

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS**

IN THE MATTER OF:	)	
	)	
FAST-TRACK RULES UNDER NITROGEN	)	R07-18
OXIDE (NO <sub>x</sub> ) SIP CALL PHASE II	)	(Rulemaking – Air)
AMENDMENTS TO 35 ILL. ADM. CODE	)	
SECTION 201.146 AND PARTS 211 AND 217	)	
_____	)	
	)	
IN THE MATTER OF:	)	
	)	
SECTION 27 PROPOSED RULES FOR	)	R07-19
NITROGEN OXIDE (NO <sub>x</sub> ) EMISSIONS	)	(Rulemaking – Air)
FROM STATIONARY RECIPROCATING	)	
INTERNAL COMBUSTION ENGINES AND	)	
TURBINES: AMENDMENTS TO 35 ILL.	)	
ADM. CODE PARTS 211 AND 217	)	

**NOTICE**

To: John Therriault, Acting Clerk	Timothy Fox, Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
100 West Randolph Street	James R. Thompson Center
Suite 11-500	100 West Randolph Street
Chicago, Illinois 60601	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 **RESPONSE TO IERG'S MOTION TO STRIKE** 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 23, 2007  
Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, Illinois 62794-9276

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**RESPONSE TO IERG'S  
MOTION TO STRIKE**

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Illinois EPA”), by and through its attorneys, and files this Response to the Illinois Environmental Regulatory Group’s (“IERG”) Motion to Strike 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 for Reconsideration”) with the Board pertaining to an earlier May 17, 2007, Order.
2. On July 9, 2007, the Illinois Environmental Regulatory Group (“IERG”) filed a Response to the Motion for Reconsideration (“IERG’s Response”) with the Board. IERG incorporated a Motion to Strike with its Response (“Motion”). An electronic mail version of the filing was received at 1:18 p.m. on that same day by one of the

undersigned attorney's colleagues. The undersigned attorney was not served with a copy of the filing and, to this date, a copy of the actual document served upon the Illinois EPA has not been located by the other attorneys of record for the Illinois EPA.

3. 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 Reply with the Board by no later than Wednesday, July 18, 2007. The Illinois EPA's request for leave to file a Reply did not address the Motion.

4. The Board granted the Illinois EPA's request to file a Reply at the July 12, 2007, Board meeting. The Board's formal order, dated that same day, also did not address the Motion.

5. The Board's procedural rules provide that a party may file a response to a motion with the Board within fourteen (14) days after service. *See*, 35 Ill. Adm. Code 101.500(d).

6. The Motion alleges that the Illinois EPA did not support the arguments presented in its prior Motion for Reconsideration with the necessary "oath or affidavit" pursuant to 35 Ill. Adm. Code 101.904. Specifically, IERG argues that those arguments, which primarily focused on the rules of statutory construction, must be either (1) a "rehashing" of arguments that are not permitted by the Board's reconsideration procedures or, alternatively, (2) "new arguments" which, by implication, are not a matter of record and therefore requires the formality of an "oath or affidavit or other appropriate showing." *See*, 35 Ill. Adm. Code 101.904. Both arguments presented by IERG are erroneous.

7. The first part of IERG's analysis reflects a misunderstanding of the Board's requirements governing its standards for granting motions for reconsiderations. Section 101.902 provides that the Board "will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error." *See*, 35 Ill. Adm. Code 101.902. As the Illinois EPA stated in both its Motion for Reconsideration and the later Reply, the arguments concerning statutory construction are the principal basis for its present efforts to show that the Board's earlier interpretation of Section 28.5 was erroneous. While such arguments are admittedly not "new evidence" or a "change in the law," the Board's procedural rule does not limit the scope of consideration to those two considerations alone. Such a construction of the rule, seemingly advocated by IERG here, would deny the language its plain meaning by construing the word "including" as meaning "exclusively."

8. IERG's second part of their analysis, upon which its Motion to Strike relies, is equally flawed. Section 101.904 of the Board's procedural rules is not implicated in the matter at hand. The oath/affidavit requirements found in Section 101.904(c) is part of the procedural framework that governs a request for relief from "final opinions and orders." Those requirements are not to be confused with the separate procedures governing a request for a motion for reconsideration, which are found at 35 Ill. Adm. Code 101.520. It is true that the standards for reconsideration are addressed in Subpart I, as are the Board's procedures for obtaining relief from final judgment. However, the procedures for relief from a final order are wholly separate from the reconsideration requested in the Illinois EPA's filing. The Board's May 17<sup>th</sup> Order is not

yet final because the Illinois EPA filed a timely request for reconsideration. For this reason, the procedures cited by IERG are inapplicable.

9. It should also be noted that IERG's basic objection appears to stem from the Illinois EPA's reference to, and arguments about the relevancy of, the 1992 report created by the Attorney General's Task Force on Environmental Legal Resources. The document is an official government document that is currently maintained by the Illinois EPA in a library open to the public (i.e., Headquarters office in Springfield, Illinois) and, further, it has been relied upon by one of the participants to this rulemaking and at least one other participant in a prior Board rulemaking. More fundamentally, the Illinois EPA's citation and supporting statements concerning the document must be viewed in the proper context. A legal argument concerning the proper interpretation of a statute is not akin to the types of the factual representations that would ordinarily require an oath or affidavit from a non-lawyer.

**Wherefore**, the Respondent respectfully requests that the Board deny IERG's Motion to Strike or, in the alternative, provide such relief as may be just and appropriate.

Respectfully submitted by,

\_\_\_\_\_/s/\_\_\_\_\_  
Robb H. Layman  
Assistant Counsel

Dated: July 23, 2007  
Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, Illinois 62794-9276  
(217) 524-9137

**CERTIFICATE OF SERVICE**

I hereby certify that on the 23<sup>rd</sup> day of July 2007, I did send, by electronic mail, the following instrument entitled **RESPONSE TO IERG'S MOTION TO STRIKE** to:

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

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

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

See also, Attached Service List

\_\_\_\_\_/s/\_\_\_\_\_  
Robb H. Layman  
Assistant Counsel

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