BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

IN THE MATTER OF:	)	
	)	
FAST-TRACK RULES UNDER NITROGEN OXIDE (NOx) SIP CALL PHASE II AMENDMENTS TO 35 ILL. ADM. CODE SECTION 201.146 AND PARTS 211 AND 217	)	R07-18 (Rulemaking – Air)
	)	
IN THE MATTER OF:	)	
	)	
SECTION 27 PROPOSED RULES FOR NITROGEN OXIDE (NOx) EMISSIONS FROM STATIONARY RECIPROCATING INTERNAL COMBUSTION ENGINES AND TURBINES: AMENDMENTS TO 35 ILL. ADM. CODE PARTS 211 AND 217	)	R07-19 (Rulemaking – Air)

NOTICE

To: John Therriault, Acting Clerk
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Timothy Fox, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Chicago, Illinois 60601

See also, Attached Service List

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board the **APPEARANCE and MOTION FOR RECONSIDERATION** of the Respondent, Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

Respectfully submitted by,

_____/s/_____
Robb H. Layman
Assistant Counsel

Dated: June 25, 2007
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 524-9137

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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APPEARANCE

NOW COMES Robb H. Layman and enters his appearance on behalf of the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, as one of its attorneys in the above-captioned matters.

Respectfully submitted by,

_____/s/_____
Robb H. Layman
Assistant Counsel

Dated: June 25, 2007
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MOTION FOR RECONSIDERATION

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by and through its attorneys, and pursuant to 35 Ill. Adm. Code 101.520, and moves the Illinois Pollution Control Board ("Board") for reconsideration of its May 17, 2007, Order bifurcating the Illinois EPA's fast-track rulemaking proposal for the control of nitrogen oxides (hereinafter "NOx") from stationary reciprocating internal combustion engines and turbines originally filed on April 6, 2007. This motion, captioned in the form of the Board's bifurcated dockets, is filed in accordance with 35 Ill. Adm. Code 101.520. For the reasons set forth below, the Illinois EPA requests that the Board rescind its ruling halting the proposed fast-track rulemaking for sources not affected by the NOx State Implementation Plan ("SIP) Call/Phase II relative to the aforementioned engines and turbines. Further, as explained below, the Board should order the resumption of a fast-track rulemaking proceeding for all sources and/or emission units affected by the R07-19 docket.

INTRODUCTION

On May 17, 2007, the Board entered an order bifurcating the fast-track rulemaking proposal under Section 28.5 of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/28.5 (2006) relating to stationary reciprocating internal combustion engines and turbines that had been submitted by the Illinois EPA on April 6, 2007. The original proposal had been accepted by the Board on April 19, 2007, as a fast-track rulemaking under the R07-18 docket. The Illinois EPA received a copy of the Board's May 17th Order on May 21, 2007.

The May 17th Order principally arose from separate objections received by the Board concerning the fast-track proposal from a consortium of natural gas suppliers (hereinafter "Pipeline Consortium") and the Illinois Environmental Regulatory Group (hereinafter "IERG").[1] As a result of the Board's ruling, the rulemaking was split off into two rulemaking proceedings. The original R07-18 docket is now designated for the Board's continuing consideration of those sources affected by the NOx SIP Call/Phase II. A new R07-19 docket was opened by the Board for its consideration of the remaining portion of the Illinois EPA's original fast-track rulemaking proposal.

In this motion, the Illinois EPA respectfully seeks a reconsideration of the Board's May 17th Order pursuant to 35 Ill. Adm. Code 101.520(a). The procedural rule governing the Board's reconsideration of its orders generally provides that the Board will consider such factors that demonstrate whether its decision was in error. *See,* 35 Ill. Adm. Code 101.902. In this instance, the Illinois EPA contends that the Board is gravely mistaken in its interpretation of the Section 28.5 provisions for fast-track rulemakings, in part, because the Board may have misconstrued the statute's plain language and overlooked other valuable aids of statutory construction. Moreover, the Illinois EPA is

[1] For the sake of convenience, the parties are referred to collectively as "industry objectors."

concerned that in reconsidering its earlier order accepting the fast-track rulemaking proposal, the Board has inadvertently acted outside of its lawful authority with respect to other procedural requirements of Section 28.5.

Because of the importance of these considerations relative to this rulemaking, as well as the impact that the Board's ruling may have on future fast-track rulemaking proceedings, the Illinois EPA requests that the Board consider the merits of this Motion and re-examine its May 17th Order. In the event that the Board finds reason(s) to reconsider its decision based on the arguments raised herein, the Illinois EPA requests that the Board take the necessary steps to order the resumption of a fast-track rulemaking procedure in the current R07-19 docket.

ARGUMENT

In its May 17th Order, the Board rested its decision to bifurcate the current proceedings on two alternative grounds. First, the Board held that the Illinois EPA failed to link its fast-track rulemaking proposal relating to those sources unaffected by the NOx SIP Call/Phase II to a federal rule or regulation that is required to be adopted. *See, May 17th Order* at page 34. Alternatively, the Board found that even if USEPA was authorized under federal law to sanction the State of Illinois for the failure to make a SIP submittal, no threat of such sanctions could be demonstrated with respect to the proposal's 8-hour ozone and $PM_{2.5}$ NAAQS component.

1. The Board has misconstrued the meaning of "required to be adopted" in Section 28.5, thereby denying the proper applicability of the fast-track rulemaking procedures to the Illinois EPA's original proposal.

In its May 17, 2007, Order, the Board observed that Illinois EPA's portrayal of federal requirements relating to the implementation of the 8-hour ozone and $PM_{2.5}$ NAAQS was not "persuasive," as it did not articulate a basis for concluding that the non-Phase II component of the proposal met the threshold requirements under Section 28.5 of

the Act. To be precise, the Board found that the Illinois EPA had not "traced the language of this portion of its proposal *to a specific rule* that is required to be adopted by the State under the CAA." *See, May 17th Order* at page 34 (emphasis added). Thus, the Board reads the Act's fast-track provisions as requiring the existence of a "specific rule" that must be adopted under the Clean Air Act Amendments ("CAAA").

The Board's ruling on this aspect of the proceeding is unencumbered by words or explanation but it is seemingly borrowed from arguments raised by the industry objectors. The Pipeline Consortium posited that nothing in federal law dictates that Illinois or any other state "specifically" regulate engines and turbines of the nature and size identified in the Illinois EPA's proposal.[2] IERG similarly claimed that the 8-hour ozone and $PM_{2.5}$ NAAQS requirements sought to be addressed by the Illinois EPA in the rulemaking do not compel "specific action" and, accordingly, this component of the rulemaking was not required to be adopted for purposes of Section 28.5.[3] In the Illinois EPA's view, the central premise of these arguments is specious. Whether enticed by its simplicity or the repetition with which it was stated, the Board fell victim to an artificial construct that which has no support in the statutory language and eschews the legislative purpose of the fast-track provisions.

A. Plain meaning of the relevant statutory language

Courts routinely observe that the cardinal rule of statutory construction is to ascertain and give true meaning to the intent of the legislature. This endeavor begins with a review of the statute's language. Where the plain language of a statute is clear and unambiguous, a reviewing court or administrative tribunal must enforce the statute. *See,*

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[2] *See,* Objection Motion of April 16, 2007, and the Reply of May 8, 2007, filed by Pipeline Consortium, at pages 5 and 2 respectively.

[3] *See,* Objection Motion filed April 17, 2007, by IERG at pages 8-9.

Solich v. George and Anna Portes Cancer Prevention center of Chicago, Inc., 15 Ill.2d 76, 630 N.E.2d 820 (1994); *Color Communications, Inc. v. Pollution Control Board*, 288 Ill. App.3d 527, 680 N.E.2d 516 (Ill. App. 4th Dist. 1997).

Section 28.5(a) of the Act provides that the fast-track rulemaking procedures apply exclusively to "rules… required to be adopted" by the State of Illinois under the CAAA. *See,* 415 ILCS 5/28.5(a)(2006). Section 28.5(c) defines a "fast-track" rulemaking as "a proceeding to promulgate rules that the CAAA requires to be adopted." 415 ILCS 5/28.5(c)(2006). This subsection also gives meaning to the term "requires to be adopted," defining it as "those regulations or parts of regulations for which the [USEPA] is empowered to impose sanctions against the State for failure to adopt such rules." *Id.* The meaning given to the latter phrase is thus specifically defined by reference to USEPA's sanctions authority under the CAAA. Significantly, the principle source of this authority under the federal statute is critical to a comprehensive understanding of the proper scope and role of Illinois' fast-track rulemaking process.

EPA authority to impose sanctions under the federal Clean Air Act ("CAA") is fairly circumscribed. However, perhaps the broadest and most frequently discussed part of this authority is found in Section 179. Entitled as "Sanctions and Consequences of Failure to Attain," Section 179 was substantially revised by Congress in 1990 to add teeth to the non-attainment area program. The provision authorizes USEPA to withhold federal highway funds and/or impose emission offsets at a ratio of 2 to 1. *See,* 42 U.S.C. §7509**.** One or both of these available sanctions are to be applied by USEPA whenever a State fails to put forward a necessary SIP, SIP revision or such other submissions as are required under Part D or otherwise incorporated into Section 110.

Two common scenarios that illustrate the applicability of USEPA's sanction authority, relevant here, are a State's failure to submit a plan or plan revision relating to a

finding of "substantial inadequacy" under Section 110(k)(5) of Part A in Title 1 and a State's failure to submit a plan or plan revision required under Part D in Title I, governing "Plan Requirements for Non-attainment Areas." The proposed rule for the affected sources under the NOx SIP Call/Phase II properly fit within the first aforementioned scenario, albeit not because of the specificity with which the NOx SIP Call addressed certain emission sources, controls or other normal attributes of a rulemaking.[4] Rather, the origin of the NOx SIP Call, arising as it did from the OTAG process and the resulting findings of inadequacy by USEPA, placed the affected States into a position of having to assure that their SIPs addressed the interstate ozone problem or face sanctions under Sections for affected States under Section 179(a)(1).

Separately, the Illinois EPA has stated that its original rule proposal was also meant to satisfy attainment demonstrations, as well as the accompanying obligations of Reasonably Available Control Technology ("RACT") and Reasonable Further Progress ("RFP"), for the 8-hour ozone and $PM_{2.5}$ NAAQS.[5] The Illinois EPA has argued that the proposed rule would fall within the second aforementioned scenario, as the rule would be addressing the State of Illinois' obligation to submit plan revisions (i.e., for attainment demonstrations and the required elements of RACT and RFP) relative to both the ozone and $PM_{2.5}$ NAAQS under Part D. The threat of sanctions obviously comes into play upon the State's failure to submit such plan revisions, which can be directly traced to the language of Section 179(a)(1).

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[4] Industry objectors would appear to object, as a matter of principle, to the notion that the NOx SIP Call would serve as a basis for sanctions under Section 179. However, as a result of a transparent negotiations strategy memorialized in their objections, they have agreed to waive such objections if and when the proposal for non-NOx SIP Call/Phase II sources is removed from its proposed fast-track path.

[5] The two moderate attainment areas in Illinois for the 8-hour ozone standard were subject to an attainment demonstration that was required by June 15, 2007, which has now passed. The two moderate attainment areas in Illinois for $PM_{2.5}$ are subject to a future attainment demonstration date that is required by April 5, 2008.

Notably, the enabling language of USEPA's sanctions authority in the CAA is not geared towards the promulgation of a specific rule or type of regulation but, rather, is broadly aimed at various types of SIP submittals. A SIP delineates the strategies by which a State will achieve compliance with the NAAQS.[6] Among other things, a SIP must contain "enforceable emission limitations and other control measures, means, or techniques… as well as schedules and timetables for compliance, as may be necessary or appropriate to [comply with the CAA]." 42 U.S.C. 7410. Generally speaking, these limits and other requirements assume the form of regulations, which implement and serve as a basis for enforcement of the SIP. It is unimaginable that any SIP submittal would be approved in the absence of rules for implementing and enforcing the SIP. The rules or regulations that are promulgated by a State to implement the NAAQS are therefore part and parcel, if not the real embodiment, of a SIP submittal.

For purposes of Section 179, it is clear that USEPA's authority to impose sanctions is focused on the overall adequacy of a SIP or SIP revision, including any required elements set forth in Part D or Section 110 of the CAA. In this regard, the rules necessary to implement the SIP are synonymous with the SIP itself. This impression is not only supported by the broad, narrative language of Section 179, but is confirmed by USEPA's approach of requiring that a SIP submittal contain all measures necessary for approval, including the adoption of implementing rules. As the Illinois EPA noted in a response to one of the filed objections, USEPA has pointedly directed States to submit SIP revisions for the 8-hour ozone and $PM_{2.5}$ NAAQS to show that all control measures

[6] The CAA affords a State ample discretion in selecting the requisite mix of controls necessary to achieve the NAAQS, although such discretion is obviously contingent upon the choice of controls achieving the NAAQS.

are adopted in order to demonstrate attainment a manner as expeditiously as practicable.[7]

Because the Illinois EPA's proposed rule will address required SIP revisions under Part D for both ozone and $PM_{2.5}$ NAAQS, thus making it a SIP-related requirement for which USEPA sanctions are clearly contemplated, the Illinois EPA maintains that the requirements of Section 28.5 have been satisfied and that the proposal is eligible for fast-track rulemaking.

The Board's ruling draws attention to the absence of a "specific rule" in the Illinois EPA's proposal that is actually required to be adopted by a State under the CAAA. This approach would suggest that the Board is attempting to define a "required" rule as a specific regulatory enactment, seemingly one already promulgated or put into place by USEPA, which States, in turn, are obliged to adopt as their own. This construction, however, is overly literal and restrains the more natural reading of the statute's text. The Illinois EPA's proposed rule *is* a rule that, in the absence of its adoption, will result in a failure to meet the SIP-related requirements for ozone and $PM_{2.5}$ NAAQS. Moreover, such a crimp on the applicability of Section 28.5 would effectively fast-track rulemaking to nothing more than a glorified type of pass-through or identical-in-substance rulemaking. As discussed below, such an outcome would ignore the fundamental purpose of the legislation.

B. Other aids to statutory construction

The Illinois EPA contends that its proposed rule falls within the plain meaning of the statute's text. Industry objectors and the Board, on the other hand, reach a different conclusion in interpreting the same language. If two possible interpretations of the statute's text are reasonably possible, a reviewing court or administrative tribunal should consider other aids in statutory construction. It is not clear from the Board's order that

[7] *See*, Illinois EPA Reply to Pipeline Consortium's Objection Motion, filed May 1, 2007, at page 7.

this endeavor was made.

Among other things, a reviewing court or administrative tribunal may look "beyond the language of the statute when its meaning is unclear" or otherwise ambiguous. *See, Hansen v. Caring Professionals, Inc.*, 676 N.E.2d 1349, 1352 (Ill. App. 1st Dist. 1997); Solich, 15 Ill.2d 76, 630 N.E.2d 820 (1994). This examination is directed at the "reason and necessity for the law, evils which the legislature sought to remedy and the purposes intended to the accomplished." *Harvel v. City of Johnston City*, 586 N.E.2d 1217 (Ill. 1992). An interpretation of a statute that is demonstrably at odds with the legislature's intent, or thwarts it object or policy, is not favored. Moreover, "[i]f the language of a statute is susceptible to two constructions, one of which will carry out its purpose and another will defeat it, the statute will receive the former construction." *Id., citing 2A N. Singer, Sutherland on Statutory Construction*, Section 46.05, at 91 (Sands 4th Ed., 1984); *see also, Tucker v. Country Mutual Insurance Company,* 465 N.E. 2d 956 (Ill. App. 4th Dist. 1984)(consideration should be given in such cases to the "the entire statute, its nature, object and consequences which would result from construing it one way or another").

Here, the purpose and object of the fast-track rulemaking process found in Section 28.5 was to prevent federally-imposed sanctions caused by Illinois' failure to meet new rulemaking requirements. The statute was enacted by the Illinois General Assembly on the heels of the completion of a final report and recommendations compiled by an Attorney General's Task Force in 1992. *See, Report of the Attorney General's Task Force on Environmental Legal Resources (1992).* As the report observed, controversy had previously ensued over Illinois' failure to meet the NAAQS standard for ozone in the non-attainment area of metropolitan Chicago. Moreover, as the Attorney General's Task Force noted, the CAAA enacted by Congress in 1990 had placed "unprecedented"

demands on the ability of States in adopting and implementing rulemakings in accordance with federal deadlines. *Id.* at page 29. In particular, the report emphasized that "Illinois stands to lose massive federal highway funding and becomes subject to costly sanctions for failure" to achieve the federal deadlines under the CAAA. *Id.* at page 30.

The Illinois EPA's interpretation of Section 28.5 presented here will arguably fulfill the achievement of the legislation's policy and object, as compared to the construction adopted by the Board. Construing the statute's text as inclusive of SIP submittals, not just specific rules already acted upon by USEPA, will ensure that Illinois is not subjected to unwanted sanctions. Under the interpretation advocated by industry and accepted by the Board, a fast-track rulemaking is successfully avoided but it does not deter or marginalize USEPA's authority to impose sanctions resulting from the State's failure to timely submit a SIP or SIP revision. It is not unreasonable to assume that the General Assembly would want Illinois' administrative rulemaking process to error on the side of caution when faced with the threat of possible sanctions, especially since the loss of highway funding was specifically referenced in the Attorney General's Task Force Report and would have been a significant factor in the creation of the legislation.

It is also remarkably telling that the litigation referenced by the Attorney General Task Force is so closely analogous to the present case. The litigation in the Wisconsin lawsuit centered around Illinois' failure to meet the NAAQS for ozone non-attainment. In particular, the Illinois EPA had failed to submit a satisfactory SIP for the affected area, including adequate provisions for RACT and a demonstration that the SIP would likely achieve attainment. No specific rules or regulations promulgated by USEPA were in place at the time, except for the usual SIP process under the pre-CAAA statutory regime. Following a prolonged lull in the SIP development process, and before USEPA could

finalize a formal disapproval of the SIP submittal, the State of Wisconsin initiated suit against USEPA to compel the promulgation of a federal implementation plan. *See, Illinois EPA v. USEPA*, 947 F.2d 283 (7th Cir. 1991).

If that litigation was a motivating factor in spurring the General Assembly's enactment of Section 28.5, then it seems odd, even somewhat absurd, that the legislation would not apply in a similar setting. After all, the Illinois EPA's proposed rule addressing ozone and $PM_{2.5}$ is meant to address the same type of SIP submittal process. If the protections afforded by the fast-track legislation were intended to avoid the circumstances presented in the Wisconsin lawsuit, as the Attorney General's Task Force Report clearly suggests, then the interpretation advocated by industry objectors and embraced by the Board is not only overly-literal, it stands in the way of the accomplishment of the legislature's intended goals. It can be noted that a literal construction of a statute is not controlling where the obvious legislative intent is defeated or where it leads to a absurd result. *See, Grever v. Board of Trustees of the Illinois Municipal Retirement Fund,* 818 N.E.2d 401, 404-405 (Ill. App. 2nd Dist. 2004).

Finally, the Attorney General Task Force's Report mentioned that the State's ability to achieve timely compliance with the CAAA's requirements is important, as "air quality is such a serious problem in Illinois." *See infra, Attorney General Task Force's Report* at 30. While much progress towards achieving NAAQS throughout Illinois has been made in recent decades, considerable work remains to be done. Fast-track rulemakings for the implementation of federal regulations not only allow the State to avoid unwanted sanctions, it arguably assures that Illinois is on a path towards achieving compliance with the CAA all the more sooner. Given the recognized impacts to public health in areas designated non-attainment for NAAQS and the urging of USEPA to conduct rulemakings for ozone and $PM_{2.5}$ NAAQS at the earliest practicable time, this

goal is furthered by the interpretation of Section 28.5 advocated herein, rather than by the one recently adopted by the Board.

2. The Board has misconstrued the meaning of Section 28.5 by reading a subjective element into the statute's language relating to USEPA's imposition of sanctions.

The Board's May 17th Order also discusses an alternative basis for its ruling. Specifically, the Board observes that it is not convinced of any threat of USEPA-sponsored sanctions outside of the purview of the NOx SIP Call. *See, May 17th Order* at page 34. This part of the Board's holding may have stemmed from various arguments raised by the industry objectors. The Pipeline Consortium argued that the proposal for the 8-hour ozone and PM2.5 component of the rule lacks any kind of "immediate time constraint or threat" of USEPA sanctions.[8] IERG presented a slightly different argument, challenging the Illinois EPA's assertion that the proposed rulemaking must be "implemented almost immediately or sanctions may be imposed."[9]

Whether the Board's alternative holding is derived from the pleadings or from its independent review, it is clearly erroneous. The Board's ruling rests on a mistaken impression that the statute's text authorizes a subjective element by which one can assess the threat or immediacy of USEPA-sponsored sanctions. The statute provides no such thing. Section 28.5, in fact, is silent as to the measurement of a threat level, subjective or otherwise. Instead, the language plainly hinges on the nature of the sanctions that USEPA is "empowered" to impose. If USEPA is empowered to impose sanctions under the CAAA, there is no need for scrutinizing the significance of a threat or its temporal relationship to the rulemaking process.

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[8] *See*, Objection Motion filed April 16, 2007, by Pipeline Consortium, at page 6.

[9] *See*, Objection Motion filed April 17, 2007, by IERG, at page 9. In IERG's case, the argument proceeded on the grounds that USEPA would not actually seek sanctions for any component of the proposed fast-track rulemaking, as USEPA would accept a SIP submittal where a rulemaking has been proposed but is not adopted.

This construction of the statutory language, as advocated here, is plain and unambiguous. More significantly, it underscores the General Assembly's legislative intent to protect the State of Illinois against any potential scenario involving USEPA sanctions. Section 28.5 fast-track procedures provide an appropriate mechanism for required rulemaking regardless of either the time found on a federal sanctions "clock" or the various back-and-forth stages of federal rule development. This approach signals a legislative intent to error on the side of caution any time that the State is dealing with federal sanctions under the CAAA. By crafting the provision as an extension of USEPA's sanctions authority, the legislature arguably keeps the State from being blindsided by sanctions resulting from a change in federal policy, bureaucratic miscue or some other unpredictable occurrence.

3. The issuance of the Board's May 17th Order violated certain procedural requirements of Section 28.5, requiring the Board to resume the fast-track rulemaking process for the R07-19 docket.

On April 19, 2007, the Board directed the Illinois EPA's fast-track rulemaking proposal to proceed in accordance with Section 28.5 of the Act. The April 19th Order opened the R07-18 docket in the rulemaking proceeding and set dates for an initial public hearing. The April 19th Order was subsequently rescinded by the Board's May 17th Order to the extent that the bifurcation of the proceeding brought to an end the fast-track rulemaking for those sources unaffected by the NOx SIP Call/Phase II.

Section 28.5(f) provides that the Board "shall file the rule for first notice… and shall schedule all required hearings on the proposal" within 14 days of the filing of the fast-track proposal. *See*, 415 ILCS 5/28.5(f). In its May 17th Order, the Board refuted the argument that sought to limit the Board's deliberations on a fast-track proposal to a mere technical or "checklist" type of review. Citing to an earlier ruling, the Board defended its general right as an administrative body to assess its jurisdiction over a particular

proceeding. *See, May 17th Order,* at page 33. The Board went on to conclude that Section 28.5 and supporting case law authority permit it to consider whether a fast-track proposal may proceed under the fast-track ruling procedures. *Id.* The issue that the Illinois EPA addresses in this Motion is the authority of the Board to "continue to proceed" with a fast-track proposal after the Board has previously ordered, within the initial 14-day period of receipt, that the matter proceed under the fast-track procedures.

Courts frequently observe that administrative agencies are creatures of statute and that they are authorized to act only pursuant to the powers "specifically conferred" upon them by the legislature. *See, Reitner v. Neilis,* 466 N.E.2d 696, 699 ((Ill. App. 3rd Dist. 1984). From this principle flows the recognition that an administrative agency possesses no inherent ability to amend or reconsider its decisions. *Id.* For this reason, an administrative agency may "undertake a reconsideration of a decision only where authorized by statute." *Reichhold Chemicals, Inc., v. Illinois Pollution Control Board,* 561 N.E.2d 1343 (3rd Dist. 1990); Caldwell v. Nolan, 522 N.E.2d 175 (Ill. App. 1st Dist. 1988). Where an agency lacks the enabling authority to modify its decision, any such modification is generally regarded as null and void.

If the Board is correct in the view that its deliberations amount to more than simply a "checklist review" of a fast-track proposal, then those deliberations must arguably take place within the 14-day period allotted in Section 28.5(f). However, once the Board orders that the proposal must proceed with all required hearings and public notice under Section 28.5(f), the Board must rely upon express statutory authority to amend or modify any such decision. The fast-track procedures are silent with respect to the Board's reconsideration of its decisions. Significantly, the absence of such authority may reflect the legislature's desire to ensure completion of the fast-track rulemaking process in an expedited fashion.

This issue ultimately goes to the heart of the Board's jurisdiction (i.e., authority to act) in the remaining proceedings for the R07-19 docket. Because the Board lacked authority under Section 28.5 to reconsider its April 19th Order, the Board was without authority in its May 17th Order to halt the fast-track rulemaking process for those sources unaffected by the NOx SIP Call/Phase II. In order to move the Illinois EPA's proposal forward in a manner consistent with the spirit and intent of Section 28.5, the Board should rescind its May 17th Order to the extent that it ended the fast-track rulemaking relative to sources and/or emission units unaffected by the NOx SIP Call/Phase II.[10] In particular, the Board should place the rulemaking for those latter affected sources and/or emissions units back on a path towards fast-track rulemaking under Section 28.5, including taking steps necessary to procure the scheduling of required hearings and employing its best efforts to expedite the rulemaking**.** At this juncture, little harm seems evident from the Board's decision to separate the dockets. Thus, the NOx SIP Call/Phase II could proceed on its current fast-track path under the R07-18 docket and the remaining portion of the Illinois EPA's original proposal could proceed independently under the R07-19.

The Board also arguably failed to observe an additional procedural requirement of Section 28.5. Section 28.5(m) provides that the Board cannot unilaterally change the Illinois EPA's fast-track proposal until the end of the rulemaking process. Specifically, the provision states that the Board "shall not revise or otherwise change an Agency fast-track rulemaking proposal without agreement of the Agency until after the end of the hearing and comment process." *See*, 415 ILCS 5/28.5(m)(2006). The Board's May 17th Order revised the April 6, 2007, fast-track rulemaking proposal, without prior or later

[10] The Board actually will not be "rescinding" its May 17th Order as much as recognizing that it was outside the reach of reconsideration.

agreement from the Illinois EPA, by splitting off the component of the proposed rule affecting 8-hour ozone and PM_{10} sources from the fast-track rulemaking process. In doing so, the Board failed to observe a mandatory requirement of the fast-track ruling process. While this deficiency probably does not rise to the level of a jurisdictional requirement, the Board is not without an ability to correct it. As discussed above, the Board may accomplish such a feat by simply resuming fast-track rulemaking for the sources affected by the newly docketed R07-19 proceeding.

Wherefore, the Respondent respectfully requests that the Board reconsider its May 17th Order in light of the arguments raised herein and, further, that the Board order the resumption of a fast-track rulemaking proceeding for all sources and/or emission units now contained within the R07-19 docket.

Respectfully submitted by,

_____/s/_____
Robb H. Layman
Assistant Counsel

Dated: June 25, 2007
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 524-9137

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of June 2007, I did send, by electronic mail, the following instruments entitled **APPEARANCE and MOTION FOR RECONSIDERATION** to:

John Therriault, Acting Clerk
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

and a true and correct copy of the same foregoing instrument, by First Class Mail with postage thereon fully paid and deposited into the possession of the United States Postal Service, to:

Timothy Fox, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Chicago, Illinois 60601

See also, Attached Service List

_____/s/_____
Robb H. Layman
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