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

(VIA ELECTRONIC MAIL)

Tim Fox, Esq.
Hearing Officer
Illinois Pollution Control Board 100
James R. Thompson Center
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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 **MOTION TO STRIKE AND RESPONSE TO MOTION FOR RECONSIDERATION 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: July 9, 2007

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

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N. LaDonna Driver
Gale W. Newton
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CERTIFICATE OF SERVICE

I, Katherine D. Hodge, the undersigned, hereby certify that I have served the attached MOTION TO STRIKE AND RESPONSE TO MOTION FOR RECONSIDERATION 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 July 9, 2007, and upon:

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by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois, on July 9, 2007.

/s/ Katherine D. Hodge
Katherine D. Hodge

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MOTION TO STRIKE AND RESPONSE TO MOTION FOR RECONSIDERATION

NOW COMES the Illinois Environmental Regulatory Group ("IERG"), by and through its attorneys, HODGE DWYER ZEMAN, and submits its motion to strike and, in the alternative, its response to the Illinois Environmental Protection Agency's (the "Illinois EPA") Motion For Reconsideration (the "Motion") with regard to the Illinois Pollution Control Board's ("Board") order dated, May 17, 2007, (the "Order") which bifurcated the above-captioned rulemakings.

As set forth in detail below, IERG moves the Board to strike the Motion because it is procedurally inadequate under 35 Ill. Admin. Code 102.Subpart G. Motions for Reconsideration and Appeal ("Subpart G"). In the alternative, IERG hereby responds to the Motion and requests that the Board deny the Motion because the Motion does not provide any basis, under Subpart G, for the Board to reconsider the Order.

I. MOTION TO STRIKE

In Board regulatory proceedings, "[m]otions for reconsideration or modification of any Board order taking substantive action on a regulatory proposal must be filed in accordance with 35 Ill. Admin. Code § 101.902. The contents of such motions are governed by 35 Ill. Adm. Code 101.Subpart I." 35 Ill. Admin. Code § 102.700. 35 Ill. Admin. Code 101.Subpart I provides, in pertinent part, that ". . . The motion must be supported by oath or affidavit or other appropriate showing as to matters not of record. . . ." 35 Ill. Admin. Code § 101.904. (Emphasis added.) The Motion is not supported by oath or affidavit or other appropriate showing as to matters not of record. *See* Motion.

As discussed in more detail below, before a motion for reconsideration can be granted by the Board, such motion must include "newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the court's previous application of the existing law." *See* 2007 Ill. ENV LEXIS 87 (Ill. ENV 2007). In the matter at issue here, if the arguments brought by the Illinois EPA in the Motion are matters of record, the Motion is a mere rehashing of arguments upon which the Board has already made its decision. Therefore, the Motion is technically inadequate because the Board could not grant the Motion. On the other hand, if the arguments made by the Illinois EPA in the Motion are, in fact, new arguments, such arguments must necessarily constitute new matters not of record. If so, such arguments must be supported by oath or affidavit or other appropriate showing. The Motion is not supported by oath or affidavit or other appropriate showing. In such case, the Motion has been improperly filed and may not be considered by the Board.

In addition, throughout the Motion, there are statements of alleged fact that are not part of the record, quotations from documents that are not publicly available and not part of the record and conclusions of law that are not supported by citations or the record. *See generally* Motion. The following example is not intended to be a comprehensive listing of matters raised in the Motion that are not supported by the record.

In section B of the Argument portion of the Motion, the Illinois EPA builds an argument regarding the intent of the legislature at the time it promulgated 415 ILCS 5/28.5. Motion at 9-11, 13. The foundation of the Illinois EPA's argument is a document entitled Report of the Attorney General's Task Force on Environmental Legal Resources (1992) (the "Report"). *See* Motion at 9-11. The Report is not available through the Illinois EPA's website, the Illinois Attorney General's website or through the internet. Further, the Report is not part of the record in this matter.[1] The Report is mentioned, but not included, in the response of the Illinois EPA to IERG's objection to the use of Section 28.5 for this rulemaking (the "Illinois EPA's Response[2]"). IERG did not object to the mention of the Report in the Illinois EPA's Response because the Illinois EPA's

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[1] On Friday, July 6, 2007, IERG received a copy of a Motion for Leave to Supplement and Supplement to Motion for Reconsideration (the "Supplement") related to the rulemakings captioned above. Motions in rulemaking proceedings are governed by 35 Ill. Admin. Code Part 102. *See* 35 Ill. Admin. Code § 102.100. Part 102 provides that "[m]otion practice, production of information and the issuance of subpoenas in regulatory proceedings is governed by 35 Ill. Adm. Code 101." 35 Ill. Admin. Code § 102.402. With regard to motions, Part 101 provides that "[a]ll motions and responses must clearly state the grounds upon which the motion is made and must contain a concise statement of the position or relief sought. Facts asserted that are not of record in the proceeding must be supported by oath, affidavit, or certification in accordance with Section 1-109 of the Code of Civil Procedure [735 ILCS 5/1-109]. . . ." 35 Ill. Admin. Code § 101.504. (Emphasis added.) The Supplement attaches a copy of the Report and states that the copy is "in the same form as the copy currently maintained by the Illinois EPA in its public library . . . ." Supplement at 2. As with the Motion, the Supplement is not supported by oath, affidavit, or certification. Therefore, IERG maintains its position, as discussed herein, that the Report is not a part of the Record in the matter at hand.

[2] At the time the Illinois EPA responded to IERG's objection to the use of Section 28.5 for the original R07-18 rulemaking, it also responded to an objection by a pipeline consortium. In this document, the phrase "Illinois EPA's Response" is intended to include both the response to IERG and the response to the pipeline consortium unless otherwise stated.

Response was supported by a properly sworn affidavit. *See* Illinois EPA's Response. As stated above, the Motion is not supported by any oath or affidavit or other appropriate showing as to matters not of record.

For the reasons stated above, IERG respectfully moves the Board to strike the Motion in its entirety.

II. RESPONSE

Recently the Board specifically stated the factors that it must consider when making a determination regarding a motion for reconsideration. The Board stated:

> In ruling on a motion for reconsideration, the Board will consider factors including new evidence or a change in the law, to conclude that the Board's decision was in error. 35 Ill. Adm. Code 101.902. In Citizens Against Regional Landfill v. County Board of Whiteside. PCB 93-156 (Mar. 11, 1993), we observed that "the intended purpose of a motion for reconsideration is to bring to the court's attention newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the court's previous application of the existing law." Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992).

2007 Ill. ENV LEXIS 87 (Ill. ENV 2007)

Thus, in order to prevail on a motion to reconsider, the movant must demonstrate that one of the three criteria has been met to justify reconsideration of an order. The questions the Board must ask are: 1) did the movant provide convincing new evidence that was not available at the time of hearing; 2) did the movant demonstrate an applicable change in law; or 3) did the movant establish that the Board made errors in its previous application of existing law. In the matter at hand, the answer to each of these questions is clearly "no." The questions are addressed individually below.

A. New Evidence

The Motion does not specifically claim to, and in fact, does not provide any new evidence that was not available at the time of hearing. Even if the Motion were to be based on some new evidence, such evidence, being "new," would necessarily be matters not of record. Since matters not of record must be supported by oath or affidavit or other appropriate showing, and the Motion is not so supported, any new evidence could not be considered by the Board.

B. Change in Law

The Motion does not specifically claim to, and in fact does not, include any reference to or discussion of any change in any law that was not in effect at the time the Illinois EPA last addressed the issue of the applicability of Section 28.5 in the Illinois EPA Response.

C. Errors in the Board's Previous Application of Existing Law

The "Illinois EPA contends that the Board is gravely mistaken in its interpretation of the Section 28.5 provisions." Motion at 2. The Illinois EPA also contends that "the Board fell victim to an artificial construct that which [SIC] has no support in the statutory language and eschews the legislative purpose of the fast-track provisions." *Id.* at 4. However, the Illinois EPA does not offer any convincing argument that the Board erred in its application of Section 28.5. The Motion is divided into several sections wherein the Illinois EPA claims that the Board erred in the application of Section 28.5. IERG addresses the claims made by the Illinois EPA in each of these sections below.

1. Claimed incorrect application of plain meaning of Section 28.5

In a section of the Motion entitled "A. Plain meaning of the relevant statute", the Illinois EPA reiterates its argument that, in addition to the Phase II NOx SIP Call Engines, "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 PM2.5 NAAQS." Motion at 6. *See also* R07-18 Statement of Reasons and Illinois EPA Response. IERG has already addressed the arguments raised in this section in its Objection to Use of Section 28.5 "Fast Track" Rulemaking for the Illinois Environmental Protection Agency's Proposed Rules (the "Objection") and its Reply to Response to Objection to Use of Section 28.5 "Fast-Track" Rulemaking for the Illinois Environmental Protection Agency's Proposed Rules (the "Reply"), both of which are part of the record in the R07-18 rulemaking. Rather than reiterate its arguments that the rules in question here are not required by the Clean Air Act ("CAA"), IERG incorporates the documents referenced in the preceding sentence herein by reference. Since the Illinois EPA's claims in this section are no more than a repetition of its earlier arguments regarding the applicability of Section 28.5, the Illinois EPA has not established that the Board made any error in its application of Section 28.5.

2. Beyond the plain meaning of Section 28.5

In a section of the Motion entitled "B. Other aids to statutory construction," the Illinois EPA "contends that its proposed rule falls within the plain meaning of the statute's text." Motion at 8. The Illinois EPA then concedes that the Board has already found otherwise and makes the following unsupported, uncited statement: "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." *Id.* Actual case law indicates that: "The language of the statute is the most reliable indicator of the legislature's objectives in enacting a particular law. We give statutory language its plain and ordinary meaning, and, where the language is clear and unambiguous, we must apply the statute without resort to further aids of statutory construction." Alternate Fuels, Inc. v. Dir. of the IEPA, 215 Ill. 2d 219, 237-238 (2004) (citations omitted). The Board already has applied the clear, unambiguous language of section 28.5 in the matter at hand. The mere fact that the Illinois EPA disagrees with the Board's holding does not allow the Board to "resort to further aids of statutory construction."

The Illinois EPA proceeds to argue that the legislature intended that Section 28.5 would allow the Illinois EPA to pursue all of the rulemakings at issue here under the fast-track process. *See generally* Motion at 8-12. The Illinois EPA gleans the intentions of the legislature exclusively from the Report (as defined above). *See* Motion at 9-11. Other than noting that 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", the Illinois EPA does not provide any evidence that the legislature relied on the Report at all when enacting Section 28.5. In fact, a review of the legislative process with regard to Section 28.5 does not indicate that the legislature relied on the Report.

The bill that created Section 28.5 was Senate Bill 1295 of the 87th Illinois General Assembly ("SB 1295"). *See* 1992 ILL. ALS 1213. House Bill 4037 of the 87th Illinois General Assembly ("HB 4037") was eventually included in SB 1295. Ill. Senate

Tr., 87th Illinois General Assembly, 132nd Legislative Day, July 2, 1992, p. 24. It must be noted that, although the Senate discussed SB 1295 several times during 1991 and 1992, not once was the Report mentioned with respect to SB 1295. *See* Ill. Senate Trs., 87th Illinois General Assembly. SB 1295 passed the Senate on July 2, 1992. Ill. Senate Tr., 87th Illinois General Assembly, 132nd Legislative Day, July 2, 1992, p. 25.

SB 1295 also was passed by the Illinois House of Representatives on July 2, 1992. Ill. House Tr. Debate, 87th Illinois General Assembly, 168th Legislative Day, July 2, 1992, p. 44. Representative Ryder, the House sponsor of SB 1295, stated, in pertinent part, as follows:

> This Bill represents the culmination of negotiations for several months in which many interested parties participated, and I take particular pride in expressing to you that the folks who are now in support of this legislation include such diverse folks as the Illinois Environmental Council and the Illinois Manufacturing Association, the Illinois Petroleum Council and Steel Group Petroleum Marketers and the Chicago Lung Association. Truly, we have a piece of environmental law in which the interested parties have created something meaningful on behalf of the Illinois General Assembly and the people of Illinois.

Id. at 42. (Emphasis added.)

It is noteworthy that Representative Ryder did not mention the Attorney General, the Attorney General's Task Force on Environmental Legal Resources (the "Task Force") or the Report. *See Id.* As with SB 1295 in the Senate, although the House discussed HB 4037 and SB 1295 several times during 1991 and 1992, not once was the Report mentioned with respect to either bill. *See* Illinois House Transcription Debates, 87th Illinois General Assembly. Based on this review of the legislative history of Section 28.5, the Illinois EPA's reliance on the Report as an indication of the legislative intent with regard to Section 28.5 is misplaced.

In fact, when discussing Senate Bill 232, the bill that created the Task Force, Senator Welch stated "[w]hat this bill does is create a task force under the authority of the Attorney General to combine environmental legal resources throughout the State to determine where we're spending our money on environmental problems. . . . [s]o it's mainly a task force for trying to oversee the money that's spent, not to tell the Pollution Control Board what to do." Ill. Senate Tr., 87th Illinois General Assembly, 30th Legislative Day, May 21, 1991, pp. 275-277. (Emphasis added.) This statement offers no indication that the purpose of the Task Force was related to the enactment of Section 28.5. It is unclear upon which, if any, basis the Illinois EPA used language in the Report to represent the intent of the legislature during the enactment of Section 28.5.

3. Claim that Board's Order was based on a subjective element

In Section B.2. of the Motion, the Illinois EPA contends that the Board's holding is "clearly erroneous" because it "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." Motion at 12. Following a careful review of the Order of the Board, dated May 17, 2007 (the "Order"), IERG is unable to determine how the Illinois EPA has construed the language in the Order to provide that the Board's opinion was based on an assessment of the threat or immediacy of USEPA-sponsored sanctions. *See generally* Order. The Board merely states that it "is not persuaded that the State faces sanctions as a consequence of failing to adopt regulations other than those addressed in the NOx SIP Call Phase II as an element of those submissions." Order at 34. IERG does not understand how this statement indicates that the Board based its decision on any assessment of the threat of sanctions or any temporal element. Section 28.5 rulemakings

are only available for rules "required to be adopted." 415 ILCS 5/28.5(a). "'[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). The language in the Order merely correctly stated that certain portions of the originally proposed rules were not required to be adopted by the CAA and, therefore, could not legally be promulgated under Section 28.5.

4. Claim that the Board may not reconsider its April 19 Order

The final substantive section of the Motion is enumerated as B.3. *See* Motion at 13. In the first part of section B.3., the Illinois EPA states that the Board issued an order on April 19, 2007 (the "April 19 Order"). *Id.* The Illinois EPA argues that the Board is not authorized to reconsider the April 19 Order because an "administrative agency may 'undertake a reconsideration of a decision only where authorized by statute.'" *Id.* at 14. The Illinois EPA cites the case Reichhold Chemicals, Inc., v. Illinois Pollution Control Board, 561 N.E.2d 1343 (3d Dist. 1990), in support of its argument. *Id.* The Illinois EPA badly misreads Reichhold. Fortunately, the Third District Appellate Court, the same court involved in Reichhold, later provides a succinct explanation of its holding in Reichhold. Three years after the decision in Reichhold, the Court stated "[t]his court has previously recognized that, while there is no authority for the Illinois Environmental Protection Agency to reconsider its rulings, the Board does have that authority. Reichhold Chemicals, Inc. v. Pollution Control Board (3d Dist. 1990), 204 Ill. App. 3d 674, 678, 561 N.E.2d 1343, 1345, 149 Ill. Dec. 647." Land & Lakes Co. v. Pollution Control Bd., 245 Ill. App. 3d 631, 640-641 (1993). (Citation included in original.)

(Emphasis added.) Based on the applicable case law, the Illinois EPA's position, as stated in the first part of Section B.3. of the Motion, is simply incorrect.

5. Claim that the Board improperly revised the initial proposal

The Illinois EPA concludes the Motion by arguing that the Board has revised the Illinois EPA's proposed rulemaking without the permission of the Illinois EPA. *See* Motion at 15. However, the Board has not revised the proposal. The Board merely attached a strikethrough copy of the proposal to indicate which materials would be considered in the separate rulemakings. The Board makes its intention clear by stating:

> For the convenience of the participants in this proceeding, and in the interest of focusing testimony and questions at hearing upon the language the Board will continue to consider under "fast-track" procedures, the Board attaches to this order Attachment A. That attachment, based upon the Agency's original proposal, strikes through language the Board will no longer consider in R07-18.

Order at 37. (Emphasis added.)

Therefore the Board has not revised the Illinois EPA's rulemaking and the Illinois EPA's argument is not accurate.

III. PROCEDURAL INADEQUACY OF ORIGINAL PROPOSAL

As discussed above, IERG filed the Objection and the Reply with regard to the original R07-18 rulemaking. The Objection and the Reply have been incorporated herein by reference. The Objection and the Reply raise certain objections based on procedural inadequacies of the original R07-18 rulemaking with regard to the portions of the original rulemaking that are now part of rulemaking R07-19. In the Order, the Board stated that, with regard to IERG's procedural arguments, "[t]o the extent that these arguments may apply in the bifurcated docket R07-19, IERG or another participant may renew them

there." Order at 36. IERG reiterates each of these arguments as each may apply to any potential recombined rulemaking.

IV. CONCLUSION

The Motion is based on matters not of record in this rulemaking and is not supported by oath or affidavit or other appropriate showing as to such matters not of record. Therefore, IERG respectfully requests that the Board strike the Motion in its entirety. In the alternative, the Motion does not provide new evidence that was not available at the time of hearing; demonstrate an applicable change in law; or, establish that the Board made errors in its previous application of existing law. Thus, IERG respectfully requests that the Board deny the Motion. Finally, IERG reiterates its original arguments regarding the procedural filing inadequacies with regard to any potential recombination of rulemakings R07-18 and R07-19.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

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

Dated: July 9, 2007

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IERG:001\R Docket\Elec.Filings R07-18\Response to Motion for Reconsideration

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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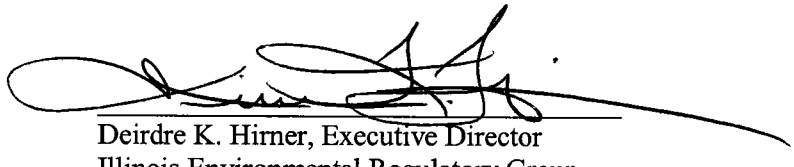
AFFIDAVIT

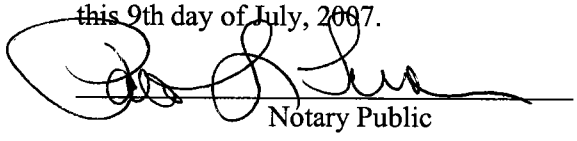
STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure [735 ILCS 5/1-109], the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.



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

Subscribed and sworn to before me
this 9th day of July, 2007.



Notary Public