

ILLINOIS POLLUTION CONTROL BOARD
April 2, 2009

IN THE MATTER OF:)
)
NITROGEN OXIDES EMISSIONS FROM) R08-19
VARIOUS SOURCE CATEGORIES:) (Rulemaking - Air)
AMENDMENTS TO 35 ILL. ADM. CODE)
PARTS 211 AND 217)

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

On May 9, 2008, the Illinois Environmental Protection Agency (Agency) filed a proposal under the general rulemaking provisions of Sections 27 and 28 of the Environmental Protection Act (Act) (415 ILCS 5/27, 28 (2006)). The Agency proposes to amend Parts 211 and 217 of the Board's air pollution regulations (35 Ill. Adm. Code 211, 217) to control nitrogen oxides (NO_x) emissions from various source categories. On March 20, 2009, the Agency filed a "Motion for Expedited Review" (Mot.). Below, the Board summarizes that motion before deciding it.

SUMMARY OF MOTION TO EXPEDITE

On May 9, 2008, the Illinois Environmental Protection Agency (Agency) filed a proposal under the general rulemaking provisions of Sections 27 and 28 of the Environmental Protection Act (Act) (415 ILCS 5/27, 28 (2006)). Mot. at 1 (¶1). Generally, the Agency proposes to amend Parts 211 and 217 of the Board's air pollution regulations (35 Ill. Adm. Code 211, 217) to control nitrogen oxides (NO_x) emissions from various source categories such as industrial boilers, process heaters, glass melting furnaces, cement kilns, lime kilns, furnaces used in steelmaking and aluminum melting, and fossil fuel-fired stationary boilers. *Id.* The Board has held three hearings on this proposal: the first on October 14, 2008, in Springfield; the second on December 9 and 10, 2008, in Chicago; and the third on February 3, 2009, in Edwardsville. *Id.*

The Agency states that Section 110 of the Clean Air Act (CAA) requires states to submit to the United States Environmental Protection Agency (USEPA) for its approval state implementation plans (SIP) "that provide for the attainment and maintenance of standards established by USEPA through control programs directed to sources of the pollutants involved." Mot. at 1-2 (¶2), citing 42 U.S.C. § 7410. The Agency further states that "[t]he CAA also provides for the State to address emissions sources on an area-specific basis though such requirements as reasonably available control measures (RACM) and reasonably available control technology (RACT)." Mot. at 2(¶2), citing 42 U.S.C. §§ 7502, 7511a. The Agency also states that,

[f]or each nonattainment area, the CAA requires the State to demonstrate that it has adopted 'all reasonably available control measures as expeditiously as possible (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available

control technology) and shall provide for attainment of the nation primary ambient air quality standards.’ Mot. at 2 (¶¶2, 5), citing 42 U.S.C. § 7502(c)(1).

The Agency indicates that its proposal is intended to meet Illinois’ obligation under the CAA to submit a State Implementation Plan (SIP) addressing major sources of NO_x in areas designated as nonattainment with respect to National Ambient Air Quality Standards (NAAQS). Mot. at 1 (¶1), citing 42 U.S.C. §§ 7502, 7511a. NO_x is one of the two primary precursors to the formation of ozone, and NO_x is also a precursor to the formation of fine particulate matter (PM_{2.5}). Mot. at 2 (¶3). USEPA has designated two areas of Illinois as nonattainment for both ozone¹ and PM_{2.5}². Mot. at 2, 3 (¶¶4, 7, 8), citing 40 C.F.R. 81.314.

The Agency characterizes RACT as a “subset” of RACM. Mot. at 2 (¶6). The Agency states that “RACT is defined as the lowest emission limitation that a particular source can meet by applying a control technique that is reasonably available considering technological and economic feasibility.” *Id.*, citing 44 Fed. Reg. 53762 (Sept. 17, 1979). The Agency further states that the CAA requires Illinois “to adopt RACT rules for all areas designated nonattainment for ozone and classified as moderate or above.” Mot. at 2 (¶6), citing 42 U.S.C. § 7511a.

The Agency argues that, by September 15, 2006, Illinois was required to submit “a SIP demonstrating that sources specified under the CAA were subject to RACT requirements.” Mot. at 3 (¶9), citing 70 Fed. Reg. 71612, 71652 (Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard; Final Rule). The Agency states that, on March 24, 2008, USEPA found “that Illinois, among other states, failed to make a RACT submittal required under Part D of Title I of the CAA for its two moderate nonattainment areas.” Mot. at 4 (¶11), citing 73 Fed. Reg. 15416 (Mar. 24, 2008); *see also* Mot., Att. A (letter from USEPA Regional Administrator). The Agency further states that “[s]uch a finding starts the 18-month emission offset sanctions clock and 24-month highway funding sanctions clock . . . and the 24-month clock for the promulgation by USEPA of the Federal Implementation Plan” Mot. at 4 (¶11), citing 42 U.S.C. §§ 7509(a), (b), 7410(c).

The Agency states that, by letter dated March 12, 2009, USEPA reiterated that Illinois must still “address the findings of failure to submit the required ozone SIP element previously identified by the USEPA. . . .” Mot. at 4 (¶12), citing 73 Fed. Reg. 15416; *see* Mot., Att. B (letter from USEPA Acting Regional Administrator). The Agency states that USEPA’s letter

¹ For the eight-hour ozone NAAQS, the following jurisdictions comprise the greater Chicago nonattainment area: Cook, DuPage, Kane, Lake, McHenry, and Will Counties, Aux Sable and Goose Lake Townships in Grundy County, and Oswego Township in Kendall County. Mot. at 3 (¶7). The following counties comprise the Metro-East/St. Louis nonattainment area: Jersey, Madison, Monroe, and St. Clair. *Id.*

² For the PM_{2.5} NAAQS, the following jurisdictions comprise the greater Chicago nonattainment area: Cook, DuPage, Kane, Lake, McHenry, and Will Counties, Aux Sable and Goose Lake Townships in Grundy County, and Oswego Township in Kendall County. Mot. at 3 (¶8). The following jurisdictions comprise the Metro-East/St. Louis nonattainment area: Madison, Monroe, and St. Clair Counties and Baldwin Township of Randolph County. *Id.*

emphasized the risk of sanctions and requested that the Agency and the Board expedite their processes to adopt the ozone SIP and avoid those sanctions. Mot. at 4 (¶13), citing Mot., Att. B.

Specifically, the Agency claims “that if, by September 24, 2009, Illinois has not submitted all of the required SIP elements,” the new source offset sanction will apply in the two nonattainment areas, making it more difficult for new sources to locate there. Mot. at 5 (¶15). The Agency further claims that, if Illinois has not submitted the required SIP elements within six months after imposition of the first sanction, then Illinois will suffer highway sanctions. Mot. at 5 (¶16), citing 40 C.F.R. 52.31. The Agency also claims that, if Illinois has not submitted the required SIP elements and received USEPA approval by March 24, 2010, then USEPA may promulgate a FIP to replace the SIP elements that Illinois lacks. Mot. at 5 (¶17).

The Agency concludes by arguing that, “due to the impending date of September 24, 2009, so as to avoid the imposition of sanctions, the regulations need to be adopted in an expedited manner.” Mot. at 6 (¶21). Specifically, the Agency requests that the Board proceed to First Notice as expeditiously as possible. Mot. at 6 (¶23), citing 5 ILCS 100/1-1 *et seq.* (Illinois Administrative Procedure Act). The Agency expresses the belief that “the Board possesses the information necessary for the Board to proceed to First Notice. . . .” Mot. at 6 (¶24). In the event that the Board requires additional information, the Agency states that it “will fully cooperate to expeditiously provide the same to the Board and its hearing officer.

DISCUSSION AND CONCLUSION

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).

Based on the circumstances described in the Agency’s motion, the Board finds that undue delay would result from awaiting the expiration of the 14-day response period. In this regard, the Board notes that, on March 24, 2009, in order to avoid undue delay, the hearing officer issued an order directing any participant wishing to respond to the Agency’s motion to do so on or before March 30, 2009.

Before deciding the motion, however, that Board notes that it received from Midwest Generation, LLC (Midwest Generation) on March 20, 2009, a response to the Agency’s motion (MG Resp.). Midwest Generation states that it has participated actively with both the Agency and the Board in this rulemaking. MG Resp. at 1. Midwest Generation further states that it “supports the Agency’s Motion to Expedite Review and urges the Board to adopt the proposal as it has been amended over the course of the rulemaking as soon as possible.” *Id.*

The Board also notes that it received from the Illinois Environmental Regulatory Group (IERG) on March 26, 2009, a response to the Agency's motion (IERG Resp.). IERG states that it "supports the Illinois EPA's Motion for Expedited Review." IERG Resp. at 2.

Section 101.512 of the Board's rules addresses requests for expedited review. *See* 35 Ill. Adm. Code 101.512. Such requests must include, among other elements, "a complete statement of the facts and reasons for the request." 35 Ill. Adm. Code 101.512(a). 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).

In denying a recent motion for expedited review filed by the City of Galva, the Board stated that its "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." In the Matter of: City of Galva Site-Specific Water Quality Standard for Boron Discharges to Edwards River and Mud Creek: 35 Ill. Adm. Code 303.447 and 303.448, R9-11, slip op. at 3 (Feb. 5, 2009). The Board can only conclude, however, that USEPA's implementation deadline and the risk of federal sanctions constitute "dire circumstances." The Agency's motion for expedited review is granted. The Board will proceed to adopt a first-notice opinion and order in this rulemaking as expeditiously as it able to do so with its current resources.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 2, 2009, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board