

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
AMENDMENTS TO) R18-20
35 ILL. ADM. CODE 225.233) (Rulemaking – Air)
MULTI-POLLUTANT STANDARDS)
(MPS))

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed with the Illinois Pollution Control Board the Illinois Attorney General's Response in Opposition to the Illinois Environmental Protection Agency's Motion for Expedited Review, the Appearance of James P. Gignac, and the Appearance of Stephen J. Sylvester, copies of which are hereby served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY,

BY: LISA MADIGAN,
Attorney General of the State of Illinois

BY: /s/ James P. Gignac
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Dated: October 16, 2017

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CERTIFICATE OF SERVICE

I, JAMES P. GIGNAC, an attorney, do certify that on October 16, 2017, I caused the Illinois Attorney General's Response in Opposition to the Illinois Environmental Protection Agency's Motion for Expedited Review, the Appearance of James P. Gignac, the Appearance of Stephen J. Sylvester, and the Notice of Filing to be served upon the persons listed in the attached Service List by email for those who have consented to email service and by U.S. Mail for all others.

/s/ James P. Gignac
JAMES P. GIGNAC

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APPEARANCE

I, James P. Gignac, hereby file my appearance in this proceeding on behalf of the Illinois Attorney General's Office, for the People of the State of Illinois, as an interested party.

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN, Attorney
General of the State of Illinois

By: /s/ James P. Gignac
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APPEARANCE

I, Stephen J. Sylvester, hereby file my appearance in this proceeding on behalf of the Illinois Attorney General's Office, for the People of the State of Illinois, as an interested party.

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN, Attorney
General of the State of Illinois

By: /s/ Stephen J. Sylvester
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
AMENDMENTS TO) R18-20
35 ILL. ADM. CODE 225.233) (Rulemaking – Air)
MULTI-POLLUTANT STANDARDS)
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**THE ILLINOIS ATTORNEY GENERAL’S RESPONSE
IN OPPOSITION TO THE ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY’S MOTION FOR EXPEDITED REVIEW**

Pursuant to 35 Ill. Adm. Code § 102, the Illinois Attorney General, on behalf of the People of the State of Illinois (the “People”), hereby submits its comments in response to the Illinois Environmental Protection Agency’s (“Illinois EPA”) motion for expedited review and request that the Board move directly to first notice in the above-captioned rulemaking docket. For the reasons set forth below, the Board should deny the motion and allow a full opportunity for public comment and hearing prior to proceeding to first notice.

I. Expedited Review Is Not Warranted.

“In acting on a motion for expedited review, the Board will, at a minimum, consider all statutory requirements and whether material prejudice will result from the motion being granted or denied.” 35 Ill. Adm. Code § 101.512(b). The Board will only grant a motion for expedited review consistent with available resources. *Id.* at 101.512(c). Any such requests must include, in part, “a complete statement of the facts and reasons for the request.” *Id.* at 101.512(a).

As an initial matter, Illinois EPA’s motion provides very little factual support for the stated purpose for its request. The motion could be denied on that ground alone (*i.e.*, for failure to provide a “complete statement of the facts and reasons for the request” pursuant to Section 101.512(a)).

In addition, as the Board has stated, “[f]or various reasons, [it] cannot expedite consideration of every case or rulemaking proposal.” *In the Matter of: Amendments to 35 Ill. Adm. Code 217, Nitrogen Oxides Emissions*, R11-24, slip op. at 4 (April 11, 2011). The Board must take into account its own limited resources, which has in the past “render[ed] the granting of a motion for expedited review unlikely in all but the most dire circumstances.” *Id.*, quoting *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 has granted motions for expedited review when the state faced the risk of federal sanctions for missing United States Environmental Protection Agency’s deadlines or when a regulated entity’s permit relief was due to expire. *See Section 27 Proposed Rules for Nitrogen Oxide (MV) Emissions From Stationary Reciprocating Internal Combustion Engines and Turbines: Amendments to 35 Ill. Adm. Code Parts 211 and 217*, R07-19, slip op. at 4 (Apr. 2, 2009); *In the Matter of: Nitrogen Oxides Emissions from Various Source Categories, Amendments to 35 Ill. Adm. Code Parts 211 and 217*, R08-19, slip op. at 4 (Apr. 2, 2009); *In the Matter of: Petition of Caterpillar Inc. for an Adjusted Standard From 35 Ill. Adm. Code 620.410(A) and 817.106(A)*, AS 13-5, slip op. at 2 (Sept. 15, 2013).

The Board has not granted motions to expedite when the regulated entities sought to avoid expenditures or were concerned about delay or lack of regulatory certainty. *In the Matter of: Amendments to 35 Ill. Adm. Code 217, Nitrogen Oxides Emissions*, R11-24 (Apr. 11, 2011); *In the Matter of: Proposed Site-Specific NO_x Rule Amendment Applicable to Saint-Gobain Containers, Inc.* at 35 Ill. Adm. Code 217.152(B), R11-17 (Dec. 2, 2010). *See also In the Matter of: NO_x Trading Program: Amendments to 35 Ill. Adm. Code Part 217*, R06-22, slip op. at 4

(Apr. 20, 2006) (holding that “even considerable uncertainty does not rise to the level of material prejudice sufficient to allow the Board to grant” a motion to expedite).

Here, Illinois EPA states that the “sooner these new provisions are effectuated, the sooner the operational flexibility can be utilized” by Dynegy through combining the two separate MPS compliance groups. First, it is neither Illinois EPA’s nor the Board’s duty to assist Dynegy with its financial and business interests—especially so when the impetus for the rulemaking is to obtain flexibility to run higher-emitting plants more often. Second, the Illinois EPA does not allege that there will be any “material prejudice” if the Board fails to grant its motion. On this basis alone the Board should deny the motion. *See In the Matter of NOx Trading Program: Amendments to 35 Ill. Adm. Code Part 217, R06-22*, slip op. at 4 (Apr. 20, 2006) (Board has not granted motions to expedite when it finds “that no material prejudice will result with the denial of the motion for expedited review”).

In addition, any sense of urgency is lacking as Dynegy acquired the second MPS group from Ameren in 2013, nearly four years ago. Both Dynegy groups are complying with the MPS, and Illinois Power Holdings (“IPH”) (one of the subsidiaries) told the Board in a September 2016 filing that “[its] MPS Group can comply with the [sulfur dioxide] emission limit [of 0.23 lbs/mmBtu] . . . in calendar year 2017 and each calendar year thereafter” (emphasis added). IPH Motion to Terminate Variance, PCB 14-10 (Sept. 2, 2016) at 4. Third, Dynegy has been working on a proposal with Illinois EPA for almost a year. Illinois EPA Statement of Reasons, R18-20 (Oct. 2, 2017) at 3 (“[I]n or around November 2016, Dynegy approached the Illinois EPA requesting that changes be made to the MPS.”). Illinois EPA now asks the Board and the public to expedite its consideration of the proposal by limiting it to essentially just 60 days. While it is natural for a regulated entity to desire operational flexibility as soon as it can be

achieved, “operational flexibility” is not the type of reason the Board grants, or should grant, motions to expedite.

Further, Illinois EPA posits that 1/1/18 is the start of the new compliance year. But even if first notice happens immediately, it is extremely unlikely the Board will be able to get through that, second notice, the JCAR process, and final publication before 1/1/18.¹ As mentioned above, Dynegy is meeting the applicable MPS standards. If the Board decides to modify the MPS, then it can determine how to initiate the compliance period (for instance, by identifying a date when a new standard would take effect) and provide any necessary guidance to Illinois EPA with respect to making compliance determinations. Again, expedited consideration so the company can have an easier time compliance planning is not the sort of circumstance the Board looks for in granting motions to expedite.

II. A Compressed Schedule Compromises the Public’s Right to Understand and Meaningfully Participate in the Process.

In a handful of cases, the Board has denied a motion to expedite a rulemaking proposal, but has immediately proceeded to first notice without commenting on the rule’s substantive merits. *See, e.g., In the Matter of: Proposed Site-Specific NOx Rule Amendment Applicable to Saint-Gobain Containers, Inc. at 35 Ill. Adm. Code 217.152(B)*, R11-17, slip op. at 4 (Dec. 2, 2010); *In the Matter of: Abbott Laboratories' Proposed Site-Specific Amendment to Applicability Section of Organic Material Emission Standards and Limitations for the Chicago Area; Subpart T: Pharmaceutical Manufacturing (35 Ill. Adm. Code 218.480(B))*, R08-08, slip op. at 3 (Oct. 4, 2007). By contrast, the Board declined a request for immediate first notice in *In the Matter of: Ameren Ash Pond Closure Rules (Hutsonville Power Station): Proposed 35 Ill. Adm. Code Part*

¹ And even if the Board acts on 10/19 to grant the motion, and the first notice could be published on 10/20 in the Illinois Register, the minimum 45 day period runs to 12/4. If the Board acts at its 12/7 meeting to proceed to Second Notice on 12/5, then the JCAR review and approval would have to occur before, and the final rule published by, 12/31.

840.101 Through 840.144, PCB R09-21, slip op. at 10 (June 18, 2009), a proceeding in which it was recognized there would be public interest, because doing so “would reduce [the Board’s] own flexibility and that of other participants.”

The Board should not proceed with immediate first notice publication in this proceeding. Forcing the rulemaking through in such a compressed timeframe could cause material prejudice by substantially limiting meaningful public comment. In recent cases involving the MPS and its companion policy, the Combined Pollutant Standard (“CPS”), a large degree of public interest was evident. *Illinois Power Holdings, LLC v. IEPA*, PCB 14-10, slip op. at 2 (Nov. 21, 2013) (noting receipt of 5,826 public comments); *Midwest Generation, LLC v. IEPA*, PCB 13-24, slip op. at 2 (Apr. 4, 2013) (noting receipt of 8,547 public comments); *Ameren Energy Resources v. IEPA*, PCB 12-126, slip op. at 2 (Sept. 20, 2012) (noting receipt of 3,095 public comments).

MPS-related matters have resulted in Board member dissent and a Board denial. *See Illinois Power Holdings, LLC v. IEPA*, PCB 14-10 (Nov. 21, 2013) (D. Glosser, dissenting); *Ameren Energy Resources v. IEPA*, PCB 12-126 (June 6, 2013). These are significant public health and environmental standards with an important place in Illinois environmental regulations. As Illinois EPA’s former Director Douglas Scott stated in testimony before the United States Senate in 2009, the MPS is “one of the most important environmental and public health advances in Illinois in recent decades.”² The proposed changes to the MPS would allow Dynegy to increase its utilization of higher-emitting units—and thereby increase emissions of sulfur dioxide and nitrogen oxides, harmful air pollutants linked to a number of respiratory and other health issues. The rationale underlying the proposal also raises complex economic and technical questions with respect to power dispatch and competition in the energy markets. These questions

² https://www.epw.senate.gov/public/_cache/files/f/c/fc4c5288-525a-47d6-812c-809d000c617b/01AFD79733D77F24A71FEF9DAFCCB056.july909ussenatedscottwrittentestimony1.pdf at 2.

raise significant doubt as to whether the proposed amendments will ever actually limit the emissions from these units. The amendments replace a rate-based limitation that requires the plants to operate with some level of emission control with a mass-based approach with caps so high they may never be triggered.

Accordingly, the Board should consider changes like the proposed rulemaking only with great care and deliberation. *See* Ill. Const. art. XI, § 1 (“The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations.”); 415 ILCS 5/5(b) (the fundamental duty of the Board is to “determine, define and implement the environmental control standards applicable in the State of Illinois”). There will be a great deal of public interest and any revisions to the MPS should be carefully scrutinized before the Board makes any kind of proposal on first notice.

Therefore, the Board should gather additional input before deciding whether to proceed to first notice with this proposal, or any proposal, to modify the MPS.

* * * *

For the reasons set forth above, the People respectfully request that the Board deny Illinois EPA’s motion to expedite review in this rulemaking docket and to take public comment and hold hearings prior to First Notice.

Dated: October 16, 2017

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
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