ILLINOIS POLLUTION CONTROL BOARD
October 19, 2017

IN THE MATTER OF:	)	
	)	
AMENDMENTS TO 35 ILL. ADM. CODE	)	R18-20
225.233, MULTI-POLLUTANT STANDARD	)	(Rulemaking - Air)
(MPS)	)	

Proposed Rule. First Notice.

OPINION AND ORDER OF THE BOARD (by K. Papadimitriu):

On October 2, 2017, the Illinois Environmental Protection Agency (Agency) filed a rulemaking proposing amendments to the Multi-Pollutant Standard (MPS) in 35 Ill. Adm. Code 225, Control of Emissions from Large Combustion Sources. The MPS applies to coal-fired electrical generating units in central and southern Illinois, specifically, in the Counties of Fulton, Jasper, Mason, Massac, Montgomery, Peoria, Putnam, and Randolph. The rulemaking was filed pursuant to Sections 27 and 28 of the Environmental Protection Act (Act) (415 ILCS 5/27, 28 (2016)) and Section 102.202 of the Board's procedural rules (35 Ill. Adm. Code 102.202). Accompanying the proposal was a motion for expedited review (Review Mot.), among other documents.

Below, the Board first addresses a preliminary matter, a motion to appear *pro hac vice.* Next, the Board provides a brief overview of the Agency's proposal and then accepts the proposal for hearing. This is followed by a discussion of the Agency's motion for expedited review, which the Board denies. Finally, without commenting on the substantive merits of the proposed amendments, the Board directs the Clerk to provide their first notice publication in the *Illinois Register*.

***PRO HAC VICE* FILING**

Mr. Greg Wannier, one of the attorneys who filed an appearance on behalf of Sierra Club, requests Board approval to proceed *pro hac vice*. Request at 1. Attached to the motion is a verified statement of out-of-state attorney under Illinois Supreme Court Rule 707.

An individual appearing on behalf of an entity or other individual in a Board adjudicatory proceeding must be a licensed and registered attorney. 35 Ill. Adm. Code 101.400(a)(2). Further, an out-of-state attorney seeking to appear in a Board adjudicatory proceeding must have permission to do so pursuant to Supreme Court Rule 707. *Id.* at 101.400(a(3). Even in such cases, however, a motion to appear *pro hac vice* is unnecessary. *Id.*

By contrast, non-attorneys may represent themselves and others at regulatory hearings. 35 Ill. Adm. Code 102.100(b). It follows that out-of-state attorneys need not have permission under Rule 707 to appear on behalf of themselves or others in rulemaking proceedings. Accordingly, the Board denies Mr. Wannier's *pro hac vice* request as unnecessary. Mr. Wannier

is entitled to participate in this rulemaking on behalf of Sierra Club without *pro hac vice* admission.

BRIEF SUMMARY OF THE AGENCY'S PROPOSAL

Background

The Agency's filings include a statement of reasons (SR) and technical support document (TSD). SR at 1. The Agency's proposal stems from the Board's adoption in 2006 of rules establishing limitations on mercury emissions from coal-fired electrical generating units in Illinois. SR at 1, citing Proposed New 35 Ill. Adm. Code 225, Control of Emissions from Large Combustion Sources, R06-25 (Dec. 21, 2006). These rules also provided an alternative to immediate compliance with the new mercury limitations—namely, the MPS, for coal-fired generating units in central and southern Illinois—in exchange for compliance with mercury control technology requirements and emission limits for sulfur dioxide (SO_2) and nitrogen oxides (NO_x). SR at 1-2.

In 2007, Dynegy Midwest Generation, Inc. (Dynegy) and Ameren Energy Resources (Ameren) filed notices of intent to demonstrate compliance with the MPS at the generating units they directly or indirectly owned. SR at 2. Dynegy's election gave rise to the Dynegy MPS Group, consisting of specified units at the Baldwin generating station; the Havana power station; the Hennepin generating station; the Vermilion power station; and the Wood River generating station. The Ameren plants, comprising the Ameren MPS Group, consist of various units at the Coffeen power station; the Duck Creek generating station; the E.D. Edwards power station; the Hutsonville power station; the Joppa generating station; the Meredosia power station; and the Newton generating station. *Id.* Since the MPS was adopted, power stations in both groups have ceased operating: in the Dynegy MPS Group, the Vermilion and Wood River power stations; and, in the Ameren MPS Group, the Hutsonville and Meredosia power stations. In addition, one or more units at the E.D. Edwards and Newton power stations are no longer in operation. *Id.*

In the latter part of 2013, Dynegy, through an indirect subsidiary, acquired from Ameren the five active generating stations in the Ameren MPS Group: Coffeen, Duck Creek, E.D. Edwards, Joppa, and Newton. SR at 2-3. As the owner of all power stations in both MPS groups, which remain subject to different MPS emission rates, Dynegy currently is the owner of all electrical generating units subject to the MPS. SR at 3; *compare* 35 Ill Adm. Code 225.233(e)(1), (e)(2) (Dynegy MPS Group rates) *with id.* at 225.233(e)(3) (Ameren MPS Group rates).

The Agency states that Dynegy approached it in November 2016 asking that the MPS be modified to consolidate the Dynegy and Ameren MPS Groups into a single MPS Group. This would "allow the company the flexibility of using its entire fleet to meet emission standards and to simplify compliance." SR at 3. Dynegy also requested that the MPS's annual and seasonal NO_x, and annual SO_2 emission rates be replaced with mass emission limits, to provide "additional operational flexibility and economic stability." *Id.* In response, the Agency adds, the Agency developed this rule proposal, which "address Dynegy's requests while safeguarding air quality." *Id.*

Proposed Rule Amendments

The Agency explains that, effective January 1, 2018, proposed new Section 225.233(a)(4) would merge the operational units at the eight active Dynegy power stations into a single MPS Group. SR at 5. Further, under proposed new Section 225.233(f), a transfer of ownership of any emissions source would move the sources into a new, separate MPS Group; the "transferor" MPS Group would then be subject to a reduced mass emissions cap, and a new mass emission limit would be developed for the "transferee" group. *Id.* at 5, 7. The proposed rules would adjust the mass emission limitations using allocation amounts specified for each facility based on historical emissions and the level of control at each facility. *Id.* at 7. The rules also include provisions for demonstrating compliance with emission limits when a facility is transferred in the middle of an annual or seasonal compliance period, and imposes notification, recordkeeping, and reporting requirements. *Id.* at 7-8.

The proposal also would eliminate rate-based emission standards in Section 225.233(e)(1)(A) and (B) and instead require the consolidated MPS Group, beginning January 1, 2018, to limit mass emissions across Dynegy's active fleet to no more than 25,000 tons per year for NO_x; keep NO_x emissions from May 1 to September 30 (*i.e.*, the ozone season) to 11,500 tons; and limit annual SO_2 emissions to no more than 55,000 tons. SR at 6. In addition, the proposed rules cap SO_2 emissions across all units of the Joppa power station at a total of 19,860 tons per year. *Id.* The latter provision aims to keep the Massac County area out of SO_2 nonattainment under federal regulations, based on the Joppa power station's emissions, and from having to undertake additional modeling to determine attainment status. *Id.*

Proposed Section 225.233(e)(1)(E) would impose additional requirements on the units in the combined MPS Group equipped with selective catalytic reduction to control NO_x emissions: Baldwin Units 1 and 2; Coffeen Units 1 and 2; Duck Creek Unit 1, E.D. Edwards Unit 3; and Havana Unit 9. SR at 6 The amended rules would require these units to comply with a combined NO_x average emission rate not exceeding 0.10 pound per million British thermal units (lb/mmBtu) during the ozone season. *Id.* The Agency explains that averaging is allowed only among generating units in the same MPS Group, which would be relevant if, for example, a new owner acquired two or more of the units with selective catalytic reduction controls. *Id.* The same proposed provision would require the existing NO_x control systems to be operated at all times in accordance with good operating practices while the associated generating unit is in operation, consistent with technological limitations and engineering and maintenance practices. *Id.* at 6-7. When the controls are not operational, the Agency adds, plant owners would have to minimize emissions "to the extent reasonably practicable." *Id.* at 7. According to the Agency, taken together, the seasonal emission rate and operational requirement ensure "continuation of a high level of NO_x control" by the units with NO_x controls. *Id.*.

Impact on Emissions

Regarding the proposal's environmental impact, the Agency maintains that combined allowable emissions would be lower under the proposed rules than under the current rules. SR at 9. In particular, Agency calculations based on currently applicable emission rates and rated capacity of each source in the combined MPS Group yield a total of 32,841 tons per year for NO_x, 13,766 tons for seasonal NO_x, and 66,354 tons per year for SO_2 (as compared to the proposed mass emission limits of 25,000 tons per year for NO_x, 11,500 tons for seasonal NO_x, and 55,000 tons per year for SO_2). SR at 9, citing TSD at 9-11. As for actual emissions, the Agency states that the proposal's impact is "difficult to assess" because of variables such as weather and the price of natural gas. *Id.*, citing TSD at 9. According to the Agency, while in recent years emissions from units in the two MPS Groups have been below the proposed mass emission limits, that situation could change if demand for electricity were to rise because of, for example, an increase in the market price of natural gas or changing weather conditions. *Id.* The Agency states that changes in the level of emissions could occur whether or not Dynegy's generating units are subject to the current rate-based standards or the proposed mass emission caps. *Id.*

Further, the Agency states that allowable NO_x and SO_2 emissions under the proposed amendments would be lower than the levels the Agency projected (based on a 2002 base year) in Illinois's State Implementation Plan (SIP) submittals under the current MPS rate-based standards. SR at 11 & n.3, citing TSD at 18-19. Those submittals anticipated 27,951 tons per year of NO_x emissions and 55,953 tons per year in SO_2 emissions from all units in the two current MPS Groups, as compared to the proposed mass emission limits of 25,000 tons per year and 55,000 tons per year, respectively. *Id.* at 11. From this, the Agency concludes that the proposed mass emission limitations would keep emissions of both pollutants below the level determined to be necessary to achieve the visibility improvement goals specified in the Agency's SIP submittals. *Id.*

SIP Revisions

The Agency intends to submit to the United States Environmental Protection Agency (USEPA) any amendments the Board adopts to the affected subsections of 35 Ill. Adm. Code 225.233. SR at 9-10. In 2012, USEPA approved as part of Illinois's Regional Haze SIP subsection (e) and other provisions of Section 225.233; accordingly, the Agency must submit to USEPA, as a revision to the Regional Haze SIP, subsequent amendments to the previously-approved subsections. *Id.* at 10. The Agency therefore requests that the Board treat one of the hearings in this proceeding as the hearing on a proposed SIP revision that is required under the federal Clean Air Act, and conform the corresponding notice of hearing to federal SIP notification requirements. *Id.*

The Agency states that USEPA, Region V, has reviewed the Agency's proposed amendments and indicated that the amendments are "likely approvable" as a revision to Illinois's Regional Haze SIP. *Id.* at 11.

BOARD DISCUSSION

Acceptance of the Proposal

The Board finds that the Agency's proposal satisfies the content requirements of the Board's procedural rules. *See* 35 Ill. Adm. Code 102.202. The Board therefore accepts the proposal for hearing. The Board will hold at least two hearings on the proposal under Section 28 of the Act. 415 ILCS 5/28 (2016). The Board directs the assigned hearing officers to schedule and proceed to hearing under the rulemaking provisions of the Act and the Board's procedural rules (415 ILCS 5/27, 28 (2016); 35 Ill. Adm. Code 102).

Motion for Expedited Review

The Board turns now to the Agency's motion for expedited review. Because the proposed amendments set an effective date of January 1, 2018—*i.e.*, the beginning of the next compliance period for annual NO_x and SO_2 emissions from Dynegy's fleet—the Agency contends expedited review is "necessary." Review Mot. at 2. The Agency maintains that promulgating the proposed rules "as expeditiously as possible," including by immediately proceeding to first-notice publication, would simplify compliance determinations for both the Agency and the affected sources. *Id.* at 2, 3. Doing so, the Agency continues, would also allow affected sources maximum time to plan for compliance with "whichever set of standards is in place in the upcoming year." *Id.* at 2. Accompanying the motion is an affidavit of Agency counsel attesting that the motion's factual statements are true. *Id.* at 4. Dynegy supports the motion to expedite, arguing that the proposed amendments should be adopted expeditiously to realize their benefits, including reducing emissions, simplifying compliance determinations, and providing operational flexibility, which is particularly needed given the trend of coal-fired generating unit and plant retirements. Dynegy Response at 1-9.

The Attorney General's Office (AGO Resp.) and four environmental organizations[1] (Env. Org. Resp.) filed responses opposing the motion for expedited review. These participants generally contend that the motion relies only on a self-imposed exigency (or "non-emergency") when in fact there are no dire circumstances warranting less than full and deliberative review; that the Board cannot lawfully adopt the amendments before their proposed effective date, January 1, 2018, because it would severely limit opportunities for public participation in a controversial rulemaking; and that the proposed rules would not reduce emissions or yield any environmental benefits. *See* AGO Resp. at 1-6; Env. Org. Resp. at 7-15.

Requests for expedited review are addressed in Section 101.512 of the Board's procedural rules (35 Ill. Adm. Code 101.512). In deciding a motion for expedited review, the Board considers 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 and decision deadlines. *Id.* at 101.512(c).

[1] The Environmental Defense Fund, the Environmental Law & Policy Center, the Respiratory Health Association, and the Sierra Club.

This rulemaking is not subject to a statutory deadline. As to material prejudice, the Agency chiefly relies on the proposed rules' January 1, 2018 effective date to contend that the Agency and Dynegy require as much lead time as possible to plan for compliance with whatever rules are in effect for the 2018 compliance period. This argument lacks pertinent supporting detail—such as why the Agency chose January 1, 2018 as the proposed effective date, as opposed to, for example, the beginning of the next compliance period. Without such detail, the Board finds that the motion does not offer sufficient grounds for expediting review—certainly not for completing this rulemaking by or immediately after the end of calendar year 2017. Accordingly, the Board denies the Agency's motion.

However, the Board believes the Agency's contention does support avoiding unnecessary delays in initiatating the statutorily prescribed notice and comment process. In particular, any prejudice that will arguably start to accrue once the amendments' proposed effective date passes can be mitigated by the Board proceeding to non-substantive first-notice publication of the Agency's proposal and promptly scheduling hearings. In addition, the Board may establish a new effective date, if appropriate, for any rule amendments the Board adopts.

This approach, which the Board has taken in prior matters, will not prejudice any participant in this rulemaking. *See, e.g.*, Proposed Site-Specific NO_x Rule Amendment Applicable to Saint-Gobain Containers, Inc. at 35 Ill. Adm. Code 217.152(b), R11-17, slip op. at 3-4 (Dec. 2, 2010). Proceeding immediately to first notice without substantive review of the proposed amendments and avoiding unnecessary administrative delays will not deny or limit opportunities for public comment; reduce the number of hearings held; or alter the nature, scope, and extent of the Board's review. The Board emphasizes that first-notice publication without substantive review is exactly that—not substantive—and in no way reflects Board agreement with the substantive merits of the proposal. Further, the Board is not bound to proceed with the Agency's proposal after first-notice publication; based on the hearings and public comments, the Board may proceed with a modified proposal or withdraw the proposed amendments altogether.

For these reasons, the Board denies the Agency's motion for expedited review. The Board, however, proceeds to first-notice publication without commenting on the proposal's substance. The Board also directs its hearing officers to schedule hearings promptly, taking account of available resources and statutory deadlines in other matters.

First Notice and Hearings

As stated above, the Board sends the proposed rules to first-notice publication without substantive review. After considering the issues raised at the hearings and in public comments, the Board will determine how to proceed consistent with statutory requirements.

Public Comment

The Board today submits the proposed rule amendments for first-notice publication under the Illinois Administrative Procedure Act (5 ILCS 100/5-40 (2016)) without commenting on the proposal's substantive merits. First-notice publication in the *Illinois Register* of these proposed

amendments starts a period of at least 45 days during which anyone may file a public comment with the Board. The docket number for this rulemaking, R18-20, should be indicated on the public comment.

Public comments must be filed with the Clerk of the Board. Public comments may be filed electronically through the Clerk's Office On-Line (COOL) on the Board's Web site at www.ipcb.state.il.us. In addition, public comments may be filed at the following address:

Pollution Control Board
Don A. Brown, Clerk
James R. Thompson Center
100 W. Randolph Street, Suite 11-500
Chicago, IL 60601

Any questions about electronic filing through COOL should be directed to the Clerk's Office at (312) 814-3629.

ORDER

The Board accepts the Agency's rulemaking proposal for hearing and directs the assigned hearing officers to schedule hearings. The Board denies the Agency's motion for expedited review. However, without substantive comment on the merits, the Board directs the Clerk to cause first-notice publication of the rule amendments in the addendum to this order in the *Illinois Register* under the Illinois Administrative Procedure Act (5 ILCS 5-5 *et seq.* (2016)). The proposed rule amendments are appended in the addendum to this opinion and order. Finally, the hearing officers are directed to avoid unnecessary delay in scheduling hearings and otherwise completing the record.

IT IS SO ORDERED.

Member Keenan abstained.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on October 19, 2017, by a vote of 4-0.

Don A. Brown

Don A. Brown, Clerk
Illinois Pollution Control Board