

ILLINOIS POLLUTION CONTROL BOARD

August 6, 2009

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

ORDER OF THE BOARD (by A.S. Moore):

On August 3, 2009, the Illinois Environmental Regulatory Group (IERG) filed two motions in this rulemaking docket, a “Motion for Emergency Rule” (Mot. Emer.) and a “Motion for Expedited Action on the on the Illinois Environmental Regulatory Group’s Alternative Proposal” (Mot. Exp.). The Board first provides a brief summary of each of the two motions before issuing its order, which directs participants to file responses to the motions no later than Thursday, August 13, 2009, and directs IERG to a file a reply, if it wishes to do so, no later than Monday, August 17, 2009. The Board reserves ruling on the merits of the two motions.

ABBREVIATED PROCEDURAL HISTORY

On January 19, 2006, Illinois Environmental Protection Agency (Agency or Illinois EPA) filed a rulemaking proposal. In an order dated February 2, 2006, the Board accepted the proposal for hearing. No hearings have been held on the Agency’s proposal.

In status reports filed with the Board on November 20, 2007; June 25, 2008; October 30, 2008; and March 9, 2009, the Agency has indicated that it is in the process of evaluating its most appropriate course of action in this docket.

MOTION FOR EMERGENCY RULE

In its motion for adoption of emergency rules, IERG states that the Environmental Protection Act requires “adoption and implementation of a Nitrogen Oxide (NO_x) State Implementation Plan (SIP) Call Budget Trading Program for Non-Electric Generating Units (“Non-EGUs”).” Mot. Emer. at 1, citing 415 ILCS 5/9.9 (2008). The Board has enacted such a program as Subpart U of Part 217 of its air pollution regulations. *See* 35 Ill. Adm. Code 217.450-217.482. IERG claims that, under the rule facilities subject to Subpart U “must hold NO_x SIP Call allowances for the 2009 season on November 30, 2009.” Mot. Emer. at 3, citing 35 Ill. Adm. Code 217.456(d).

IERG further claims that, in recently adopting the federal Clean Air Interstate Rule (CAIR), the United States Environmental Protection Agency (USEPA) stated “that it would no longer issue NO_x SIP Call allowances after the 2008 ozone season.” Mot. Emer. at 3. IERG argues that the Agency nonetheless “has failed to take any action to establish a new regulatory mechanism for issuing NO_x SIP Call allowances to sources subject to Subpart U for the 2009

ozone season.” *Id.* at 4. IERG expresses some doubt that CAIR NO_x allowances would be sufficient to demonstrate compliance with Subpart U. *See id.* at 4-5.

IERG argues that, because no regulation now issues CAIR allowances to sources that are subject to Subpart U, “an emergency rule is necessary in order to require that the Illinois EPA distribute allowances to impacted facilities and prompt the USEPA to establish CAIR compliance accounts for such facilities.” Mot. Emer. at 6. IERG requests that the Board exercise its authority to adopt emergency rules by revising Subpart U to bring NO_x SIP Call budget units “into the CAIR NO_x Ozone Season Trading Program, using a slightly revised Non-EGU budget and the same applicability requirements, as found in the current Subpart U.” *Id.*, *see id.*, Exh. 1 (proposed emergency rule amending Part 217); *see* 5 ILCS 100/5-45 (Illinois Administrative Procedure Act), 415 ILCS 5/27(c) (2008); 35 Ill. Adm. Code 102.612 (Adoption of Emergency Regulations). IERG expresses its understanding that “the rule must be final prior to the end of the ozone season (September 30, 2009) in order for USEPA to consider allocating the 2009 NO_x allowances to the Illinois EPA, and thus, it is imperative that an emergency rule be adopted for the 2009 control period.” Mot. Emer. at 16.

MOTION FOR EXPEDITED ACTION

IERG states that Subpart U of the Board’s air pollution regulations requires that affected non-EGUs hold NO_x allowances on November 30, 2009, but argues that the Agency has not issued any of those allowances to non-EGUs for 2009. Mot. Exp. at 2, 8, 11. IERG further argues that “a rule is necessary in order to incorporate NO_x SIP Call budget units into the CAIR NO_x Ozone Season Trading Program and distribute allowances accordingly.” *Id.* IERG states that, because of the Agency’s failure to act, “IERG is compelled to offer this alternative proposal to address the problems that will be faced by owners/operators of affected Non-EGUs should they not hold the requisite NO_x allowances through no fault of their own.” *Id.* at 11.

IERG notes that the revised Subpart U attached to the motion for an emergency rule is “identical” to the alternative proposal attached to the motion for expedited action. Mot. Exp. at 12, n.1. Nonetheless, IERG distinguishes the two motions from one another: the emergency rule is intended to address the allocation of allowances only for the 2009 control period, while the alternative proposal “is intended to be the rule requiring the allocation of allowances for the 2010 control period and beyond.” *Id.* at 12. IERG argues that the “alternative proposal will satisfy the requirement for Illinois to have regulations in place to address the NO_x SIP Call emissions reduction from Non-EGU’s, absent the USEPA’s continued administration of the NO_x SIP Call trading program.” *Id.* at 13; *see id.*, Exh. 1. IERG provides a summary of the rulemaking proposal it has submitted to the Board and on which it seeks expedited action. *See id.* at 16-26.

ORDER

Section 101.500(d) of the Board’s procedural rules provides, in pertinent part, that,

[w]ithin 14 days after service of a motion, a party may file a response to the motion. If no response is filed, the party will be deemed to have waived objection

to the granting of the motion, but the waiver of objection does not bind the Board or the hearing officer in its disposition of the motion. Unless undue delay or material prejudice would result, neither the Board nor the hearing officer will grant any motion before expiration of the 14 day response period. . . .” 35 Ill. Adm. Code 101.500(d).

Although the Board today reserves ruling on the two motions filed by IERG, it notes that IERG has raised issues concerning the timing of Board action in the event that the Board grants either or both of the motions. As one example, IERG has expressed the understanding that it is necessary for the Board to adopt a final rule concerning allocation of NO_x allowances by September 30, 2009, less than eight weeks from the date of this order. The Board finds that undue delay would result from allowing the full 14-day response period to run under 35 Ill. Adm. Code 101.500(d).

Accordingly, the Board directs any participant wishing to file a response to either or both of IERG’s motions to do so on or before Thursday, August 13, 2009. If IERG wishes to file a reply to any response, it is directed to do so on or before Monday, August 17, 2009. The “mailbox rule” at 35 Ill. Adm. Code 101.300(b)(2) does not apply to the filing of these responses or to any reply by IERG. The Board’s Clerk must receive these responses before the close of business on the day of the applicable deadline. Although responses may be filed electronically through the Clerk’s Office On-Line (COOL) from the Board’s Web site at www.ipcb.state.il.us, all electronic or approved fax filings must be received by the Clerk’s Office no later than 4:30 PM on the day of the applicable deadline. Any questions about electronic filing through COOL should be directed to the Clerk’s Office at (312) 814-3629. The deadlines above for any responses and reply would allow the Board to address the merits of the motion at its next regularly-scheduled meeting on Thursday, August 20, 2009.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 6, 2009, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board