

ILLINOIS POLLUTION CONTROL BOARD

October 1, 2015

IN THE MATTER OF:)
)
AMENDMENTS TO 35 ILL. ADM. CODE)
PART 214, SULFUR LIMITATIONS, PART) R15-21
217, NITROGEN OXIDES EMISSIONS, AND) (Rulemaking - Air)
PART 225, CONTROL OF EMISSIONS)
FROM LARGE COMBUSTION SOURCES)

DISSENTING OPINION (by D. Glosser):

I respectfully dissent from the majority opinion in this case. While the majority accepts the position of the Illinois Environmental Protection Agency (Agency) regarding the inclusion of Parts 217 and 225 in this rulemaking, I am convinced by the arguments of the Illinois Attorney General's Office (People), and Citizens Against Ruining the Environment (CARE) that inclusion of the Combined Pollutant Standard (CPS) is not appropriate. Also, I agree with the Sierra Club and Environmental Law and Policy Center (Citizen's Groups) that the modeling performed by the Agency is insufficient. Therefore, I believe that proceeding with this rule as proposed by Agency is inappropriate and against good public policy.

I note that the People argue that amending the Combined Pollutant Standard (CPS) is unnecessary for the purpose of this rulemaking, the purpose of which, according to the People, is to develop a state implementation plan for the attainment of federal SO₂ National Ambient Air Quality Standards (NAAQS). PC 1449 at 2. The Agency agrees that "these regulations are proposed to control emissions of sulfur dioxide ("SO₂") in and around areas designated as nonattainment with respect to the" NAAQS. SR at 1. This attainment plan must be developed using United States Environmental Protection Agency (USEPA) *guidelines* for modeling and be approved by USEPA.

INCLUSION OF AMENDMENTS TO THE CPS

By way of background, in Amendments to 35 Ill. Adm. Code 225: Control of Emissions From Large Combustion Sources (Mercury Monitoring), R9-10, the Board explained:

The Agency and Midwest Generation negotiated the CPS during the original mercury rulemaking process. TSD at 4, Exh. 7 at 5; *see* 35 Ill Adm. Code 225 Subpart F. "Similar to the MPS, the CPS allows flexibility in complying with the mercury provisions in exchange for SO₂ reductions, NO_x reductions, and other considerations agreed to by the parties." TSD at 4; Exh. 7 at 5. Amendments to 35 Ill. Adm. Code 225: Control of Emissions From Large Combustion Sources (Mercury Monitoring), slip op. at 46, R9-10 (Apr. 16, 2009).

Thus, the original adoption of the CPS was a negotiated process in a rulemaking that included numerous hearings and substantial public interest and participation. I have previously expressed

concern that Midwest Generation would seek additional variances from the CPS in my concurrence in Midwest Generation, LLC v. IEPA, PCB 13-24 (Apr. 4, 2013). In the current rulemaking, Midwest Generation is once again seeking another change to the CPS from the originally adopted standards but without coming to the Board directly. As a result of the amendments to the CPS in this rulemaking, a unit still burning coal (Will County 4) will not be required to install or control emissions by use of flue gas desulfurization (FGD) equipment. Thus, the area around Will County 4 will not see a reduction in actual emissions from that unit, even though under the CPS, the FGD equipment was to be installed by December 31, 2018.

Moreover, the proposed rule will allow Midwest Generation's units being converted to natural gas to remain subject to the CPS NO_x provisions. That provision of the CPS allows a NO_x emissions rate of no more than 0.11 lbs/mmBtu. However, under Section 217.344, units that burn natural gas are limited to a NO_x emissions rate of no more than 0.06 lbs/mmBtu. 35 Ill. Adm. Code 217.344. Consequently, the amendments to the CPS will allow Midwest Generation to avoid installation of control equipment on Will County 4 for SO₂ emissions, but also will allow Midwest Generation the ability to emit levels of NO_x from units included under the CPS at a rate higher than other natural gas fueled units. The potential for no localized improvement in NO_x emissions is another example of why amendment of the CPS in this rulemaking is not prudent.

The People share my concerns that “amending the CPS-and making related changes to Nitrogen Oxides limitations . . . is unnecessary to accomplish the purpose of this rulemaking”. PC 284 at 1. The People also argue that the Board should not allow Midwest Generation “to obscure” within a rulemaking to address SO₂ NAAQS “yet another request for altering the CPS”. *Id.* at 2.

CARE points out the CPS was adopted more than six years ago and this allowed Midwest Generation significant regulatory flexibility, giving Midwest Generation nine years advance notice to decide the future of Will County 4. PC 148 at 1-2. The flexibility allowed by the CPS did not include transferring unit specific requirements in the CPS to other units, as will be allowed in this rule. *Id.* Further, CARE notes that not allowing the transfer of unit specific requirements is prudent because Will County 4 and Joliet 5 are not comparable units and operate in very different air quality regions. *Id.* CARE explains that the two units are not equivalent in size, emissions, or environmental impacts. *Id.* at 5.

Furthermore, according to information in the record, to increase the company's profits, Midwest Generation is converting the Joliet Plant to natural gas and retiring Will County 3. PC 284 at 2. The People point out that the reductions in emissions from the Midwest Generation facilities are not contingent on amending the CPS and are not contingent on Midwest Generation receiving an exemption for Will County 4. *Id.* at 1-2. The People maintain that Midwest Generation will make the changes without the amendment to the CPS and therefore the CPS need not be amended in this rulemaking. *Id.*

Based on this record I am convinced by the arguments of CARE and the People, and I believe that the changes to the CPS are not required to attain the SO₂ NAAQS. Therefore, the amendments to the CPS are not necessary to accomplish the purposes of this rulemaking.

As a matter of public policy, I find myself in complete agreement with the People that “[j]ust because an area is showing attainment for the federal SO₂ standard does not mean that the Agency and the Board must relax other, independent standards like the CPS.” PC 284 at 5. Furthermore the People state:

In questioning Agency witnesses, counsel for Midwest Generation suggested that rejecting the Will County 4 exemption from this rulemaking would have a “chilling effect” on the willingness of industries to make voluntary pollution reductions. But the role of the Board is not to simply accept deals negotiated between regulators and industries. The Board has been reviewing rulemaking proposals for 45 years in Illinois—the Agency and regulated industries are well aware that the Board can change or reject proposals and will act to ensure the proper sequence and process of enacting or amending regulations. PC 284 at 7-8.

I am disappointed in the manner in which the Agency has brought this rulemaking forward. The Agency presented the rule and argued that the Board had to follow this approach because the Agency believes it to be the best. As will be discussed below, USEPA’s guidance for modeling allows different scenarios to be developed, yet the Agency appears to have looked at only one such scenario after being approached by Midwest Generation with a deal that included making another changing to the CPS. Only after being approached by Midwest Generation, and performing modeling based on the changes to be made by Midwest Generation, did the Agency perform outreach to other entities that were a part of the CPS negotiations. Pekin Hearing Transcript at 227. I do not believe this is good public policy, nor do I believe that the Agency’s actions in developing the rule allowed for the best possible rule.

MODELING EFFORTS

I am also concerned with the modeling efforts by the Agency, and I agree with the Citizen’s Groups that the modeling should have been done in a more conservative manner. *See* PC 285. The Citizen’s Groups express concerns that the Agency’s modeling did not account for the potential of higher SO₂ emissions. PC 285 at 1. The Citizen’s Groups are concerned the Agency’s modeling did not establish a “cushion” that would guarantee compliance even in the case of increased emissions due to unforeseen events. *Id.* The Agency settled on a strategy that represents the highest emissions across the nonattainment areas possible without violating the NAAQS. *Id.* at 1-2. Thus, any increase in SO₂ emissions, for any reason, jeopardizes compliance with the one-hour SO₂ NAAQS.

The Citizen’s Groups point to specific shortcomings in modeling with which I agree. For example, the rule will subject sources to SO₂ emissions limits at all times even periods of startup, shutdown, and malfunction, and any actual emissions during those periods could increase SO₂ concentrations. PC 285 at 2. Also, there are sources that may not achieve the full level of modeled emission reductions. *Id.* The modeling also did not account for the addition of non-major sources in the areas. *Id.* And lastly, the Agency’s modeling did not account for flaring events that occur on a regular basis, which also could increase SO₂ emissions. *Id.*

In addition to the modeling shortcomings outlined by the Citizen's Groups, I find it disturbing that the Agency did not provide sufficient information, in a timely manner, to allow the public or the Board, the opportunity to find that the Agency's modeling was the optimal approach to modeling. As witnesses for the Citizen's Groups indicated, it was impossible to evaluate the modelling results due to missing elements of the modeling process being made available in the record. Exh. 10 at 4. Furthermore, it was also pointed out that there may be a better strategy for compliance with SO₂ NAAQS that would allow for other sources of SO₂ to achieve compliance. *Id.*

While I agree that Agency used the proper USEPA guidance in its modeling analysis, there are many variables in this region-wide model that allow the Agency to consider many different ways of achieving compliance. There may be more than one set of emission controls that will demonstrate attainment with NAAQS. Exh. 10 at 4. For the Agency to stubbornly insist that the one approach they used is the one and only correct way to achieve compliance with the SO₂ NAAQS is not reasonable.

I am also concerned that the Agency appears to confuse a region-wide planning effort based on modeling and the actual emissions that result from the control of specific sources such as Midwest Generation's Will County 4 unit and the impacts actual emissions have on area residents. The regional approach may demonstrate regional benefits based on modeling, but the lack of FGD equipment on the Will County 4 unit will result in adverse impacts to localized air quality. I believe that this is another area where the Agency's decisions in its modeling process fall short.

NEED TO AMEND CPS IN THIS RULEMAKING

The Agency states that its proposed amendments to Parts 217 and 225 are inextricably linked to its proposed amendments to Part 214 and therefore cannot be revised. However, as participants have pointed out, this is not the case. The Agency claims that it will not be able to enforce the fuel conversions made by Midwest Generation, but the record indicates that Midwest Generation is already proceeding with those conversions. The Agency also claims that not proceeding with the CPS would require additional modeling that might require other sources to reduce emissions. I am unconvinced that performing additional modeling, using different inputs is problematic.

The Agency's insistence on amending the CPS through this rulemaking leaves too many questions unanswered and is not sound public policy. If indeed the CPS must be changed, Midwest Generation should approach the Board with such an amendment or variance. As the People state:

If Midwest Generation desires more relief from the CPS-in addition to all of the relief it has already asked for and received-it should petition for it separately so it can be properly considered on its own merits. The Board should not allow Midwest Generation to obscure within this rulemaking docket for SO₂ standards yet another request for altering the CPS. PC 284 at 2.

CONCLUSION

I am convinced by the arguments of the People and CARE that inclusion of the CPS is not appropriate for this rulemaking. I also agree with Citizen's Groups that the modeling performed by the Agency is insufficient. Therefore, I believe that proceeding with this rule as proposed by Agency is inappropriate and against good public policy.

For the foregoing reasons, I respectfully dissent.



Deanna Glosser, PhD

I, Don A. Brown, Assistant Clerk of the Illinois Pollution Control Board, certify that the above dissenting opinion was submitted on October 1, 2015.



Don A. Brown, Assistant Clerk
Illinois Pollution Control