

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
) AS 24-2
PETITION OF EAST DUBUQUE NITROGEN) (Adjusted Standard – Air)
FERTILIZERS, LLC FOR ADJUSTED)
STANDARD)

NOTICE

TO: Don Brown Byron F. Taylor
Clerk John M. Heyde
Illinois Pollution Control Board SIDLEY AUSTIN LLP
James R. Thompson Center One South Dearborn
100 West Randolph St., Suite 11-500 Chicago, IL 60603
Chicago, IL 60601-3218

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S MOTION FOR STAY OF PROCEEDING, OR IN THE ALTERNATIVE, MOTION FOR EXTENSION OF TIME TO FILE RECOMMENDATION of the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ Gina Roccaforte
Gina Roccaforte
Assistant Counsel
Division of Legal Counsel

DATED: September 5, 2023

1021 North Grand Avenue East
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PETITION OF EAST DUBUQUE NITROGEN) (Adjusted Standard – Air)
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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY’S MOTION FOR STAY OF PROCEEDING, OR IN THE ALTERNATIVE, MOTION FOR EXTENSION OF TIME TO FILE RECOMMENDATION

NOW COMES the Illinois Environmental Protection Agency (“Illinois EPA” or “Agency”), by its attorneys, and pursuant to 35 Ill. Adm. Code 101.514 and 101.522, respectfully submits this Motion for Stay of Proceeding, or in the Alternative, Motion for Extension of Time to File Recommendation (“Motion”). The Illinois EPA requests that the Illinois Pollution Control Board (“Board”) enter an order staying this proceeding for 90 days while the Board considers the substantively similar rulemaking proposal filed in R23-18(A). If the Board is not inclined to issue a stay, the Agency requests that it grant a 90-day extension of time to file the Illinois EPA’s Recommendation. In support of its Motion, the Illinois EPA states as follows:

Background and Status Report

1. On July 20, 2023, the Board adopted amendments to 35 Ill. Adm. Code 201, 202, and 212, to remove provisions that allowed sources to request, and the Illinois EPA to grant, advance permission to continue operating during a malfunction or to violate emission limitations during startup. *See*, R23-18, *In the Matter of: Amendments to 35 Ill. Adm. Code Parts 201, 202, and 212*, Board Order (July 20, 2023). The repealed provisions provided certain sources with a possible affirmative defense regarding emission exceedances during periods of malfunction or startup should enforcement be pursued. R23-18, Board Order (July 20, 2023).

2. Based upon testimony and comment from participants in the R23-18 rulemaking, the Board also opened a sub-docket, R23-18(A), to explore alternate emissions standards during startup, shutdown, and malfunction (“SSM”) periods. R23-18, Board Order (April 6, 2023). Consistent with its grant of expedited review, the Board directed anyone who wished to file a rulemaking proposal for alternative standards during SSM in the R23-18(A) sub-docket to do so by August 7, 2023. R23-18(A), Board Order (July 6, 2023).

3. On August 7, 2023, East Dubuque Nitrogen Fertilizers, LLC (“EDNF”) filed a proposal to amend 35 Ill. Adm. Code 217.381. *See*, R23-18(A), *In the Matter of: East Dubuque Nitrogen Fertilizers, LLC’s Proposal to Amend Section 217.381*. EDNF’s proposal seeks to amend the nitrogen oxides (“NO_x”) and opacity emission standards in 35 Ill. Adm. Code 217.381 in several ways for weak nitric acid manufacturing processes. *Id.* Specifically, EDNF proposes to amend 35 Ill. Adm. Code 217.381 to change the NO_x limit for new weak nitric acid manufacturing processes, as well as establish an alternative, non-numerical opacity standard for new weak nitric acid processes during periods of startup and shutdown. *Id.*, Statement of Reasons at 1, 16-17, and proposed rule. Four other rulemaking proposals were also filed on August 7: one by the Illinois Environmental Regulatory Group, one by Rain CII Carbon LLC (“Rain Carbon”), one jointly by Dynege Midwest Generation, LLC, Illinois Power Generating Company, and Kincaid Generation, LLC (collectively, “Dynege”) and Midwest Generation LLC (“MWG”), and one by the American Petroleum Institute. R23-18(A), Board Order (August 17, 2023).

4. On August 17, 2023, the Board combined these proposals into a single proposal amending 35 Ill. Adm. Code 212, 215, 216, and 217 to establish alternative standards during periods of startup, shutdown, breakdown, and malfunction. R23-18(A), Board Order (August 17,

2023). The Board submitted the combined proposal for first-notice publication in the Illinois Register and scheduled public hearings. *Id.* and R23-18(A), Hearing Officer Order (August 17, 2023).

5. In addition, on August 14, 2023, EDNF petitioned the Board for an adjusted standard under Section 28.1(f) of the Environmental Protection Act, 415 ILCS 5/28.1(f), during periods of startup, malfunction, or breakdown regarding the NO_x and opacity standards in 35 Ill. Adm. Code 217.381 applicable to EDNF's nitric acid manufacturing processes. *See*, AS 2024-2, *In the Matter of: Petition of East Dubuque Nitrogen Fertilizers, LLC for Adjusted Standard* ("Petition"). On August 14, 2023, ExxonMobil Oil Corporation, Marathon Petroleum Company, LLC, Dynege, Rain Carbon, and MWG also filed Petitions for Adjusted Standard with the Board that mirror rulemaking proposals in R23-18(A). *See*, AS 24-1, *In the Matter of: Petition of ExxonMobil Oil Corporation for Adjusted Standard from 35 Ill. Adm. Code 216.361*, 35 Ill. Adm. Code 216.103, and 35 Ill. Adm. Code 216.104; AS 24-3, *In the Matter of: Petition of Marathon Petroleum Company, LLC for an Adjusted Standard from 35 Ill. Adm. Code Part 201 and Section 216.361*; AS 24-4, *In the Matter of: Petition of Dynege for an Adjusted Standard from 35 Ill. Admin. Code Parts 201 and 212*; AS 2024-5, *In the Matter of: Petition of Rain CII Carbon LLC for Adjusted Standard from 35 Ill. Adm. Code §§ 201.149, 212.123, and 212.322, 215.301*; and AS 24-6, *In the Matter of: Petition of Midwest Generation, LLC for an Adjusted Standard From 35 Ill. Admin. Code Parts 201 and 212*.

6. In its Petition, EDNF seeks an adjusted standard that would apply to EDNF's nitric acid manufacturing processes as does its rulemaking proposal filed in R23-18(A). EDNF states, in part, "EDNF recently has also proposed a general rulemaking that would amend Section 217.381 so that the rule would work consistently with the Board's final order in R23-18

during startups and shutdowns.” Petition at 1. In addition, EDNF asserts, “If the Board adopts EDNF’s proposed rule amendment, an adjusted standard is not necessary. EDNF, however, is filing this petition for an adjusted standard as an alternative in the event the Board concludes that it prefers an adjusted standard for EDNF’s facility . . . instead of a general rulemaking. In addition, by requesting an adjusted standard, pursuant to the stay provided by 415 ILCS 5/28.1(f), EDNF will continue to comply with its existing Clean Air Act Permit Program (“CAAPP”) permit and applicable regulations.” Petition at 1-2.

7. Unless otherwise ordered by the Hearing Officer or the Board, the Illinois EPA is required to file its Recommendation within 45 days after the filing of EDNF’s Petition, *i.e.*, September 28, 2023, or where a hearing has been scheduled, at least 30 days before hearing, whichever is earlier. 35 Ill. Adm. Code 104.416(a). EDNF has requested a hearing on the Petition. Petition at 24.

Request for Stay

8. The Board should stay this proceeding while the Board considers EDNF’s rulemaking proposal. As explained above, EDNF’s proposed rule amendments substantively mirror its requested adjusted standard; both regard changes to/relief from the same Board regulations. EDNF itself explained that if the Board adopts EDNF’s proposed rule amendment, an adjusted standard is not necessary and that its Petition was primarily intended as an alternative in the event the Board prefers an adjusted standard instead of a rulemaking and to preserve its arguments regarding a stay under Section 28.1(f) of the Act. Petition at 1-2.

9. Simultaneously participating in both an expedited rulemaking and EDNF’s adjusted standard proceeding, both of which entail public hearing, will force the Agency, Board, EDNF, and potentially other participants to expend significant resources in proceedings that seek

similar relief. Conversely, issuing a stay here will conserve resources and allow participants to focus on EDNF's rulemaking proposal first, and this proceeding second (and only if still necessary).

10. The Illinois EPA is not opining as to whether EDNF is entitled to a stay under Section 28.1(f) of the Act, but acknowledges EDNF's stated position in this regard and clarifies that this request for stay is not intended to have any impact on the legal posture of such position. The Illinois EPA is simply seeking to "hold" this proceeding while the rulemaking moves forward, to be resumed at a later date if necessary.

Request for Extension of Time to File Recommendation

11. In the alternative, if the Board does not grant a stay, the Illinois EPA respectfully requests an extension of time of 90 days, up to and including December 27, 2023, to file the Agency Recommendation.

12. Along with its Petition, EDNF submitted 575 pages of exhibits. The Illinois EPA is currently reviewing it but anticipates that it will need additional time to both review and develop recommendations. The Illinois EPA must address and respond to the Petition with respect to each issue raised by the requirements of Section 104.406(a) through (j). 35 Ill. Adm. Code 104.416(b). As such, Section 104.406(i) requires that the Agency Recommendation indicate whether the Board may grant the proposed adjusted standard consistent with federal law. 35 Ill. Adm. Code 104.406(i). Doing so here will entail consultation with USEPA to ascertain whether the requested adjusted standard is federally approvable, *i.e.*, meets Clean Air Act requirements. Such consultation is likely not possible within the given time frame for the Illinois EPA to respond to the Petition.

13. Along with EDNF's Petition, five other Petitions for Adjusted Standard were filed with the Board on the same day. Given the number of petitions received, the time it will take the Illinois EPA to review and consult with USEPA on each, and the Agency's limited resources, more time is necessary.

WHEREFORE, for the reasons set forth above, the Illinois EPA respectfully requests that the Board grant this Motion for Stay of Proceedings for 90 days up to and including December 4, 2023 (or a later date if deemed more appropriate by the Board), or in the alternative, grant this Motion for Extension of Time to File Recommendation for 90 days, up to and including December 27, 2023.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ Gina Roccaforte
Gina Roccaforte
Assistant Counsel
Division of Legal Counsel

DATED: September 5, 2023

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CERTIFICATE OF SERVICE

I, the undersigned, an attorney, state the following:

I have electronically served the attached ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S MOTION FOR STAY OF PROCEEDING, OR IN THE ALTERNATIVE, MOTION FOR EXTENSION OF TIME TO FILE RECOMMENDATION upon the following persons:

Don Brown
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The number of pages in the e-mail transmission is 8.

The e-mail transmission took place before 5:00 p.m. on September 5, 2023.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

/s/ Gina Roccaforte
Gina Roccaforte
Assistant Counsel
Division of Legal Counsel

Dated: September 5, 2023

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