

ILLINOIS POLLUTION CONTROL BOARD

July 26, 2007

IN THE MATTER OF:)
)
FAST-TRACK RULES UNDER NITROGEN) R07-18
OXIDE (NO_x) 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_x) EMISSIONS) (Rulemaking - Air)
FROM STATIONARY RECIPROCATING)
INTERNAL COMBUSTION ENGINES AND)
TURBINES: AMENDMENTS TO 35 ILL.)
ADM. CODE PARTS 211 and 217)

ORDER OF THE BOARD (by A.S. Moore):

On June 25, 2007, the Illinois Environmental Protection Agency (Agency) filed a motion for reconsideration (Mot.) of a May 17, 2007 Board order. That order bifurcated a rulemaking proposal filed by the Agency on April 6, 2007 to control emissions of nitrogen oxides (NO_x) from stationary reciprocating internal combustion engines and turbines. After that bifurcation, the Board continues to consider the portion of the Agency's proposal applicable to engines affected by the NO_x State Implementation Plan (SIP) Call Phase II under Section 28.5 of the Environmental Protection Act (Act) (415 ILCS 5/28.5 (2006)) in docket R07-18 and considers the remainder of the proposal in docket R07-19 under Section 27 of the Act (415 ILCS 5/27 (2006)).

On July 9, 2007, the Board received from ANR Pipeline Company, Natural Gas Pipeline Company, Trunkline Gas Company, and Panhandle Eastern Pipeline Company (collectively, the Pipeline Consortium) a response to the motion for reconsideration (Pipeline Resp.) Also on July 9, 2007, the Board received from the Illinois Environmental Regulatory Group (IERG) a motion to strike and a response to the motion for reconsideration (IERG Resp.). On July 11, 2007, the Agency filed a motion for leave to file a reply by date certain, which committed to file a reply addressing both responses no later than July 18, 2007. In an order dated July 12, 2007, the Board granted the Agency leave to reply and directed the Agency to file that reply no later than July 18, 2007.

On July 19, 2007, the Agency filed a motion for leave to file its consolidated reply *instanter* (Mot. Leave) and its consolidated reply (Reply). In its motion, the Agency raises various technical and practical difficulties that prevented it from meeting its deadline. *See* Mot. Leave at 2. The Board's procedural rules provide that, "[u]nless undue delay or material

prejudice would result, neither the Board nor the hearing officer will grant any motion before expiration of the 14-day response period” 35 Ill. Adm. Code 101.500(d). In R07-18, the Board must adopt a second notice order no later than August 14, 2007. *See* 415 ILCS 5/28.5(o) (2006). In addition, pre-filed testimony for the first hearing in R07-19 must be filed no later than Monday, August 27, 2007. Accordingly, allowing the 14-day response period to expire under these circumstances would result in undue delay, and the Board will proceed to consider the motion for reconsideration. The motion for leave to file *instanter* is granted, and the Board addresses the Agency’s consolidated reply below.

The Agency on July 9, 2007 filed a motion for leave to supplement, accompanied by a supplement to its motion for reconsideration. Specifically, the Agency sought to add as an exhibit to its motion for the convenience of the participants a document entitled *Report of the Attorney General’s Task Force on Environmental Legal Resources (1992)*. On the same date, the Agency also filed a motion for waiver of filing requirement (Mot. Waive). Specifically, the Agency requested that the Board waive the requirement of filing an original and nine copies of the supplemental exhibit. Mot. Waive at 1, citing 35 Ill. Adm. Code 101.302(h). The Agency stated that it filed five copies of that exhibit with the Board and would supply a copy to the interested parties. Mot. Waive at 1. The Board has received no response to either of the Agency’s motions. *See* 35 Ill. Adm. Code 101.500(d). The Board grants the Agency’s motion for leave to supplement, accepts the supplemental exhibit into the record, and grants the Agency’s motion for waiver of procedural requirements.

The Agency’s motion for reconsideration argues that the Board has mistakenly interpreted Section 28.5 of the Act (415 ILCS 5/28.5 (2006)) by misconstruing its plain language and by overlooking other aids to statutory construction. Mot. at 2, citing 35 Ill. Adm. Code 101.902. Specifically, the Agency claims that the Board’s interpretation of the Act is “overly literal” and would thwart the applicability of Section 28.5 by rendering it “nothing more than a glorified type of pass-through or identical-in-substance rulemaking.” Mot. at 8. The Agency further claims that its interpretation of Section 28.5 is more consistent with the intent and the goals of fast-track rulemaking and with the *Report of the Attorney General’s Task Force on Environmental Legal Resources (1992)*. *See generally id.* at 9-11. In addition, the Agency argues that the Board’s May 17, 2007 order reads into Section 28.5 a subjective element relating to the immediacy of sanctions by the United States Environmental Protection Agency (USEPA). *See id.* at 12-13. Finally, the Agency claims that the Board’s May 17, 2007 order violated the procedural requirements of Section 28.5. *Id.* at 13-15, citing 415 ILCS 5/28.5(f), (m) (2006). Concluding, the Agency states that,

[a]t this juncture, little harm seems evident from the Board’s decision to separate the dockets. Thus, the NO_x SIP Call/Phase II could proceed on its current fast-track path under the R07-18 docket and the remaining portion of the Illinois EPA’s original proposal could proceed independently under the [docket] R07-19. Mot. at 15.

The Pipeline Consortium first argues in its response that the proposal under consideration in R07-19 cannot be considered under the procedures of Section 28.5 because the Agency has the discretion not to include that rule in its revised SIP without risking USEPA sanctions. Pipeline

Resp. at 6. The Pipeline Consortium further argues that Section 28.5 is “clear and unambiguous.” *Id.* at 7. The Pipeline Consortium claims that, even if ambiguity warranted consideration of the legislative history of Section 28.5, that history does not support the Agency’s position. *See id.* at 7-8. In addition, the Pipeline Consortium claims that, although the Agency supports a broad scope for the application of Section 28.5, the Agency’s proposal falls outside even that broad scope because it does not demonstrate that it is necessary to fulfill a plan or strategy. *Id.* at 9. Finally, with regard to the Agency’s arguments about the procedural requirements of Section 28.5, the Pipeline Consortium notes that the Act specifically allows the Board to bifurcate a proposal filed under Section 28.5. *Id.* at 11; *see* 415 ICLS 5/28.5(j) (2006).

IERG first argues that the Board should strike the Agency’s motion because it is not “supported by oath or affidavit or other appropriate showing as to matters not of record.” IERG Resp. at 2 (emphasis in original), citing 35 Ill. Adm. Code 101.904. IERG further argues in favor of striking the motion by claiming that, “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.” IERG Resp. at 3. In the alternative, IERG responds to the Agency’s motion by arguing that it should be denied. First, IERG incorporates arguments it previously has made regarding the applicability of Section 28.5 to this proposal and whether the proposal is required to be adopted. *Id.* at 6. Second, IERG describes the language of Section 28.5 as clear and unambiguous (*id.* at 7) and disputes the Agency’s reliance on the *Report of the Attorney General’s Task Force on Environmental Legal Resources (1992)* (*id.* at 7-9) as a basis for its interpretation of that section. Third, IERG claims that the language of the Board’s order does not support the Agency’s claim that the Board relied on a subjective element in reaching its decision. *Id.* at 9. Fourth, IERG argues that the Board possesses authority to reconsider its rulings and that the Board has not improperly revised the proposal. *Id.* at 10-11 (citations omitted). Finally, IERG reiterates arguments it raised in its objection and reply filed in R07-18. *Id.* at 11-12.

In its reply, the Agency elaborates upon its arguments regarding the applicability of fast-track rulemaking under Section 28.5 of the Act and USEPA’s authority to impose sanctions. Reply at 4-9. In addition, the Agency argues that, if the Board finds that Section 28.5 of the Act is ambiguous, the Board should “at the very least” view the Agency’s interpretation of that language as reasonable. *Id.* at 11-12. In support of that interpretation, the Agency again stresses the *Report of the Attorney General’s Task Force on Environmental Legal Resources (1992)*. *Id.* at 13-16. The Agency also argues that its interpretation of Section 28.5 is more consistent with the intent of the General Assembly in light of “the purposes sought to be achieved or the evils sought to be remedied by the legislative enactment.” *Id.* at 17 (citations omitted). Finally, although the Agency notes that time has passed since it filed its proposal on April 6, 2007, the Agency claims that “[t]he Board should not hesitate to place the R07-19 [docket] back on a path toward fast-track rulemaking.” *Id.* at 19.

The Board first addresses IERG’s motion to strike the Agency’s motion for reconsideration. On July 23, 2007, the Agency filed a response to IERG’s motion to strike (Agency Resp.). The Agency first argues that the Board’s procedural rules allow reconsideration on the basis of “factors including new evidence, or a change in the law” but do not by their terms limit reconsideration to those grounds. Agency Resp. at 3, citing 35 Ill. Adm. Code 101.902.

The Agency thus suggests that its arguments regarding statutory construction are not barred by the Board's rules. *See* Agency Resp. at 2-3. The Agency also argues that the requirement of filing an oath or affidavit is part of the procedure in the Board's rules for requesting relief from final opinions and orders. Agency Resp. at 3, citing 35 Ill. Adm. Code 101.904(c). The Agency notes that separate procedures govern motions for reconsideration. Agency Resp. at 3, citing 35 Ill. Adm. Code 101.520. The Agency suggests that IERG's motion stems from the Agency's reliance upon the *Report of the Attorney General's Task Force on Environmental Legal Resources (1992)*. Agency Resp. at 4. The Agency claims that legal arguments based on that report are "not akin to the types of the factual representations that would ordinarily require an oath or affidavit from a non-lawyer." *Id.* While the Board notes that the Agency did not include an oath or affirmation, the Board declines to strike the motion and will proceed to address the substance of the motion by giving all due weight and consideration to the arguments made in it.

In ruling on a motion for reconsideration, the Board considers factors including new evidence or a change in the law to conclude whether 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), the Board 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).

The Board finds that the Agency's motion does not identify new evidence, a change in the law, or any other factor or argument leading to the conclusion that the Board's May 17, 2007 order erred in bifurcating the Agency's April 6, 2007 proposal. The Board notes the Agency's statement that "little harm seems evident from the Board's decision to separate the dockets." Mot. at 15. With regard to that assessment of the risk of harm, the Board notes that it has now concluded all hearings in R07-18 and must adopt a second notice order in that docket on or before August 14, 2007. *See* 415 ILCS 5/28.5(o) (2006). The Board further notes that in R07-19 it has scheduled two hearings, pre-filed testimony for the first of which must be filed in approximately five weeks. The motion to reconsider is denied.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 26, 2007, by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board