BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PROPOSED NEW CAIR SO_2, CAIR NOx	)	
ANNUAL TRADING PROGRAMS,	)	**R06-26**
35 ILL.ADM.CODE 225,	)	**(Rulemaking – Air)**
CONTROL OF EMISSIONS FROM LARGE	)	
COMBUSTION SOURCES,	)	
SUBPARTS A, C, D, AND E	)	

NOTICE OF FILING

To:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

Persons included on the
ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that we have today filed with the Office of the Clerk of the Pollution Control Board a **MOTION TO DISMISS** on behalf of Dynegy Midwest Generation, Inc., Midwest Generation, LLC, and Southern Illinois Power Cooperative, copies of which are herewith served upon you.

Kathleen C. Bassi

Dated: November 30, 2006

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MOTION TO DISMISS

Participants, DYNEGY MIDWEST GENERATION, INC., MIDWEST GENERATION, LLC, and SOUTHERN ILLINOIS POWER COOPERATIVE (collectively "Petitioners"), by and through their attorneys, SCHIFF HARDIN LLP, and pursuant to 35 Ill. Adm. Code § 101.506, for the reasons set forth below, move the Board to dismiss the Illinois Environmental Protection Agency's ("Agency") proposed new Subparts C, D, and E of Part 225, to the Board's air pollution regulations (35 Ill.Adm.Code Part 225, Subparts C, D, and E).

RELEVANT FACTS

On May 30, 2006, the Agency submitted to the Board a rulemaking proposal pursuant to Sections 27 and 28 of the Illinois Environmental Protection Act (the "Act") (415 ILCS 5/27 and 28 (2004)) that proposes to add new Subparts C, D, and E to Part 225. The proposed rule applies to any fossil fuel-fired electric generating unit ("EGU") with a nameplate capacity greater than 25 megawatts ("MW") that sells electricity. As explained in the Agency's Statement of Reasons, the Agency proposes the adoption of the Clean Air Interstate Rule ("CAIR") trading program for sulfur dioxide ("SO_2") in Subpart C. The Agency's proposals for nitrogen oxides ("NOx") in Subparts D and E would provide for participation in the federal annual and seasonal NOx trading

programs, respectively, and would comply with the annual and seasonal NOx caps established by the U.S. Environmental Protection Agency ("USEPA") in the CAIR.

In addition to satisfying Illinois' obligations under the CAIR, the Agency asserts that its proposal is intended to address, in part, its obligation to meet the Clean Air Act ("CAA") requirements for the control of fine particulate matter ($PM_{2.5}$) and ozone in the Chicago and Metro East/St. Louis nonattainment areas.

On June 15, 2006, the Board accepted the proposal for hearing, finding that it generally satisfies the content requirements of the Act and the Board's procedural rules for rulemaking proposals. *Board Order*, June 15, 2006. However, because the Board lacks statutory authority to promulgate the proposed rules in Part 225, Subparts C, D, and E, Petitioners move the Board to dismiss the Agency's new Part 225 for lack of subject matter jurisdiction under 35 Ill. Adm. Code § 101.506.

DISCUSSION

I. Standard for Motions to Dismiss

Section 101.506 of the Board's procedural rules provides that parties may file "motions to strike, dismiss or challenge the sufficiency of any pleading within 30 days after service of the challenged document." 35 Ill.Adm.Code § 101.506. When ruling on a Motion to Dismiss, the Board applies "the same principles applied to Illinois Code of Civil Procedure 2-615 and 2-619 motions to strike or dismiss." *County of DuPage v. Waste Mgmt. of Illinois*, AC No. 94-92, at 2 (Dec. 1, 1994). All well-pled facts must be taken as true, and all inferences drawn from them must be drawn in favor of the non-movant. *People v. Pattison Ass'n, LLC*, PCB 05-181, at 4 (Sept. 15, 2005). However, if it appears that no set of facts could be proven under the pleadings that would entitle a complainant to relief, the complaint should be dismissed. *Pattison*, at 4.

II. Petitioners' Motion to Dismiss Is Timely.

Generally, motions to strike, dismiss, or challenge the sufficiency of any pleading filed with the Board must be filed within 30 days after service of the challenged document. 35 Ill. Adm. Code § 101.506. However, in *Brazas v. Village of Hampshire*, the Board affirmed that "a challenge to jurisdiction can be made any time prior to a final decision on the merits." PCB 06-131, at 3; *see also E&E Truck Line, Inc. v. Dep't of Employment Sec.*, 634 N.E.2d 1191, 1194 (Ill.App.Ct. 1994); *Camp v. Chicago Transit Auth.*, 403 N.E.2d 704, 706 (Ill.App.Ct. 1980) (holding that the question of whether a court has jurisdiction is always open). Thus, the Respondent's Motion to Dismiss is timely.

III. The Board Lacks Jurisdiction to Promulgate the Proposed Trading Rules.

The Board lacks statutory authority to adopt the NOx trading rules proposed in Subparts D and E, which invalidate the Agency's proposed new Subparts D and E in Part 225. Section 10 of the Act states:

> The Board, pursuant to procedures prescribed in Title VII of this Act, may adopt regulations to promote the purposes of this Title. Without limiting the generality of this authority, such regulations may among other things prescribe:
>
> (a) Ambient air quality standards specifying the maximum permissible short-term and long-term concentrations of various contaminants in the atmosphere;
>
> (b) Emissions standards specifying the maximum amounts or concentrations of various contaminants that may be discharged into the atmosphere. . . .

415 ILCS 5/10. Thus, Section 10 authorizes the Board to adopt regulations that promote the purposes of the Act, including air quality standards and emissions standards.

Aside from this general rulemaking authority, however, Section 9.8 of the Act specifically delineates a trading system for volatile organic compounds, and Section 9.9 of the

Act specifically delineates a NOx trading system. 415 ILCS 5/9.8 and 9.9. Particularly, Section 9.9 mandates that "[t]he Agency shall propose and the Board shall adopt regulations to implement an interstate NOx trading program (hereinafter referred to as the "NOx Trading Program") as provided for in 40 CFR Part 96, including incorporation by reference of appropriate provisions of 40 CFR Part 96."

The general grant of authority conveyed by Section 10 must be construed in light of the specific grants of authority in Sections 9.8 and 9.9. If the general grant of authority in Section 10 conveyed authority to promulgate trading regulations, there would have been no need to enact Sections 9.8 and 9.9, which authorized VOC and NOx trading programs, respectively. In other words, if Section 10 conveyed the authority to promulgate trading program regulations, enactment of Sections 9.8 and 9.9 would have been a meaningless, superfluous grant of authority.

Under Illinois law, however, an agency must apply a statute so that no part is rendered superfluous. *Difiore v. Retirement Board of Policemen's Annuity & Benefit Fund*, 729 N.E.2d 878, 881 (Ill.App.Ct. 2000). For this reason, the Board cannot construe the air quality and emissions standards provisions of Section 10 to authorize emissions trading programs. Trading programs in Illinois are specifically authorized by the General Assembly when the General Assembly has determined that such authorization is appropriate, such as in Sections 9.8 and 9.9. There has been no such specific grant of statutory authority with respect to the Agency's proposed NOx trading programs. If Section 10 authorizes trading programs, Sections 9.8 and 9.9 would be superfluous. If the Board has statutory authority to adopt the Agency's proposed NOx trading programs, that authority arises only under Section 9.9, which specifically provides for a

NOx trading program. The proposed NOx trading programs, however, are inconsistent with and are not authorized by Section 9.9.

Section 9.9 mandates that the Agency make certain provisions as part of the NOx Trading Program. One of these provisions includes an allowance set aside for new units that is no greater than 5%. Moreover, Section 9.9 also allows the Agency to make certain provisions if it so chooses as part of the NOx Trading Program. However, Section 9.9 does not include an allowance set-aside for any purpose other than for new units in any of its mandates or grants of authority to the Agency. If the General Assembly intended there to be allowance set-asides for the purposes proposed in the Clean Air Set-Aside ("CASA") provisions of the proposed rule as part of the NOx Trading Program, it would have included them as part of either the mandates or discretionary grants of authority under Section 9.9. However, it chose not to do so. As a result, the Board lacks statutory authority, and thus jurisdiction, to promulgate the proposed NOx trading programs under Section 9.

The proposed NOx trading programs are further inconsistent with, and thus are not authorized by, Section 9.9 because it requires the inclusion of non-EGUs[1] in the seasonal NOx trading program. The Agency has specifically excluded non-EGUs from this proposal and has indicated that it has no intention of proposing to include them in a NOx trading program in a future rulemaking.

Further, Section 9.9 of the Act specifically addresses ozone attainment and maintenance. Because ozone attainment and maintenance are only a seasonal requirement, the trading program authorized by Section 9.9 can be only a seasonal program. Proposed Subpart D, the proposed

[1] Those industrial boilers greater than 250 mmBtu and generators greater than 25 MW that do not produce electricity for sale.

annual NOx trading program, exceeds the scope of Section 9.9. Therefore, Section 9.9 cannot provide authority for the Agency's proposed annual NOx trading program as proposed in Subpart D.

In the alternative, because Section 9.9 specifically refers to the NOx SIP Call and does not recognize the CAIR, the Board does not have the authority to adopt any NOx trading rule that is different from that specified in Section 9.9.

Nor has the General Assembly authorized the Board to adopt the proposed SO_2 trading program. As discussed above, Sections 9.8 and 9.9 provide only for trading programs for VOC and NOx, respectively. There is no section in the Act that specifically provides for an SO_2 trading program. For the same reasons that the Board does not have jurisdiction to adopt the proposed NOx trading programs, *i.e.*, the lack of authority in the Act, the Board does not have jurisdiction to consider and adopt the proposed SO_2 trading program, even though Illinois sources are subject to and participate in a national SO_2 trading program authorized by Title IV of the Clean Air Act, 42 U.S.C. §§ 7651-7651o ("the Acid Rain Program"), and the proposed program builds from the Acid Rain Program as required by USEPA. The Acid Rain Program is administered directly by USEPA with no state involvement or authorization required other than to include Acid Rain permits in Clean Air Act Program (CAAPP) permits pursuant to Section 39.5 of the Act. However, the federal CAIR requirement to comply with a different cap on SO_2 emissions, which proposed Subpart C would accomplish, is based upon Section 110 of the Clean Air Act, 42 U.S.C. § 7410, and is a different program that requires the addition of substantive trading regulations by the states. For Illinois to comply with this requirement through Board-adopted Subpart C regulations, the General Assembly must have granted the Board the authority to adopt such a program. The General Assembly has not provided that authority to the Board.

For the foregoing reasons, the Board does not have the statutory authority to adopt new Subparts C, D, and E of Part 225.

IV. The Board Also Lacks Jurisdiction to Promulgate Subpart C of the Agency's Proposed Part 225 Because Adoption of Subpart C Would Violate Section 10(B) of the Act.

Under Illinois law, an administrative agency such as the Board is a "creature of statute" and, therefore, has only the authority given to it by the Act. *Brazas v. Village of Hampshire*, PCB 06-131, at 3 (May 4, 2006) (citing *Granite City Div. of Nat'l Steel Co. v. PCB*, 613 N.E.2d 719, 729 (1993)). The Board thus must act within the bounds of authority granted to it by the Act. To the extent an agency, including the Board, acts outside its statutory authority, it acts without jurisdiction, and its actions are invalid. *Bus. & Prof'l People for Pub. Interest v. Illinois Commerce Comm'n*, 555 N.E.2d 693, 716 (Ill. 1989).

The Act does not allow the Board to promulgate Subpart C of the Agency's proposed Part 225. Subpart C purports to regulate SO_2 emissions from EGUs throughout the state, including the three metropolitan areas of Chicago, Peoria, and Metro-East/St. Louis, for reasons other than attainment of the national ambient air quality standards ("NAAQS") for SO_2. Statement of Reasons, p. 18. This directly conflicts with the Board's statutory authority under section 10(B) of the Act. Section 10(B) states:

> The Board shall adopt sulfur dioxide regulations and emission standards for existing fuel combustion stationary emission sources located in all areas of the State of Illinois, except in Chicago, St. Louis (Illinois) and Peoria major metropolitan areas, in accordance with the following requirements:
>
> (1) Such regulations shall not be more restrictive than necessary to attain and maintain the "Primary National Ambient Air Quality Standards for Sulfur Dioxide" and within a reasonable time attain and maintain the "Secondary National Ambient Air Quality Standards for Sulfur Dioxide."

415 ILCS 5/10(B) (emphasis added). Thus, under Section 10(B), the Board must not adopt emission standards for existing EGUs outside the Chicago, St. Louis, and Peoria metropolitan areas that are more restrictive than necessary to attain and maintain the SO_2 NAAQS. However, this is exactly what Subpart C proposes. There are no SO_2 nonattainment areas in Illinois. Therefore, no additional SO_2 regulation is "necessary to attain and maintain" the SO_2 NAAQS. Consequently, under Section 10(B), the Board lacks statutory authority to adopt Subpart C of the Agency's proposal to amend Part 225 and any proposed rule that contains such regulations.

Despite the statutory restrictions on the Board's authority in Section 10(B), the Agency, in its Statement of Reasons, asserts statutory interpretations that are not only unpersuasive but also contradict Illinois law. The Agency attempts to argue through a convoluted interpretation of Section 10(B) that because the second purpose of Section 10(B), adoption of NAAQS for SO_2 within the three metropolitan areas, has been met, the only remaining function of Section 10(B) is to provide guidance about the adoption of SO_2-related regulations by the Board. Statement of Reasons, p. 21. Based on this interpretation, the Agency then asserts that a "newer statutory provision has superseded Section 10(B) as to that limited purpose, and therefore all remaining purpose and effect of Section 10(B) has essentially ended." Statement of Reasons, p. 21. That newer statutory provision, Section 9.10, directs the Agency to "issue to the House and Senate Committees on Environment and Energy findings that address the potential need for the control or reduction of emissions from fossil fuel fired electric generating plants." 415 ILCS 5/9.10(b). According to the Agency, this means that the statutory limitations in Section 10(B) are no longer effective even though they remain in the Act.

However, the language of Section 9.10 does not displace the restriction on the Board's jurisdiction to adopt regulations requiring reductions in SO_2 emissions outside the three major

metropolitan areas beyond the levels necessary for attainment of the SO_2 NAAQS. The Agency's contorted interpretation directly contradicts long-standing principles of Illinois law. Under Illinois law, in construing a statute, the most fundamental rule is to give effect to the legislature's intent, and the best evidence of that intent is the statutory language. *U.S. Bank Nat'l Assoc. v. Clark*, 837 N.E.2d 74, 82 (Ill. 2005). Moreover, statutory language must be given its plain and ordinary meaning. *Clark*, at 82. As a result, courts must not construe a statute by altering its language in a way that constitutes a change in the plain meaning of the words actually adopted by the legislature. *Clark*, at 82.

Applying these fundamental principles of statutory construction to Section 10(B), its plain and ordinary meaning clearly prohibits the Board from regulating SO_2 emissions beyond that required for attainment of the SO_2 NAAQS. Even if there was any ambiguity in this statutory prohibition, and there is not, Section 9.10 cannot be construed to provide authority that was precluded under Section 10(B). Section 9.10 merely requires the Agency to issue a report that addresses such things as reduction of SO_2 emissions. The General Assembly could then act upon the report's findings. Such action could potentially have included, if requested by the Agency and determined to be necessary, repeal of Section 10(B) and a grant of authority to the Board to adopt additional SO_2 regulations.[2] However, as discussed further below, the General Assembly has not repealed Section 10(B) and has not granted such authority following submission of the Agency's report. Indeed, a bill that would have repealed Section 10(B), Senate Bill 2721 ("S.B. 2721") was proposed but never enacted. Nothing in the statutory language of Section 9.10 suggests that the Board may regulate SO_2 emissions in contradiction of

[2] If the Agency found that further regulation of SO_2 was an appropriate outcome of its investigation, the Agency could have and should have included a recommendation to amend Section 10(B) in its report to the General Assembly pursuant to the statutory direction in Section 9.10.

Section 10(B). As a result, the Agency's interpretation of these two statutes violates their plain and ordinary meaning.

Other principles of statutory interpretation also preclude the Agency's tortuous interpretation of Sections 10(B) and 9.10. Under Illinois law, it is presumed that the legislature will not enact a law which completely contradicts a prior statute without an express repeal of it. *See Clark*, 837 N.E.2d at 80; *In re Marriage of Lasky*, 678 N.E.2d 1035, 1037 (Ill. 1997). Thus, repeal by implication is generally disfavored, and the Supreme Court will presume new legislation was intended to be consistent with existing law. *Clark*, 837 N.E.2d at 80; *Lasky*, 678 N.E.2d at 1037. In fact, when there is an alleged conflict between two legislative enactments, the court has a duty to construe those statutes in a manner that avoids an inconsistency and gives effect to both enactments, where such a construction is reasonably possible. *Spina v. Toyota Motor Credit Corp.*, 703 N.E.2d 484, 492 (Ill.App.Ct. 1998); *see also Clark*, 837 N.E.2d at 80. Nevertheless, repeal by implication is exactly what the Agency asks the Board to find in order to support promulgating Subpart C. Indeed, the Board is effectively asked to repeal Section 10(B) when the General Assembly itself has chosen not to do so even following the Agency's report under Section 9.10.

On January 20, 2006, Senator James F. Clayborne, Jr. proposed S.B. 2721 to repeal Section 10(B) of the Act. S.B. 2721, 94th Gen. Assem., Reg. Sess. (Ill. 2006). After a First Reading, the Senate referred S.B. 2721 to its Rules Committee. On February 8, 2006, the Senate Rules Committee assigned this bill to the Senate Environment and Energy Committee. However, the Senate Environment and Energy Committee postponed S.B. 2721 on February 15, 2006, and subsequently re-referred the bill to the Senate Rules Committee on February 17, 2006. Since that time, the Senate has taken no further action toward passing this bill.

The Legislature passed Section 10(B) over twenty years ago. It has had ample time to explicitly repeal or otherwise amend this section if it so desired, including through S.B. 2721. However, it has not done so, and the Agency should not ask the Board to find, through the Agency's contorted interpretation, that the General Assembly has repealed Section 10(B) by implication through its adoption of Section 9.10.

Further, even if the two statutes may be construed to be in conflict, as apparently urged by the Agency, the Board has a duty to construe them in a manner that avoids inconsistency and gives effect to both enactments. The Agency's interpretation gives no effect to Section 10(B). However, the Board can readily give effect to the plain and ordinary language of both statutes by the following natural and consistent interpretation: (1) Section 10(B) prohibits the Board from regulating SO_2 emissions in excess of attainment, and (2) Section 9.10 required the Agency to file a report to the legislature. Neither part of this interpretation includes authorization of regulation of SO_2 outside the three major metropolitan areas more than is necessary to attain the SO_2 NAAQS.

For all of these reasons, the Agency's labyrinthine interpretation of Sections 10(B) and 9.10 in its Statement of Reasons defies all principles of statutory construction under Illinois law. Accordingly, the Agency's interpretation does not establish that the Board has subject matter jurisdiction to adopt SO_2 regulations, proposed Subpart C, or to adopt any rule that regulates SO_2 outside the three major metropolitan areas beyond the level necessary to attain or maintain the SO_2 NAAQS.

CONCLUSION

For the foregoing reasons, the Board lacks the requisite statutory authority to promulgate proposed Subparts C, D, and E of Part 225 and must dismiss the Agency's proposal.

WHEREFORE, for the reasons set forth above, Petitioners request that the Board grant its Motion to Dismiss and dismiss the Agency's proposal to add new Subparts C, D, and E to Part 225.

Respectfully submitted,

DYNEGY MIDWEST GENERATION, INC.,
MIDWEST GENERATION, LLC, and
SOUTHERN ILLINOIS POWER COOPERATIVE

by:

One of Their Attorneys

Dated: November 30, 2006

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 30th day of November, 2006, I have served electronically the attached **MOTION TO DISMISS** on behalf of Dynegy Midwest Generation, Inc., Midwest Generation, LLC, and Southern Illinois Power Cooperative,, upon the following persons:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

and electronically and by first-class mail with postage thereon fully prepaid and affixed to the persons listed on the **ATTACHED SERVICE LIST**.

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