

ILLINOIS POLLUTION CONTROL BOARD
April 20, 2006

IN THE MATTER OF:)
)
PROPOSED NEW 35 ILL. ADM. CODE 225) R06-25
CONTROL OF EMISSIONS FROM LARGE) (Rulemaking - Air)
COMBUSTION SOURCES (MERCURY))

DISSENTING OPINION (by T.E. Johnson):

I respectfully dissent from the majority opinion. As was discussed in the majority opinion, the issue of whether or not fast-track procedures are appropriate in this rulemaking hinges on two factors. One is whether or not the rules are “required to be adopted” under Section 28.5 of the Illinois Environmental Protection Act (Act) (415 ILCS 5/28.5 (2004)); the second is whether rules adopted using the fast-track procedures can be more stringent than the federal requirements upon which the rules are based.

I disagree with the majority on the “required-to-be-adopted” portion of the majority opinion. Section 28.5 of the Act defines “requires to be adopted” as “those regulations or parts of regulations for which the United States Environmental Protection Agency (USEPA) is empowered to impose sanctions against the State for failure to adopt such rules.” 415 ILCS 5/28.5 (2004). While it is clear that any Illinois failure to adopt a mercury emission regulation will result in the federal clean air mercury rule becoming enforceable in Illinois, I do not think the imposition of the federal plan is a sanction pursuant to Section 28.5. Thus, I do not believe that this rulemaking proposes regulations or parts of regulations for which the USEPA is empowered to impose sanctions against the State for failure to adopt such rules, and I feel the Board should not proceed with this rulemaking pursuant to Section 28.5. Rather, this proposal should proceed under the Board’s general rulemaking provisions found at Sections 27 and 28 of the Act. 415 ILCS 5/27 and 28 (2004).

I want to underscore the importance of this rulemaking. However, in my opinion, Section 28.5 is simply not the appropriate vehicle for this proposal. I agree with the majority concerning the Board’s authority to consider whether or not a proposal filed pursuant to Section 28.5 may proceed under that provision. As the majority states, both the language of the Act and well-settled case law authorize the Board to consider whether or not a proposal filed pursuant to Section 28.5 may proceed under that provision. Further, the Act and case law establish that the Board has the discretion to determine whether it has jurisdiction over a matter filed before it.

Additionally, I believe the majority is correct in finding that no part of the proposal must be dismissed because of the lack of specific findings regarding mercury emissions in the Section 9.10 report. Under Sections 27 and 28.5 of the Act, the Illinois Environmental Protection Agency has broad authority to bring proposals to the Board.

Ultimately though, I cannot join the majority in voting for this opinion because I feel that the Board should not proceed with this rulemaking utilizing the Act’s fast-track-procedures since

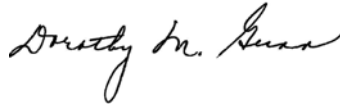
the imposition of the federal clean air mercury rule in Illinois does not amount to a sanction as referenced in Section 28.5 of the Act.

For the above stated reasons, I respectfully dissent.

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Thomas E. Johnson
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the above dissenting opinion was submitted on April 24, 2006.

A handwritten signature in black ink, written in a cursive style, appearing to read 'Dorothy M. Gunn'.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board