BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To:

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 the **APPEARANCES of KATHLEEN C. BASSI, STEPHEN J. BONEBRAKE, RENEE CIPRIANO, and JOSHUA R. MORE on behalf of ANR PIPELINE COMPANY, KINDER MORGAN, INC., TRUNKLINE GAS COMPANY, and PANHANDLE EASTERN COMPANY** and **REPLY TO THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSES TO OBJECTIONS TO THE USE OF SECTION 28.5 FAST-TRACK PROCEDURES IN THIS MATTER.**

Kathleen C. Bassi

Dated: May 8, 2007

Renee Cipriano
Kathleen C. Bassi
Stephen J. Bonebrake
Joshua R. More
SCHIFF HARDIN, LLP
6600 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
312-258-5500
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AMENDMENTS TO 35 ILL.ADM.CODE	)	
SECTION 201.146 AND PARTS 211 AND 217.	)	

APPEARANCE

I, KATHLEEN C. BASSI, hereby file my appearance in this matter on behalf of ANR PIPELINE COMPANY, NATURAL GAS PIPELINE COMPANY, TRUNKLINE GAS COMPANY, and PANHANDLE EASTERN COMPANY.

Respectfully submitted,

Kathleen C. Bassi

Dated: May 8, 2007

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AMENDMENTS TO 35 ILL.ADM.CODE	)	
SECTION 201.146 AND PARTS 211 AND 217.	)	

APPEARANCE

I, STEPHEN J. BONEBRAKE, hereby file my appearance in this matter on behalf of ANR PIPELINE COMPANY, NATURAL GAS PIPELINE COMPANY, TRUNKLINE GAS COMPANY, and PANHANDLE EASTERN COMPANY.

Respectfully submitted,

Stephen J. Bonebrake

Dated: May 8, 2007

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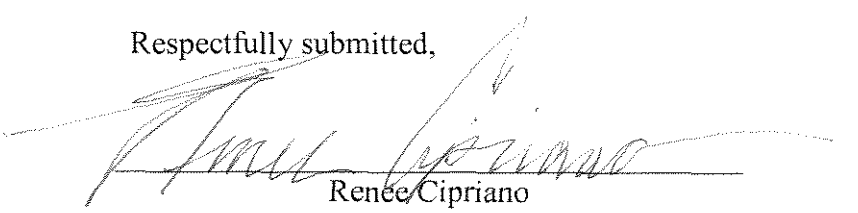
AMENDMENTS TO 35 ILL.ADM.CODE	)	
SECTION 201.146 AND PARTS 211 AND 217.	)	

APPEARANCE

I, RENEE CIPRIANO, hereby file my appearance in this matter on behalf of ANR PIPELINE COMPANY, NATURAL GAS PIPELINE COMPANY, TRUNKLINE GAS COMPANY, and PANHANDLE EASTERN COMPANY.

Respectfully submitted,



Renee Cipriano

Dated: May 8, 2007

Renee Cipriano
Kathleen C. Bassi
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Joshua R. More
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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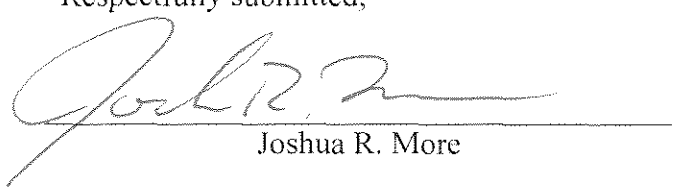
SECTION 201.146 AND PARTS 211 AND 217.	)	

APPEARANCE

I, JOSHUA R. MORE, hereby file my appearance in this matter on behalf of ANR PIPELINE COMPANY, NATURAL GAS PIPELINE COMPANY, TRUNKLINE GAS COMPANY, and PANHANDLE EASTERN COMPANY.

Respectfully submitted,



Joshua R. More

Dated: May 8, 2007

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REPLY TO THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSES TO OBJECTIONS TO THE USE OF SECTION 28.5 FAST-TRACK PROCEDURES IN THIS MATTER

NOW COME ANR PIPELINE COMPANY, NATURAL GAS PIPELINE COMPANY, TRUNKLINE GAS COMPANY, and PANHANDLE EASTERN PIPELINE COMPANY (collectively "the Pipeline Consortium"), by and through their attorneys, SCHIFF HARDIN LLP, and, pursuant to 35 Ill.Adm.Code § 101.500(e) and the Board's First Notice Order, dated April 19, 2007, ("Order") at page 3, reply to the Responses to Objections to Use of Section 28.5 Fast Track Procedures for Consideration of Nitrogen Oxide Proposal ("the Responses") filed by the Illinois Environmental Protection Agency ("Agency") on May 1, 2007. The Pipeline Consortium reiterates its position, stated in its Objection, and supports the Objection filed by the Illinois Environmental Regulatory Group ("IERG"), that it is improper for the Board to proceed under the fast-track rulemaking provisions of Section 28.5 of the Environmental Protection Act ("Act") (415 ILCS 5/28.5) (reference to fast-track rulemaking only: "28.5") with respect to Sections 217.392(a)(3) and (4) of the proposed rule. The Board has jurisdiction under 28.5 only when the U.S. Environmental Protection Agency ("USEPA") may impose sanctions for the state's failure to adopt a federally-required rule. Section 28.5 does not confer jurisdiction when USEPA may impose sanctions for the state's failure to make a federally-required submittal that

is something other than a rule, such as an attainment demonstration or plan for reasonable further progress ("RFP") or rate of progress ("ROP") or monitoring deployment plan or any of a number of other components of the state implementation plan ("SIP") that are not rules. In support of its previously-stated request that the Board sever Sections 217.392(a)(3) and (4) of the proposal into a separate rulemaking proceeding pursuant to Section 27 of the Act, the Pipeline Consortium states as follows:

I. RELIANCE ON INCLUSION OF THE RULE IN ATTAINMENT DEMONSTRATIONS

The Agency argues in its Responses that the attainment area sources are properly included in the 28.5 rulemaking because emission reductions under the proposed rule at these sources somehow will be used as part of the attainment demonstrations for ozone and fine particulate matter ("PM2.5"). However, the Agency has not included in this proposal any evidence other than its assertions that this is, indeed, the case. Further, because the contents of an attainment demonstration are subject to the Agency's discretion rather than specifically mandated in the Clean Air Act for these two national ambient air quality standards ("NAAQS"), *see* 42 U.S.C. §§ 7409, 7502, and 7511, the proposed attainment area rules are not required. Indeed, the Agency could, arguably, decide at a later date not to use this attainment area rule in the attainment demonstration, thus setting aside the status currently asserted by the Agency for these sources that such rules are federally required and that sanctions can be imposed absent their inclusion. In fact, these particular rules are not federally required, and if these rules are not adopted by the Board, there will be no federal sanctions imposed. Therefore, they do not meet the requirements of 28.5.

A. **Lack of Technical Support and Legal Sufficiency as to Inclusion of the Attainment Area Sources Precludes the Board's 28.5 Jurisdiction over These Sources.**

The Board's rules require that the Agency submit technical support and arguments of legal sufficiency with a 28.5 submittal. The Agency has failed to meet these requirements with respect to the portion of the proposal that applies to attainment area sources.

The Technical Support Document makes broad assertions with no support regarding the necessity of inclusion of these sources for the attainment demonstration. The Agency argues in its Response that this is an issue of fact that is properly addressed at hearing and is not necessary for inclusion in the initial submittal. To the contrary, where the Board's jurisdiction under 28.5 depends on factual issues, the Agency must initially submit sufficient information, not merely assertions, to resolve those issues in a manner that establishes jurisdiction under 28.5. If it cannot, then the Board lacks jurisdiction under 28.5. The question of including attainment area sources in an attainment demonstration when such industrial category has not been identified by Congress or the U.S. Environmental Protection Agency ("USEPA") as a source category that must be regulated requires a far more complete initial submittal with an adequate justification for 28.5 jurisdiction. The Agency has failed to make the requisite jurisdictional demonstration.

The Agency asserts that these attainment area sources must be included in the attainment demonstrations without providing any overall description of the mix of sources that will be included in the attainment demonstrations. The Board has not been provided with a factual basis upon which to determine that inclusion of these sources in the attainment demonstration is necessary or appropriate. When the Board's jurisdiction relies on such a determination, the Agency must include in the initial submittal sufficient information beyond its mere assertions

that imposition of its 28.5 jurisdiction is appropriate in order for the Board and the public to determine that 28.5 jurisdiction is available.

Failure to include such information in the initial submittal makes the submittal technically and legally insufficient under 28.5, leaving the Board with no jurisdiction to proceed with the rule as it pertains to the attainment area sources, because the rule is not federally required and USEPA cannot impose sanctions if the Board fails to adopt it. Therefore, the Board must sever Sections 217.392(a)(3) and (4) and any related portions of the rule from the rest.

B. The Agency's Discretion Regarding the Contents of an Attainment Demonstration Render Rules Not Specifically Identified by Congress in the Clean Air Act or by USEPA by Rule Not Subject to Adoption Under 28.5.

A part of the Agency's responsibility under the Act is to make the submittals to USEPA that comprise the SIP. 415 ILCS 5/4. Exercise of that responsibility involves employment of discretion in choosing the mix of rules that comply with SIP requirements, including the attainment demonstrations for the ozone and PM2.5 NAAQS. *C.f.*, 72 Fed.Reg. 26586 26588-89 (April 25, 2007). Clearly, an attainment demonstration SIP is federally required, and USEPA can impose sanctions on the state if the Agency does not submit an approvable attainment demonstration. 42 U.S.C. §§ 7410 and 7509. Because the rules that form a part of the attainment demonstration are not specifically federally required until and unless the attainment demonstration is approved as part of Illinois' SIP, USEPA cannot impose sanctions upon the state for failure to submit any rules prior to its approval of the attainment SIP. 42 U.S.C. §§ 7410 and 7509. It is that approval that makes the particular rules that the Agency, in its discretion, determines are necessary or appropriate for the attainment demonstration federally required. Until that moment, those rules are not federally required and USEPA cannot impose sanctions. In fact, USEPA cannot ever impose sanctions for the state's failure to adopt any rule

component of an attainment demonstration SIP if those rules are not specifically identified and required by Congress or USEPA. 42 U.S.C. § 7509. All that USEPA can impose sanctions for is the failure of the state to submit an approvable attainment demonstration.

Because inclusion of the portion of the rule controlling attainment area sources is not federally required and is not subject to sanctions, the Board does not have jurisdiction to include that portion of the rule in a 28.5 rulemaking, and the Pipeline Consortium reiterates its request that the Board sever that portion of the proposal.

II. RELIANCE ON THE RULE AS A PART OF RFP/ROP

The Agency also asserts that the attainment area portion of the rule is necessary for purposes of demonstrating RFP and ROP. The Agency discusses at some length in the Responses that reductions of nitrogen oxides ("NOx") outside the attainment areas for purposes of RFP/ROP is approvable under federal guidance. However, the federal requirements are (1) that the state consider attainment area regulation and (2) that it justify reliance on attainment area regulation if it chooses to rely on attainment area regulations in its RFP/ROP. *C.f.* 72 Fed.Reg. 20586, 20636-39 (April 25, 2007). Not only did the Agency fail to sufficiently describe how it complies with these factors in the initial submittal, but also, compliance with these factors do not confer on the Board 28.5 jurisdiction in a rulemaking.

A. Inclusion of a Rule in an RFP Plan Does Not Confer on the Board 28.5 Jurisdiction.

Despite the Agency's lack of justification, RFP/ROP does not apply in the Chicago area in any event because the area attains the ozone standard, revealed to the Board in the R06-26 rulemaking. *See Sierra Club v. USEPA*, 99 F.3d 1551, 1556-58 (10th Cir. 1996); *Sierra Club v. USEPA*, 375 F.3d 537, 541-41 (7th Cir. 2004); 72 Fed.Reg. 19424, 19429 (April 18, 2007); 72 Fed.Reg. 14422, 14427 (March 28, 2007). Therefore, the Agency's reliance on RFP/ROP for

ozone for the Chicago nonattainment is misplaced. Further, it is highly questionable whether the Agency can justify reliance on attainment area sources that are not upwind of the Metro-East/St. Louis ozone nonattainment area. Regardless, the Agency did not include in its submittal any discussion of the impact of attainment area sources all over the state on the Metro-East/St. Louis ozone nonattainment area.

The Agency relied upon the proposed PM2.5 implementation rule, not the final rule, in its submittal to support inclusion of attainment area sources for RFP/ROP for PM2.5. That rule has since been finalized does not relieve the Agency of the requirement that it be responsible in its submittals and the Board to be discerning in determining its jurisdiction. A proposed rule has no legal effect and cannot be the basis of an assertion that a rule is federally required.

The final rule requires that a state specifically justify the inclusion of attainment area sources in an RFP submittal. The Agency provided no evidence of such justification other than references to LADCO modeling in the Agency's submittal and Responses, but, as the Agency admits, that modeling is preliminary. *Response to Pipeline Objection*, p. 11. The modeling discussion included with the TSD describes regional modeling. It does not focus on Illinois sources, let alone attainment area sources and, therefore, is insufficient justification for inclusion of the attainment area sources for RFP. Where the Board's jurisdiction is in question, mere assertions by the Agency and suggestions that it will address the question more fully at hearing is insufficient. We must question whether the Agency would address the question at hearing absent these Objections.

Regardless, however, of the lack of justification for inclusion of the attainment area portion of the proposal in the RFP plan in the Agency's submittal, it is not possible for a rule intended to satisfy an RFP plan requirement to proceed under 28.5. The rule does not become

federally required until USEPA has approved the RFP plan, and USEPA requires that the rules included in an RFP plan to have been already adopted. Further, it is only the RFP plan itself that is sanctionable, not the failure to adopt a rule that may be a component of the RFP plan.

B. The Agency's Discretion Regarding the Contents of an RFP Plan Render Rules Not Specifically Identified by Congress in the Clean Air Act or by USEPA by Rule Not Subject to Adoption Under 28.5.

As with the attainment demonstration SIP, the Agency has discretion as to what it will include in an RFP SIP. Until and unless USEPA has approved the RFP plan submittal as a part of the SIP, the rules included in the RFP plan are not federally required. Moreover, USEPA cannot impose sanctions for a state's failure to include a rule not specifically required by Congress or USEPA through a rule in the RFP plan submittal.42 U.S.C. §§ 7410 and 7509. Rather, all that USEPA can impose sanctions for is a state's failure to submit an approvable RFP plan. 42 U.S.C. §§ 7410 and 7509.

With respect to the ozone and PM2.5 NAAQS, USEPA has not required that any specific attainment area sources be controlled other than those identified in Phase II of the NOx SIP Call and in the CAIR. USEPA has required, in the PM2.5 Implementation Rule, that states "consider" attainment area sources, but it has not required that any specific attainment area sources – or even any attainment area sources – be regulated. 72 Fed.Reg. 20586, 20636 (April 25, 2007). Therefore, those portions of this rule that apply to attainment area sources is not federally required, and USEPA cannot impose sanctions if the Board fails to adopt them.

III. SPECIFIC POINTS IN THE AGENCY'S RESPONSES

The Agency states that USEPA has started the sanctions clocks for states that failed to submit SIPs addressing the NOx SIP Call for power plant boilers. Agency Response to Pipeline Consortium Objection, p. 9. The Pipeline Consortium does not understand the relevance of this

statement. This is a rule addressing reciprocating internal combustion engines, not power plants. What USEPA has required relative to power plants is irrelevant to whether this rulemaking should proceed under 28.5.

The fact that the Board has accepted other rules intended as parts of RFP/ROP plans or attainment demonstrations without the Agency including in its initial submittal sufficient support is first of all, a question of fact that we do not intend to explore, and second of all, irrelevant. *See* Agency Response to IERG Objection, p. 8. That the Board proceeded on the basis of the Agency's assertions and the lack of objection is irrelevant here. *See* Agency Response to IERG Objection, p. 8. The sufficiency of the submittal this time and the Board's jurisdiction over the attainment area sources in this rulemaking is under question. The Agency cannot rely on past actions to justify current actions. It must constantly submit complete proposals if it seeks to rely on 28.5. And it is the public's duty to serve as a watchdog over this, given the statutorily short timeframes available to the Board.

When an objection to the Board's alleged 28.5 jurisdiction is made, the Board must engage in a higher level of scrutiny over a submittal to absolutely ensure that the submittal justifies proceeding under 28.5. The statutory and regulatory checklist for determining the sufficiency of an Agency submittal pursuant to 28.5 is insufficient once the public has raised an objection to the Board's jurisdiction under 28.5.

The Agency relies on the Technical Support Document ("TSD") as the repository of all of its assertions, including legal arguments. One must question the role of the Statement of Reasons ("SOR"). Arguably, if the Agency submits an SOR, which is not specifically required under the Board's procedural rules for 28.5 rulemakings, then the Agency must meet the

requirements of general rulemakings for SORs at 35 Ill.Adm.Code § 102.202(b). A TSD is not technically required by the Board's rules, either.

Usually, the TSD is written by the Agency's technical staff – thus its name. It is not the appropriate location for legal arguments. That leaves the SOR, normally written by the Agency's legal staff, as the legitimate location of legal arguments or assertions. Where what is legal and what is technical tend to overlap, perhaps the assertion of the information must also overlap. In any event, the Agency's reliance on the TSD as the locale of all of its arguments or assertions relative to the rulemaking is questionable and arguably leaves the inclusion of an SOR irrelevant.

The Agency complains that the federal clock is ticking with respect to the requirement that this rule be adopted as quickly as possible. First, the Agency is the creator of this particular time crunch. The Phase II NOx SIP Call was finalized in 2005 – two years ago. The last outreach meeting relative to these rules was over a year ago. Regardless, the Pipeline Consortium does not challenge the propriety of the Phase II NOx SIP Call portion of this rule proceeding under 28.5, but it does object to the Agency's specious arguments regarding time. Further, there is not a federal doomsday clock ticking over this rulemaking other than the Phase II NOx SIP Call portion. There is plenty of time for a Section 27 rulemaking, particularly with respect to the attainment area sources.

WHEREFORE, for the reasons set forth above, the Pipeline Consortium reiterates its objection to the Board proceeding under Section 28.5 for those portions of the proposal that would control attainment area sources and requests that the Board sever that portion of the rule to

a separate, Section 27 rulemaking. The Board does not have 28.5 jurisdiction over the portion of the rule that is in question.

Respectfully submitted,

ANR PIPELINE COMPANY, NATURAL GAS PIPELINE COMPANY, TRUNKLINE GAS COMPANY, and PANHANDLE EASTERN PIPELINE COMPANY

by:

One of Their Attorneys

Dated: May 8, 2007

Renee Cipriano
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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 8th day of May, 2007, I have served electronically the attached **APPEARANCES of KATHLEEN C. BASSI, RENEE CIPRIANO, and JOSHUA R. MORE on behalf of ANR PIPELINE COMPANY, KINDER MORGAN, INC., TRUNKLINE GAS COMPANY, and PANHANDLE EASTERN COMPANY** and **REPLY TO THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSES TO OBJECTIONS TO THE USE OF SECTION 28.5 FAST-TRACK PROCEDURES IN THIS MATTER** upon the following persons:

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**.

Kathleen C. Bassi

Renee Cipriano
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