BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE

TO: Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601-3218

SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have today filed with the Office of the Pollution Control Board a RESPONSE TO MOTION TO DISMISS, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: _____
John J. Kim
Managing Attorney
Air Regulatory Unit
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DATED: December 22, 2006

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THIS FILING IS SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PROPOSED NEW CLEAN AIR	)	
INTERSTATE RULES (CAIR) SO_2, NO_x	)	R06-26
ANNUAL AND NO_x OZONE SEASON	)	(Rulemaking – Air)
TRADING PROGRAMS, 35 ILL. ADM.	)	
CODE 225, SUBPARTS A, C, D and E	)	

RESPONSE TO MOTION TO DISMISS

NOW COMES the Proponent, the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by one of its attorneys, and, pursuant to the Illinois Pollution Control Board ("Board") Rules at 35 Ill. Adm. Code 101.500 and 101.504, hereby responds to the Motion to Dismiss ("Motion") filed by Dynegy Midwest Generation, Inc., Midwest Generation, LLC, and Southern Illinois Power Cooperative ("Movants," collectively). In support of this response, the Illinois EPA states as follows:

FAILURE TO TIMELY FILE MOTION TO DISMISS

In their Response to Motion to Dismiss, Environment Illinois and the Environmental Law and Policy Center ("Environmental Advocates," collectively), the Environmental Advocates present a cogent and compelling argument as to the untimely filing of the Motion by the Movants. The Illinois EPA finds the presentation of relevant facts and legal arguments in the Environmental Advocates' response to be more than sufficient to warrant the Board's denial of the Motion on the grounds that it was not timely filed based on the Board's own procedural rules that such a motion be filed within 30 days of the initial filing. In this case more than 7 months has passed and 5 days of hearing in two cities.

Further, the Environmental Advocates clearly distinguish and put into proper perspective the Board's past ruling in the case of *Brazas v. Village of Hampshire*, PCB 06-131. Based upon

the strong arguments presented by the Environmental Advocates, the Illinois EPA joins in their request that the Board deny the Motion. A decision by the Board to allow consideration of the merits of the Motion would reward the Movants for their untimely conduct and would in fact materially prejudice the Illinois EPA and other interested participants given the extensive administrative resources that have to date been expended through the participation and defense of the underlying rulemaking proposal.

ARGUMENTS REGARDING LACK OF JURISDICTION

Assuming arguendo that the Board does consider the merits of the Motion, despite the strong and clear cut arguments to the contrary, the Board should nonetheless deny the Motion based on the lack of merit of the arguments presented by the Movants.

Statutory Authority Regarding NO_x Trading Rules

The first argument raised by the Movants is that the presence of Sections 9.8 and 9.9 of the Environmental Protection Act ("Act") (415 ILCS 5/9.8, 5/9.9) as compared with the more general provisions of Section 10 of the Act (415 ILCS 5/10) results in the Board lacking jurisdiction to consider and promulgate the NO_x trading provisions found in Subparts D and E of Part 225. This conclusion is premised on the observation that Sections 9.8 and 9.9 address specific trading systems (the Emissions Reductions Market System ("ERMS") and NO_x SIP Call, respectively), while Section 10 of the Act confers general authority upon the Board to adopt regulations to promote the purposes of the Act. Section 10 lists examples of such regulations. This listing is provided without limiting the generality of the authority.

Essentially, the argument being proffered by the Movants is an application of the statutory maxim of construction of *inclusio unius est exclusio alterius*, or the inclusion of one is the exclusion of the other. Presumably, the Movants' rationale is that the more specific nature of

Sections 9.8 and 9.9 – that evidence the General Assembly's recognition and establishment of certain trading programs – counteracts the more general authority conferred by Section 10. As a result, the Movants would have the Board find that there is no authority pursuant to Section 10 of the Act to allow the Board to adopt the NO_x trading provisions of this proposed rulemaking.

This argument fails for several reasons. First, a clear reading of Section 10 of the Act shows the General Assembly's intent to provide general and broad rulemaking authority upon the Board, as evidenced by the words that a list of examples of rulemakings that could be promulgated by the Board was provided "[w]ithout limiting the generality of this authority." 415 ILCS 5/10(A). This unequivocal statement of statutory intent by the General Assembly, ascertained by a clear and plain reading of Section 10(A), cannot be questioned. How then should the provisions of Sections 9.8 and 9.9 be reconciled with Section 10? Initially, by calling into question the application of the above-cited statutory maxim (i.e., inclusion of one is to the exclusion of all others) by the Movants.

If the Movants were to have an argument of substance, Section 10 could not contain the language that expresses the general grant of authority to the Board. Further, the "inclusion/exclusion" maxim does not preclude expressions by the General Assembly that an administrative agency could have broad rulemaking authority while also having specific authority for particular rulemakings. Indeed, if the Movants' argument were taken as true, then only specific provisions similar to Sections 9.8 and 9.9 could be relied upon by the Board to enact regulations, and Section 10 would be rendered superfluous.

Another reason the Movants' argument is without merit can be found by an examination of the language within Sections 9.8 and 9.9 of the Act. Along with a description of the particular programs and contents of the programs is language that creates special funds to be used in

conjunction with the programs (the Alternative Compliance Market Account Fund for the ERMS program and the NO_x Trading System Fund for the NO_x SIP Call). Any money belonging to or for the use of the State must either be paid into the State's general revenue fund or into a special fund. 30 ILCS 105/4. As both the ERMS program and NO_x SIP Call involve the receipt of funds, special funds had to be established by the General Assembly to allow for the receipt of such funds. Hence, an argument could be made that Sections 9.8 and 9.9 were adopted because of a need to create these special funds rather than because they are trading programs. In the case of the pending rulemaking, there is no need to create a special fund for receipt of money and thus arguably no need for the General Assembly to pass statutory provisions similar to Sections 9.8 and 9.9. The presence of such language in those sections creating special funds distinguish those provisions from the present rulemaking, and thus comparison of Sections 9.8 and 9.9 to Section 10 as is being attempted by the Movants is improper.

For these reasons, the Movants' arguments that the NO_x trading provisions of the proposed rulemaking should be stricken must be denied by the Board. The Board should instead recognize the clear and intended general authority conferred by Section 10 of the Act that authorizes the consideration and promulgation of the NO_x trading provisions of the proposed rulemaking.

Statutory Authority Regarding Regulation Of SO_2 Emissions

The Movants argue that Section 10(B) of the Act (415 ILCS 10(B)) prohibits the Board from adopting the SO_2 provisions of Subpart C of the proposed Part 225 rulemaking given the language of Section 10(B)(1) that refers to regulations that may not be more restrictive than necessary to attain and maintain the Primary National Ambient Air Quality Standards

("NAAQS") for Sulfur Dioxide. This argument also is without merit, as the Movants fail to pay heed to the history and purpose of Section 10(B).

Again, a review of the authority pursuant to Section 10(A) of the Act is warranted. Section 10(A) provides the Board's general authority for rulemaking addressing air pollution:

> 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 . . . ambient air quality standards . . . emissions standards . . . standards for issuance of permits . . .

415 ILCS 5/10(A). Not only are the proposed regulations necessary to meet the State's obligations under the Clean Air Interstate Rule ("CAIR"), they are also necessary to meet the State's obligations under the Clean Air Act ("CAA") to attain the two new NAAQS: 8-hour ozone and $PM_{2.5}$. With respect to $PM_{2.5}$, the United States Environmental Protection Agency ("USEPA") has identified emissions of both NO_X and SO_2 as precursors to $PM_{2.5}$ formation in the atmosphere. As part of the steps needed for Illinois to demonstrate attainment with the $PM_{2.5}$ NAAQS, to reduce interstate transport, and to improve visibility, Illinois must adopt and implement certain regulations for the control of NO_X and SO_2 emissions that meet these federal requirements.

For reasons other than attainment of the SO_2 NAAQS, the proposed regulations would further address SO_2 emissions from electric generating units, a type of fuel combustion source, located throughout the State, including the three major metropolitan areas of Chicago, Peoria, and Metro-East/St. Louis.[1] As the Movants attempt to argue, it may seem at first glance that Section 10(B) is applicable. A closer reading, however, of that provision and subsequent regulatory and legislative history prove otherwise. Section 10(B) provides:

[1] On April 4, 1995, USEPA approved the State Implementation Plan ("SIP") revision necessary for the last remaining SO_2 nonattainment area in the Illinois to be redesignated to attainment of the NAAQS. 40 CFR 52.724(h).

> The Board shall adopt SO_2 regulations and emission standards for existing fuel combustion stationary emission sources located in all areas of the State of Illinois, except the 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). Although Section 10(B) appears to apply to the SO_2 portion of the present rulemaking, such is not the case for several different reasons.[2]

The Purpose of Section 10(B) Has Been Met

Section 10(B) of the Act is not applicable to this rulemaking since the purpose behind that statutory provision has been fulfilled. It is well-established that 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. That language must be given its plain and ordinary meaning, and courts may not properly 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. If the statutory language is clear, a reviewing body must give effect to the plain and ordinary meaning without resorting to other construction aids. *U.S. Bank National Association v. Clark*, 216 *Ill.2d* 334, 346, 837 *N.E.2d* 74, 82 (2005).

The language of Section 10(B) is clear. The provisions were intended to limit the extent to which SO_2 emissions from fuel combustion sources outside of the three major metropolitan areas could be controlled, as Illinois EPA was moving forward with its attainment and maintenance strategies for the SO_2 NAAQS, following the adoption of the Clean Air Act Amendments of 1977. Accordingly, the General Assembly clearly gave the Board the authority

[2] Section 10(B) of the Act was adopted as part of Senate Bill 1967, later P.A. 81-1370, effective August 8, 1980.

to adopt two categories of regulations. First, the General Assembly stated that the Board would have the authority to adopt certain SO_2 regulations and emission standards for existing stationary fuel combustion emission sources located in all areas of the State except for the Chicago, Peoria and Metro-East/St. Louis major metropolitan areas. As to those "state-wide" SO_2 regulations, the General Assembly's language required in pertinent part that such regulations be no more restrictive than necessary to attain and maintain primary and secondary NAAQS for SO_2. 415 ILCS 5/10(B)(1).

Regarding the second purpose, the regulation of such sources in the three major metropolitan areas, the General Assembly clearly, by lack of any restriction or other conditions, left the criteria for regulation of such sources in the major metropolitan areas to the authority and discretion of the Board. *Id.* Again, this is consistent with the action of Illinois EPA to propose regulations that would address the nonattainment status in the major metropolitan areas. Effectively then, there were two different regulatory approaches that were envisioned and created by the General Assembly; the first sought to impose SO_2 emissions standards for areas of the State other than the major metropolitan areas, and the second sought to allow for Illinois EPA and the Board to work in tandem to impose SO_2 emissions standards specifically tailored to the major metropolitan areas, which included areas in which the SO_2 NAAQS were not met or were threatened.

Setting aside the first purpose of Section 10(B), the second part of the statutory provision may be now examined. To address that second purpose, i.e., nonattainment in the major metropolitan areas, Illinois EPA proposed standards for SO_2 emissions from fuel combustion emission sources located within the major metropolitan areas.[3] The proposal was received by the

[3]*See, In the Matter Of: Sulfur Dioxide Emission Limitations: Rule 204 of Chapter 2*, R80-22, February 24, 1983.

Board on December 1, 1980, or several months after the effective date of Section 10(B). On February 24, 1983, the Board issued its final order for the adopted rule stemming from Illinois EPA's December 1980 proposal. *See, In the Matter Of: Sulfur Dioxide Emission Limitations: Rule 204 of Chapter 2*, R80-22, February 24, 1983. In the final order, the Board recognized that Illinois EPA's December 1980 proposal was in response to the legislative mandate (of Section 10(B) of the Act) that it review the SO_2 emission standards for existing fuel combustion emission sources located within the three major metropolitan areas and thereafter propose amendments, consistent with the CAA's NAAQS program, which would enhance the use of Illinois coal. R80-22, p. 1. Those final rules are now found in Part 214 of the Board's regulations. 35 Ill. Adm. Code Part 214, originally adopted as Rule 204.

By virtue of the completed rulemaking in R80-22, the Board and Illinois EPA fulfilled the second purpose of Section 10(B) as set forth by the General Assembly; namely, the Board adopted regulations for the three major metropolitan areas that addressed NAAQS for SO_2. Thus, that aspect of Section 10(B) has been met and the provisions of Section 10(B) related to that purpose no longer have any purpose.

With respect to the first portion of Section 10(B), the Board was left with certain guidelines as to the nature of regulations affecting SO_2 emissions in the remainder of the State other than the major metropolitan areas. The Board was to adopt such regulations so long as they were no more restrictive than the need to attain the NAAQS for SO_2. Again, it bears repeating that Section 10(B) of the Act was enacted in 1980; in 1983, the second purpose of the provision was met via the Board's adoption of the SO_2 emissions proposal in R80-22. Prospectively from 1983, then, the only remaining function of Section 10(B) was to provide guidance in the adoption of SO_2-related regulations by the Board.

Section 10(B) Limited to SO_2 NAAQS

Another reason Section 10(B) of the Act is not an impediment to this rulemaking proposal is the limited scope of that section. The only NAAQS that Section 10(B) addresses is the NAAQS for SO_2, as is plainly evidenced in Section 10(B)(1). In the proposed rulemaking, however, SO_2 would be regulated not in the context of compliance with SO_2 NAAQS, but rather in its role as a precursor to the formation of $PM_{2.5}$, a different pollutant. To address the State's obligations under the CAA to control contributions to inter- and intra-state pollution transport, and improvement in visibility, all of which will improve the air quality for the citizens of Illinois, and all of which are consistent with the Board's authority pursuant to Section 10(A) of the Act, regulation of SO_2 emissions as contemplated in this proposal is appropriate and not precluded by Section 10(B). For these reasons, the Movants' arguments that Section 10(B) of the Act precludes the Board from exercising its statutory authority and adopting the proposed regulations must be taken as legally deficient. Accordingly, the Motion should be denied.

WHEREFORE, for the reasons set forth above, the Illinois EPA respectfully moves that the Board deny the Motion filed by the Movants.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: _____
John J. Kim
Managing Attorney
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DATED: December 22, 2006

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STATE OF ILLINOIS)
) **SS**
COUNTY OF SANGAMON)
)

PROOF OF SERVICE

I, the undersigned, an attorney, state that I have served electronically the attached RESPONSE TO MOTION TO DISMISS upon the following person:

Dorothy Gunn
Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph St., Suite 11-500
Chicago, IL 60601-3218

and mailing it by first-class mail from Springfield, Illinois, with sufficient postage affixed to the following persons:

SEE ATTACHED SERVICE LIST

_____

SUBSCRIBED AND SWORN TO BEFORE ME

This 22nd day of December, 2006

_____
Notary Public

SERVICE LIST
R06-26

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