BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
NOx EMISSIONS FROM STATIONARY RECIPROCATING INTERNAL COMBUSTION ENGINES AND TURBINES: 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 OF FILING

To:

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
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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 PIPELINE CONSORTIUM'S RESPONSE TOTHE AGENCY'S MOTION FOR RECONSIDERATION**.

Kathleen C. Bassi

Dated: July 6, 2007

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BEFORE THE POLLUTION CONTROL BOARD

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)**

THE PIPELINE CONSORTIUM'S RESPONSE TO THE AGENCY'S MOTION FOR RECONSIDERATION

NOW COME ANR PIPELINE COMPANY, NATURAL GAS PIPELINE COMPANY, TRUNKLINE GAS COMPANY, LLC, AND PANHANDLE EASTERN PIPE LINE COMPANY, LP, (collectively, "the Pipeline Consortium") by and through their attorneys, SCHIFF HARDIN LLP, and, pursuant to 35 Ill.Adm.Code §§ 102.700, 101.902, and 101.520, respond to the Illinois Environmental Protection Agency's ("Agency") Motion for Reconsideration.

INTRODUCTION

On April 6, 2007, the Agency filed a fast-track rulemaking pursuant to Section 28.5 ("28.5" or "Section 28.5") of the Environmental Protection Act ("Act"), 415 ILCS 5/28.5, proposing certain emissions limitations for large, stationary internal combustion engines and turbines allegedly (a) to fulfill Illinois' obligations pursuant to Phase II of the NOx SIP Call, 69 Fed. Reg. 21604 (April 21, 2004), (b) to fulfill part of its obligations to demonstrate attainment of the 8-hour ozone and fine particulate matter ("PM2.5") National Ambient Air Quality Standards ("NAAQS") pursuant to Section 110 of the Clean Air Act ("CAA"), 42 U.S.C. § 7410, (c) to show reasonable further progress ("RFP") towards attainment as required by Sections 172 and 182 of the Clean Air Act, 42 U.S.C. §§ 7502 and 7511a, and (d) to provide for reasonably available control technology ("RACT") as to emissions of nitrogen oxides ("NOx") as required by Sections 172 and 182 of the Clean Air Act, 42 U.S.C. §§ 7502 and 7511a. Subsequent to the Agency's submittal of the proposed fast-track rulemaking, the Pipeline Consortium and the Illinois Environmental Regulatory Group ("IERG") timely submitted objections to the Agency's reliance on Section 28.5 for this rulemaking, citing that the particular rules proposed by the Agency do not meet the jurisdictional requirements of Section 28.5 as they are not required to be adopted by the Clean Air Act or the U.S. Environmental Protection Agency ("USEPA") and sanctions may not be imposed upon the state if it fails to adopt the rules.[1] On May 17, 2007, the Board agreed with the Pipeline Consortium and IERG, bifurcating the Agency's proposal.

[1] Further, while the Pipeline Consortium noted that the annual compliance requirement of the rule proposed to comply with Phase II of the NOx SIP Call was outside the scope of the NOx SIP Call, it explicitly stated that it did not object to that portion of the rule proceeding under 28.5. Mr. James McCarthy, who testified on behalf of the Pipeline Consortium at the hearing held June 19, 2007, reiterated that position. In actuality, the entirety of the rule proposed to comply with Phase II of the NOx SIP Call is also improperly before the Board under 28.5, as IERG argues, but the Pipeline Consortium has waived its objection to proceeding in that portion of the rulemaking under 28.5.

Following the issuance of the Board's May 17, 2007 Order, the Agency filed a motion for reconsideration asking the Board to order the resumption of a fast-track rulemaking proceeding for all sources and/or emission units affected by the R07-19 docket.

As explained below, the Board acted in accordance with Section 28.5 in accepting the rulemaking under 28.5 and then removing at least the RFP and NOx RACT portions of the proposal upon review of its jurisdiction.

ARGUMENT

In its May 17th Order, the Board bifurcated the Agency's proposal because the Agency had failed to establish that the proposal was a federally required rule for which USEPA may impose sanctions upon the state if it fails to adopt the rule. Nothing has changed since the parties briefed this issue in April, not even the Agency's argument. The crux of the issue remains that neither the Clean Air Act nor Phase II of the NOx SIP Call requires Illinois to adopt these rules and Illinois is not threatened by sanctions if the Board does not adopt these rules.

Absent a clear showing that a rule is federally required and that USEPA is "empowered to impose sanctions" for the state's failure to adopt the particular rules, the Board does not have the jurisdiction to proceed with a rulemaking under 28.5 regardless of whether the Agency submits the rule for a fast-track rulemaking.

Plain Meaning of Section 28.5

As the Agency argues, the language of a statute is the best indication of the legislature's intent. *Solich v. George and Anna Portes Cancer Prevention Center of Chicago, Inc.*, 158 Ill.2d 76, 81, 630 N.E.2d 820, 822 (1994). The cardinal rule of statutory construction is that the Board must ascertain and give effect to the intent of the General Assembly. *In re Marriage of King*, 208 Ill.2d 332, 340, 802 N.E.2d 1216, 1220 (2003). "The legislature's intent can be determined by looking at the language of the statute and construing each section of the statute together as a whole." *People v. Patterson*, 308 Ill.App.3d 943, 947, 721 N.E.2d 797, 800 (2d Dist. 1999). Moreover, the language of the statute should be given its plain and ordinary meaning. *Marriage of King*, 208 Ill.2d at 340, 802 N.E.2d at 1220.

Section 28.5's applicability is limited "solely to the adoption of rules proposed by the agency that are required to be adopted by the State. . . ." Section 28.5(a), 415 ILCS 5/28.5(a) (emphasis added). Section 28.5(c) specifically defines the phrase "requires to be adopted" as used in that section as follows:

> (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 the State for failure to adopt such rules. . . .

Section 28.5(c), 415 ILCS 5/28.5(c) (emphasis added).

Section 28.5(c) clearly limits the use of Section 28.5 to only those federally required rules or parts of rules for which the USEPA is "empowered to impose sanctions against the state" if the state fails to adopt such rules. The term *sanctions* is not defined by the Act; however, USEPA obtains power to impose sanctions with respect to air rules pursuant to the CAA. 42

U.S.C.A. §§ 7401 to 7671; *see e.g.,* 7509(a). Therefore, a proposed rule or portion of a rule qualifies for fast track procedures under Section 28.5 only if the rule is federally required and USEPA has authority under the CAA to impose sanctions against Illinois if it is not adopted by the Board.

USEPA is not empowered to impose sanctions for all rules that it requires to be adopted. Some types of rules are specifically federally required and sanctions apply if a state fails to adopt them. The Control Technique Guidelines ("CTGs") identified by Section 182(b)(2)(A) and (B) of the CAA are an example of that. Other types of federal rules are required to be promulgated but are not specifically identified; rather, the state is given a goal, such as a budget or the state identifies a level of reduction necessary for attainment or RFP, but the rule and even the industrial group to be regulated are not identified. The rules before the Board in these two dockets are examples of this last group, and, therefore, there is no sanction for failure to adopt these rules.

The Agency asserts that the proposal is federally required as part of the state's implementation plan ("SIP") revisions for the ozone and PM2.5 NAAQS under the CAA. Mot. at p. 6. However, while the CAA does require the state to submit a plan revision, it does not require the state to adopt these rules as part of that plan. The CAA requires Illinois to identify how it will attain the NAAQS in the nonattainment areas by a certain date through submission of attainment demonstrations and the satisfaction of certain obligations of RACT, RFP, and Rate of Progress ("ROP"). 42 U.S.C. §§ 7407(a), 7410, 7502(c)(1) and (2), and 7511a(a)(2)(A) and (b)(1).

The rules comprising an attainment demonstration, RACT, and RFP/ROP plan submittals are not, themselves, federally required rules, and the Agency does not argue that they are. An attainment demonstration is a submission to USEPA to demonstrate that, among other non-regulatory types of activities, the specific programs and rules included in the attainment demonstration are sufficient to attain the NAAQS by the statutory deadline. 42 U.S.C. §§ 7407(a), 7410, 7502(c)(2), and 7511a(b)(1). What comprises NOx RACT is discretionary to the state upon proper justification to USEPA. 42 U.S.C. §§ 7502(c)(1) and 7511a(a)(2)(A). RFP plans are submissions to USEPA demonstrating that annual incremental reductions in mass air pollutant emissions are sufficient to provide for progress towards attainment of the NAAQS by the statutory deadline. 42 U.S.C. §§ 7501, 7502(c)(2), and 7511a(b)(1). With respect to ROP plans, Section 182 of the CAA requires that states reduce mass emissions by three percent per year until the applicable nonattainment areas attain the ozone standard without specifying any rules that are required to be adopted. 42 U.S.C. § 7511a(c)(2)(B).

The contents of an attainment demonstration and RFP/ROP plan submittals and the composition of RACT are subject to the Agency's discretion rather than specifically mandated in or by the CAA or by USEPA by rule. 42 U.S.C. §§ 7408, 7409, 7502, and 7511a. The Agency has the discretion to not include the rule that will be adopted under R07-19 in its SIP revision without the threat of USEPA imposing sanctions, and the Agency does not quibble with this assertion. The CAA is based on the principle of federalism, where states are best situated to determine the mix of controls that will accomplish the particular federal goal. *See United States v. Morrison*, 529 U.S. 598, 661, 120 S.Ct. 1740, 1777 (2000) (noting CAA as an example of cooperative federalism). But the particular mix of controls is neither federally required nor

sanctionable. *See e.g.,* NOx SIP Call Phase II Rule, 69 FR 21604, 21605 (April 21, 2004) ("States have the flexibility to adopt the appropriate mix of controls for their State to meet the NOx emissions reductions requirements of the NOx SIP Call.")

It is not disputed that Illinois is not required to adopt the precise rules that are pending before the Board. The state's liability or exposure to sanction is purely derivative of the state's authority – and requirement – to develop and submit SIPs. Section 28.5 does not address such liability and, therefore, is not applicable to these rules.

Legislative History of Section 28.5

The Agency also argues that an ambiguity in Section 28.5 exists because the parties have a difference of opinion as to how it should be interpreted. A difference of opinion does not necessarily mean that there is an ambiguity. In each of the cases cited by the Agency, there was a difference of opinion as to how the statute should be interpreted. In the majority of those cases, the court determined that the statute was clear and unambiguous. *See e.g., Solich*, 158 Ill.2d 76, 630 N.E.2d 820; *Color Comm., Inc. v. IPCB*, 288 Ill.App.3d. 527, 680 N.E.2d 516 (4th Dist. 1997); *Hansen v. Caring Professionals, Inc.*, 286 Ill.App.3d 797, 676 N.E.2d 1349 (1st Dist. 1997). When an enactment is clear and unambiguous, as this one is, the Board is not at liberty to depart from the plain language and meaning of the statute by reading into it conditions that the General Assembly did not express. *Solich*, 158 Ill.2d 76, 82, 630 N.E.2d 820, 822.

Even if the Board were permitted to depart from the plain language of the statute as the Agency requests, the legislative materials and history do not support the Agency's position regarding the intent of Section 28.5. Section 28.5 was first adopted in 1992 "on the heels of the Report of the Attorney General's Task Force on Environmental Legal Resources." Mot. p. 9.

However, we could find nothing in the legislative history of Section 28.5 to suggest that the General Assembly considered the Report of the Attorney General's Task Force. The Clean Air Act Amendments of 1990 spelled out very specific requirements for nonattaining states, with very strict deadlines. History in Illinois suggested at the time that it was not certain that Illinois would be able to comply with those statutory requirements or those deadlines, thus exposing the state to severe sanctions. Section 28.5 was adopted to enable the state to more quickly and more assuredly adopt the CTGs specified by Section 182(b)(2)(A) and (B) of the CAA, New Source Review rules, and the permit program prescribed by Title V of the Clean Air Act.[2]

The 1990 Amendments to the Clean Air Act were enacted two years before Section 28.5 was adopted by the General Assembly. The Board is able to presume the legislature acted with knowledge of prevailing case law. *People v. Hickman*, 163 Ill.2d 250, 644 N.E.2d 1147 (1994). Thus, the Board must construe the legislature's failure to directly address the matter of sanctions being issued for failure to submit a SIP revision or a discretionary rule that the Agency has identified would be submitted as part of a SIP revision, as opposed to a specific federally required rule, as further evidence that the General Assembly never intended Section 28.5 to be used for SIPs in whole or in part.

Construing Section 28.5's text as inclusive of SIP submittals, not just specific rules already acted upon by USEPA, is contrary to the clear and unambiguous language of the section and is contrary to proper statutory construction.

[2] As it happens, the rules that the Agency developed to implement Title V were, instead, adopted by the General Assembly as Section 39.5 of the Act.

Scope of Section 28.5

Even if the Board were to determine that the scope of Section 28.5 encompasses rules that the Agency claims are necessary for an attainment plan or RFP or RACT, there must be some evidence in the Agency's initial submittal that the statement is true. That evidence could take the form of an overall emissions reduction plan that is included in the rule submittal or, at the least, a summary of such a plan demonstrating how the proposal fits in with the overall strategy. It cannot be the mere statement that the Agency has decided the rule is necessary with no context to demonstrate its necessity. Such an approach is arbitrary and capricious.

The Agency claims that these proposed rules are necessary to address the state's obligation to submit plan revisions (*i.e.*, for attainment demonstrations and the required elements of RACT and RFP) relative to both the ozone and PM2.5 NAAQS. However, the Agency has not demonstrated that this is the case. The Agency has not provided in its submittal or even in the testimony that it prefiled prior to the bifurcation that failure on the Board's part to adopt these rules would preclude the state from attaining either the ozone or PM2.5 standards other than its mere assertion that this is the case. The Agency has not provided any discussion of how these rules fit into the overall approach to demonstrating attainment to prove that these rules are necessary. Based upon the Agency's submittals thus far, the claim that these rules are necessary is specious. The Agency has not even complied with the expansive reading of Section 28.5 it supports.

The Board should also reject the expansive interpretation espoused by the Agency because it allows the Agency to abuse Section 28.5 to the detriment of the general public and the regulated community. To accept the Agency's argument that its mere assertion that a rule

submitted under Section 28.5 locks the Board in to the 28.5 strictures invites the Agency to submit any air rule under 28.5, because the Agency's argument precludes any review of the propriety of the assertion, *i.e.*, a determination of the Board's jurisdiction over the rulemaking under Section 28.5, other than the Board's cursory checklist review that occurs when a flagged fast-track submittal arrives in the Clerk's office.

However, as noted in the Pipeline Consortium's Reply in support of its Objection to Fast Track Rulemaking, a rule that the Agency proffers as part of an RFP/ROP plan or attainment demonstration is not federally required, a prerequisite for rulemaking under 28.5, until the RFP/ROP plan or attainment demonstration is approved by USEPA as part of the SIP.

No Violation of Section 28.5's Procedures

Section 28.5 sets forth very strict timelines for the Board's actions when the Agency submits a rulemaking proposal flagged as a fast-track rulemaking. The Board's procedural rules at 35 Ill.Adm.Code 102.Subpart C faithfully reflect these strictures. Because of the strict timelines under Section 28.5, the Board must proceed as if a rule has been properly submitted pursuant to Section 28.5 once the cursory checklist review for missing pieces of a submittal has been completed. That the Board proceeds under the strictures of Section 28.5 does not relieve the Board of its authority or responsibilities relative to determining its jurisdiction in a timeframe consistent with such review. The Board's rules allow a party to file a motion at anytime and allow 14 days to respond to a motion. 35 Ill. Adm. Code §§ 101.500(c) and (d). Section 28.5 does not grant the Board the luxury of holding action on a proposed rule flagged as fast-track while motion practice is completed. Rather, all parties must proceed as if the rule is properly a

fast-track rulemaking until the Board has been able to consider the arguments, conduct its own research, and determine the proper course.

Section 28.5(c) anticipates that not all of a rulemaking flagged as fast-track is properly a fast-track rule. It specifically provides that the Board may bifurcate a portion of a rule that is not properly a fast-track proposal into another docket. The alternative is for the Board to dismiss the non-fast-track portion of the submittal.

The Agency's argument that Section 28.5(m) precludes the Board from bifurcating a proposal is nonsensical. If the Agency's interpretation were given credence, then the only alternative to the Board where it found that a portion of a submittal was not properly a fast-track rule would be to dismiss the entire rulemaking and require the Agency to start over. This would not be consistent with the spirit or the letter of Section 28.5. Section 28.5 is fast track rulemaking, meaning that delays caused by dismissals of an entire rulemaking because a portion is not properly before the Board under 28.5 is contrary to the intent of 28.5, as proven by Section 28.5(c).

Section 28.5 as Pass-Through or Rubber Stamp

The Agency argues that the Board's actions turn Section 28.5 into "effectively [a] rulemaking [that is] nothing more than a glorified type of pass-through or identical-in-substance rulemaking." Mot. p. 7. The Agency is absolutely correct. That is what Section 28.5 is. The Agency's argument relative to the scope of the Board's authority under Section 28.5(m) confirms that such is the Agency's view, as well. Section 28.5 requires the Board to go to First Notice with no consideration of the merits of the proposal. Section 28.5(f). It specifies the number of hearings without regard to whether the Board, in its expertise, determines that additional

hearings would be more appropriate. Section 28.5(g). It specifically identifies the length of time between hearings without regard to whether more time would better develop the merits. Section 28.5(g). And the crowning point is that the Board may not change the language of the proposal regardless of its expert views as to whether the language that the Agency developed is the best or even appropriate unless all parties agree. Section 28.5(m). This precludes the Board even from changing the language in a rulemaking based on the merits, because if the Agency for whatever reason does not accept participants' suggested alternatives, the Board is precluded from adopting them, even though the Board may be persuaded that they should be included in the rule. This is clearly rubber stamping. The Board has no choice.

Where the state has no flexibility regarding the rule to be adopted, as in the case of the CTGs, then a rulemaking proceeding under 28.5 is appropriate. Regardless of what industry might argue, the CTGs developed by USEPA were to be adopted into state rules without provision for alternatives. Where there is flexibility granted to a state, then use of Section 28.5 is not appropriate, because the merits of a proposal should receive full consideration by the Board with the opportunity to adjust the rule as the Board is persuaded by the cases presented by proponents, opponents, and those in between.

WHEREFORE, for the reasons set forth above, the Pipeline Consortium reiterates its objection to the Board proceeding under Section 28.5 for R07-19 and supports the Board's rationale for bifurcating the Agency's initial proposal.

Respectfully submitted,

ANR PIPELINE COMPANY, NATURAL GAS PIPELINE COMPANY, TRUNKLINE GAS COMPANY, LLC and PANHANDLE EASTERN PIPE LINE COMPANY, PL

by:

One of Their Attorneys

Dated: July 6, 2007

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 6th day of July, 2007, I have served electronically the attached **PIPELINE CONSORTIUM'S RESPONSE TOTHE AGENCY'S MOTION FOR RECONSIDERATION** upon the following persons:

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601

and by first class mail, postage affixed upon persons included on the **ATTACHED SERVICE LIST**.

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