

ILLINOIS POLLUTION CONTROL BOARD
September 16, 2010

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 A.S. Moore):

On August 19, 2010, the Illinois Environmental Protection Agency (Agency or Illinois EPA) filed a “Motion to Withdraw Proposal and Close Docket.” On September 2, 2010, the Illinois Environmental Regulatory Group (IERG) filed a response to the Agency’s motion. After providing an abbreviated procedural history of this rulemaking, the Board summarizes the Agency’s motion and IERG’s response before granting the Agency’s motion to withdraw and also denying two pending motions as moot.

ABBREVIATED PROCEDURAL HISTORY

On January 19, 2006, the Agency filed a rulemaking proposal. In an order dated February 2, 2006, the Board accepted the proposal for hearing.

On March 13, 2006, IERG filed a motion for expedited review, accompanied by its initial comments on the Agency’s proposal. On March 27, 2006, the Agency filed its response. On March 31, 2006, IERG filed a motion for leave to reply to the Agency’s response, accompanied by its reply. In an order dated April 20, 2006, the Board denied IERG’s motion for expedited review.

In an order dated October 29, 2007, the hearing officer noted that the Board had denied the motion for expedited review and that the Board since that denial had received no request to schedule hearing or take any other action. NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217, R06-22 (Oct. 29, 2007). The order directed the Agency as proponent to file within 21 days a brief status report on its readiness to schedule hearing. *Id.* On November 20, 2007, the Agency filed a motion for leave to file *instanter*, accompanied by its status report. In that status report, the Agency stated that it

is in the process of evaluating whether the proposed amendments are now moot, or whether some of the amendments would best be addressed in an upcoming rulemaking concerning the transition of both industrial boilers and utility boilers from the NO_x SIP Call trading program to the Clean Air Interstate Rule (CAIR) trading program. The Illinois EPA is planning to proceed with that rulemaking early this winter, and, at that time it will be in the best position to determine whether any outstanding issues from R06-22 would be best addressed in that rulemaking or whether the above proposal, in an amended format, should proceed.

NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217, R06-22
(Nov. 20, 2007).

In an order dated May 13, 2008, the hearing officer noted that there had been no substantive activity in the docket since the Agency's November 20, 2007, status report. The order directed the Agency to file within 30 days a status report "addressing whether the Agency has determined whether to proceed in this docket with an amended proposal or to address the proposed amendments in another docket." NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217, R06-22 (May 13, 2008). On June 25, 2008, the Agency filed a motion for leave to file *instanter*, accompanied by its status report. In the report, the Agency stated that it

is in the process of evaluating whether the proposed amendments are now moot, or whether some of the amendments would best be addressed in an upcoming rulemaking concerning the transition of both industrial boilers and utility boilers from the NO_x SIP Call trading program to the Clean Air Interstate Rule (CAIR) trading program. The Illinois EPA is planning to proceed with that rulemaking this Fall, and, at that time it will be in the best position to determine whether any outstanding issues from R06-22 would be best addressed in that rulemaking or whether the above proposal, in an amended format, should proceed. NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217, R06-22 (June 25, 2008).

In an order dated July 2, 2008, the hearing officer noted the Agency's filing of the June 25, 2008 status report and directed the Agency within 120 days "to file a brief status report addressing whether the Agency has determined whether to proceed in this docket with an amended proposal or to address the proposed amendments in another docket." NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217, R06-22 (July 2, 2008). On October 30, 2008, the Agency filed a status report in which it stated that,

[o]n July 11, 2008, the Clean Air Interstate Rule ("CAIR") rule was vacated by the United States Court of Appeals; however the requirements to address interstate transport from large NO_x sources remain. North Carolina v. EPA, No. 05-1244 (D.C. Cir. July 2008). The decision left the NO_x SIP Call trading program intact. The United States Environmental Protection Agency ("USEPA") requested a rehearing on September 24, 2008, and the court has not yet ruled on that request.

In light of the above decision and the possible rehearing, the Illinois EPA is in the process of evaluating whether the proposed amendments affecting the NO_x SIP Call trading program are now moot, or whether some of the amendments would best be addressed when the Illinois EPA addresses its obligations to mitigate interstate transport. The timetable for addressing that requirement is uncertain at this time; the Illinois EPA will be in a better position to determine its timetable when the court rules on USEPA's and other petitioners' requests for rehearing. NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217, R06-22 (Oct. 30, 2008).

In an order dated November 7, 2008, the hearing officer noted the Agency's filing of the October 30, 2008 status report and directed the Agency by March 9, 2009, "to file a brief status report addressing whether it has determined that proposed amendment affecting the NO_x SIP Call are moot or whether it would deal with the proposed amendments in meeting its obligations to mitigate interstate transport." NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217, R06-22 (Nov. 7, 2008). On March 9, 2009, the Agency filed a status report in which it stated that

[o]n July 11, 2008, the Clean Air Interstate Rule ("CAIR") rule was vacated by the United States Court of Appeals; however the requirements to address interstate transport from large NO_x sources remain. North Carolina v. EPA, No. 05-1244 (C.A.D.C. Cir. July 2008). The decision left the NO_x SIP Call trading program intact. The United States Environmental Protection Agency ("USEPA") requested a rehearing on September 24, 2008. On December 23, 2008, the court reversed in part its earlier decision and remanded the CAIR rule to USEPA without *vacatur*. North Carolina v. EPA, 550 F.3d 1176 (C.A.D.C. 2008). This opinion means that the CAIR rule remains in effect.

In light of the above decision and the reinstatement of the obligation for meeting interstate NO_x reductions for industrial boilers, the Illinois EPA is planning to replace Subpart U with a new rule and withdraw this rulemaking, R06-22, at that time. The new rulemaking will integrate the Non-EGUs [Electrical Generating Units] into the CAIR rule. The timetable for addressing that requirement is expected to be the Spring of 2009.

On August 3, 2009, IERG filed a motion for emergency rule and a motion for expedited consideration of its alternate proposal. In an order dated August 6, 2009, the Board reserved ruling on the motions but directed participants to file responses to the motions no later than Thursday, August 13, 2009, and directed IERG to file a reply, if it wished to do so, no later than Monday, August 17, 2009.

On August 11, 2009, the Board received responses to IERG's motion from Prairie Power, Inc.; the Argo Plant of Corn Products International, Inc.; the Chemical Industry Council of Illinois; and the Illinois Chamber of Commerce. On August 12, 2009, the Board received responses from the Illinois Manufacturers' Association; Flint Hills Resources, LP; and Duke Energy Generation Services, Inc. On August 13, 2009, the Board received responses from Bunge North America, Inc.; CITGO Petroleum Corporation; Archer Daniels Midland Company; the Illinois Petroleum Council; Marathon Petroleum Company, LLC; and the Agency. On August 17, 2009, IERG filed its reply to the Agency's response to the motions.

In an order dated August 20, 2009, the Board denied the motion for emergency rule and also denied the motion for expedited consideration. The Board's order also directed the Agency to file a status report on or before October 19, 2009.

On September 14, 2009, IERG filed a motion for reconsideration and clarification of the Board's August 20, 2009 order. Pursuant to an extension granted by the hearing officer on October 2, 2009, the Agency on October 14, 2009 filed a motion to file *instanter* and for extension of the deadline to respond to IERG's motion for reconsideration and clarification. On October 15, 2009, IERG filed a motion to withdraw a portion of its pending motion for reconsideration and clarification. Pursuant to an extension granted by the hearing officer on October 23, 2009, the Agency on October 26, 2009, filed its response to IERG's motion for reconsideration and clarification.

On October 21, 2009, the Agency filed a motion to file *instanter* and for an extension of the deadline to file its status report. In an order dated October 23, 2009, the hearing officer granted the motion for leave to file *instanter* and also extended to November 10, 2009, the Agency's deadline to file the status report. On November 10, 2009, the Agency filed a motion for an extension to December 22, 2009, of the deadline to file its status report. In an order dated November 25, 2009, the hearing officer granted the Agency's motion and extended the Agency's deadline to file its status report to December 22, 2009.

On December 18, 2009, the Agency filed its status report, which stated that the Agency

plans to file a Motion to withdraw docket R06-22 in January 2010. The amendments proposed in the Illinois EPA's initial proposal of updating NO_x allocations under the NO_x State Implementation Plan ("SIP") Call, provisions for low mass emitters and other amendments are now moot, because USEPA is no longer administering the NO_x SIP Call program. . . . At the same time that the Illinois EPA files its Motion to Withdraw docket R06-22, it will also file a new proposal sunsetting only the trading portions of the NO_x SIP Call Trading program, and retaining the monitoring, recordkeeping and reporting elements as required by the Clean Air Interstate Rule. NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217, R06-22 (Dec. 18, 2009).

In an order dated May 5, 2010, the hearing officer directed the Agency by June 15, 2010 to file an additional status report. On June 15, 2010, the Agency filed a status report stating that it was still developing a motion to withdraw rulemaking docket R06-22 and a new rulemaking proposal, both of which it intended to file in the summer of 2010. NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217, R06-22 (June 15, 2010).

On August 19, 2010, the Agency filed its motion to withdraw its rulemaking proposal and close this docket (Mot.). On September 2, 2010, IERG filed its response to the Agency's motion (Resp.).

AGENCY MOTION TO WITHDRAW

The Agency states that the Board adopted Subparts T, U, and W of Part 217 of its air pollution regulations on December 21, 2000; March 1, 2001; and April 5, 2001, respectively. Mot. at 1; *see* 35 Ill. Adm. Code 217.400-217.410, 217.450-217.482, 217.750-217.782; *see also*

Proposed New 35 Ill. Adm. Code 217. Subpart T, Cement Kilns, and Amendment to 35 Ill. Adm. Code 211 and 217, R01-11 (Mar. 1, 2001); Proposed New 35 Ill. Adm. Code 217. Subpart U, NO_x Control and Trading Program for Specified NO_x Generating Units, Subpart X, Voluntary NO_x Emissions Reduction Program, and Amendments to 35 Ill. Adm. Code 211, R01-17 (Apr. 5, 2001); Proposed New 35 Ill. Adm. Code 217. Subpart W, The NO_x Trading Program for Electrical Generating Units, and Amendments to 35 Ill. Adm. Code 211 and 217, R01-9 (Dec. 21, 2000). The Agency further states that Subparts T, U. and W regulate NO_x emissions from large cement kilns, industrial boilers (non-EGUs), and utility boilers (EGUs), respectively. Mot. at 1. The Agency claims that “Illinois was required to regulate these sources pursuant to the NO_x SIP [State Implementation Plan] Call.” *Id.*, citing 63 Fed. Reg. 57356 (Oct. 27, 1998). The Agency reports that the United States Environmental Protection Agency (USEPA) approved the adopted Subparts T, U, and W as part of Illinois’ SIP for ozone on November 8, 2001. Mot. at 1, citing 66 Fed. Reg. 56449 (Nov. 8, 2001).

The Agency states that its proposal in this docket sought to amend authorities including Subparts T, U, and W by proposing “to amend applicable test methods and monitoring provisions, update Subpart U to reflect changes of ownership and fixed allocations, simplify the administration of the program, and address the sale of NO_x allowances for Non-EGUs.” Mot. at 1. The Agency notes that, on May 12, 2005, USEPA adopted the Clean Air Interstate Rule (CAIR), which had “the purpose of replacing the NO_x SIP Call Trading Program beginning with the 2009 control period and added two new trading programs addressing annual emissions of NO_x and sulfur dioxide for EGUs.” *Id.* at 1-2, citing 70 Fed. Reg. 25162 (May 12, 2005). The Agency further notes that the Board adopted regulations implementing CAIR, which USEPA approved. Mot. at 2, citing Proposed New Clean Air Interstate Rule (CAIR) SO₂, NO_x Annual and NO_x Ozone Season Trading Programs, 35 Ill. Adm. Code 225, Subparts A, C, D, E and F, R06-26 (Aug. 23, 2007); 72 Fed. Reg. 58528 (Oct. 16, 2007).

The Agency argues that CAIR distinguishes non-EGUs from EGUs. Mot. at 2. Specifically, the Agency argues that “[s]tates are required to meet a NO_x emissions budget equal to the one set under the NO_x SIP Call for Non-EGUs but are not required to include Non-EGUs in a seasonal ozone NO_x trading program, and are only allowed to include Non-EGUs in the annual NO_x trading program as opt-in units.” *Id.* The Agency further argues that “CAIR did not tighten the NO_x emissions requirements as they apply to the seasonal emissions of Non-EGUs and did not require the implementation of an annual program for these sources.” *Id.*

The Agency states that, on July 11, 2008, while this docket was pending, “the United States Court of Appeals vacated the CAIR rule in its entirety and remanded the rule back to USEPA for revision.” Mot. at 2, citing North Carolina v. USEPA, 531 F.3d 896 (C.A.D.C. Cir. 2008). The Agency further states that the Court’s opinion provided that, “pending the remand of the CAIR program to USEPA, the provisions of the NO_x SIP Call Trading Program would remain in place.” Mot. at 2, citing North Carolina v. USEPA, 531 F.3d 896 (C.A.D.C. Cir. 2008). The Agency reports that, as a result of this decision, it did not propose to address non-EGUs under CAIR because the appellate court had vacated the rule. However, the Agency notes that, pursuant to a petition for rehearing, the Court on December 23, 2008, granted rehearing “and unvacated CAIR with implementation to begin with the original control period in 2009.”

Mot. at 3; citing North Carolina v. USEPA, 550 F.3d 1176 (C.A.D.C. Cir. 2008). The Agency states that, as a result of this subsequent decision, it “also did not proceed with the clean-up of the older NO_x SIP Call Trading Program as proposed in R06-22 because USEPA stated that it would no longer allocate NO_x allowances or administer the NO_x SIP Call Trading Program.” Mot. at 3.

The Agency states that it then “contacted USEPA about compliance with the NO_x Budget for Non-EGUs because the NO_x SIP Call Trading Program was no longer operating and the future of the new NO_x Trading Program (CAIR) is extremely uncertain.” Mot. at 3. The Agency reports that USEPA’s response in a letter dated September 24, 2009, indicated that it would no longer implement the NO_x SIP Call. *Id.*; see Mot., Att. A at 2 (USEPA letter). The Agency also reports that USEPA responded “that Non-EGUs would no longer be required to hold NO_x allowances after the 2008 control period so long as state could demonstrate that the Non-EGU portion of the NO_x Budget was being met by retention of the existing requirements for monitoring, reporting and recordkeeping.” Mot. at 3; see Mot., Att A at 2.

The Agency reports that the amendments proposed in this docket “are now moot because USEPA is no longer administering the NO_x SIP Call program.” Mot. at 3. The Agency states that “[a]ny amendments to the NO_x SIP Call Program are, therefore, unnecessary and not federally approvable.” *Id.* Arguing that “the original purpose of the docket has been rendered moot by the CAIR rule, the Illinois EPA is requesting that its proposal be withdrawn and that the docket be closed.” *Id.* at 3-4. In this regard, the Agency notes that, “[a]long with this Motion [to Withdraw], the Illinois EPA is submitting a new regulatory proposal sunsetting the provisions in Subpart U that USEPA is no longer administering and retaining those provisions of the Subpart U that are necessary to demonstrate compliance with the NO_x Emissions Budget.” *Id.* at 4; see Regulatory Proposal for NO_x Trading Program Sunset Provisions for Non-Electric Generation Units (“Non-EGU.”): Amendments to 35 Ill. Adm. Code Part 217, Subpart U, R11-8, slip op. at 2-3 (Sept. 2, 2010) (accepting proposal for hearing).

IERG RESPONSE

IERG notes the filing of the Agency’s motion to withdraw based on the Agency’s position that the “original purpose of the docket has been rendered moot by the CAIR rule.” Resp. at 1, citing Mot. at 3-4. IERG further notes the Agency’s filing of “a new regulatory proposal sunsetting the provisions of the Subpart U that USEPA is no longer administering and retaining the provisions in Subpart U that are necessary to demonstrate compliance with the NO_x Emissions Budget.” Resp. at 1, citing Mot. at 4; Regulatory Proposal for NO_x Trading Program Sunset Provisions for Non-Electric Generation Units (“Non-EGU.”): Amendments to 35 Ill. Adm. Code Part 217, Subpart U, R11-8.

IERG cites the Agency’s statement that the Agency had asked USEPA “about compliance with the NO_x Budget for Non-EGUs because the NO_x SIP Call Trading Program was no longer operating and the future of the new NO_x Trading Program (CAIR) is extremely uncertain.” Resp. at 2, citing Mot. at 3. IERG notes USEPA’s response, which states in pertinent part as follows:

[t]he emission budget requirements of the NO_x SIP Call regulations remain in effect. If Illinois chooses to include only EGUs in the CAIR NO_x Ozone Season Trading Program, Illinois will need to demonstrate that sufficient restrictions on non-EGU emissions are in place to assure the continued satisfaction of the emission budget requirements under the NO_x SIP Call. We understand that historic emissions for non-EGUs are well below the emission budget and the significant emission restrictions are in place for non-EGUs as a result of a combination of consent decrees (presumably to be replaced with equivalent permit restrictions), permit restrictions, and your recently adopted NO_x reasonably available control technology regulations. We look forward to working with you as you evaluate the adequacy of those restrictions in meeting emission budget requirements of the NO_x SIP Call, now and in the future. Resp. at 2, citing Mot., Att. A at 2.

IERG indicates that it does not object to having the Board grant the Agency's motion and close this docket. Resp. at 2. IERG nonetheless "respectfully requests that the Board defer closing the R6-22 docket until it has taken final action in R11-8 rulemaking. . . ." *Id.* IERG argues that "Illinois EPA has given no indication as to the alternative means by which it intends to demonstrate compliance with the NO_x SIP Call requirements." Resp. at 2. IERG claims that the Board should close this docket only after "Illinois EPA has clarified the method by which the State will demonstrate compliance with the NO_x SIP Call requirements." *Id.* IERG elaborates that, "[b]ecause any such alternative may require additional restrictions on the regulated community, closing the R6-22 docket is premature." *Id.* IERG claims that holding this docket open gives participants the opportunity "to participate, if necessary in the R6-22 rulemaking should Illinois EPA's action in respect to the NO_x SIP Call so warrant or should the R11-8 rulemaking be delayed." *Id.* at 3. IERG also claims that "[l]eaving the R6-22 docket open until the R11-8 rulemaking is final and until Illinois EPA clarifies the method by which it will demonstrate compliance with the NO_x SIP Call requirements does not prejudice any parties. . . ." *Id.*

In addition, "IERG respectfully asks that the Board request a status report from Illinois EPA on its evaluation of the method by which it will demonstrate compliance with the NO_x SIP Call requirements." Resp. at 2-3. IERG supports this request by stating that "Illinois EPA has not taken any action to show how the NO_x SIP Call requirements will be met, which creates uncertainty for the regulated community regarding how it may be regulated in the future." *Id.* at 3.

DISCUSSION

Motion to Withdraw

The Board has in numerous rulemaking dockets granted a proponent's motion to withdraw a proposal. Amendments to 35 Ill. Adm. Code 201 (New Section 201.501 PSD Construction Permits), R06-27, slip op. at 1 (Aug. 4, 2006) (granting Agency motion to withdraw and closing docket); Clean-Up Amendments to 35 Ill. Adm. Code Part 214, R04-10, slip op. at 1

(Dec. 18, 2003) (deferring to Agency determination in granting motion to withdraw and closing docket); Provisional Variances From Water Temperature Standards: Proposed New 35 Ill. Adm. Code 301.109, R01-31, slip op. at 1 (Sept. 6, 2001) (granting Agency motion to withdraw and closing docket); Procedures for Collection of Air Pollution Site Fees: Amendments to 35 Ill. Adm. Code 251, R97-9, slip op. at 1 (granting Agency motion to withdraw and closing docket); Utility Industry Amendments to the Landfill Regulations (35 Ill. Adm. Code 810-815), R90-25, slip op. at 3 (granting Utility Group's motion to dismiss and closing docket).

In this docket, the Agency as proponent has moved to withdraw its rulemaking proposal and close the docket because that proposal has become moot, is unnecessary, and will not be approved by USEPA. Mot. at 3.

The Board is not persuaded by IERG's arguments that this docket should remain open while docket R11-8 is pending. IERG appears to suggest that the Agency may use this docket to clarify the method by which it will demonstrate compliance with the NO_x SIP Call requirements. *See* Resp. at 2, 3. The Agency's motion requesting that the Board close the docket plainly indicates that the Agency has no intention of doing so. There is no basis to require or even to expect the Agency to propose such a clarification by amending its rulemaking proposal in this docket. Accordingly, it is not clear that the Agency's actions with regard to the NO_x SIP Call would necessarily warrant participation in this rulemaking. *See* Resp. at 3.

In addition, the Board notes that the Agency filed a new rulemaking proposal "sunsetting the provisions of the Subpart U that USEPA is no longer administering and retaining those provisions in Subpart U that are necessary to demonstrate compliance with the NO_x Emissions Budget." Mot. at 4. In an order dated September 2, 2010, the Board accepted that proposal for hearing. Regulatory Proposal for NO_x Trading Program Sunset Provisions for Non-Electric Generation Units ("Non-EGU."): Amendments to 35 Ill. Adm. Code Part 217, Subpart U, R11-8, slip op. at 3 (Sept. 2, 2010). IERG has stated its intention to participate in that proceeding. Resp. at 2.

Having reviewed the Agency's motion, IERG's response, and the record in this proceeding, the Board grants the motion to withdraw the rulemaking proposal and closes the docket. Should the Agency propose to clarify compliance with the NO_x SIP Call, particularly by requiring "additional restrictions on the regulated community," it would do so through a rulemaking proceeding in which IERG may participate. Accordingly, IERG's request that the Board direct the Agency to file a status report on that issue is denied.

Pending Motions for Reconsideration and to Withdraw

The Board notes that it now has pending before it both IERG's September 14, 2009 motion for reconsideration and clarification and IERG's October 15, 2009 motion to withdraw a portion of its pending motion for reconsideration and clarification. Having granted the Agency's motion to withdraw its rulemaking proposal and closed this docket, the Board denies the two pending motions filed by IERG as moot.

CONCLUSION

The Board grants the Agency's motion to withdraw its rulemaking proposal and close this rulemaking docket. Having granted that motion, the Board denies both IERG's September 14, 2009 motion for reconsideration and clarification and IERG's October 15, 2009 motion to withdraw a portion of that motion as moot.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on September 16, 2010, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board