

ILLINOIS POLLUTION CONTROL BOARD

July 6, 2023

IN THE MATTER OF:)
)
AMENDMENTS TO 35 ILL. ADM. CODE) R 23-18(A)
PARTS 201, 202, AND 212) (Rulemaking – Air)

ORDER OF THE BOARD (by M. Gibson):

The Board today addresses American Petroleum Institute’s (API) motion for relief and clarification (Mot.). On June 12, 2023, API filed a motion requesting that the Board (1) delay the effective date of the R23-18 final rule for those seeking alternative standards in this sub-docket until the sub-docket concludes, (2) clarify that the effective date of the R23-18 final rule will be stayed for anyone filing for an adjusted standard within 20 days after the rule’s effective date, (3) clarify that the effective date of the R23-18 final rule will be stayed for anyone filing for a variance within 20 days after the rule’s effective date, and (4) expeditiously review API’s proposed alternative emissions standard so any sub-docket final rule will have the same effective date as the R23-18 final rule. Mot. at 2-3.

On June 22, 2023, Dynegy Midwest Generation, LLC, Electric Energy Inc., Illinois Power Generating Company, Illinois Power Resources Generating, LLC, and Kincaid Generation, LLC (Dynegy) filed a response to API’s motion (Dynegy Resp.). Also on June 22, 2023, the Illinois Environmental Protection Agency (IEPA or Agency) filed a response to API’s motion (IEPA Resp.).

For the reasons below, the Board denies API’s request to delay the effective date of the R23-18 final rule, denies API’s requests for clarification, and grants in part and denies in part API’s request for expedited review. The Board also sets filing deadlines in this sub-docket consistent with expedited review.

API REQUEST FOR DELAYED EFFECTIVE DATE

API requests that the Board delay the effective date of the final rule in the main docket (R23-18) “for sources seeking alternative emissions standards in Subdocket R 23-18A” until the Board completes consideration of alternative standard proposals in this sub-docket (R23-18(A)).¹ Mot. at 6, 7. API argues that immediate compliance with the R23-18 proposed rule is neither technically feasible nor economically reasonable because it is “highly impractical if not impossible . . . for FCCUs [fluid catalytic cracking units] to comply with the generic CO [carbon monoxide] emissions standard during periods of SSM [startup, shutdown, malfunction].” *Id.*

¹ Based on IEPA’s proposal, the Board is conducting the main docket rulemaking under the Clean Air Act “Fast-Track” provisions of the Environmental Protection Act (415 ILCS 5/28.5 (2020)). That proposed rule is presently at second notice before the Joint Committee on Administrative Rules (JCAR). At its June 13, 2023 meeting, JCAR voted to extend the second-notice period with the Board’s concurrence (5 ILCS 100/5-40(c) (2020)).

Without a delay in the effective date of the main docket's rule, API states that refineries will "unfairly and unnecessarily be faced with allegations of noncompliance during startup while the Subdocket work progresses." *Id.* Dynegy supports API's request to delay the effective date of the final R23-18 rule. Dynegy Resp. at 3, 5.

At the first R23-18 rulemaking hearing, IEPA stated that "U.S. EPA [United States Environmental Protection Agency (USEPA)] Region 5 advised the agency that they likely could not deem our submittal complete and stop the sanctions clock if we submit a rule that is not currently effective." R23-18 Transcript of Jan. 19, 2023 hearing at 133-134. Therefore, IEPA opposed a later effective date. *See id.* at 134. In its response to API's motion, IEPA argues that delaying the effective date of the R23-18 final rule "would cause Illinois to miss the August 11, 2023 deadline to submit an approvable SIP [State Implementation Plan] necessarily subjecting the State to mandatory sanctions . . . which include increased emissions offset ratios for New Source Review and loss of federal highway funding." IEPA Resp. at 3-4.

As IEPA testified before the Board, a SIP submittal containing a rule that is not in effect would likely be found incomplete by USEPA, subjecting the State of Illinois to mandatory sanctions under the Clean Air Act. The Board agrees with IEPA that API "does not address this consequence." IEPA Resp. at 3. Under these circumstances, the Board denies API's request to delay the effective date of the R23-18 final rule.

API REQUESTS FOR CLARIFICATION OF ACT

API next requests that the Board clarify two provisions of the Environmental Protection Act (Act) (415 ILCS 5 (2020)). First, API asks the Board to clarify that under Section 28.1(e) of the Act (415 ILCS 5/28.1(e) (2020)), the effective date of the R23-18 final rule will be stayed for a person who files a petition for an adjusted standard within 20 days after the rule's effective date. Mot. at 2. Second, API asks the Board to clarify that under Section 38(b) of the Act (415 ILCS 5/38(b) (2020)), the effective date of the R23-18 final rule will be stayed for a person who files a petition for a variance within 20 days after the rule's effective date. *Id.*

Dynegy opposes API's requests for clarification. Dynegy argues that "the plain text of Sections 28.1(f) and 38(b) of the Act unambiguously provides that a rule or regulation will be stayed as to sources that file a petition for an individual adjusted standard or variance within 20 days of the effective date." Dynegy Resp. at 3. According to Dynegy, "API's concerns that this exemption may not be available in the context of R23-18 appear to be due to an incomplete reading of the statute." *Id.* Therefore, Dynegy maintains that it is "unnecessary and improper" for the Board to clarify that the effective date of the R23-18 final rule will be stayed for anyone seeking an adjusted standard or variance. *Id.* IEPA observes that no variance or adjusted standard petition has been filed and maintains that the language of Section 28.1(e), as well as that of Sections 35 and 38(b), is "clear on its face." IEPA Resp. at 4, citing 415 ILCS 5/28.1, 35, 28(b) (2020).

The Board does not give advisory opinions. *See* League of Women Voters v. North Shore Sanitary District, PCB 70-7, slip op. at 1 (May 12, 1971); Granite City Steel Co. v. EPA, PCB 72-34, slip op. at 1 (Feb. 7, 1972); *see also* Revision of the Board's Procedural Rules: 35

Ill. Adm. Code 101-130, R00-20, slip op. at 18 (Board declining to add procedural rule for “declaratory rulings”). Therefore, the Board declines API’s request to issue an advisory opinion on the meaning of Sections 28.1(e) and 38(b) of the Act. However, nothing in this order prevents anyone from filing a petition for variance or adjusted standard within 20 days after the effective date of the R23-18 final rule.

API REQUEST FOR EXPEDITED REVIEW

Finally, API requests that—if the Board does not grant any of API’s first three requests—the Board expedite review in this sub-docket of API’s proposed alternative emissions standard “so that it is effective at the same time that the Final Rule in the original SSM proceeding (R 23-18) becomes effective.” Mot. at 10.

API states that it:

anticipates requesting that the Board adopt an alternative emissions standard that would apply instead of the carbon monoxide standard located at 35 Ill. Adm. Code 216.361 (“CO standard”) or the general prohibitions of Parts 201, 202 and 212 during periods of startup for fluid catalytic cracking units (“FCCUs”) (“Proposed Alternative Emissions Standard”). The Proposed Alternative Emissions Standard would consist of the proposal from pages 38-60 of the February 6, 2023, Pre-Filed Testimony of Kelly Thompson and David R. Wall for the Illinois Environmental Regulatory Group (“IERG”) in R 23-18. Mot. at 1-2.²

API argues that it and “its refinery members in Illinois will be subject to material prejudice unless the requested relief is granted.” Mot. at 10-11. Further, API states that granting its motion for expedited review will not lead to USEPA imposing sanctions. *Id.* at 11. Dynegy supports API’s request to “expedite consideration of proposed alternative emissions standards.” Dynegy Resp. at 3. IEPA does not object this API request if the Board does not delay the R23-18 final rule effective date and any sub-docket schedule does not hinder IEPA’s ability to submit an approvable SIP revision to USEPA by August 11, 2023. IEPA Resp. at 5.

The Board’s procedural rules require a motion for expedited review to “completely state the facts and reasons for the request.” 35 Ill. Adm. Code 101.512(a). When acting on a motion

² IERG proposed amendments to Board rules of statewide applicability: Section 216.121 on CO emissions from fuel combustion emission sources; Section 216.361 CO emissions from petroleum and petrochemical processes; and Sections 216.103 and 216.104 on definitions and incorporations by reference, respectively. IERG Pre-Filed Testimony at 23-64 (Feb. 6, 2023) in docket R23-18. Dynegy (then Dynegy Midwest Generation, LLC, Illinois Power Generating Company, and Kincaid Generation, LLC) and Midwest Generation, LLC (MWG) ultimately jointly proposed amending Section 212.124 to add a site-specific rule concerning opacity for identified coal-fired boilers at Baldwin Energy Complex, Kincaid Power Station, Newton Power Station, and Powerton Generating Station. Public Comment 14 in docket R23-18; *see also* Dynegy Pre-Filed Testimony at 3-20 (Feb. 6, 2023) in docket R23-18; MWG Pre-Filed Testimony at 6-10 (Feb. 6, 2023) in docket R23-18.

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 “grant a motion for expedited review consistent with available resources and decision deadlines.” 35 Ill. Adm. Code 101.512(c).

The Board finds that it can grant expedited review in this sub-docket and still comply with all statutory requirements applicable to rulemaking, as discussed in this order’s next section. This sub-docket could result in alternative standards applicable during SSM. Accordingly, the Board further finds that, with removal of the *prima facie* defense in the main docket (R23-18), API will not be able to raise that defense should an enforcement action be brought against it and, to that extent, will be subject to material prejudice without expedited review in this sub-docket. The Board therefore grants expedited review, consistent with its resources. The Board, however, grants API’s motion only in part. The Board denies the part of API’s motion requesting that this sub-docket be so expedited that any rule adopted here have the same effective date as the rule adopted in the main docket. Considering all statutory requirements applicable to this sub-docket’s rulemaking, the Board agrees with IEPA that granting that part of API’s motion would jeopardize IEPA’s timely submittal to USEPA of the SIP revision containing the R23-18 final rule.

EXPEDITED REVIEW IN THIS SUB-DOCKET

Consistent with its grant of expedited review, the Board directs anyone who wishes to file a rulemaking proposal for alternative standards during SSM to do so by August 7, 2023, in this R23-18(A) sub-docket, regardless of whether the proposed rule text and related information were already filed in the main docket, R23-18. Each rulemaking proposal must comply with the content requirements of Section 102.202 (rule of general applicability) or Section 102.210 (site-specific rule) of the Board’s procedural rules, including by providing technical support for the proposal. *See* 35 Ill. Adm. Code 102.202, 102.210. The Board waives the 200-person signature requirement of Section 102.202(g) (35 Ill. Adm. Code 102.202(g) (“Unless the proponent is the Agency or DNR,” the proposal must include “a petition signed by at least 200 persons”). *See, e.g., Proposed Amendments to Solid Waste Landfill Rules*, R07-8, slip op. at 2 (Aug. 17, 2006) (waiving 200-person signature requirement).

The Board appreciates industry’s interest in proceeding swiftly with this sub-docket but, in so proceeding, the Board also must ensure compliance with all statutory rulemaking requirements. The Board’s compliance with those requirements will ensure that all persons, including members of the public, have the opportunity to participate in this rulemaking. Under the Act, adoption of a substantive rule requires that the Board first hold at least one or two public hearings on the proposal, depending on whether the proposed rule will apply statewide or only to a specific site: “No substantive regulation shall be adopted, amended, or repealed until after a public hearing within the area of the State concerned. In the case of state-wide regulations hearings shall be held in at least two areas.” 415 ILCS 5/28(a) (2020). Accordingly, each rulemaking proposal for alternative standards during SSM must include a statement of whether the proponent requests that one or more public hearings be held on its proposal, along with a statement addressing whether the Act requires one or more hearings to be held on the proposal,

including whether any hearing already held in the main docket would satisfy all or part of that requirement, as well as public notice requirements under the Act and the Clean Air Act.³

If the Board timely receives more than one rulemaking proposal for alternative standards during SSM, the Board will combine the rule text of each into a single proposal. Nothing in this order precludes persons from combining their respective rule text and jointly filing a single rulemaking proposal. Under Section 27(b) of the Act (415 ILCS 5/27(b)(1) (2020)), the Board will request that the Department of Commerce and Economic Opportunity conduct an economic impact study on the proposal.⁴

By August 14, 2023, anyone, regardless of whether they filed a proposal in this sub-docket, may request that one or more hearings be held in this sub-docket on any proposal filed and otherwise may comment on whether the Act requires one or more hearings to be held in this sub-docket on any proposal filed, including whether any hearing already held in the main docket would satisfy all or part of that requirement, as well as public notice requirements under the Act and the Clean Air Act.⁵

At its August 17, 2023 meeting, the Board will issue an order directing its Clerk to publish a single first-notice proposal in the *Illinois Register*. In that order, the Board will not make findings on the proposal's substantive merits, which is consistent with expedited review. *See, e.g., Amendments to Primary Drinking Water Standards* 35 Ill. Adm. Code 611, R15-23, slip op. at 5 (June 4, 2015) (granting motion for expedited review; proposing rule for first notice without addressing its substantive merits). But the Board will direct the hearing officer to expeditiously schedule one or more public hearings on the proposal as specified by the Board.⁶

³ The proposals referred to in this order's footnote 2 were among the subjects addressed at the Board's second hearing in the main docket, R23-18. *See* R23-18 Transcript of Feb. 16, 2023 hearing.

⁴ The Board must "conduct at least one public hearing on the economic impact of those new rules. At least 20 days before the hearing, the Board shall notify the public of the hearing and make the economic impact study, or the Department of Commerce and Economic Opportunity's explanation for not producing an economic impact study, available to the public. Such public hearing may be held simultaneously or as a part of any Board hearing considering such new rules." 415 ILCS 5/27(b)(2) (2020).

⁵ The opportunity to request a public hearing provided by this order is not in lieu of the opportunity to request a public hearing provided by Section 5-40(b) of the Illinois Administrative Procedure Act (5 ILCS 100/5-40(b) (2020)).

⁶ Newspaper notice must be published at least 30 days before the hearing date. 35 Ill. Adm. Code 102.416(a)(3); *see also* 40 C.F.R. § 51.102(d) (notice at least 30 days before SIP-revision hearing).

The first-notice period must run for at least 45 days from *Illinois Register* publication. 5 ILCS 100/5-40(b) (2020). During and at the conclusion of the first-notice period, the Board will expeditiously consider the proposal's substantive merits, as well as any public comment, testimony, and evidence in the record. Based on that expedited review, the Board will issue an appropriate order on the proposal, which may include proceeding to second notice.

CONCLUSION

The Board denies API's requests to delay the effective date of the R23-18 final rule. The Board also denies API's request that the Board opine as to whether the effective date of R23-18 final rule will be stayed for anyone who timely petitions the Board for a variance or adjusted standard.

The Board grants API's request for expedited review in this sub-docket but denies the part of that request seeking any rule adopted in this sub-docket to have the same effective date as the rule in the main docket. As described above, the Board proceeds with expedited review in this sub-docket.


ORDER

1. The Board grants in part and denies in part API's motion for expedited review as detailed above.
2. The Board otherwise denies API's motion.
3. Anyone who wishes to file a rulemaking proposal for alternative standards during SSM in this R23-18(A) sub-docket must do so by August 7, 2023. The proposal must:
 - a. Comply with the applicable proposal-content requirements of 35 Ill. Adm. Code 102, except for the 200-person signature requirement; and
 - b. Include a statement of whether the proponent requests that one or more public hearings be held on its proposal, along with a statement addressing whether the Act requires one or more hearings to be held on the proposal, including whether any hearing already held in the R23-18 main docket would satisfy all or part of that requirement, as well as public notice requirements under the Act and the Clean Air Act.
4. By August 14, 2023, anyone, regardless of whether they filed a proposal under paragraph 3, may file a public comment in this R23-18(A) sub-docket:
 - a. Requesting that one or more public hearings be held on any proposal filed under paragraph 3; and

- b. Addressing whether the Act requires one or more hearings to be held on any proposal filed under paragraph 3, including whether any hearing already held in the R23-18 main docket would satisfy all or part of that requirement, as well as public notice requirements under the Act and the Clean Air Act.
- 5. At its August 17, 2023 meeting, the Board will issue an order:
 - a. Directing the Clerk to publish a single first-notice proposal in the *Illinois Register*; and
 - b. Directing the hearing officer to expeditiously schedule one or more public hearings on the first-notice proposal as specified by the Board.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 6, 2023, by a vote of 3-0.

A handwritten signature in black ink that reads "Don A. Brown". The signature is written in a cursive, flowing style.

Don A. Brown, Clerk
Illinois Pollution Control Board