

ILLINOIS POLLUTION CONTROL BOARD

April 20, 2006

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 T.E. Johnson):

This matter is before the Board on a motion for expedited review filed by the Illinois Environmental Regulatory Group (IERG) on March 13, 2006. The Illinois Environmental Protection Agency (Agency) filed a response to the motion on March 27, 2006. On March 31, 2006, IERG filed a motion for leave to file a reply, accompanied by a reply to the Agency's response.

For the reasons more fully discussed presently, the Board reluctantly denies IERG's motion for expedited review.

BACKGROUND

On January 19, 2006, the Board received a rulemaking proposal submitted by the Agency pursuant to Section 27 and 28 of the Illinois Environmental Protection Act (Act) 415 ILCS 5/27 and 28 (2004). Included in this proposal are amendments to the regulations governing Nitrogen Oxide (NO_x) emissions found at 35 Ill. Adm. Code Part 217, Subparts A, T, U, and W.

The Agency proposes updates to Part 217 to reflect recent amendments made by the United States Environmental Protection Agency (USEPA) to the Code of Federal Regulations (C.F.R.) concerning several test methods and procedures, and by the Illinois General Assembly to Section 9.9 of the Act concerning the sale of NO_x allowances and the repeal of the stay provisions. Pet. at 19. The Agency proposes amendments intended to ensure that the NO_x budgets for both the Electrical Generating Units (EGU) and the non-EGUs are not reduced by low-emitters in a way that was unanticipated at the time the rules were originally adopted by the Board. *Id.* Finally, the Agency proposes clarifications to the dates and timing of allocations designed to simplify the administration of the NO_x Trading Program. *Id.* The Agency asserts that this proposal does not change the emission limits or require new control devices on affected sources. *Id.*

The Board accepted the proposal for hearing on February 2, 2006. In that order, the Board partially granted a motion to waive filing requirements, waiving the requirement that the Department of Natural Resources (DNR) be served an entire copy of the proposal, and the requirement that the Agency submit the original and nine copies of all documents upon which it relied. However, the Board also directed the Agency to file five copies of certain documents relied upon by the Agency in the preparation of the proposal not readily accessible to the Board.

PRELIMINARY MOTION

In its motion for leave to file a reply, IERG asserts that in its statement of reasons filed as part of the instant proposal, the Agency requests that the Board expeditiously adopt the rules. Mot. for Leave at 1. IERG asserts that it filed its motion for expedited review in keeping with the Agency's request to the Board. Mot. for Leave at 2. IERG contends that allowing it to file a reply in this case would avoid material prejudice that would result if the response were allowed to stand containing incorrect allegations of misrepresentations by IERG and a misunderstanding of the concept of material prejudice. *Id.*

No response to the motion for leave to file a reply has been filed by the Agency. If a party files no response to a motion within 14 days the party will be deemed to have waived objection to the granting of the motion. *See* 35 Ill. Adm. Code 101.500(d).

A moving party does not have the right to file a reply, except as permitted by the Board to prevent material prejudice. 35 Ill. Adm. Code 101.500(d). IERG asserts that material prejudice will result if no reply is filed. By not filing a response to the motion, the Agency has waived any objection thereto. Accordingly, the Board finds that material prejudice will result if the reply is not accepted, grants IERG's motion for leave to file a reply, and accepts the reply.

MOTION TO EXPEDITE

In the motion for expedited review, IERG asserts that the proposed amendments are primarily intended to clarify and update Part 217, and expediting review of the amendments will not cause material prejudice to the Agency. Mot. at 1. IERG contends that sources wishing to sell NO_x allowances during the period this rulemaking is pending would be materially prejudiced if the motion for expedited review is denied. Mot. at 2. IERG argues that the Agency's filing may discourage prospective out-of-state buyers of NO_x allowances from buying from Illinois units. *Id.*

IERG argues that if the Agency allocates NO_x allowances for 2007, 2008, and 2009 under the current rule, it may have to make an adjustment of the allocation to redistribute certain allowances, thus materially prejudicing the owners of the units involved since they would not be certain of the number of allowances that they could rely upon until some future date after the allocation. Mot. at 3.

IERG asserts that since the initial proposal of Part 217 proceeded under the State's fast-track rulemaking provisions, the current amendments clarifying and updating Part 217 should also be expedited. Mot. at 4.

AGENCY RESPONSE

The Agency argues that it would be materially prejudiced if the motion for expedited review was granted, and that no material prejudice will befall any affected source if the motion is denied. Resp. at 1-2. The Agency argues that if it is required to divert already stretched technical and legal staff to handle the instant matter on an expedited basis, it will adversely affect its ability to adequately present proposed rulemakings in other dockets. Resp. at 1. The Agency

notes that a recently-filed complex rulemaking concerning mercury emissions was filed under the State's fast-track rulemaking provisions, and that future proposed rulemakings concerning the Clean Air Interstate Rule and the NO_x SIP Call Phase II will also be filed under the fast-track provisions. *Id.*

The Agency asserts that the arguments presented by IERG are without merit and, in some cases, misleading. Resp. at 3. The Agency contends that allocations for the 2006 season have already been made and cannot be undone, and that no confiscation of allowances that have already been allocated to source accounts can take place. *Id.* Further, the Agency argues that the Board should not grant a motion to expedite based on the speculation of the mindset of prospective out-of-state buyers. *Id.*

The Agency notes that maximizing the value of the allowances is not a goal of Part 217, and that any hypothetical economic impact on the allowances is not something that the Board should act upon as a basis for expediting review of the amendment proposal. Resp. at 4. The Agency asserts that allowances for 2007 and 2008 will most likely not be issued until very near the regulatory deadline of March 2007, and that even without expediting the review of this rulemaking, the amendments will still likely be in place by that time. *Id.* Finally, the Agency argues that although the initial rule for Part 217 met the criteria for a fast track rulemaking, the instant proposal does not, because they are not being proposed pursuant to a *Federal Register* or *Clean Air Act requirement*. Resp. at 5.

IERG REPLY

In reply, IERG asserts that since the Agency filed the proposal and initially requested that the Board expeditiously adopt the rules, it is now inconsistent for the Agency to claim it would be materially prejudiced if the rulemaking proceeding is expedited. Reply at 1. IERG reiterates that the proposed changes will affect IERG member companies and should be in effect for the 2006 season. Reply at 2. IERG contends that the language of the proposal, when read literally, would require the Agency 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. Reply at 3.

IERG asserts that it is unclear whether the Agency could issue allowances for the years 2007 and forward during the pendency of this rulemaking, and unless the rulemaking is expedited, there is no assurance that the units will receive an allocation prior to the March 2007 deadline. Reply at 4. IERG argues that the Agency's repeated statements that maximizing the value of allowances are not the goal of the rule have no bearing on whether certain IERG members would be materially prejudiced by a failure to expedite this rulemaking. *Id.*

IERG maintains that 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 more settled and updated NO_x SIP call trading programs. Reply at 4. IERG concludes that since only one of the fast-track rulemakings discussed by the Agency has been filed, it would seem that the Agency and Board resources in

the short term would best be utilized by pursuing the rule at issue here as expeditiously as possible. Reply at 5.

DISCUSSION

Requests for expedited review are governed by Section 101.512 of the Board's rules, and must contain, *inter alia*, a complete statement of the facts and reasons for the request. *See* 35 Ill. Adm. Code 101.512. In acting on a motion for expedited review, the Board considers, at a minimum, all statutory requirements and whether or not material prejudice will result from the motion being granted or denied. 35 Ill. Adm. Code 101.512(b). In addition, the Board will only grant a motion for expedited review consistent with available resources. *See* 35 Ill. Adm. Code 101.512(c).

The Board denies IERG's motion for expedited review. The Board is unconvinced that material prejudice will result if expedited review is denied. As IERG outlines in its reply, IERG member companies may suffer uncertainty if expedited review is not granted. However, even considerable uncertainty does not rise to the level of material prejudice sufficient to allow the Board to grant IERG's request.

Further, the Board has received several rulemakings from the Agency that require the Board to proceed under very tight deadlines. Those rules include both the R06-25 fast-track rulemaking and other proposals under specific statutory deadlines. (*See* Clean Construction or Demolition Debris Fill Operations Under PA 94-272 (35 Ill. Adm. Code 1100), R06-10 (September 1, 2006 adoption deadline) and Standards and Requirements for Potable Water Well Surveys and for Community Relations Activities Performed in Conjunction with Agency Notices of Threats from Contamination Under PA 94-134: New 35 Ill. Adm. Code Part 1505, R06-23 (September 17, 2006 adoption deadline). The Board's calendar for May and June presently shows scheduled regulatory hearings on more than half of that period's workdays, and the Board's meeting and deliberative session calendars have regulatory adoption milestones that must be met by timely issuance of Board orders. The Board is also cognizant of the various rulemaking proposals yet to be filed by the Agency pursuant to the State's fast-track rulemaking provisions. Until those proposals arrive, the Board has no particulars as to when hearings will be necessary, although Section 28.5 provides that hearings must be held within a period running 55 through 100 days after a proposal's filing. -.

As noted, expedited review is granted consistent with available resources and decision deadlines. Even if the Board were to accept IERG's claim of material prejudice, the Board's limited resources in light of its current and future decision deadlines render the granting of a motion for expedited review unlikely in all but the most dire circumstances. However, finding that no material prejudice will result with the denial of the motion for expedited review, the Board does not have to consider, in this case, whether or not it has the available resources to grant expedited review.

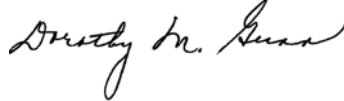
Even though ruling that the Board will not expedite this proceeding, the Board wishes to make clear that it intends to move this proceeding along as early as it can practicably do so.

CONCLUSION

The Board denies IERG's motion for expedited review of this rulemaking proposal. The hearing officer is directed to proceed to hearing in a manner consistent with the Board's available resources and deadlines.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 20, 2006, by a vote of 4-0.

A handwritten signature in cursive script, appearing to read "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board