

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	
NO _x TRADING PROGRAM)	R 06-22
AMENDMENTS TO 35 ILL.)	(Rulemaking Air)
ADM. CODE PART 217)	

NOTICE

TO: Dorothy Gunn, Clerk	John Knittle, Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
James R. Thompson Center	2125 South First Street
100 W. Randolph Street, Suite 11-500	Champaign, Illinois 61820
Chicago, Illinois 60601	(VIA FIRST CLASS MAIL)
(VIA ELECTRONIC MAIL)	

SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have filed with the Office of the Pollution Control Board the RESPONSE TO MOTION FOR EXPEDITED REVIEW on behalf of the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

Date: March 27, 2006

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ Rachel L Doctors
Rachel L. Doctors
Assistant Counsel
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THIS FILING IS SUBMITTED ON
RECYCLED PAPER

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have served the attached **Response to Motion for Expedited Review** upon the person to whom it is directed, by placing it in an envelope addressed to:

TO: Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601
(VIA ELECTRONIC MAIL)

John Knittle, Hearing Officer
Illinois Pollution Control Board
2125 South First Street
Champaign, Illinois 60601
(VIA FIRST CLASS MAIL)

SEE ATTACHED SERVICE LIST

and mailing it by First Class Mail from Springfield, Illinois on March 27, 2006, with sufficient postage affixed.

/s/ Rachel L. Doctors

THIS FILING IS SUBMITTED ON RECYCLED PAPER

SERVICE LIST R 06-22

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**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

IN THE MATTER OF:)	
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NO _x TRADING PROGRAM:)	R06-22
AMENDMENTS TO 35 ILL.)	(Rulemaking – Air)
ADM. CODE PART 217)	

RESPONSE TO MOTION FOR EXPEDITED REVIEW

NOW COMES the Proponent, the Illinois Environmental Protection Agency (“Illinois EPA”), by one of its attorneys, Rachel L. Doctors, Assistant Counsel, and, pursuant to the Illinois Pollution Control Board (“Board”) Rules at 35 Ill. Adm. Code 101.500, 101.504 and 101.512, hereby responds to the Motion for Expedited Review (“motion for expedited review” or “motion”) filed by the Illinois Environmental Regulatory Group (“IERG”). The Illinois EPA requests that the Board enter an order denying IERG’s motion. In support of this request, the Illinois EPA states as follows:

I. THERE IS NO MATERIAL PREJUDICE IF THE MOTION IS DENIED

1. Section 101.512(b) of the Board’s procedural rules (35 Ill. Adm. Code 101.512(b)) provides in part that the Board will consider whether material prejudice will result if the motion for expedited review is either granted or denied. In its motion for expedited review, IERG argues that expediting the proposed amendments will not cause material prejudice to the Illinois EPA, but denying the motion may result in material prejudice to sources that wish to sell NO_x allowances. IERG motion, pp. 1, 2.

2. Contrary to IERG’s assertion, the Illinois EPA would be materially prejudiced if the motion were granted, and no material prejudice will befall any affected sources if the motion

is denied. Section 101.512(c) of the Board's procedural rules (35 Ill. Adm. Code 101.512(c)) states that the Board will grant a motion for expedited review consistent with available resources and decision deadlines. As the Board is well aware, the Illinois EPA has recently filed a very complex proposed rulemaking concerning mercury emissions. See, In the matter of: Proposed New 35 Ill. Adm. Code Part 225, Control of Emission from Large Combustion Sources, PCB R06-25. That proceeding will consume much of the Board's and Illinois EPA's resources over the next several months. If the Illinois EPA is required to divert its already stretched technical and legal staff to handle this matter on an expedited basis, it will adversely affect its ability to adequately present its rulemakings in other dockets.

3. Further, there will be several other major rulemakings, including the Clean Air Interstate Rule (CAIR) and NO_x SIP Call Phase II (engine/turbine) rulemakings, that the Illinois EPA anticipates filing with the Board in the coming weeks. Both of these will be filed by the Agency as "fast track" proceedings pursuant to Section 28.5 of the Act and these may be accepted and handled by the Board pursuant to fast track procedures. These matters will, therefore, further reduce the Board's and the Illinois EPA's available resources. These more pressing and immediate rulemakings will tax the Board's staff; actions unnecessarily adding to the Board's and Illinois EPA's short-term work load should be avoided.

4. Granting IERG's motion in this matter is unnecessary, since there is no compelling reason to expedite the rulemaking. The arguments presented by IERG in favor of granting the motion to expedite review are without merit and, in some cases, are misleading.

5. One assertion by IERG is that the amendments set forth in the proposed rulemaking should be implemented as soon as possible since the relevant amendments concerning allocations of NO_x allowances may impact the allocations for the 2006 ozone season.

IERG motion, p. 1. This is a dubious claim at best, since the 2006 season's allocations have already been made and cannot be undone. The 2006 ozone season ends on September 30, 2006. Even if this matter were expedited as requested, it is very possible that the amendments would still not be formally adopted before that date.

6. There are also some misrepresentations made by IERG as to whether the Illinois EPA may "confiscate" certain NO_x allowances. While those statements go to the substance of the rulemaking, and thus should not be argued in the context of the motion, it is sufficient to state that the Illinois EPA takes issue with IERG's characterizations since no such "confiscation" of allowances that have already been allocated to source accounts can take place. To state there is such a possibility is extremely misleading. Further, sources have no property rights to allowances that have not yet been allocated. See, 35 Ill. Adm. Code 217.456(d)(6).

7. However, IERG's interpretation of the amendments aside, its argument on this point is that prospective out-of-state buyers have access to the proposed amendments and may not be as likely to purchase NO_x allowances from Illinois units out of fear that the amendments may become rules and thus the threat of "confiscation" would be raised. IERG motion, p. 2.

8. This argument fails for several reasons. The statement made by IERG regarding the supposed mindset of prospective out-of-state buyers is pure speculation. The Board should not grant a motion based on the possible fears of parties that have not expressed such fears to the Board. Also, there should be no fear of "confiscation" since there is no possible taking of allowances in the manner described by IERG.

9. This speculation as to fear on the part of out-of-state buyers is taken one step further by IERG, when it asserts that allowances from Illinois units would have a lower value than NO_x allowances from units in other states. IERG motion, p. 2. For this expanded

speculation on the part of IERG to have any possible relevance, the Board would have to recognize that the rules covering NO_x allowances should be treated with the goal of increasing the value of those allowances as much as possible. Maximizing the value of the allowances is not a goal of Part 217, and any hypothetical economic impact on the allowances is not something that the Board could or should act upon as a basis for expediting review of the amendment proposal.

10. The concern expressed by IERG that sources that wish to sell NO_x allowances during the pendency of this rulemaking would be materially prejudiced by the denial of this motion is without validity. Pursuant to Section 217.466(a) of the Board's rules (35 Ill. Adm. Code 217.466(a)), the Illinois EPA must issue 2007 and 2008 allowances for Non-EGUs by March of 2007. It should be noted that, contrary to IERG's motion, there are no allowances to be given for the 2009 ozone season since the NO_x trading program will conclude after the 2008 ozone season. This will be further described in the Illinois EPA's proposal for the Clean Air Interstate Rule (one of the upcoming fast track rulemakings soon to be received by the Board).

11. Past 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. An Illinois source that wishes to sell its NO_x allowances during the time of the Board's review of this rulemaking will not be materially prejudiced, especially since the alleged prejudice could stem only from an alleged possible loss in value of the allowances. The current and proposed amended rules are not written to maximize the value of the allowances, and the rules are not intended to safeguard against any such loss in value (for whatever reason).

12. Further arguments by IERG that the value of NO_x allowances could possibly be

reduced unless the Board expedites its review of this proposal are similarly unpersuasive. While the Illinois EPA does not wish to intentionally adversely affect the value of the NO_x allowances, there is no requirement that it take action to actively maximize the value of the allowances. To expedite the review of this matter will not guarantee that the allowances' value will be increased (since the Illinois EPA will likely not act upon the 2007 and 2008 allowances until after the date these amendments would be adopted by a normal review by the Board), but it will almost certainly place the Board and the Illinois EPA at an administrative resource disadvantage in this and several other rulemakings.

13. Finally, IERG argues that since the initial rule for Part 217 was accepted pursuant to the fast track provisions, these amendments should also be handled as a fast track rulemaking. IERG motion, p. 4. This argument fails to acknowledge that while the initial rule did meet the criteria for a fast track rulemaking (i.e., a federally required rule that exposes the State to sanctions if not adopted), these amendments do not. The amendments are not being proposed pursuant to a *Federal Register* or a *Clean Air Act* requirement that obligates the State to act or US EPA will act in its stead. The amendments are not federally required, and there is no sanction exposure if the amendments are not adopted. Further, the Illinois EPA did not file this proposal pursuant to Section 28.5 of the Act and has not met the procedural requirements for "fast track" rulemaking.

WHEREFORE, for the reasons and arguments herein, the Illinois EPA respectfully requests that the Board deny the motion for expedited review.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Proponent

 /s/Rachel L. Doctors

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Dated: March 27, 2006