPA was required to make a NOx allocation to budget units before March 1, 2004. See 35 Ill. Admin. Code 217.466(a).

15. The language of the Proposal, when read literally, would require the Illinois EPA to confiscate certain allowances listed in Appendix E and allocate them to different budget units in certain circumstances, regardless of when the allowances were initially allocated.

16. Thus, IERG did not make any mischaracterization on this issue and did not make any “extremely misleading” statements.

HISTORY OF NOx ALLOCATIONS

17. The Illinois EPA states that “[p]ast history and current Illinois EPA staffing levels clearly indicate that the 2007 and 2008 allowances will not be issued until very near the March 2007 date. As such, even without expediting the review of this rulemaking, the amendments will still likely be in place by the March 2007 date.” Response at paragraph 11. (Emphasis added.)

18. Past history actually indicates that the Illinois EPA has initially allocated over 101,000 allowances under the NOx trading program for the years 2004, 2005 and 2006. United States Environmental Protection Agency (“USEPA”) NOx Trading Program Database. The USEPA confirmed the issuance of 85,593 (84%) of these allowances on October 21, 2002, over 16 months before the deadline. Id. An additional 14,862 (15%) of these allowances were confirmed as issued on July 21, 2003, over 7 months before the deadline. Id.

19. Thus, based on past history, affected units in Illinois would have expected to receive their allocation of allowances for 2007 and beyond in November of 2005, or in any case, no later than July of 2006. Even if the rulemaking is expedited, units may not receive their allowances in line with the past history of NO_x allocations. However, it is unclear whether, so long as this rulemaking is pending, the Illinois EPA could issue allowances for the years 2007 forward and, unless this rulemaking is expedited, there is no assurance that the units will receive an allocation prior to the March 1, 2007, deadline.

MATERIAL PREJUDICE

20. The Illinois EPA states that “alleged prejudice could only stem from an alleged possible loss in value of the allowances.” Response at 11.

21. In an apparent attempt to buttress its argument that IERG member companies would not be materially prejudiced if the Motion were denied, the Illinois EPA repeatedly states that maximizing the value of allowances is not the goal of the rule. See Response at paragraphs 9, 11 and 12.

22. However, the goals of the rule have no bearing on the question of whether certain IERG member companies would be materially prejudiced by failure to expedite this rulemaking.

23. Although the term “material prejudice” has not been defined with regard to a motion to expedite Board proceedings, failure to expedite these proceedings will cause several IERG member companies to suffer considerable uncertainty with respect to: (1) the value of their NO_x allowances; (2) their flexibility and ability to effectively plan for future operations; and, (3) their ability to compete with facilities in other states with a more settled and updated NO_x SIP call trading program. See Motion at

paragraphs 5, 6 and 7. It would seem clear that the occurrence of any one of the above-mentioned circumstances would cause material prejudice to a company. Therefore, this rulemaking should be expedited to avoid material prejudice to IERG's member companies.

STRAIN ON THE ILLINOIS EPA AND BOARD RESOURCES

24. The Illinois EPA states that it has filed one extremely complex rulemaking with the Board and intends to file several additional major rulemakings at some undefined point in the near future. See Response at paragraphs 2 and 3.

25. IERG agrees that the upcoming rulemakings described by the Illinois EPA may be contentious and resource intensive. However, the rulemaking at issue here is merely an update of a currently existing rule. Only three areas of disagreement remain with regard to this rule change, namely, the low-emitter provisions, the confiscation provisions and the Appendices. Since only one of the rulemakings discussed by the Illinois EPA has reached the filing stage, it would seem that the Illinois EPA and Board resources in the short-term would best be utilized by pursuing the rule at issue here as expeditiously as possible.

WHEREFORE, for the above and foregoing reasons, the ILLINOIS ENVIRONMENTAL REGULATORY GROUP, respectfully requests that the Illinois Pollution Control Board grant its Motion for Expedited Review.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP

By: /s/ Katherine D. Hodge
One of Its Attorneys

Date: March 31, 2006

Katherine D. Hodge
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