

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
STATIONARY RECIPROCATING) R07-18
INTERNAL COMBUSTION ENGINES) (Rulemaking – Air)
AND TURBINES: AMENDMENTS TO)
35 ILL. ADM. CODE SECTION 201.146,)
PARTS 211 AND 217)

NOTICE OF FILING

TO: Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA ELECTRONIC MAIL)

Tim Fox, Esq.
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA FIRST CLASS MAIL)

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board an **OBJECTION TO USE OF SECTION 28.5 “FAST-TRACK” RULEMAKING FOR THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY’S PROPOSED RULES and AFFIDAVIT OF DEIRDRE K. HIRNER**, on behalf of the Illinois Environmental Regulatory Group, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

Dated: April 17, 2007

By: /s/ Katherine D. Hodge
One of Its Attorneys

Katherine D. Hodge
N. LaDonna Driver
Gale W. Newton
HODGE DWYER ZEMAN
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

CERTIFICATE OF SERVICE

I, Katherine D. Hodge, the undersigned, hereby certify that I have served the attached **OBJECTION TO USE OF SECTION 28.5 "FAST-TRACK"**

RULEMAKING FOR THE ILLINOIS ENVIRONMENTAL PROTECTION

AGENCY'S PROPOSED RULES and AFFIDAVIT OF DEIRDRE K. HIRNER

upon:

Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

via electronic mail on April 17, 2007; and upon:

Tim Fox, Esq.
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Rachel L. Doctors, Esq.
Assistant Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Post Office Box 19276
Springfield, Illinois 62794-9276

Renee Cipriano, Esq.
Elizabeth A. Leifel, Esq.
Sonnenschein Nath & Rosenthal LLP
7800 Sears Tower
233 S. Wacker Drive
Chicago, Illinois 60606-6404

Matthew Dunn, Esq.
Illinois Attorney General's Office
Environmental Control Division
James R. Thompson Center
100 West Randolph Street
Chicago, Illinois 60601

Kathleen C. Bassi, Esq.
Schiff Hardin, LLP
6600 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606-6473

William Richardson, Esq.
Chief Legal Counsel
Illinois Department of Natural Resources
One Natural Resources Way
Springfield, Illinois 62702-1271

by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois, on April 17, 2007.

/s/ Katherine D. Hodge

Katherine D. Hodge

IERG:001/R Dockets/R07-18/COS – Objection

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
STATIONARY RECIPROCATING)
INTERNAL COMBUSTION) R07-18
ENGINES AND TURBINES:) (Rulemaking – Air)
AMENDMENTS TO 35 ILL.)
ADM. CODE SECTION 201.146,)
AND PARTS 211 AND 217)

**OBJECTION TO USE OF SECTION 28.5 “FAST-TRACK”
RULEMAKING FOR THE ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY’S PROPOSED RULES**

NOW COMES the Illinois Environmental Regulatory Group (“IERG”), by and through its attorneys, HODGE DWYER ZEMAN, and submits its Objection due to the Illinois Environmental Protection Agency’s (the “Illinois EPA”) improper use of Section 28.5 of the Illinois Environmental Protection Act (the “Act”) in the Stationary Reciprocating Internal Combustion Engines and Turbines Proposal (the “Proposed Rules”).

IERG is an affiliate of the Illinois State Chamber of Commerce, and is a not-for-profit Illinois corporation comprised of 54 member companies engaged in power generation, industry, commerce, manufacturing, agriculture, trade, and transportation, which are regulated by governmental agencies that promulgate, administer or enforce environmental laws, regulations, rules or policies. IERG’s member companies therefore have a significant stake in how environmental requirements are established. And, a number of IERG member companies own and operate emission units that are potentially affected by the Proposed Rules.

As set forth in detail below, IERG does not believe that the Proposed Rules are appropriate for a Section 28.5 “fast-track” rulemaking proceeding. However, based on

the Consortium Objection¹ (as defined below), IERG does not object to the use of Section 28.5 rulemaking for the 28 internal combustion engines ("IC engines") that are affected by the NOx State Implementation Plan Call Phase II (the "Phase II NOx SIP Call Engines"). All other requirements in the Proposed Rules that would affect units other than the Phase II NOx SIP Call Engines are non-required rules, and must be considered under a second docket that should proceed under Title VII of the Act.

I. INTRODUCTION

On April 2, 2007, the Illinois EPA announced that it "has filed a proposal with the Illinois Pollution Control Board for regulatory proceedings for the control of NOx emissions from stationary reciprocating internal combustion engines (RICE) and turbines." <http://www.epa.state.il.us/air/> (April 3, 2007). Regulatory proposal R07-18 was date stamped as received by Illinois Pollution Control Board (the "Board") on April 6, 2007, and posted to the Board's website on that date. The Illinois EPA contends that the:

proposal is intended to satisfy Illinois' obligations under the United States Environmental Protection Agency's ("USEPA") NOx State Implementation Plan ("SIP") Call Phase II. The proposed new Subpart is also intended to address, in part, Illinois' obligation to meet certain requirements under the federal Clean Air Act (the "CAA") (which also incorporates the amendments (CAAA) as per Section 28.5(a) of the Act), 42 U.S.C. § 7401, *et seq.*, specifically the requirements for reasonable further progress ("RFP"), reasonably available control technology ("RACT"), rate-of-progress ("ROP"), and attainment demonstrations for the 8-hour ozone and PM_{2.5} National Ambient Air Quality Standards ("NAAQS").

R07-18, Statement of Reasons ("SOR") at 1-2.

¹ See R07-18 Objection To Use Of Section 28.5 Fast Track Procedures For Consideration Of Nitrogen Oxide Proposal As Filed (April 16, 2007).

The Illinois EPA submitted the Proposed Rules to the Board pursuant to Sections 9.9, 10, 27 and 28.5 of the Act. SOR at 1. The Illinois EPA proposed that the Board treat the Proposed Rules as a fast-track rulemaking pursuant to Section 28.5, which allows for the expedited review of regulations that are “proposed by the Agency and required to be adopted by the State under the Clean Air Act as amended by the Clean Air Act Amendments of 1990 (CAAA).” 415 ILCS 5/28.5(a). However, only rules required to be adopted by the State under the Clean Air Act (“CAA”) can be fast-tracked under Section 28.5 of the Act.

IERG opposes the Illinois EPA’s use of Section 28.5 of the Act for the proposed regulation of emission units other than the Phase II NO_x SIP Call Engines. IERG urges the Board to create a second docket for the portions of the Proposed Rules that would affect all other emission units and to proceed under Title VII of the Act in that proceeding.

II. THE PROPOSED RULE MUST BE SPLIT INTO PORTIONS THAT MAY BE PROMULGATED UNDER SECTION 28.5 OF THE ACT AND PORTIONS THAT MAY NOT BE PROMULGATED UNDER SECTION 28.5 OF THE ACT

As described below, the Proposed Rules are not required by the CAA. However, based on the Consortium’s Objections, IERG does not object to the portions of the Proposed Rules that affect the Phase II NO_x SIP Call Engines. See R07-18 Objection To Use Of Section 28.5 Fast Track Procedures For Consideration Of Nitrogen Oxide Proposal As Filed (April 16, 2007). Therefore, the Proposed Rules should be separated pursuant to Section 28.5(j). Section 28.5(j) provides:

The Board shall adopt rules in the fast-track rulemaking docket under the requirements of this Section that the CAAA requires to be adopted, and may consider a non-required rule in a second docket that shall proceed under Title VII of this Act.

415 ILCS 5/28.5(j).

The Illinois General Assembly, through consultation with the Illinois EPA, the public, and the regulated community, chose to limit fast-track proceedings to rules required to be adopted by the CAA where sanctions can be imposed for failure to adopt such rules. 415 ILCS 5/28.5. This is not a limitation that should be ignored, as the Illinois EPA seemingly does in its Proposed Rules. Without such a limitation, the Act would allow any proposed regulations related to the CAA to be fast-tracked, thus bypassing the deliberative proceedings of a regular rulemaking. IERG participated in the development of this section of the Act and has always maintained the position that this limitation is necessary.² Otherwise, all CAA regulations would be subject to the fast-track timeframe, providing less meaningful opportunities for public comment on the proposed regulations.

IERG has also advocated the proper use of accelerated rulemaking procedures in other air rulemaking proceedings. In In the Matter of: RACT Deficiencies – Amendments to 35 Ill. Adm. Code Parts 211 and 215, R89-16 (Feb. 8, 1990), the Illinois EPA sought to amend Parts 211 and 215 of the Board's air regulations under the federally required rules procedures of Section 28.2. The Board severed the rulemaking into two dockets because it concluded that sections of the proposed rulemaking were not federally required. The Board placed the non-federally required provisions in subdocket B "to address these proposed amendments under Section 28 of the Act." Id. at 1. The Board

² Please see attached Affidavit of Deirdre K. Hirner.

explained that it was “persuaded by the thorough analysis” of the Industry Group and by the “lack of analysis in the Agency’s response” when it found that portions of the proposed regulations were not “required.” Id. at 8.

Although the RACT Deficiencies rulemaking was not filed pursuant to Section 28.5, but rather pursuant to the federally required rules procedures of Section 28.2, the Board must be careful of its statutory rulemaking authority in this proceeding, as it clearly was in the RACT Deficiencies proceeding. It is certainly the Illinois EPA’s responsibility to propose regulations consistent with statutory requirements. Yet, as discussed herein, the Proposed Rules simply do not meet the statutory parameters for a Section 28.5 fast-track rulemaking. The Board must so find and ensure that any action to promulgate the Proposed Rules does not occur outside the Board’s rulemaking authority.

In a recent rulemaking, the Board was asked to split a proposed rule into portions that were required by the CAA and portions that were not so required. See Board R06-25. (Wherein IERG joined in Utility Motions And Objections To The Use Of Section 28.5 of the Act for the Illinois EPA’s Mercury Proposal.) R06-25, Illinois Environmental Regulatory Group’s Response In Support of Utility Motions And Objection To The Illinois Environmental Protection Agency’s Use Of Section 28.5 Of The Illinois Environmental Protection Act For Consideration Of Its Mercury Proposal (March 29, 2006). In refusing to split the rulemaking, the Board stated “the approach taken by the Agency to meet the federal mandate is not conducive to identifying and ‘separating out’ portions of the proposal for consideration under Section 27. As such, the Board will proceed under the fast-track procedures, rather than risk failing to adopt the required portions of the proposal by November 17, 2006, in order to avoid potential sanctions.”

Id., Order of April 20, 2006 at 18. However, the Circuit Court of the Seventh Judicial District in Sangamon County halted the entire proceeding under Section 28.5 because the Court found that the “fast-track” rulemaking in that matter would deprive the Plaintiffs of a fair hearing. In the matter at hand, such a “separating out” process is not difficult. The 28 Phase II NOx SIP Call Engines are clearly identified in the proposal and the Proposed Rules. The Proposed Rules could be separated into two dockets. The first docket would be applicable only to the 28 listed Phase II NOx SIP Call Engines and could proceed under Section 28.5 without the delay that could be caused by judicial review. The second docket would be applicable to the other potentially affected units and could proceed under the traditional rulemaking procedures provided in the Act.

III. PORTIONS OF THE PROPOSED RULE DO NOT COMPLY WITH THE APPLICABILITY REQUIREMENTS OF SECTION 28.5 OF THE ACT

The Act limits the applicability of 28.5 to certain types of rulemakings. The types of rulemakings that may be performed pursuant to Section 28.5, are as follow:

- (a) This Section shall apply solely to the adoption of rules proposed by the Agency and required to be adopted by the State under the Clean Air Act as amended by the Clean Air Act Amendments of 1990 (CAAA).

* * *

- (c) For purposes of this Section, a ‘fast-track’ rulemaking proceeding is a proceeding to promulgate a rule that the CAAA requires to be adopted. For purposes of this Section, ‘requires to be adopted’ refers only to those regulations or parts of regulations for which the United States Environmental Protection Agency is empowered to impose sanctions against a State for failure to adopt such rules. . .

415 ILCS 5/28.5.

According to the Illinois EPA, the Proposed Rules are intended to perform three primary regulatory functions and therefore affect three types of emission units. See SOR

at 12-13. The United States Environmental Protection Agency (“USEPA”) is not currently empowered to impose sanctions against the State for failure to adopt rules to meet such requirements. Each category will be discussed separately below.

A. Attainment of the 8-hour and PM_{2.5} NAAQS

The first category of units identified by the Illinois EPA are units where emission “reductions [are] needed for attainment of the [8-hour ozone and PM_{2.5}] NAAQS.” *Id.* at 12. The affected units in this category would appear to include IC engines over 500 bhp and certain turbines at minor sources in nonattainment areas and at all sources in attainment areas statewide (the “Improperly Affected Units”).³ The Proposed Rules establish compliance dates of: 1) January 1, 2009 for IC engines and turbines located at major sources in nonattainment areas; 2) January 1, 2011 for larger IC engines or turbines located in attainment areas; and 3) January 1, 2012 for smaller IC engines or turbines located in attainment areas. Proposed Rules at Section 217.392.

Based on the discussion below, the specific portions of the Proposed Rules that would affect the Improperly Affected Units: 1) are not required by the CAA; 2) could not trigger sanctions if not approved; and 3) are, in any case, not ripe for promulgation under Section 28.5 because the rules are based on preliminary modeling and have been drafted without the benefit of finalized guidance from the USEPA. Therefore, the portions of the Proposed Rules that would require reductions from the Improperly Affected Units must be separated from the portion of the Proposed Rules that would affect the Phase II NO_x SIP Call Engines, and be treated under a separate rulemaking as described above.

³ This category also presumably includes reductions expected from NO_x RACT for IC engines and turbines located at major sources in nonattainment areas (discussed in more detail in Section B below).

The SOR repeatedly notes the general duty of the Illinois EPA to provide attainment demonstrations, and to eventually include such demonstrations in the State's SIP. The attainment demonstrations discussed by the Illinois EPA are apparently required by Sections 172 and 182 of the CAA (42 USCS § 7502 and 42 USCS § 7511(a), respectively). Both Sections 172 and 182 include extensive discussions of the items that must be included in attainment demonstrations. Both Sections discuss specific requirements for major sources within the nonattainment area, such as RACT and review of new sources. See Id. However, neither Section requires any specific action with regard to any sources and/or emissions outside a nonattainment area. See Id.

As provided above, the Board has authority under Section 28.5 only to fast-track rules that are required to be adopted by the State under the CAA. 415 ILCS 5/28.5(a). (Emphasis added.) Further, the phrase “‘requires to be adopted’ refers only to those regulations or parts of regulations for which the United States Environmental Protection Agency is empowered to impose sanctions against a State for failure to adopt such rules” 415 ILCS 5/28.5(c). The USEPA may enforce sanctions including the loss of highway funds or increased offsets under Section 179 [42 USCS § 7509] when: 1) a state has failed to submit a plan that satisfies the minimum criteria; 2) USEPA disapproves a plan; 3) a state fails to provide other required submissions; or (4) USEPA determines that a state is not implementing its plan. See 42 USCS § 7509.

With regard to requiring statewide emission controls on the Improperly Affected Units, there are no minimum criteria listed in the CAA that include such requirements. Further, there has been no approval or disapproval of any attainment plan. In addition, any potential requirement of further submissions is years in the future. In short, the

statewide applicability of the Proposed Rules to the Improperly Affected Units is not required by the CAA, and the USEPA could not enforce any sanction against the State if Illinois did not adopt a statewide rule affecting the Improperly Affected Units.

Therefore, Section 28.5 is unavailable for the portions of the Proposed Rules that would apply to the Improperly Affected Units.

The Illinois EPA implies that all of the Proposed Rules must be implemented almost immediately or sanctions may be imposed. The Illinois EPA states that “Moderate nonattainment areas are required to submit attainment demonstrations by June 15, 2007, addressing how the State will achieve the 8-hour ozone standard by the attainment date of June 15, 2009 . . .” SOR at 5. The Illinois EPA claims that “Section 110 of the CAA requires that measures included in all State Implementation Plans (“SIP”) and SIP revisions be fully adopted. The attainment demonstrations for ozone and PM_{2.5} will revise Illinois’ SIP.” *Id.* at 3. However, “EPA rulemaking to incorporate a State regulation in a SIP may also be initiated when a rule has been proposed by the State but not yet adopted.” 47 FR 27073 (June 23, 1982). This interpretation was most recently reiterated by the USEPA with regard to the Phase II NO_x SIP Call. There, the USEPA stated, “[w]e note that States can submit draft plans (i.e., plans that have not completed the final steps in the State administrative process) for parallel processing.” 69 FR 21604, 21633. Based on longstanding USEPA guidance, it is clear that the USEPA would not seek sanctions against the State for failure to adopt the portions of the Proposed Rules affecting the Improperly Affected Units so long as such portions of the Proposed Rules have been proposed. Here, such rules have been proposed.

Furthermore, as noted by the Illinois EPA, the air modeling effort upon which the Illinois EPA is basing the portions of this rulemaking that would apply to the Improperly Affected Units has not been completed. SOR at 12. The submittal for the Proposed Rules includes two documents that may discuss air modeling with respect to the required reductions for attainment. These documents are: 1) Technical Support Document for Final Clean Air Interstate Rule, Air Quality Modeling, U.S. EPA, Research Triangle Park, NC, March 2005, and 2) LADCO, Attainment Strategy Options, Draft, October 28, 2005. See R07-18, Table of Contents of Regulatory Submittal. It must be noted that the Technical Support Document for the CAIR rule is, at best, only peripherally related to the matters addressed by the Proposed Rules. In addition, the LADCO document is clearly marked as a draft document and it is nearly 18 months old. Attachment A of the Technical Support Document (“TSD”) entitled Assessment of Regional NO_x Emissions in the Upper Midwest, LADCO, February 15, 2007 (the “TSD Attachment”), includes additional modeling information. However, the TSD Attachment apparently does not model the impact of the Proposed Rules. The TSD Attachment does state that: 1) with regard to NO_x in relation to the 8 hr ozone standard, “[t]he source region results show that nearby emissions generally have the highest impacts;” TSD at 67; and 2) with regard to NO_x in relation to PM_{2.5}, “[t]he source region results show that emissions from nearby/local sources are large contributors to PM_{2.5} concentrations. There is also a sizable regional contribution;” TSD at 72. The TSD Attachment does not appear to provide support for the Illinois EPA’s apparent position that immediate statewide emission reductions from the Improperly Affected Units are required by air modeling and therefore, somehow required by the CAA.

Moreover, the USEPA guidance for implementing the PM_{2.5} NAAQS has yet to be finalized. SOR at 13. It is difficult to understand how a rule may be “required to be adopted” by the CAA, for purposes of Section 28.5, when: 1) modeling to determine whether such a rule would be needed or effective has yet to be completed, 2) the most recent modeling information does not specifically address the emission reductions claimed for the Proposed Rules, and 3) the USEPA itself has yet to provide guidance on how such a rule should be structured.

It must also be considered that the Illinois EPA relies on two Board rulemakings for the proposition that the “Board has the authority to adopt regulations to avoid sanctions for a failure to meet the requirements of Section 172 of the CAA as it is also contained in Part D of the CAA.” SOR at 11. The Board rulemakings are: In the Matter of: 15% ROP Plan Control Measures for VOM Emissions-Part II Marine Vessel Loading: Amendments 35 Ill. Adm. Code Parts 211, 218 and 219, R94-15, October 25, 1994; and In the Matter of: Visible and Particulate Matter Emissions-Conditional Approval and Clean Up Amendments to 35 Ill. Adm. Code Parts 211 and 212, R96-5, May 22, 1996. Id. The R94-15 rulemaking involved Sections 218 and 219 and, therefore, by definition was not applicable statewide. With regard to the R96-5 rulemaking, the Board stated “[a]lthough this proposal includes amendments which will apply statewide, the major changes in this proposal will affect steel production sources located in the McCook and Lake Calumet areas in Cook County and the Granite City area in Madison County.” R96-5, Adopted Rule, Final Notice, May 16, 1996. Therefore, the authority cited by the Illinois EPA does not apply to statewide rulemaking affecting units such as the Improperly Affected Units.

Finally, in the past, the Board has applied RACT rules (similar to the statewide portions of the Proposed Rules) to areas outside of nonattainment areas. See, for example R86-36, In the Matter of: Proposed Amendments to 35 Ill. Adm. Code 215.204, 215.211, and 215.212: Heavy Off-Highway Vehicle Products, June 25, 1987. However, in that matter the Board stated:

It is required, at a minimum, that RACT rules be applied within counties which are nonattainment for ozone. However, there are compelling reasons that the rules also apply in some counties in addition to those which are classified as nonattainment. The Board believes that the most important of these is that emissions in certain attainment counties can impact on the ozone air quality in adjacent nonattainment counties via the phenomenon of transport. The significance of the transport phenomenon has been extensively developed in the instant record

Id. at 37. (Emphasis added.) See also R80-5, In The Matter Of: RACT II Rules, Chapter 2: Air Pollution, May 27, 1982 (extending rule beyond the nonattainment area where “[t]here is strong logic and evidence in the record of this proceeding of hydrocarbon transport, of significant ozone levels occurring throughout the state and of violations of the standard continuing to occur in several areas.”).

In the matter at hand, there has been no “extensive” development of the potential for the transport of NO_x from Attainment Area Units into nonattainment areas. The record here has not been developed sufficiently to demonstrate that statewide reductions from the Improperly Affected Units will have any affect on nonattainment areas. The Proposed Rules and accompanying documents merely make the assumption.

For the reasons described in this section, the Board must separate the portions of the Proposed Rules that would require reductions from the Improperly Affected Units and the units described in the following section from the remainder of the Proposed Rules and treat such portions of the Proposed Rules under a separate rulemaking.

B. NO_x RACT for Large Engines and Turbines at Major Sources in Nonattainment Areas

The second category of units identified by the Illinois EPA are units where reductions are needed to comply with NO_x RACT requirements for ozone and PM_{2.5}. SOR at 13. The affected units in this category are IC Engines and turbines located at major sources in nonattainment areas (the “Major Source Nonattainment Area Units”). See Id. The Proposed Rules establish a compliance date of January 1, 2009 for the Major Source Nonattainment Area Units. It must be noted that the Proposed Rules do not distinguish between units at major sources in nonattainment areas and units at minor sources in nonattainment areas. IERG’s comments in this section are applicable to all potentially affected units in nonattainment areas other than Phase II NO_x SIP Call Engines.

Based on the discussion below, IERG opposes the use of Section 28.5 for the promulgation of the portions of the Proposed Rules that the Illinois EPA claims are required to comply with NO_x RACT requirements for the Major Source Nonattainment Area Units.

The Illinois EPA states that “States are required to submit SIPs addressing RACT for precursors of ozone, which includes NO_x. Major sources in moderate nonattainment areas are defined as those that have the potential to emit 100 tons or more of NO_x in a nonattainment area.” SOR at 13. The federally required nonattainment plan provisions include “the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control

technology) and shall provide for attainment of the national primary ambient air quality standards.” 42 USCS § 7502(c). (Emphasis added.) While this language in the CAA indicates that NO_x RACT for major sources in nonattainment areas may be required at some point, IERG takes no position on whether the USEPA could impose sanctions on the State for failure to impose RACT on the Major Source Nonattainment Area Units. IERG does believe that the Illinois EPA has not properly demonstrated that reductions from the Major Source Nonattainment Area Units would be required by admittedly incomplete air modeling or by the CAA. Therefore, IERG opposes promulgation under Section 28.5 for portions of the Proposed Rules that require RACT for the Major Source Nonattainment Area Units.

C. Phase II NO_x SIP Call

The final category of units identified by the Illinois EPA are units where reductions are needed to comply with the Phase II NO_x SIP Call. SOR at 12. The affected units in this category are the 28 Phase II NO_x SIP Call Engines. The Proposed Rules establish a compliance date of May 1, 2007 for the Phase II NO_x SIP Call Engines. Proposed Rules at Section 217.392.

In a Federal Register notice dated February 8, 2006, the USEPA made a finding that Illinois had failed to submit its “Phase II SIP revisions.” 71 FR 6347 (February 8, 2006). The USEPA stated that “this finding defines the start of a clock for EPA to develop a federal implementation plan (FIP) under section 110(c) of the CAA.” Id. The Circuit Court for the Seventh Circuit, Sangamon County, Illinois, recently addressed the issue of whether a FIP is a “sanction” under the CAA. The Court stated, “this Court does not believe the imposition of a federal plan until such time as Illinois adopts rules

governing mercury emissions would be a sanction under the Act.” 06-CH-213 (May 1, 2006). Therefore, IERG does not believe that portions of the Proposed Rule that would affect Phase II NO_x SIP Call Engines may be properly promulgated under Section 28.5. However, on April 16, 2007, the “Pipeline Consortium” filed an Objection To Use Of Section 28.5 Fast Track Procedures For Consideration Of Nitrogen Oxide Proposal As Filed in this matter (the “Consortium Objection”). Based on the discussion put forth in the Consortium Objection, IERG does not oppose the use of Section 28.5 for the promulgation of the portions of the Proposed Rules that affect the Phase II NO_x SIP Call Engines.

IV. PORTIONS OF THE PROPOSED RULE DO NOT COMPLY WITH THE PROCEDURAL REQUIREMENTS OF SECTION 28.5 OF THE ACT

Section 28.5 includes several procedural requirements that must be followed by the Illinois EPA and the Board for the promulgation of regulations under that Section. As with other statutory provisions, the procedural provisions of Section 28.5 are binding on the Illinois EPA and the Board. Courts in Illinois have stated as follows:

[T]he fundamental principle of statutory construction is to give effect to the intent of the legislature. [Citation.] Courts should first look to the statutory language as the best indication of the intent of the drafters. [Citations.] Although it is generally recognized that courts will give substantial weight and deference to an interpretation of an ambiguous statute by the agency charged with the administration and enforcement of the statute, agency interpretations are not binding on the courts [citation], and agency action that is inconsistent with the statute or regulations must be overturned [citations]. . . .

Environmental Protection Agency v. Pollution Control Board, et al., 219 Ill. App. 3d 975, 977, 759 N.E.2d 1215, 1217 (5th Dist. 1991) (citing Carson Pirie Scott & Co. v. Department of Employment Security, 131 Ill. 2d 23, 34, 544 N.E.2d 772, 777 (1989); see

also Chemrex, Inc. v Illinois Pollution Control Board, 257 Ill. App. 3d 274, 278, 628 N.E.2d 963, 965-66 (1st Dist. 1993). (Emphasis added.)

Portions of the Proposed Rules and the associated materials fail to conform to the statutory procedural requirements as discussed in the following sections.

A. Identification of Federal Basis of Rule

The Act provides procedural requirements regarding the form of filings for fast-track rulemakings pursuant to Section 28.5, which state, in pertinent part:

(e) The Agency shall submit its fast-track rulemaking proposal in the following form:

* * *

(3) The proposal shall clearly identify the provisions and portions of the federal statute, regulations, guidance, policy statement, or other documents upon which the rule is based.

415 ILCS 5/28.5. (Emphasis added.)

The SOR states that the Proposed Rules are “intended to satisfy Illinois’ obligations under USEPA’s NO_x (“SIP”) Call Phase II. The proposed new Subpart is also intended to address, in part, Illinois’ obligation to meet certain requirements under the federal CAA, 42 U.S.C. § 7401, et seq., specifically the requirements for reasonable further progress (“RFP”), reasonably available control technology (“RACT”), rate-of-progress (“ROP”), and attainment demonstrations for the 8-hour ozone and PM_{2.5} National Ambient Air Quality Standards (“NAAQS”).” SOR at 1-2. The SOR also contains general references to Part D, subparts 1 and 2; Section 172; and Section 182. For example, SOR at 6.

IERG does not oppose the proposition that the Phase II NO_x SIP Call is a clearly identified document upon which the portion of the Proposed Rules affecting the Phase II NO_x SIP Call Engines could be based. IERG has no opinion on whether the reference to the RACT provisions of the CAA may include enough specificity that the Illinois EPA has clearly identified the provision of the CAA that requires RACT for the Major Source Nonattainment Area Units.

However, the general references in the SOR to the CAA, and the RFP, ROP and NAAQS provisions of the CAA, do not clearly identify the provisions and portions of the CAA that form the basis of the portions of the Proposed Rules that would affect the Improperly Affected Units. "Reasonable Further Progress" or RFP is referenced in seven separate provisions or portions of the CAA. The "National Ambient Air Quality Standards" or NAAQS are referenced in 41 separate provisions or portions of the CAA. Further, "Rate of Progress" or ROP is not referenced at all in the CAA. The portions of the Proposed Rules that would affect the Improperly Affected Units are clearly not based on every provision or portion of the CAA that references RFP or the NAAQS and must be based on some other document than the CAA with regard to ROP. With sufficient time, it may be possible to determine which specific provisions of the CAA that the Illinois EPA intended to use as a basis for the portions of the Proposed Rules that would affect the Improperly Affected Units. However, the duty is on the Illinois EPA to "clearly identify the provisions and portions of the federal statute, regulations, guidance, policy statement, or other documents upon which the rule is based." 415 ILCS 5/28.5. The Illinois EPA has failed in this duty.

Throughout the SOR and TSD, there are general references to general requirements of federal regulations and statutes. However, other than the requirements of the Phase II NO_x SIP Call Engines, there are no references to specific federal requirements that would mandate the specific provisions of the Proposed Rules. Therefore, the Illinois EPA has not clearly identified the provisions and portions of the federal statute, regulations, guidance, policy statement, or other documents upon which the Proposed Rules are based, other than the provisions of the Proposed Rules that affect the Phase II NO_x SIP Call Engines. Therefore, the portions of the Proposed Rules that would affect any units other than the Phase II NO_x SIP Call Engines do not meet the required form of filing for a 28.5 rulemaking and must be separated from the provisions of the Proposed Rules that would affect the Phase II NO_x SIP Call Engines, and treated as a separate rulemaking under Section 27.

B. List of Units

The procedural requirements regarding the form of filings for fast-track rulemakings pursuant to Section 28.5, also include the following:

(8) The Agency shall include in its submission a description of the geographical area to which the rule is intended to apply, a description of the process or processes affected, an identification by classes of the entities expected to be affected, and a list of sources expected to be affected by the rule to the extent known to the Agency.

415 ILCS 5/28.5(e). (Emphasis added.)

The Illinois EPA identifies the classes of entities expected to be affected as follows:

Existing NO_x SIP Call engines were those identified as emitting one ton a day or more in 1995. In Illinois, 28 engines were identified, 25 at gas pipeline facilities and three at a chemical manufacturing company. The

NOx SIP Call engines are listed in proposed Appendix G. Other engines that will be affected by this proposal are those that are rated at 500 bhp or greater. There are 1,200 engines rated at or greater than 1,500 bhp, and 175 engines rated between 500 bhp and 1,500 bhp. Of these, 202 of the larger engines are potentially impacted as are 44 of the smaller engines. Turbines that will be affected are those rated at 3.5 MW or greater. TSD at 7.2 and 7.3. There are 205 turbines rated at 3.5 MW or greater. Of these, 36 are expected to be affected by the rule. TSD at 7.2.

SOR at 11-12. (Emphasis added.)

The Proposed Rules and the accompanying TSD both include a list of the Phase II NOx SIP Call Engines to which the Proposed Rules would apply. Proposed Rules Appendix G and TSD Attachment B. The TSD also includes lists of the 202 larger impacted engines and 36 impacted turbines. TSD Attachment C. Neither the Proposed Rules nor any of the supporting documents includes a list of the 44 smaller engines that would be affected by the Proposed Rules. While Section 28.5(e)(8) only requires that units be listed "to the extent known to the Agency," it seems clear that the Illinois EPA knows which particular 44 smaller engines may be affected by the Proposed Rules. It is likely that if the Illinois EPA knew that some number of smaller units would be affected but was not sure which units or the exact number of units that would be affected, the Illinois EPA would have said "less than fifty" or even "approximately 45." However, the Illinois EPA said that 44 smaller engines would be affected. The definitiveness of the number "44" clearly indicates that the Illinois EPA knows which specific 44 units could be affected. The Illinois EPA failed to list these 44 units as required by Section 28.5(e)(8). Therefore the portions of the Proposed Rules that may affect these 44 units may not be promulgated under Section 28.5. Such rules must be promulgated under Section 27.

In addition, the Illinois EPA's lists of 202 affected engines and 36 affected turbines do not distinguish between engines or turbines that would be Major Source Nonattainment Area Units and those that would be Minor Source Nonattainment Area Units or Attainment Area Units. Since the Proposed Rules indicate different compliance dates based on IC engine size and unit location (i.e. in attainment or nonattainment areas), the Illinois EPA should identify the classes of entity that would be expected to be affected by the Proposed Rules with respect to the major/minor source classification and attainment/nonattainment location for each of the 202 IC engines and 36 turbines listed in the proposal. Therefore, the Proposed Rules do not properly provide "an identification by classes of the entities expected to be affected." Such information is necessary for the Board and potentially affected sources to make an accurate assessment of the impact of the Proposed Rules.

C. Summary of Economic Data

The procedural rules regarding the form of filings for fast-track rulemakings pursuant to Section 28.5, also require that "[t]he Agency shall file a summary of economic and technical data upon which it relied in drafting the rule." 415 ILCS 5/28.5(e)(6). The Table of Contents of Regulatory Submittal that the Illinois EPA included with this rulemaking includes a section entitled "5. Economic and Budgetary Analysis." R07- 18, Table of Contents of Regulatory Submittal at 1. While the SOR and TSD both include some cost effectiveness data, neither discusses the total annual cost of the program nor the average annual cost per unit. Therefore, it must be presumed that the Illinois EPA relied upon the economic data as summarized in the Economic and Budgetary Analysis in drafting the Proposed Rules.

The Economic and Budgetary Analysis is split into three sections. Section 5.a. states that the Illinois EPA will incur annual costs of approximately \$100,000, and affected sources will incur no costs, due to the proposed changes to 35 Ill. Adm. Code 201.146. Economic and Budgetary Analysis, section 5.a. Section 5.b. states that the neither the Illinois EPA nor affected sources will incur any costs due to the proposed changes to 35 Ill. Adm. Code 201.111. Id. at Section 5.b. Section 5.c. states that the Illinois EPA will incur annual costs of approximately \$150,000 due to the proposed changes to 35 Ill. Adm. Code 201.217. Id. at Section 5.c. Section 5.c. also states that total average annual cost of the proposed changes to 35 Ill. Adm. Code 201.217 will be \$15,270,000 with an average annual cost per affected emission unit of \$855. Id.

While at first glance it may appear that the Illinois EPA is proposing a rule that will result in emission reductions at the nominal annual average cost of \$855 per emission unit, the economic data upon which the Illinois EPA relied in drafting the rule is simply incorrect. The Illinois EPA states that the Proposed Rules will affect 28 NOx SIP Call engines, 202 large engines, 44 smaller engines and 36 turbines. SOR at 11–12. Therefore, the Proposed Rules will affect 310 engines. Assuming that the Illinois EPA's program-wide annual cost estimate of \$15,270,000 is correct, the average annual cost to each of the 310 affected units would be \$49,258.06. On the other hand, if the Illinois EPA's annual cost estimate of \$855 per unit is correct, the total average annual cost of the Proposed Rules should be \$265,050. In either case, the summary of economic data upon which the Illinois EPA relied in drafting the rule, which was submitted with the Proposed Rules, is not correct. If the Illinois EPA actually based the Proposed Rules on these cost data, the Proposed Rules are based on an incorrect economic analysis. If the

Proposed rule is based on different economic data, the Illinois EPA has not "file[d] a summary of economic and technical data upon which it relied in drafting the rule."

Therefore the Proposed Rules cannot proceed for the Phase II NOx SIP Call Engines under Section 28.5 until the Illinois EPA cures the incorrect economic data.

V. CONCLUSION

Based on the discussion above, IERG requests that the Board separate the Proposed Rules into: 1) a docket, to be promulgated under Section 28.5 of the Act, which would include portions of the Proposed Rules that affect the Phase II NOx SIP Call Engines; and 2) a separate docket, to be promulgated under the traditional rulemaking track provided in the Act, which would include portions of the Proposed Rules that affect all potentially affected units other than the Phase II NOx SIP Call Engines.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: /s/ Katherine D. Hodge
One of Its Attorneys

Dated: April 17, 2007

Katherine D. Hodge
N. LaDonna Driver
Gale W. Newton
HODGE DWYER ZEMAN
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

IN THE MATTER OF:)
)
 STATIONARY RECIPROCATING) R07-18
 INTERNAL COMBUSTION ENGINES) (Rulemaking – Air)
 AND TURBINES: AMENDMENTS TO)
 35 ILL. ADM. CODE SECTION 201.146,)
 PARTS 211 AND 217)

AFFIDAVIT

STATE OF ILLINOIS)
) SS
 COUNTY OF SANGAMON)

Deirdre K. Hirner, being first duly sworn on oath, affirms that the facts set forth in the Objection to Use of Section 28.5 “Fast-Track” Rulemaking for the Illinois Environmental Protection Agency’s Proposed Rules are true and correct.



Deirdre K. Hirner, Executive Director
 Illinois Environmental Regulatory Group
 3150 Roland Avenue
 Springfield, Illinois 62703

Subscribed and sworn to before me
 this 17 day of April 2007.

Angela M. Buhl
 Notary Public

