

ILLINOIS POLLUTION CONTROL BOARD

November 5, 2009

IN THE MATTER OF:)
)
PROPOSED AMENDMENTS TO TIERED) R09-9
APPROACH TO CORRECTIVE ACTION) (Rulemaking – Land)
OBJECTIVES (35 ILL. ADM. CODE 742))

ORDER OF THE BOARD (by T.E. Johnson):

The Board today grants the motion of the Illinois Environmental Protection Agency (IEPA) to stay a portion of this rulemaking, as described below. The stay will last through November 5, 2010, unless the Board issues an order terminating the stay sooner. In this order, the Board provides a brief procedural history of this proceeding before discussing and ruling on IEPA's motion.

PROCEDURAL HISTORY

On September 3, 2008, the Board received a rulemaking proposal from IEPA to amend the Board's rules concerning the Tiered Approach to Corrective Action Objectives (TACO). The proposal was docketed as R09-9, Proposed Amendments to Tiered Approach to Corrective Action Objectives (35 Ill. Adm. Code 742). On September 16, 2008, the Board accepted IEPA's proposal for hearing. The Board has held two public hearings, one in Springfield on January 27, 2009, and the other in Chicago on March 18, 2009. The Board has received six public comments to date. The proposal has not been to first notice under the Administrative Procedure Act (5 ILCS 100/5-40 (2008)).

On October 5, 2009, IEPA filed a motion for partial stay (Mot.) of this proceeding. On October 19, 2009, the Illinois Environmental Regulatory Group (IERG) filed a response (Resp.) to IEPA's motion.

DISCUSSION

IEPA Motion

IEPA asks the Board to stay only a portion of this rulemaking proceeding. Mot. at 1. Specifically, IEPA requests a stay of the "proposed amendments that pertain to vapor intrusion." *Id.* at 2. IEPA states that after the second hearing and the pre-first notice public comment period, IEPA was contacted by representatives of Region 5 of the United States Environmental Protection Agency (USEPA):

who expressed serious concerns with part of Illinois EPA's proposal. USEPA indicated that they believe our proposal is inconsistent with national policy and inconsistent with the way the Johnson and Ettinger model is supposed to operate.

Because Illinois EPA values USEPA's expertise and takes USEPA's concerns seriously, we have been working diligently to understand and evaluate their issues of concern. *Id.* at 1.

IEPA seeks this partial stay "so that we can fully evaluate USEPA's concerns, the impact of those concerns on the Illinois EPA proposal, and the latest research findings on vapor intrusion." *Id.* at 1-2.

IEPA identifies its proposed rule language that would be subject to the stay. Mot. at 2-9. IEPA asks that the stay be granted for a period of up to twelve months, during which time IEPA would provide status reports every three months. *Id.* at 2. If IEPA completes its evaluation before the stay expires, IEPA agrees to "file an interim status report with the Board indicating that no further time is necessary in the stay of the proceedings." *Id.* Finally, IEPA requests that the Board "allow the remainder of the proposed amendments to continue forward to first notice." *Id.*

IERG Response

IERG supports IEPA's motion to stay the portion of the rulemaking proposal pertaining to vapor intrusion. Resp. at 1. IERG states that it understands the "importance of Illinois' regulatory structure being considered favorably by USEPA, with regard to the science underlying the proposal." *Id.* at 1-2.

However, IERG reiterates its concerns about IEPA's remaining proposed amendments and "the implications associated with moving the amendments to first notice." Resp. at 1. IERG asks that the Board, in determining whether to propose the remainder of IEPA's language for first notice, give due consideration to the concerns raised by IERG in the pending rulemaking docketed as R08-18, Proposed Amendments to Groundwater Quality Standards, 35 Ill. Adm. Code 620. Specifically, IERG identifies its R08-18 Part 620 comments regarding the "process relied upon by the Illinois EPA for selecting the various chemicals for regulation" and whether some chemicals would be "better regulated on a site-specific basis, rather than requiring state-wide regulation." Resp. at 2 (referring to IERG public comment filed Sept. 12, 2008, in R08-18). IERG states that in the R09-9 TACO rulemaking, "new chemicals have been added to the appendices, based upon their having been selected for regulation in the [R08-18] Part 620 rulemaking." Resp. at 2.

Board Analysis

The Board's procedural rules provide that "[m]otions to stay a proceeding must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed" 35 Ill. Adm. Code 101.514(a). The decision to grant or deny a motion for stay is "vested in the sound discretion of the Board." See People v. State Oil Co., PCB 97-103, slip op. at 2 (May 15, 2003), *aff'd sub nom. State Oil Co. v. PCB*, 822 N.E.2d 876, 291 Ill. Dec. 1 (2nd Dist. 2004).

IEPA seeks a partial stay of the R09-9 TACO rulemaking to give itself time to evaluate serious concerns raised by USEPA over IEPA's proposed vapor intrusion rules. IERG supports IEPA's motion. No other participant filed a response to the motion, and the failure to respond to a motion constitutes waiver of objection to the Board granting the motion. *See* 35 Ill. Adm. Code 101.500(d). Under these circumstances and in the interest of conserving resources, the Board grants IEPA's motion to stay the portion of the rulemaking concerning vapor intrusion, as specified by IEPA.

The balance of IEPA's proposed rule language is not subject to the stay. As IERG requests, the Board's consideration of that language will take into account the concerns of IERG expressed in the R08-18 Part 620 rulemaking. To that end, the Board directs the Clerk to make IERG's public comment from the R08-18 rulemaking an attachment to IERG's response to IEPA's motion for partial stay in the R09-9 TACO rulemaking.

The partial stay of the R09-9 rulemaking proceeding will last through November 5, 2010, unless the Board terminates the stay earlier by order. IEPA must file four status reports during the term of the stay, one every three months, detailing the progress of IEPA's evaluation. However, if IEPA wishes the Board to terminate the stay before November 5, 2010, IEPA must file a motion to that effect, accompanied by a status report.

CONCLUSION

The Board grants IEPA's unopposed motion for partial stay of the R09-9 TACO rulemaking. The stay will be in effect through November 5, 2010, unless the Board issues an order terminating the stay earlier. IEPA must file status reports during the term of the stay as directed above.

IT IS SO ORDERED.

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



John Therriault, Assistant Clerk
Illinois Pollution Control Board