

ILLINOIS POLLUTION CONTROL BOARD
May 4, 2006

IN THE MATTER OF:)
)
PROPOSED NEW 35 ILL. ADM. CODE 225) R06-25
CONTROL OF EMISSIONS FROM LARGE) (Rulemaking - Air)
COMBUSTION SOURCES (MERCURY))

ORDER OF THE BOARD (by G.T. Girard, A.S. Moore):

The Board today, on its own motion, is proceeding with the Illinois Environmental Protection Agency's (Agency) March 14, 2006 proposal for rulemaking pursuant to Section 27 of the Environmental Protection Act (Act) (415 ILCS 5/27 (2004)). The Board is proceeding under the authority of Section 27 of the Act in response to a preliminary injunction entered by the Sangamon County Circuit Court on May 1, 2006. The Sangamon County Circuit Court enjoined the Board from proceeding pursuant to the hearing and rulemaking schedule required by Section 28.5 of the Act (415 ILCS 5/28.5 (2004)). The following discussion summarizes the procedural background of this rulemaking and delineates how the Board will proceed under Section 27 of the Act. The Board will also address a motion to appear *pro hac vice*.

PROCEDURAL BACKGROUND

On March 14, 2006, the Agency filed a proposal for rulemaking pursuant to Sections 9.10, 27, and 28.5 of the Act (415 ILCS 5/9.10, 27, and 28 (2004)). The proposal addresses the control of mercury emissions from coal-fired electric generating units beginning in July 2009. On March 16, 2006, the Board accepted the proposal for first notice under the provisions of Sections 9.10, 27, and 28.5 of the Act (415 ILCS 5/9.10, 27, and 28 (2004)), without commenting on the merits of the proposal.

On March 15, 2006, the Board received three filings, which objected to the acceptance of the proposal under Section 28.5 of the Act (415 ILCS 5/28.5 (2004)). The objectors maintained that the rule is not "required to be adopted" under the provisions of the Clean Air Act (CAA) (42 U.S.C. §7401 *et seq.*). The Agency responded to the objections on March 29, 2006. Replies were allowed by hearing officer order and received on April 5, 2006. On April 20, 2006, the Board determined that proceeding with this rulemaking using the fast-track procedures of Section 28.5 of the Act (415 ILCS 5/28.5 (2004)) was appropriate.¹

While the Board was considering the motions to remove the proposal from the fast-track procedures, Dynegy Midwest Generation, Inc., Kincaid Generation, L.L.C., and Midwest

¹ In addition, Dynegy, Midwest Generation, and Southern Illinois Power Company raised the issue of whether or not the proposal properly cited Section 9.10 of the Act (415 ILCS 5/9.10 (2004)) as authority. The Board determined that Section 9.10 should be stricken from the authority note at second notice. Therefore, the Board will not cite to Section 9.10 of the Act when re-first noticing the rule.

Generation, L.L.C. (plaintiffs) filed a complaint in the Sangamon County Circuit Court on April 3, 2006. That case is Dynegy Midwest Generation, Inc., Kincaid Generation, L.L.C., and Midwest Generation, L.L.C. v. PCB and IEPA, No 2006-CH-213. In that complaint, plaintiffs sought declaratory relief that the use of the fast-track procedures is inappropriate, that the existing schedule cannot proceed, and that Section 28.5 is unconstitutional. The plaintiffs also asked for injunctive relief. On April 17, 2006, the plaintiffs filed a motion seeking a preliminary injunction against the Board and the Agency. The Sangamon County Circuit Court heard argument on the motion on April 27, 2006, and entered an order granting a preliminary injunction on May 1, 2006.

On May 2, 2006, the plaintiffs filed a request with the Board to cancel hearings and rescind the schedule in R06-25, based on the preliminary injunction order entered in Sangamon County Circuit Court. Also on May 2, 2006, the Agency filed a motion asking for expedited review and requesting that the hearing scheduled in this matter for June 5, 2006, proceed in accordance with 35 Ill. Adm. Code 102.410.

On April 25, 2006, participant Kincaid Generation, L.L.C. (Kincaid) filed a motion (Mot.) seeking leave for Kathleen M. Rahill to appear *pro hac vice* on its behalf in this matter. Mot. at 1.

DISCUSSION

Sangamon County Court Order

The Board has reviewed the order from the Sangamon County Circuit Court, and the motions filed by the participants. The Board notes that the Board's procedural rules provide that unless undue delay or material prejudice will result, the Board will not grant a motion until the time for response has expired. *See* 35 Ill. Adm. Code 101.500(d). The Board finds that undue delay will result if the Board does not rule on the motions before the Board and therefore, the Board will decide the motions today.

The Board respects the order of the court, and will abide by the court's decision. Therefore, the Board will cancel the hearings scheduled to begin on May 8, 2006, and will rescind the schedules set forth by both the Board and the hearing officer in their respective March 16, 2006 orders. The Board will also re-first notice the rule under the Administrative Procedure Act (5 ILCS 100/5 *et seq.* (2004)). At the same time, the Board will file a notice of withdrawal of the first notice that appeared March 31, 2006 (30 Ill. Reg. 5957). The Board will cite only Section 27 of the Act (415 ILCS 5/27 (2004)) as authority for the proposed rule in the new first notice.

The Board agrees with the Agency that this rulemaking should proceed expeditiously in an attempt to adopt a rule before the federal deadline of November 17, 2006. The Board believes that proceeding with a first hearing in June is appropriate to meet the deadline and is consistent with the court's order. However, the Board cannot re-notice hearings for June 5, 2006, as requested by the Agency, and meet the statutory notice requirements of both the Act and the Clean Air Act. The Board can timely notice hearings to begin on June 12, 2006. Therefore, the

hearing officer is directed to set the first hearing for June 12, 2006, and a second hearing to begin August 14, 2006.

Pro Hac Vice

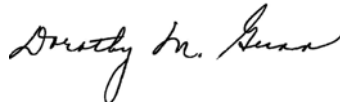
Kincaid's motion states that Ms. Rahill is a current member in good standing of the Bar of the State of Colorado. Mot. at 1. The motion further states that she is an associate at Jenner & Block, LLP, which represents Kincaid in this matter. *Id.* Kincaid's motion further states that Ms. Rahill passed the February 2006 Illinois Bar exam and will be sworn in on May 4, 2006. The Board grants Kincaid's motion and grants Ms. Rahill leave to appear *pro hac vice* on Kincaid's behalf in this matter.

CONCLUSION

The Board will proceed to hearing pursuant to Section 27 of the Act (415 ILCS 5/27 (2004)) with the Agency's March 14, 2006 proposal. The Board grants the motion to cancel hearings and rescind the schedule for hearings under the authority of Section 28.5 of the Act (415 ILCS 5/28.5 (2004)). The Board will re-first notice this rulemaking under Section 27 of the Act (415 ILCS 5/27 (2004)). The Board grants in part the motion for expedited review, in that the Board will proceed to first hearing in June. The Board also grants the motion to appear *pro hac vice*.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 4, 2006, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board