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 **MOTION FOR LEAVE TO FILE CONSOLIDATED REPLY INSTANTER and CONSOLIDATED REPLY** 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: July 19, 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
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MOTION FOR LEAVE TO FILE
CONSOLIDATED REPLY INSTANTER

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by and through its attorneys, and respectfully requests leave to file a Consolidated Reply to the separate Responses recently filed with the Board in the above-captioned matter. In support thereof, the Respondent states the following:

1. On June 25, 2007, the Illinois EPA electronically filed a Motion for Reconsideration (hereinafter "Motion") with the Board pertaining to an earlier May 17, 2007, Order.

2. On July 6, 2007, the Pipeline Consortium filed a Response to the Agency's Motion for Reconsideration ("Pipeline Consortium's Response") to the Motion with the Board. An electronic mail version of the Response was received at 3:57 p.m. on that same day by the undersigned attorney.

3. On July 9, 2007, the Illinois Environmental Regulatory Group ("IERG") filed a separate Response to the Motion for Reconsideration ("IERG's Response") to the

Motion with the Board. An electronic mail version of the Response was received at 1:18 p.m. on that same day by one of the undersigned attorney's colleagues.

4. On July 11, 2007, the Illinois EPA sought leave to file a Reply to the separate Responses filed by the industry objectors. Specifically, the Illinois EPA sought leave to file a comprehensive Reply to both Responses with the Board by no later than Wednesday, July 18, 2007. The Illinois EPA noted that the selected filing date was at least two days shy of the Board's 14-day period allotted in its procedural rules for filing a reply. *See, 35 Ill. Adm. Code 101.500(e).*

5. The Board granted the Illinois EPA's Motion at the July 12, 2007, Board meeting.

6. The undersigned attorney worked much of this prior weekend and numerous hours through the current workweek to prepare this Consolidated Reply and to fully respond to the issues raised in industry objectors' responses. Unfortunately, certain delays were encountered that prevented the timely filing of the Consolidated Reply until this date. The Illinois EPA's computer server was down for much of the weekend, so needed research was put off until the technical problems were fixed on Monday of this week. Regrettably, the undersigned attorney is not also as experienced in rulemaking affairs as some of his colleagues and counterparts. As a result, he spent a great deal of unnecessary time over the course of this last week reading through reams of information, including some vintage federal register notices, in order to respond thoroughly, if not exhaustively, to the complex arguments presented in this case.

7. No hardship or prejudice will occur to the Pipeline Consortium or the IERG as a result of the granting of this Motion, and copies of this Reply are being emailed to them on this same date. Further, the one-day delay in the filing of this Reply

is still within the 14-day filing period that would have otherwise been applicable under the Board's rules.

WHEREFORE, the Illinois EPA respectfully requests that the Board grant leave for the Illinois EPA to file its Consolidated Reply Instanter or, in the alterative, provide such relief as may be just and appropriate.

Respectfully submitted by,

_____/s/_____
Robb H. Layman
Assistant Counsel

Dated: July 19, 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
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CONSOLIDATED REPLY

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by and through its attorneys, and pursuant to prior Pollution Control Board (hereinafter "Board") order, and files a Reply in the above-captioned matter. This filing, captioned in the form of the Board's bifurcated dockets, arises from a Motion for Reconsideration (hereinafter "Motion") filed on June 25, 2007, by the Illinois EPA in regards to 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. For purposes of administrative convenience, the Illinois EPA has consolidated the separate Responses to the Motion filed in this matter to this single document.

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 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.

On June 25, 2007, the Illinois EPA filed its Motion seeking reconsideration of the Board's May 17th Order. 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 its Motion, the Illinois EPA did not address new evidence or a change in the law. Rather, the Illinois EPA focused on factors, including the rules of statutory construction and certain prohibitions identified in the fast-track procedures of Section 28.5 of the Act, suggesting that the Board was mistaken in its interpretation of Section 28.5 and its applicability to the rulemaking proceeding currently docketed under R07-19.

On July 6, 2007, the Pipeline Consortium filed a Response to the Agency's Motion for Reconsideration ("Pipeline Consortium's Response") with the Board. On the

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

next day, IERG filed its own separate Response to Motion for Reconsideration ("IERG's Response"). On July 11, 2007, the Illinois EPA sought leave to file a Reply to the separate Responses filed by the industry objectors. The Board granted the Illinois EPA's Motion at the July 12, 2007, Board meeting.

ARGUMENT

In its Motion, the Illinois EPA focused principally on issues dealing with statutory construction of Section 28.5 of the Act, addressing at length both the plain meaning of the text and certain extrinsic aids. *See generally, Motion at pages 3-12.* The Illinois EPA also discussed the possibility that the Board had acted outside of its lawful authority under certain procedural requirements of Section 28.5 in bifurcating the Illinois EPA's original rulemaking proposal. *Id. at pages 12-16.*

1. The Board has misconstrued the phrase "requires to be adopted" in Section 28.5 in a manner that denies the statutory text its plain meaning and that is inconsistent with legislative intent.

In their Responses to the Motion, industry objectors raise several issues relating to statutory construction that are erroneous and without merit. As addressed in the earlier Motion, the Illinois EPA has alleged that the Board rested its May 17th Order to bifurcate the current proceedings on two alternative grounds. *See, Motion at page 3.* In the part of its May 17th Order relevant to this issue, the Board held that the Illinois EPA failed to link its fast-track rulemaking proposal relating to those sources unaffected by the Phase II NOx SIP Call to a "specific rule" that is required to be adopted by federal law.

A. Plain language

The Illinois EPA has urged the Board to reconsider its interpretation of the fast-track rulemaking's applicability, in part, by focusing on the statutory text that

accompanies the definition of "requires to be adopted."[2] 415 ILCS 5/28.5(c) (2006). As the wording of Section 28.5(c) makes clear, the source of United States Environmental Protection Agency's sanctions authority in the Clean Air Act's Amendments of 1990 ("CAAA") is pivotal to the applicability of fast-track rulemakings under Section 28.5, as it provides a key legend to understanding the types of actions that can trigger federal sanctions.[3] In construing Section 28.5 in light of USEPA's sanctions authority, the Board will be giving proper consideration to both the relevant wording of the statute and its context. *See, Whelan v. County Officers' Electoral Board of Du Page County,* 629 N.2d 842, 844 (Ill. App. 2nd Dist. 1994).

In its recent Motion, the Illinois EPA highlighted the origin of USEPA's sanctions authority at issue here.[4] More importantly, the Illinois EPA stressed that the mechanics of this sanctions authority, found at Section 179(a)(1) of the Clean Air Act ("CAA"), are geared towards the enforcement of State Implementation Plan ("SIP") requirements for those areas that do not meet the National Ambient Air Quality Standards ("NAAQS"). That is to say, the machinery speaks in terms of SIP submittals, which encompasses both the initial SIP and any later SIP revision required under Subpart D of Title I.[5] *See*, 42 U.S.C. §7509(a). As previously argued in the Motion, the rules that form the basis for the

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[2] *See, Motion at page 5.*

[3] The Illinois EPA is not alone in framing the analysis in this way. Industry objectors have acknowledged the role that the federal statute plays in the implementation of the State's fast-track rulemakings. *See, Pipeline Consortium's Response to Motion at pages 4-5.* However, they fail to appreciate that the statute's applicability is, in fact, driven by the scope of USEPA's sanctions authority, not the nature of the rules that are required to be adopted.

[4] *Motion at pages 5-6.* As the Illinois EPA has explained, the relevant context of USEPA's sanctions authority for this proceeding, as it relates to the 8-hour ozone and $PM_{2.5}$ NAAQS, is found in Section 179 of the CAA. *See,* 42 U.S.C. §7509.

[5] *Motion at pages 6-7.* The Illinois EPA has also noted that SIP submittals include various elements required for USEPA approval, including enforceable emission limits and other such control measures that are necessary to comply with the CAA. *See,* 42 U.S.C. §7410.

enforceable limits and other such measures for a SIP must be viewed as an inherent part of the development of SIPs and SIP revisions.[6] Otherwise, no basis could be read into the CAA a right of disapproval by USEPA of any SIP submittal lacking an adequate means of enforceability (i.e., rules). *Cf., Environmental Defense v. USEPA*, 369 F.3d 193 (2nd Cir. 2004).

In its Response, the Pipeline Consortium asserts that a state's liability under Section 179 stems only from a state's obligation for SIP submittals, thus the sanctions authority does not extend to actions relating to the promulgation of rules. *See, Pipeline Consortium's Response at page 5.* At the same time, the Pipeline Consortium would construe USEPA's sanctions authority to incorporate the notion that sanctions are limited to a state's failure to adopt "specific" federal rules. *See, Pipeline Consortium's Response at page 5.* The Pipeline Consortium cannot have it both ways. As the plain language reveals, the particular attributes of the rules or regulations do not come into focus in Section 179. But to construe USEPA's sanctions authority as divorcing "rules" from SIP submittals altogether would deny the CAA's text a common-sense reading and sever the integral relationship between the two in the SIP implementation process.[7]

Industry objectors also appear to rely upon the CAA's general statutory scheme for their "specific rule" argument. Throughout this proceeding, industry objectors have drawn significance from USEPA actions that leave states with little or no discretion in the

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[6] *Motion at page 7.*

[7] Industry objectors also color their reading of USEPA's sanctions authority by construing rules proposed for attainment demonstrations or Reasonable Further Progress ("RFP") as not being federally required until such time that USEPA approves them. *See, Pipeline Consortium's Response at page 10; see also, Pipeline Consortium's Reply to the Illinois EPA's Responses to the Objections to the Use of Section 28.5 Fast-track Procedures in this Matter ("Pipeline Consortium's Reply") at page 7; IERG's Objection to Use of Section 28.5 "Fast-Track" Rulemaking For The Illinois EPA's Proposed Rules ("IERG's Objection") at page 8.* While this statement may represent the only way that industry objectors can fit their "specific rule" theory into the framework of USEPA's sanctions authority, the idea is misplaced. If anything, it confuses the breadth and meaning of USEPA's sanctions authority with the unrelated issue of federal enforceability.

formulation and adoption of implementing rules, in contrast with USEPA actions that impart only goals or broad objectives, thus allowing states latitude in creating the breadth or manner of regulation. Seizing upon these differences, industry objectors have hinted that federal sanctions can be imposed for a state's failure to adopt certain federally required rules but not for others.[8] As the Pipeline Consortium views it, USEPA is not authorized "to impose sanctions for all rules that it requires to be adopted" and, further, it cannot impose sanctions where a state has discretion in determining which rules must be adopted in order to meet the federal requirements. *See, Response at page 5.* This line of argument obfuscates the issue and appears to be rooted in "wishful thinking," not the CAA's statutory scheme.

The analysis advocated here by Pipeline Consortium proceeds from the assumption that some regulations are "specifically federally required and sanctions apply if a state fails to adopt them." *See, Pipeline Consortium's Response at page 5.* The example cited for this type of rule, according to Pipeline Consortium, is the Control Technique Guidelines ("CTGs") found in the CAA's Subpart D to Title I. *Id., citing 42 U.S.C. 7511a(b)(2)(A) and (B).*[9] As the root of the regulatory phrase implies, however, CTGs are only guidelines. Consistent with the federalism principles mentioned below, states retain the ability to demonstrate RACT, as part of their SIP process, through means independent of the CTGs.[10]

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[8] *See infra.*

[9] CTGs are publications for certain categories of emission sources the "identify a reasonably available control technique or a level of emission reduction that can be achieved with a control technology." *Air Quality Protection Using State Implementation Plans – Thirty-seven Years of Increasing Complexity,* Professor Arnold W. Reitze, Jr., 15 Villanova Environmental Law Journal 209, 249 (2004). They "inform" the States about the availability of emission control technologies and develop "presumptive norms" as to RACT for individual emission sources. *Id., citing 44 Fed. Reg. 53,761, 53,762 (September 17, 1979).*

[10] *See generally, 72 Fed. Reg. 37582, 37,585 (July 10, 2007)(discussion of the significance of CTGs for non-attainment areas regulated under Section 182).*

It is not altogether clear, under the model envisioned by industry objectors, what other types of USEPA actions might also be said to leave such little room for states' discretion that they are "specifically" federally required. In the most extreme case, it could be supposed that USEPA might condition approval of a state's SIP or SIP revision on the adoption of a specific emissions limitation or control measure.[11] Judging by miscellaneous statements made by industry objectors, those USEPA actions that fall into this category might also include any actions that set forth "minimum criteria" for specified types of emission sources, specified emission reductions or emission controls.[12]

On the other hand, industry objectors are convinced that many types of rules are not "specifically" required by USEPA and that a state's failure to adopt such rules is not an action subject to sanctions, apparently because they involve only limited encroachment by USEPA on the states' discretionary role in the SIP process. Where "any number of other measures or combinations of measures [such as for achieving NOx attainment demonstration or RACT] could be proposed that would achieve similar or greater reductions," it can purportedly be presumed that the USEPA action is not specifically required.[13] Similarly included in this class are USEPA actions where neither

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[11] Such an endeavor, however, would clearly run afoul of the CAA's past and continuing "experiment in federalism," a concept that the Pipeline Consortium itself touts in its Response. *See, Pipeline Consortium's Response at page 6; see also, Train v. Natural Resources Defense Counci*l, 421 U.S. 60, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1975)(finding that the SIP process under the pre-1990 CAA vests in states the "liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation," as long as the result achieves compliance with the NAAQS); *Commonwealth of Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997)(finding that the CAAA of 1990 did not modify federalism principles existing between the USEPA and the states in the context of SIP revisions arising from ozone transport region requirements under Section 184).

[12] *See, IERG's Objection at page 8; Pipeline Consortium's Objection to Use of Section 28.5 Fast Track Procedures of Consideration of Nitrogen Oxide Proposal as Filed ("Pipeline Consortium's Objection") at pages 5-6.*

[13] *See, Pipeline Consortium's Objection at page 6.*

the level of emission control nor the source categories are specifically listed and the states are simply provided "goals" for the development of their SIPs.[14]

The conceptual scaffold built by industry objectors here is weak and would prove unworkable in the context of Section 28.5.[15] Far from justifying any legal basis for their purported distinctions, industry objectors reveal only that USEPA's strategies for SIP implementation can differ according to the CAA-related requirements from which they originate. For example, the Phase II NOx SIP Call for stationary reciprocating internal combustion engines and turbines, like other components of the NOx SIP Call, identified a specific class of sources that must meet designated levels of NOx emission reductions. Notwithstanding those established parameters, states nonetheless possess flexibility in SIP implementation. In this regards, Pipeline Consortium has specifically noted that the Phase II NOx SIP Call permits states to either "choose to regulate large internal combustion engines to meet the NOx reduction targets, or they may choose to establish emissions reductions targets for individual companies and allow those companies to develop a plan to achieve that target." *See, Pipeline Consortium's Objection, at page 4.*

While the Phase II NOx SIP Call and other similar actions may offer different degrees of state flexibility as compared to the more traditional SIP approaches, these strategies have been undertaken within the scope of a SIP implementation process that is still premised on principles of cooperative federalism. More fundamentally, the theory

[14] This scenario is derived from the following text: "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…" *See, Pipeline Consortium's Response to Motion at page 5.*

[15] The argument lacks a principled means of discerning rules that impart too little flexibility for states, such that they are "specific federally required," from those that are just flexible enough to assure that they avoid the snare of USEPA sanctions. Indeed, the concept does not answer why the Illinois EPA's proposal for 8-hour ozone and PM2.5 attainment demonstration, RACT and RFP should be treated differently from the Phase II for NOx SIP Call, even though programmatic features of the two separate strategies arguably have more in common with each other than with CTGs.

articulated by industry objectors tends to blur the dichotomy existing between the SIP implementation process and the wholly separate development of national rules. *See generally, 70 Fed. Reg. 65,984, 65,990-65,991.*

It is widely understood that the SIP implementation process is the vehicle through which the NAAQS are achieved under the CAA's framework of cooperative federalism. Separate from that framework, however, USEPA is charged with developing "standards and programs to reduce emission from sources that are more effectively and efficiently addressed at the national level." *Id. at 65,991* (citing as examples the emission reduction strategies directed at power plants). Viewed through this prism, states are frequently asked to develop SIPs in conjunction with USEPA's separate, albeit related, development of national standards (e.g., NOx SIP Call). While these national rules may form the basis for a USEPA strategy that results in the initiation of SIPs or SIP revisions, it does not mean that states are adopting the national rules *per se. Id.* As such, there is no support in the CAA's statutory scheme for the notion that certain rules, by virtue of their particular attributes, are not "specifically" required by USEPA and therefore do not fall within the scope of its sanctions authority under Section 179.

Finally, in requesting the Board's reconsideration in this matter, the Illinois EPA has characterized the over-arching argument as an "artificial construct" that lacks the more natural reading offered by the Illinois EPA's statutory construction.[16] More specifically, the Illinois EPA stated in its Motion that industry objectors' advocacy of the "specific rule" argument, as well as the Board's embrace of the same, was "overly-literal."[17] While industry objectors did not squarely dispute this contention in their responses, upon further reflection, the Illinois EPA stands corrected as to its choice of

[16] *See, Motion at page 8.*

[17] *Id.*

adjectives. By placing an over-riding emphasis on the attributes of a given rule, both industry objectors and the Board read *too much* into the applicability provisions of Section 28.5. For this reason, the proper depiction of the erroneous construction is that it is overly-broad.

In construing a statute's text, courts must be hesitant to construe language either "too literally or too broadly." *See generally, Grever v. Board of Trustees of the Illinois Municipal Retirement Fund,* 818 N.E.2d 401, 404 (Ill. App. 2nd Dist. 2004); *Illinois Power Company v. Mahin,* 364 N.E.2d 597 (Ill. App. 4th Dist. 1977). Here, the interpretation at issue ultimately rests on a construction that hinges upon a single word: "specific." The Board itself recognized that the Illinois EPA's portion of the proposal relating to the 8-hour ozone and $PM_{2.5}$ NAAQS failed to tie into to a "*specific* rule that is required to be adopted {emphasis added}." *See, May 17th Order at page 34.* However, this word is not found in the statute's text and cannot be read into its plain meaning. *Cf., First Midwest Bank, N.A., v. IPB, Inc.,* 731 N.E.2d 839 (Ill. App. 3rd Dist. 2000)(court may modify wording of statutory text to give effect to legislative intent "though it cannot read into the statute words that are not within the plain intention of the legislature as determined from the statute itself"). By embracing the "specific rule" theory espoused by industry objectors, the Board has supplied wording or text to Section 28.5 that the legislature did not itself provide or otherwise intend. For this reason alone, the Board should give pause to ratifying the interpretative error in its May 17, 2007, Order and, instead, should reconsider it consistent with the Illinois EPA's reading of the Act's fast-track provisions.

B. Other aids to statutory construction

For reasons already mentioned, the Board has no reason to be won over by industry objectors' "specific rule" argument as it relates to the statute's plain language. However, if the Board is still not persuaded by the Illinois EPA's reading of the text, or if it finds the competing interpretations equally plausible, then it should resolve any doubts as to the meaning of the statute by searching for other statutory aids of construction.

In its earlier Motion, the Illinois EPA urged the Board to consider certain extrinsic aids in the reconsideration of the fast-track rulemaking's applicability.[18] The Illinois EPA explained that the Board could look to such aids where two interpretations were being offered for the statute's plain meaning and each one, in its own right, might be judged permissible readings.[19] Industry objectors challenge the basis for resorting to statutory aids when their argument was the one that obviously prevailed with the Board. In this regards, both the Pipeline Consortium and IERG suggest that the Illinois EPA lacks a credible argument and is expressing merely a "difference of opinion," which is insufficient to permit the Board to engage in additional statutory construction. *See, Pipeline Consortium's Response, at page 7; IERG's Response, at pages 6-7.*

Admittedly, both sides of this of dispute have positioned themselves as the better advocate for the statute's plain meaning than their opponent. As a consequence, only one or the other must prevail, unless the statutory text is ambiguous and a further examination into legislative intent is necessary. In this latter respect, the Board could find that neither argument reflects the plain meaning of Section 28.5. Alternatively, the Board could find, as previously suggested by the Illinois EPA, that the language is amenable to two

[18] *See, Motion at pages 8-12.*

[19] *Id.*

possible constructions. *See, Paciga v. Property Tax Appeal Board,* 749 N.E.2d 1072, 1075 (Ill. App. 2nd Dist. 2001)("a statute is ambiguous if it is capable of two reasonable and conflicting interpretations").

At the very least, the Illinois EPA's argument should be viewed as a reasonable interpretation of the statute, especially in light of views presented to the Board in another recent proceeding. A glimpse into the Board's prior mercury rulemaking reveals that certain arguments concerning the applicability of Section 28.5 raised by industry participants closely dovetailed the Illinois EPA's plain reading of the statute advocated here.[20] For example, one participant involved in the fast-track rulemaking issue described USEPA's sanctions in terms of "those actions that EPA may take against a state for failure to implement a SIP in accordance with EPA regulations…" *See, Ameren Energy Generating Company et. al's Objection to Use of Section 28.5 Fast Track Procedures for Consideration of Mercury Proposal, at page 5.* [21] Other statements in that filing convey the same meaning.[22]

On their face, these references run counter to the notion, as argued in this proceeding, that the fast-track rulemaking provisions do not apply to a SIP or SIP revision. *Cf., Pipeline Consortium's Response, at page 8* ("the legislature's failure to

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[20] *In the Matter of: Proposed New 35 Ill. Adm. Code 225 Control of Emissions From Large Combustion Sources 35 Ill. Adm. Code 225.100, 200,* PCB R06-25.

[21] *In the Matter of: Proposed New 35 Ill. Adm. Code 225 Control of Emissions From Large Combustion Sources 35 Ill. Adm. Code 225.100, 200,* PCB R06-25. To the extent that excerpts from pleadings in a prior rulemaking proceeding are technically not a part of the Board's record in the subject proceeding, the Illinois EPA requests that the Board take official notice of such documents identified herein, as they are already known to the Board through the prior filings and their existence can be readily verifiable.

[22] *Id.* In a discussion as to the legislative history of Section 28.5, the participant observed that the phrase "requires to be adopted" was meant "to limit the fast track rulemaking to those rules USEPA required states to adopt to create or modify SIPs to attain and maintain [the NAAQS]." *Id., at page 4.* Further, it was noted that the CAA's sanctions authority in Section 179 and Section 110(m) deal solely with SIPs and NAAQS" and that EPA may sanction a state under Section 179 "upon a 'finding' that a state has failed to submit a SIP provision (1) "required under Part D" or (2) "required in response to a finding of substantial inadequacy under section 110(k)." *Id., at pages 4 and 6 respectively*..

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… [should be construed as] further evidence that the General Assembly never intended Section 28.5 to be used for SIPs in whole or in part"). When compared to the unvarnished arguments presented in the earlier rulemaking, the Illinois EPA's position cannot be said to be implausible.

The Illinois EPA has urged the Board to consider certain background information that is pertinent to Section 28.5, namely a 1992 report generated by the Attorney General's Task Force on Environmental Legal Resources ("Task Force Report"). Both industry objectors challenge the use of the document, claiming that there is nothing in the legislative history showing that the Task Force Report was actually considered or relied upon.[23] All things considered, the Illinois EPA finds it astonishing that industry objectors would oppose the Board's consideration of the Task Force Report in evaluating Section 28.5.

In its original filing objecting to the fast-track proposal, the Pipeline Consortium cited the Task Force Report in its discussion of the fast-track rulemaking's background.[24] It is perfectly evident that the Task Force Report was referenced in that pleading for the sole purpose of demonstrating legislative intent.[25] Moreover, the same Task Force Report was instructive to a discussion presented by an industry participant in the Board's prior mercury rulemaking, where it was related to stakeholder negotiations that ultimately

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[23] *See, Pipeline Consortium's Response at page 8; IERG's Response at page 7.*

[24] *See, Pipeline Consortium's Objection at page 3.*

[25] *Id.* The document is cited in a footnote accompanying an argument concerning the scope of Section 28.5.

led to the creation of the fast-track rulemaking procedures.[26] Only after the Illinois EPA employed the Task Force Report to more accurately depict the object and purposes of Section 28.5 did it meet with objections to its historical relevance.

The Illinois EPA acknowledges that the document cannot be identified in references to the General Assembly's conference committee reports, transcripts of floor debates or other records directly relating to the legislative bill responsible for its creation, Senate Bill 1295. However, courts have noted that extrinsic aids in statutory construction may extend beyond the hallowed halls of the legislature. As the Illinois Supreme Court once observed, a court engaged in statutory construction may:

> "resort to public official documents, public records, both state and national, and may take judicial notice of and consider the history of the legislation and the surrounding facts and circumstances in connection therewith."

Scofield v. Board of Education of Community Consol. School Dist. No. 181 et al., 103 N.E.2d 640, 643 (Ill. 1952)(relying upon a report's findings and recommendations, developed by a statutorily-created School Problems Commission and submitted to the 67th General Assembly on the same day that various bills were introduced in the House of Representatives to address school elections, to ascertain "strong proof" of legislative intent to not enact certain requirements); *see also, Dietz v. Property Tax Appeal Board,* 547 N.E.2d 1367, 1371-1372 (Ill. App. 4th Dist. 1989)(in addition to legislative history,

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[26] *See, Ameren Energy Generating Company et. al's Objection to Use of Section 28.5 Fast Track Procedures for Consideration of Mercury Proposal at pages 3-4.* The discussion ties the Task Force Report to USEPA's past criticism of the state's rulemaking process, which the Task Force described as "[L]ong standing concern about lengthy, quasi-judicial rulemaking process especially in light of the new Clean Air Act and outstanding deficiencies in the Illinois State Implementation Plan." *Id., at page 3, citing Task Force Report at page 19.* This discussion dovetails with the Illinois EPA's contention, as referenced herein and in the earlier Motion, that the fast-track provisions were meant to address the same types of SIP-related problems experienced by Illinois prior to the CAAA, including the *Wisconsin v. Reilly*, 87-C-0395 (U.S. Dist. Ct., E.D. Wis.) lawsuit and resulting consent decree. *See, Motion at page 9.* The discussion also noted that stakeholder negotiations sought "to address more specifically the need to adopt timely [SIP] rules to meet federal deadlines related to the new non-attainment deadlines under the [CAAA]." *Objection at page 3.*

its reasons for enactment and ends to be achieved, courts may consider "the circumstances that led to its adoption"). Along these same lines, there are several observations regarding the Task Force Report that bear mention.

First, the Attorney General's Task Force itself was created by the legislature in 1991 to "assess the delivery of environmental legal services in Illinois and to recommend changes which will result in improved and balanced enforcement of environmental laws." *See, Letter from Attorney General Roland Burris, dated May 7, 1992, accompanying Task Force Report.*[27] The Task Force Report was submitted to the 87th General Assembly on May 7, 1992. Senate Bill 1295 did not contain the fast-track rulemaking provisions, as well as its other substantive provisions, until it was added to the bill on June 29, 1992. *See, Legislative Synopsis and Digest,* at 411, 87th General Assembly, 1992). As IERG's Response observes, the bill passed out of the Senate and the House on July 2, 1992. *See, IERG's Response, at page 8.*

The timing of Senate Bill 1295's enactment in relation to the Attorney General's submission of the Task Force Report to the General Assembly is, at the very least, intriguing. A statement made from the Senate floor debate on House Bill 4037, which proceeded on a parallel path with Senate Bill 1295 during the 1992 spring legislative session and contained the same fast-track provisions, indicates that the "intensive negotiations" among the various stakeholders occurred during the prior two-month

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[27] Legislative history, namely the Senate transcripts of the floor debate on the bill creating the Task Force, stated the need for the task force to evaluate "where we're spending our money on environmental problems… so it's mainly a task force for trying to oversee the money that's spent." Ill. Senate Tr., 87th General Assembly, 30th Legislative Day, May 21, 1991, pages 275-276. IERG surmises that the reasons for creating the Attorney General's Task Force were not related to Section 28.5. *See, IERG Response at page 9.* However, the Senate transcript also quotes the same elected official stating that the Attorney General's Task Force will "oversee State expenditures on environmental problems that may overlap with local expenditures or federal expenditures." Ill. Senate Tr., 87th General Assembly, 30th Legislative Day, May 21, 1991, pages 276. The Task Force Report's recommendations concerning the streamlining of the Board's rulemaking procedures is not unrelated to the issue of expenditures on environmental resources, especially if the costs associated with USEPA sanctions would be taken into account.

period. *See,* Ill. Senate Tr., 87th General Assembly, 129th Legislative Day, June 29, 1992, page 135. This timing suggests that negotiations would have begun in early May of 1992, at about the same time that the Task Force Report arrived at the General Assembly.[28]

These judicially noticeable facts could be merely coincidental. And it is not the Illinois EPA's contention that this collection of observations should have the same force and effect regarding the legislative history as would floor debate transcripts or conference committee reports. However, it cannot be denied that the Task Force Report's recommendations for streamlining preceded the enactment of Section 28.5 by only a few months. As a creature of statute, the Attorney General's Task Force created the Task Force Report in the commission of its duties. To this end, the document is an official government report that was duly submitted to the legislature. It would not be unreasonable to presume that the General Assembly gives consideration to such reports. Moreover, by addressing the same subject matter, object and purposes behind the recommended streamlining of CAAA rulemakings, the Task Force Report's contents are a window into the circumstances that led to the creation of Section 28.5 and should therefore not be considered beyond the reaches of statutory construction. *See, Motion at pages 10-11.*

[28] IERG points out that the Senate addressed Senate Bill 1295 "several times during 1991 and 1992" but that no mention of the Task Force Report was ever made. *See, IERG Response at page 8.* But given its late amendment to the bill, it should come as no surprise that the legislation was not discussed by the General Assembly in either 1991 or earlier in the spring session of the Eighty-Seventh General Assembly. It can also be noted that two senate members and two House members were named to the Attorney General's Task Force. Two of them, Senator Jerome J. Joyce and Representative Louis I. Lang, were listed as committee members for the bill's conference committee report in the House Journal entry for Senate Bill 1295 on July 2, 1992. *See, Journal of the House of Representatives,* 168th Day, page 8824 (July 2, 1992**).** Only one of them was apparently available for signature. Additionally, the other House member, Timothy V. Johnson was ostensibly one of the joint sponsors added to the Senate Bill 1295 on July 2, 1992. *See, See, Legislative Synopsis and Digest,* at 411, 87th General Assembly, 1992); *see also, Illinois Blue Book for 1991-1992,* identifying Mr. Johnson as the only person with that surname serving in the General Assembly during that time.

IERG states in its Response that the Illinois EPA purports to "glean the intentions of the legislature exclusively from the [Task Force] Report." *See, IERG Response, at page 7.* This contention is mistaken. In fact, the Illinois EPA employed another statutory rule of construction in construing Section 28.5 in light of its object and purposes. In examining legislative intent, reviewing courts should look to the purposes sought to be achieved or the evils sought to be remedied by the legislative enactment. *Grever v. Board of Trustees f the Illinois Municipal Retirement Fund, supra; Whelan v. County Officers' Electoral Board of Du Page County, supra; Granite City Div. of Nat. Steel Co. v. Illinois PCB,* 613 N.E.2d 719 (Ill. 1993). The Illinois EPA urged this type of consideration to find USEPA's sanctions authority as "inclusive of SIP submittals, not just specific rules already acted upon by USEPA." *Motion, at page 10.* The Illinois EPA warned that the narrow application of the statute advocated by industry objectors could result in the State's exposure to the imposition of sanctions, an evil that the legislature obviously sought to avoid.

An additional consideration can be made with respect to this rule. An emphasis on the specific attributes of a particular rule in construing the applicability of the Act's fast-track procedures would obscure an obvious legislative design. To be precise, it would deny the continuity between the applicability of the fast-track procedures and USEPA's sanctions authority. If the fast-track rulemaking provisions do not extend to rules related to the development of SIPs and SIP revisions, then why would the General Assembly link the fast-track's procedures to USEPA's sanctions authority in the first place? Such an outcome would be especially puzzling considering that the heart of USEPA's sanctions authority, as recognized under the CAAA, deals with SIP submittals relating to non-

attainment areas. This point, as previously noted in the earlier Motion, is buoyed by the contents of the Task Force Report. *See, Motion at pages 10-11.*

Finally, courts are also wary of construing statutes in a way that produce absurd or inequitable results that the legislature would not have intended. *See, Jensen v. Bayer AG*, 862 N.E.2d 1091, 1099 (Ill. App. 1st Dist. 2007). In this regards, industry objectors generally depict the fast-track provisions of Section 28.5 as a kind of rulemaking of last resort. Yet legislative history suggests that the fast-track rulemaking procedures, at the time of enactment, were slated for use in an estimated thirty (30) separate rulemakings required under the CAAA. *See*, Ill. Senate Tr., 87th General Assembly, 129th Legislative Day, June 29, 1992, page 135. In fact, the Board has promulgated a number somewhat less than that. Nonetheless, the General Assembly views a need for the fast-track rulemaking's continued availability as well, as they have extended its sunset provisions on several occasions.[29] Moreover, the role of fast-track rulemaking is not akin to the other rulemaking provisions authorized by the Act and is not, as claimed by Pipeline Consortium, tantamount to a "glorified type of pass-through or identical-in-substance rulemaking." *See, Pipeline Consortium at page 11, citing Motion at page 7.* Such a construction would be superfluous and disregard the statutory text limiting the applicability of the separate rulemakings provisions to their own unique circumstances.

2. The Board should resume fast-track rulemaking for sources affected by the R07-19 docket.

In its Motion, the Illinois EPA requested the Board to rescind its May 17th Order halting the proposed fast-track rulemaking for sources not affected by the Phase II NOx SIP Call relative to the aforementioned engines and turbines. *See, Motion at page 15.*

[29] 415 ILCS 5/28.5 (2006), amended by P.A. 90-265, § 5, eff. July 30, 1997; P.A. 92-574, § 5, eff. June 26, 2002.

Additionally, the Illinois EPA asked the Board to order a resumption of a fast-track rulemaking proceeding for all sources and/or emission units affected by the R07-19 docket. *Id.*

The Board should not hesitate to place the R07-19 back on a path towards fast-track rulemaking. While it is true that industry objectors have raised several issues concerning modeling and the application of control measures in attainment areas, these issues are of little consequence to assessing the applicability of Section 28.5. Rather, they are more appropriately reserved for the Board's consideration in the rulemaking itself. Likewise, the Board should find no legal impediment to implementing the fast-track ruling provisions in R07-19 by ordering its resumption now, notwithstanding the lapse of time that has occurred since the Illinois EPA's filing of the original proposal.

Wherefore, the Respondent respectfully requests that the Board reconsider its May 17th Order in light of the arguments raised both in the earlier Motion and in this Consolidated Reply and, consistent therewith, rescind its earlier decision and 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
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Dated: July 19, 2007
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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of July 2007, I did send, by electronic mail, the following instrument entitled **MOTION FOR LEAVE TO FILE CONSOLIDATED REPLY INSTANTER and CONSOLIDATED REPLY** 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

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