

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 )

**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.  
Hearing Officer  
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 a **REPLY TO RESPONSE TO 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: May 8, 2007

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

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**THIS FILING SUBMITTED ON RECYCLED PAPER**

**CERTIFICATE OF SERVICE**

I, Katherine D. Hodge, the undersigned, hereby certify that I have served the attached REPLY TO RESPONSE TO OBJECTION TO USE OF SECTION 28.5 "FAST-TRACK" RULEMAKING FOR THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S PROPOSED RULES and AFFIDAVIT OF DIERDRE 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 May 8, 2007, and upon:

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by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois, on May 8, 2007.

/s/ Katherine D. Hodge  
Katherine D. Hodge

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**REPLY TO RESPONSE TO  
 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 reply to the Illinois Environmental Protection Agency’s (the “Illinois EPA”) response (the “Response”) to IERG’s Objection (the “Objection”) to the Illinois EPA’s 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 Rule”). IERG incorporates the Objection herein by reference.

As set forth in detail below, IERG reiterates its Objection to the use of Section 28.5 “fast-track” rulemaking proceedings for the propagation of the Proposed Rule.<sup>1</sup> The proposal filed in support of the Proposed Rule is procedurally inadequate under Section 28.5(e) and does not present a set of rules that are “required to be adopted by the State under the Clean Air Act [“the “CAA”] . . .” as provided by Section 28.5. The Response does not adequately address any of the issues discussed in the Objection. In fact, the Response: 1) ignores a recent Illinois Pollution Control Board (“Board”) holding

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<sup>1</sup> Except for 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”) as discussed in the Objection.

regarding the extent of its ability to review Section 28.5 proposals; 2) fails to adequately explain the procedural shortcomings of the proposal; 3) raises an additional procedural omission; and, 4) does not provide a sufficient basis for the Illinois EPA's assertion that the specific Proposed Rule is required to be adopted by the CAA. For the convenience of the Board, the issues raised in the Response will be addressed in the order listed in the Response, rather than in the order of importance to the matter at hand.

**I. PROCEDURAL REQUIREMENTS**

The Illinois EPA indicates that the Board may only make a cursory examination of a proposal under Section 28.5 to determine if the items listed in a "statutory checklist" found in Section 28.5(e) have been included in the proposal. See, R07-18 Illinois EPA's Response to the Illinois Environmental Regulatory Group's Objection to Use of Section 28.5 Fast Track Procedures for Consideration of Nitrogen Oxide Proposal ("Response"), at 2-4. The Illinois EPA states that "[t]he Board has held that its review of a rulemaking proposal submitted by the Illinois EPA pursuant to Section 28.5 of the Act is limited to a procedural review so as to ensure that all components of a rulemaking package are present in the submission. The Board discussed this issue in a Board resolution docketed as Board Resolution 92-2, dated October 29, 1992." Id. at 2. While IERG would agree that the Illinois EPA must strictly adhere to the requirements of Section 28.5(e), the Board has specifically recognized that it has considerably more authority over the decision of whether to proceed under Section 28.5 than a mere glance at a checklist.

Recently, the Board has stated that "[w]hen the Agency argues that the Board's review of this proposal [under Section 28.5] is limited to technical or procedural issues, it disregards well-settled case law providing an agency has authority to determine whether

it has jurisdiction over a proceeding.” R06-25, In the Matter of: Proposed New 35 Ill. Adm. Code 225 Control of Emissions from Large Combustion Sources (Mercury) at 14, 2006 Ill. ENV LEXIS 232 (Ill.Pol.Control.Bd. April 20, 2006). In that matter, the Board held that “[t]he Board finds that the language of the Act and case law clearly authorize the Board to consider whether or not a proposal filed pursuant to Section 28.5 may proceed under that provision. Neither Board Resolution 92-2 nor the Board's procedural rules restrict the Board to a technical review of the Agency's proposal.” Id. at 15.

Clearly, the Board recognizes that it has the authority, and in fact the duty, to review a proposal under Section 28.5 in more detail than a mere review of the proposal to ensure that certain checklist items are included. The Illinois EPA's position on this issue is simply incorrect.

**A. The Illinois EPA has failed to Clearly Identify the Basis for the Rule**

The Response identifies “references” in the Technical Support Document (the “TSD”) to certain provisions of the CAA and certain regulations promulgated thereunder. However, the “references” are merely generalizations that certain provisions of the CAA require general emission reductions. With the possible exception of the Phase II NO<sub>x</sub> SIP Call Engines, the Illinois EPA has failed 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(e)(3). (Emphasis added.) General references to portions of the CAA that require a state implementation plan or reasonable further progress do not provide a basis for the Proposed Rule.

**B. The Illinois EPA has failed to Identify Known Affected Units**

In the Response, the Illinois EPA clarifies that a portion of the Proposed Rule would be applicable to approximately 44 engines. Response at 6. The Illinois EPA explains that a survey was sent to 10,025 businesses and from the responses inferred that 175 units had the potential to be affected. Id. The Illinois EPA further “narrowed the estimated number of affected units to approximately 44 impacted units.” Id.

The Illinois EPA had the results of a survey. From these results, it was able to extrapolate that 44 engines from the population of 10,025 businesses would be affected by the Proposed Rule. Clearly, some number of responses must have included information on engines that would be affected by the Proposed Rule, or the Illinois EPA would have been unable to make any extrapolation at all (i.e., if the Illinois EPA’s survey would not have uncovered a single affected source, the number zero would have necessarily been used to apply to the total population, giving a total number of affected engines of zero). Therefore, the Illinois EPA must have known at least some of the small engine sources that would be affected by the Proposed Rule. The Illinois EPA failed to list such known sources.

Somewhat incredibly, the Illinois EPA argues that “[q]uestions pertaining to the mere use of “44” as the number, and Illinois EPA’s methodology, are best left for hearing, and not as the justification for an objection to the Proposal utilizing Section 28.5 of the Act.” Response at 6. As discussed earlier, it is the Illinois EPA’s position that the Board may only review certain “checklist” items to make sure such items are present before it must accept a rule for “fast track” rulemaking under Section 28.5. It seems that the Illinois EPA is arguing that the Board may merely look at a proposal to see if certain

“checklist” items are present and it may not look into the accuracy of such “checklist” items until hearing.

**C. Additional Omitted Requirement**

During the Illinois EPA’s discussion of its failure to include any list of known smaller engines that may be affected by the Proposed Rule, the Illinois EPA states that “because engines less than 1,500 bhp are not currently required to obtain permits to operate; hence, the Illinois EPA’s NO<sub>x</sub> inventory does not include all the engines of this size in its emissions inventory.” Response at 6. Since the Illinois EPA does not require permits for many of these sources, it can be safely assumed that many of the sources are small businesses. Small businesses are afforded special protections in Illinois as explained further below.

It must be noted that the “checklist” items in Section 28.5(e) include the following: “1) The Agency shall file the rule in a form that meets the requirements of the Illinois Administrative Procedure Act [the “APA”][5 ILCS 100/1-1 et seq.] and regulations promulgated thereunder.” 415 ILCS 5/28.5(e)(1). The APA provides that “[i]n all rulemaking to which Sections 5-45 and 5-50 [5 ILCS 100/5-45 and 5 ILCS 100/5-50] do not apply, each agency shall comply with this Section.<sup>2</sup> 5 ILCS 100/5-40. The APA requires that:

The first notice shall include all the following: . . .

(4) For all proposed rules and proposed amendments to rules, an initial regulatory flexibility analysis containing a description of the types of small businesses subject to the rule; a brief description of the proposed reporting, bookkeeping, and other procedures required for compliance

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<sup>2</sup> Sections 5-45 and 5-50 are applicable to Emergency Rulemaking and Peremptory Rulemaking, respectively, which are not applicable to the matter at hand. See 5 ILCS 100/5-45 and 5 ILCS 100/5-50.

with the rule; and a description of the types of professional skills necessary for compliance.

5 ILCS 100/5-40.

As stated above, rulemakings under Section 28.5 must abide by the requirements of the APA. The Illinois EPA did not provide the required initial regulatory flexibility analysis and therefore, the Board's action to move the Proposed Rules to first notice is in violation of the APA. Since the Phase II NO<sub>x</sub> SIP Call Engines are all located at large sources, IERG will not object to the continued application of the Section 28.5 rulemaking process to the portion of the Proposed Rule that includes the 28 Phase II NO<sub>x</sub> SIP Call Engines. However, IERG does object to the use of Section 28.5 for all other portions of the Proposed Rule for failure to abide by the requirements of Section 28.5(e) and the requirements of the APA that are incorporated into Section 28.5. The Illinois EPA's failure to provide the initial regulatory flexibility analysis jeopardizes the eventual enforceability of the Proposed Rules.

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**D. The Illinois EPA has Failed to Provide an Accurate Summary of Economic Data upon which it Relied**

The Illinois EPA concedes that it made an error in the data on the summary of economic and technical data upon which it relied in drafting the rule. The Illinois EPA claims that the mistake was minor and, therefore, should be overlooked. However, we have been unable to determine the legal support for this "minor" exception to the specific requirements of Section 28.5 rulemaking. Further, in the Response, the Illinois EPA clarifies that the "modifier for the number in question 2(a) where the Illinois EPA indicated that the cost was \$855 average annual cost per emission unit is incorrect. The correct modifier is \$855 per ton of NO<sub>x</sub> reduced annually." Response at 7. Section 2 of



the form alluded to by the Illinois EPA is entitled “Economic effect on persons affected by the rulemaking” and the specific question in question 2(a) is “Dollar amount per person.” See Agency Analysis of Economic and Budgetary Effects of Proposed Rulemaking, Nitrogen Oxides Emissions (35 Ill. Adm. Code Part 217), R07-18. The Illinois EPA’s new answer, \$855 per ton of NOx reduced, does not fit the question. It is impossible to assess the impact of the Proposed Rule when the cost per person has not been supplied.

Further, the Illinois EPA alludes to extensive economic data in the TSD. However, it must be noted that neither the overall projected cost of \$15,270,000 per year nor the \$855 per ton figure appear anywhere in the TSD. In short, the economic data on which the Illinois EPA relied in drafting the Proposed Rule is inadequate.

**E. Statewide applicability and ROP**

In the Response, the Illinois EPA cites three rulemakings for the proposition that Section 28.5 rulemaking is an accepted practice for rules that are not specifically required by the CAA or that are applicable statewide. These rulemakings are: R94-15, In the Matter of: 15% ROP Plan Control Measures-Part II: Marine Vessel Loading: Amendments to 35 Ill. Adm. Code Parts 211, 218, and 219 (Ill.Pol.Control.Bd. Oct. 20, 1994); R01-11, In the Matter of: Proposed New 35 Ill. Adm. Code 217. Subpart T, Cement Kilns, and Amendment to 35 Ill. Adm. Code 211 and 217 (Ill.Pol.Control.Bd. March 1, 2001); and R98-28, In the Matter of: Municipal Solid Waste Landfills – Non-Methane Organic Compounds 35 Ill. Adm. Code 201.103, 201.146, and Part 220 (Ill.Pol.Control.Bd. June 17, 1998). However, not one of these cases involved an

objection to the use of Section 28.5. Therefore, these cases do not stand for any proposition regarding the appropriate use of Section 28.5.

**F. Bypassing Deliberative Process in Regular Rulemaking**

The Illinois EPA takes exception to statements made by IERG in the Objection to the effect that Section 28.5 rulemaking provides less meaningful opportunities for public participation in the rulemaking process. See Response at 8. The Illinois EPA states that “[a] shortened period for public participation and review by the Board are inherent in a proceeding under Section 28.5; however, this issue is irrelevant to a Section 28.5 analysis.” Id. at 9. In opposition to this statement by the Illinois EPA are several statements made by the Circuit Court of the Seventh Judicial Circuit in Sangamon County, Illinois. In its order granting a preliminary injunction to stop a rulemaking under Section 28.5, the Court stated:

The interests of the public may be better served by a more formal and extensive rule making procedure under Section 27 of the Act.

\* \* \*

In the present case, the use of Section 28.5 or fast track, prohibits the Plaintiff from participation in a fair hearing.

\* \* \*

the harm to . . . plaintiffs . . . and the public alike will likely continue unabated unless the government body is enjoined from maintaining an unfair hearing.

\* \* \*

In conclusion the public and the Plaintiffs have an interest in ensuring that rule-making in the State of Illinois complies with Illinois procedural requirements and that the public’s participation rights are preserved.

Dynergy Midwest Generation, Inc., et al. v. Illinois Pollution Control Board and Illinois

Environmental Protection Agency, 06-CH-213, (7th Cir. Ill. 2006).

It seems clear that the Court would disagree with the Illinois EPA that a shortened period of public participation is “irrelevant to a Section 28.5 analysis.”

**II. THE PROPOSED RULE IS NOT PROPER FOR SECTION 28.5**

The Illinois EPA spends the next eight pages of its Response in an effort to substantiate that the Proposed Rule is “required by the CAA” and that sanctions may be applied by the USEPA if the Proposed Rule is not adopted. The Illinois EPA fails in its attempt.

Section 28.5 is reserved “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).” 415 ILCS 5/28.5(a). (Emphasis added.) “[R]equires 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 the State for failure to adopt such rules.” 415 ILCS 5/28.5(c). (Emphasis added.)

While reasonably available control technology (“RACT”), the Illinois state implementation plan (“SIP”) and reasonable further progress (“RFP”) are clearly required by the CAA, the Proposed Rule is not RACT, the SIP or RFP. The most that could be claimed for the Proposed Rule is that its provisions may someday need to be included in NO<sub>x</sub> RACT rules, the SIP and/or for RFP purposes. However, such potential inclusion will require finalized modeling to ensure that the Proposed Rule will have a desirable effect.

With regard to the modeling upon which the Illinois EPA is making the claim that the Proposed Rule is required by the CAA, the Illinois EPA states “this work is ongoing,

and the attainment targets for emissions reductions have not been fully identified . . .” TSD at 19. The Illinois EPA reiterates this lack of firm modeling information by stating “[i]t should be noted that this work is ongoing, and the attainment targets for emissions reductions have not yet been fully identified.” TSD at 21. In other words, the modeling has not yet progressed to the stage where the Illinois EPA can determine how much overall emission reduction will be needed. Yet the Illinois EPA claims that these specific Proposed Rules are required by the CAA because they constitute RACT, the SIP and RFP.

However, with regard to any SIP, until such modeling is complete, it will be impossible to tell whether the requirements of the Proposed Rule are requirements that are “necessary or appropriate to meet the applicable requirements of this Act.” 42 USCS § 7410(a)(2)(A) (Emphasis added.); see also 42 USCS § 7502(c)(4) and 42 USCS § 7511a(b)(1)(A)(i). Further, “[t]he term ‘reasonable further progress’ means such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date.” 42 USCS § 7501. (Emphasis added.) Since the Illinois EPA does not yet even know how much total reduction will be needed, it is difficult to imagine how this Proposed Rule could “reasonably be required . . . for the purpose of ensuring attainment . . . .”

The Illinois EPA’s argument appears to be that preliminary modeling indicates that NO<sub>x</sub> emission reductions somewhere in the State will be required, the modeling might eventually indicate that the emission reductions that would occur due to the Proposed Rule would be advantageous; therefore, the Proposed Rule is required by the CAA and the State would face sanctions if the Proposed Rule is not adopted. Based on

the materials provided in the proposal, the discussion in the Objection and the discussion herein; this argument fails.

Finally, if the Board allows the Proposed Rule to proceed under Section 28.5, because of the Illinois EPA's unsubstantiated claim that this Proposed Rule is required by the CAA, there may be no end to such claims by the Illinois EPA in the future. The Board has expressed concern with the potential unlimited use of the provisions of Section 28.5 by the Illinois EPA. When holding that it had the power to review a proposal submitted by the Illinois EPA for compliance with the requirements of Section 28.5 rather than merely glancing at a checklist of items before accepting such a proposal, the Board stated:

Taking the Agency's argument to its logical conclusion, even a proposal invoking Section 28.5 to adopt underground storage tanks rules would have to proceed toward adoption, consuming the resources of the Agency, the Board, regulated entities, and other participants. Such a proceeding would be virtually certain to be challenged and to be invalidated as outside the Board's authority under Section 28.5. Reviewing its own jurisdiction helps the Board avoid the absurd result of requiring the consumption of resources in a proceeding in which its statutory authority has been questioned.

R06-25 at 15, 2006 Ill. ENV LEXIS 232 (Ill.Pol.Control.Bd. April 20, 2006).

A similar analysis is applicable in the matter at hand. In fact, the Board's underground storage tank example is also applicable here. Based on the Illinois EPA's arguments in the proposal and the Response, if the Illinois EPA wished to propose a rule that altered the way that leaking underground storage tank cleanups were managed, the Illinois EPA could propose the rule under Section 28.5. As discussed by the Board in the above-mentioned rulemaking, such a proceeding under Section 28.5 would be ripe for challenge.

In the matter at hand, the analysis is similar. The Illinois EPA claims that the Proposed Rule is required by the CAA. The Illinois EPA has no final modeling evidence that the Proposed Rule could reasonably be required for the purpose of ensuring attainment. At best, the Proposed Rule could eventually become part of an overall plan that may be required by the CAA. As in the example discussed by the Board, such a proceeding could be ripe for review if promulgated under Section 28.5 and is better promulgated under the Board's traditional rulemaking procedures.

In short, if the Illinois EPA is allowed to offer the Proposed Rule under Section 28.5, there would seem to be no rule that would be inappropriate for rulemaking under Section 28.5. The Illinois EPA could propose a comprehensive statewide NO<sub>x</sub> RACT or SO<sub>2</sub> RACT rule under Section 28.5 and thereby circumvent the Board's regular rulemaking process. In fact, any proposed rule for which the Illinois EPA could make any claim for reductions in air pollutants could be proposed under Section 28.5. Such a result would circumvent the public's right to the more formal and extensive procedural safeguards in Section 27 of the Act.

### **III. CONCLUSION**

The proposal that includes the Proposed Rule has not been presented to the Board in a form that is acceptable under Section 28.5(e). Further, the Proposed Rule is not required by the CAA as required by Section 28.5. IERG does not object to the use of Section 28.5 for the promulgation of the portions of the Proposed Rule that would affect the Phase II NO<sub>x</sub> SIP Call Engines. However, IERG does object to the use of Section 28.5 for the promulgation of all other portions of the Proposed Rule that would affect emission units other than the Phase

II NOx SIP Call Engines. IERG requests that the Board bifurcate and proceed in this rulemaking in the manner described in the Objection.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
REGULATORY GROUP,

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

Dated: May 8, 2007

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IERG:001\R Docket\Elec.Filings R07-18\Reply to Response to Objection

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**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 Reply to Response to 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 8th day of May, 2007.

*Vickie L. Stamper*  
 \_\_\_\_\_  
 Notary Public

