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MAR 15 2006
STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PROPOSED NEW 35 ILL. ADM. CODE 225	)	R06-25
CONTROL OF EMISSIONS FROM	)	(Rulemaking – Air)
LARGE COMBUSTION SOURCES	)	
35 Ill. Adm. Code 225.100, 200	)	
	)	
	)	

NOTICE OF FILING

To: John J. Kim, Managing Attorney
Charles E. Matoesian, Assistant Counsel
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Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
Post Office Box 19276
Springfield, IL 62794-9276

Ms. Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
1000 West Randolph Street
Suite 11-500
Chicago, IL 60601

Please take notice that on March 15, 2006, the undersigned caused to be filed with the Clerk of the Illinois Pollution Control Board the **Appearances** of James T. Harrington and David L. Rieser on behalf of Petitioners, Ameren Energy Generating Company, AmerenEnergy Resources Generating Company, and Electric Energy Inc., and **Objection to Use of Section 28.5 Fast Track Procedures for Consideration of Mercury Proposal**, copies of which are herewith served upon you.

By: _____
One of the Attorneys for Petitioners

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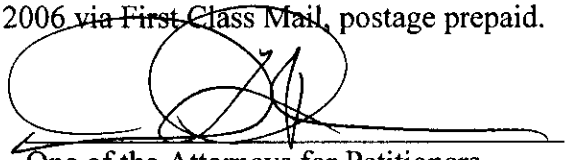
CERTIFICATE OF SERVICE

I, David L. Rieser, one of the attorneys for Petitioners, hereby certify that I served a copy of **Appearances** on behalf of Petitioners and **Objection to Use of Section 28.5 Fast Track Procedures for Consideration of Mercury Proposal** upon those listed on the attached Notice of Filing on March 15, 2006 via First Class Mail, postage prepaid.



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	)	

APPEARANCES

The undersigned, hereby enter our Appearances in this proceeding on behalf of Petitioners, Ameren Energy Generating Company, AmerenEnergy Resources Generating Company, and Electric Energy Inc.

Dated: March 15, 2006

James T. Harrington
Attorney ARDC No. 1132806

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	)	

OBJECTION TO USE OF SECTION 28.5 FAST TRACK PROCEDURES FOR CONSIDERATION OF MERCURY PROPOSAL

Petitioners, Ameren Energy Generating Company, AmerenEnergy Resources Generating Company and Electric Energy Incorporated ("Petitioners") pursuant to 35 Ill. Adm. Code 102.302(b) hereby object to the Illinois Environmental Protection Agency's ("Agency's") request that the Pollution Control Board ("Board") consider this proposed mercury rule (the "Proposed Rule") pursuant to the fast track procedures under Section 28.5 of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/28.5. The plain language of Section 28.5 clearly precludes adoption of the Proposed Rule through the fast track process. The Board's use of the fast track process here would therefore exceed its statutory authority, render the adopted Proposed Rule void and unenforceable and preclude fair and appropriate participation in the rulemaking by stakeholders.

The Agency filed the Proposed Rule, which seeks to limit mercury emissions from coal fired power plants, on March 14, 2006. The Agency claims that the Proposed Rule should be adopted through Section 28.5 in order to meet mercury limits imposed on states in the federal Clean Air Mercury Rule (70 Fed. Reg. 28,606, "CAMR"). Yet, as will be discussed below, the Proposed Rule fails to meet the definition of a "rule required to be adopted by the state under the Clean Air Act" as defined by Section 28.5. The

Board's authority to circumvent its regular rulemaking procedures and adopt regulations under Section 28.5 is strictly limited to circumstances where the Board's failure to adopt a rule would subject the state to monetary and offset sanctions imposed by the federal Environmental Protection Agency ("EPA") under the Clean Air Act ("CAA"). Section 28.5 does not authorize the Board to use the fast track process to adopt this rule because no sanctions would be imposed for failure to meet CAMR deadlines.

I. REGULATORY BACKGROUND OF SECTION 28.5

Although the IEPA's Statement of Reasons treats Section 28.5 as if it were *sui generis*, the language, intent and history of Section 28.5 require that the IEPA's request for a fast track proceeding be denied. In adopting Section 28.5 in 1992, the General Assembly created a significant and strictly limited departure from the Board's traditional rulemaking process in order to solve a specific problem. As the Board is aware, the Environmental Protection Act ("Act") created the Board to adopt environmental regulations for the State and to interpret those rules in permit appeals, variances, and enforcement proceedings. As part of its new approach to environmental rulemaking, the Act required the Board to adopt its statewide regulations through public hearings held in at least two parts of the state in addition to submitting the rules through the notice and comment procedures under the Illinois Administrative Procedure Act. (5 ILCS 100/1 *et seq.*, "IAPA"). These expansive rulemaking procedures were intended to ensure that all interested parties, including the Agency, the Illinois Attorney General, regulated entities and the public would have equal access to the rulemaking process and an opportunity to

contribute evidence and positions in an open forum. See, *Rulemaking under the Illinois Pollution Law*, David P. Currie, 42 U. Chi. L. Rev. 457 (1974-1975).[1]

While many regarded the Board's rulemaking as fair and open, others criticized the process. In particular, Region 5 of the United States Environmental Protection Agency ("USEPA") objected to the nature and length of the proceedings especially as they applied to the adoption of State Implementation Plans ("SIPs") under the CAA. USEPA conveyed these objections many times including in comments to the Attorney General's Task Force on Environmental Legal Resources, formed to consider the Board's rulemaking procedures. This task force summarized USEPA's issues as a "Long 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." *Report of the Attorney General's Task Force on Environmental Legal Issues - 1992*, page 19 of the summary of comments.

USEPA brought considerable pressure on the Agency to find ways to short cut or even avoid the Board process. As a result, the Agency proposed amendments to the Act which would have virtually eliminated the Pollution Control Board's role in adopting rules pursuant to the Clean Air Act Amendments of 1990. In response, stakeholders sought to protect the Board's role by negotiating with the Agency to revise this proposal to address more specifically the need to adopt timely State Implementation Plan ("SIP") rules to meet federal deadlines related to the new non-attainment deadlines under the Clean Air Act Amendments of 1990 (CAAA). These negotiations produced Section 28.5 to provide a highly streamlined and truncated process for the Board to adopt "federally

[1] See also "Report to the Governor of Illinois on Procedures of the Illinois Pollution Control Regulatory System," by Michael Schneiderman, Dec. 9, 1987.

required" rules, yet limited that process solely to rules which the Board needed to adopt to avoid heightened sanctions authority under the CAAA. As more fully set forth below, the clear purpose of this definition was to limit the fast track rulemaking to those rules USEPA required states to adopt to create or modify SIPs to attain and maintain National Ambient Air Quality Standards ("NAAQS"). In short, stakeholders, the Agency and the General Assembly crafted Section 28.5 solely to respond to the specific USEPA complaints to the Attorney General's Task Force and others, and this narrow focus was the only reason to amend the Act to limit the Board's broad rulemaking powers. As discussed below and as acknowledged by the IEPA, the Proposed Rule does not relate to any NAAQS and has no bearing on the Illinois SIP.

II. ARGUMENT

A. USE OF THE FAST TRACK PROCEDURE FOR THE PROPOSED RULE IS NOT AUTHORIZED

The General Assembly authorized the Board to use the fast track procedures "solely" for adoption of regulations "required to be adopted" under the CAA. 415 ILC 5/28.5(a). The Act defines "required to be adopted" as applying "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***." (Emphasis added). As explained below, CAMR does not subject the state to "sanctions" under the Clean Air Act and, therefore, the fast track procedure is inapplicable.

1. The Board Has the Authority to Reject an Agency Fast Track Proposal

The Board clearly has the authority to hear this objection and decline to accept the Proposed Rule for a Section 28.5 proceeding. Since the Act assigns primary authority to the Board to promulgate statewide regulations, the Board has the ultimate responsibility to ensure that its rulemaking procedures meet the requirements of the Act and the IAPA. As the Board stated in its first resolution outlining procedures for fast track rulemaking, the Board has the "inherent authority to determine what documents to accept." (*In the Matter of Clean Air Act Rulemaking Procedures Pursuant to Section 28.5*, RES 92-2, 1992 Ill. Env. Lexis 899, December 3, 1992). The Board later codified its authority to review the agency's fast track proposal for compliance with the standards in the Act in its fast track procedural rules. (35 Ill. Adm. Code 102.302(b)). Since these rules require the Board to determine whether to accept the Agency's Proposed Rule within 14 days of receipt, Petitioners submit this Objection to request that the Board decline to accept the Proposed Rule for a Section 28.5 proceeding.

2. CAA "Sanctions" Do Not Apply to CAMR

Despite the IEPA's arguments that "sanctions" can refer to anything the USEPA does to a state, the term is strictly and narrowly defined under the CAA. Under the CAA, the term "sanctions" encompasses only those actions that the EPA may take against a state for failure to implement a SIP in accordance with EPA regulations and thus does not include any actions the USEPA could take with regard to CAMR. Since mercury is not a criteria pollutant for which a NAAQS has been set, the CAA does not define attainment and non-attainment areas for mercury and requires no SIP to address those areas. The CAA authorizes the EPA to impose sanctions with regard to a state's stationary source

programs (aside from sanctions under the Title V permit program which are not in issue here) only pursuant to Section 179 and Section 110(m) of the CAA which deal solely with SIPs and NAAQS. Neither section authorizes sanctions with respect to CAMR. The IEPA apparently agrees that these sections do not authorize sanctions with respect to CAMR since it does not rely on them for support of its fact track rulemaking request.

Section 179 of the CAA is entitled "Sanctions and Consequences of Failure to Attain." Under Section 179, EPA may impose identified "sanctions" against a state 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)."[2] Section 179 authorizes essentially two different sanctions: withholding of certain state highway funds and increasing required offsets for sources located in non-attainment areas. EPA interprets the term "required under Part D" to refer exclusively to those plan revisions that are required for areas designated as non-attainment under section 107, or the attainment portions of designated transport regions such as the Northeast Ozone Transport Region.[3]

The CAA requires SIPs only to achieve attainment NAAQS for the six identified criteria pollutants: sulfur oxides, carbon monoxide, ozone, nitrogen dioxide, lead and particulate matter. See 40 CFR §§ 50.4 through 50.12. Since mercury is not a criteria pollutant, EPA has not established a NAAQS for mercury and, consequently, has not and cannot designate areas of the country as non-attainment for mercury. As a result, plans required by EPA to reduce mercury emissions, such as those identified in CAMR, cannot be plans "required under Part D" for which Section 179 sanctions can be issued.

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[2] 58 Fed. Reg. 51270, 51275 (Oct. 1, 1993)(EPA rulemaking proceeding on "Application Sequence for Clean Air Act Section 179 Sanctions.")

[3] Id.

The CAA also authorizes the USEPA to issue sanctions under Section 179 for a state's failure to submit a SIP provision required in response to a finding of substantial inadequacy under section 110(k), referred to as a "SIP Call." [4] This provision is broader but still limited to state submissions relating to either non-attainment or attainment of NAAQS for criteria pollutants. As specified in section 110(a), the "plans" or "applicable implementation plans" described in section 110, (including section 110(k)), specifically and exclusively relate to plans which provide for implementation, maintenance and enforcement of a NAAQS. Since mercury is not a pollutant for which a NAAQS has been set, nothing in section 110, including section 110(k), authorizes EPA to impose sanctions on states for failure to submit a plan to reduce mercury.

Finally, the CAA authorizes USEPA to impose "sanctions" on stationary sources pursuant to section 110(m). Unlike section 179, which primarily addresses non-attainment areas, section 110(m) provides authority for USEPA to impose sanctions for a state's failure to submit "any plan or plan item ... required under the Act." EPA regulations defining the failures for which sanctions could be imposed under 110(m), define "plan or plan item," as "an implementation plan or portion of an implementation plan or action needed to prepare such plan." 40 CFR § 52.30(a)(4). As stated above, under section 110(a), a "plan" or an "implementation plan" is one that provides solely for the "implementation, maintenance and enforcement" of the NAAQS.[5] Since USEPA set

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[4] As EPA notes in its section 179 sanctions rulemaking, "a finding of substantial inadequacy under section 110(k) - known as a 'SIP Call' – is made whenever EPA finds that a plan for any area is substantially inadequate to attain or maintain the relevant NAAQS." Id. at Note 4.

[5] See also, 40 CFR § 51.100 (j), defining "plan" to mean "an implementation plan approved or promulgated under section 110 or 172 of the Act," with those sections of the Act dealing exclusively with attainment and maintenance of the NAAQS.

no NAAQS for mercury, USEPA cannot impose sanctions under section 110(m) upon Illinois for failure to adopt mercury standards.

USEPA clearly acknowledges that CAMR does not authorize the development of SIPs or identification of attainment areas for mercury. In the CAMR preamble, USEPA states that its authorization for CAMR is Section 111 of the CAA which addresses new source performance standards. 70 Fed. Reg. 28607. Section 111 is included in Part A of the CAA which is titled "Air Quality and Emissions Limitations" and is not related to Section 179 or Section 110 which relate to SIPs for NAAQS. Since the USEPA cannot impose any of the sanctions described above with respect to Illinois' failure to adopt a CAMR rule, the Act prohibits the Board from using the Section 28.5 procedures here.

Finally, IEPA acknowledges that Sections 179 and 110 do not authorize sanctions which might support a fast track rulemaking because it does not cite to them at all in its Statement of Reasons. As discussed below, the IEPA attempts to concoct a variety of potential maladies that could befall the state if it does not adopt a CAMR rule but it fails to reference or even acknowledge the two sections of the CAA which specifically use the term "sanctions" and discuss how these specified sanctions could be employed with respect to federally mandated state plans. That failure documents that the IEPA has no basis to claim that "sanctions" as that term is defined and used in the CAA could be applied here and thus has no basis to ask the Board to use the fast track proceeding.

3. CAMR Does Not Require the Proposed Rule

Section 28.5 authorizes restrictive procedures only to adopt rules to the extent necessary to alleviate the possibility of CAA sanctions. It does not authorize the Board to adopt rules that are substantially different than those necessary to alleviate the threat of

sanctions. Otherwise, the Board could use Section 28.5 to promulgate rules that are not "required to be adopted" by the CAA. Section 28.5(j) specifically states that the Board should use fast track to adopt required rules and should use its regular rulemaking process to consider "non-required" rules. By limiting the Board's fast track authority only to "regulations or parts of regulations" that are required to be adopted, the General Assembly clearly stated that Section 28.5 should be used only for narrowly focused issues, and not for regulations that relate to the same subject matter but are not the subject of sanctions and are therefore "non-required" rules.

As a result, even if the fast track procedures were necessary to avoid sanctions here, Section 28.5 does not authorize the Board to adopt the Proposed Rule, because as the IEPA readily acknowledges, its proposal is completely different than the regulatory requirements of CAMR. CAMR requires Illinois meet a specified emissions budget based on 21% national reduction by 2010. IEPA proposes to require a 90% in-state reduction by 2009. CAMR requires Illinois to meet that budget through reductions or trading. The Proposed Rule prohibits out-of-state trading, limits in state trading to a period of four years, and only allows such trading within EGU systems after individual plants meet a minimum 75% reduction. CAMR requires Illinois to meet a second and lower mercury emissions budget by 2018 based on a national 70% reduction and allows nationwide trading to achieve that goal. The Proposed Rule would require each unit to meet a 90% reduction with no trading by 2013.

Finally, the IEPA's proposed rule is inconsistent with CAMR in that it fails to set a limit on total mercury emissions as necessary to comply with the CAMR budget cap. While the IEPA correctly states that CAMR does not preclude a state's adoption of a

more stringent rule, and in many ways the IEPA's rule is more stringent, it contains no cap on mercury emissions to demonstrate compliance with the state's emissions budget. In short, the IEPA has proposed a rule that it insists is completely different and better than that which the CAA requires the state to adopt through CAMR. IEPA cannot then bootstrap its discretionary determination to propose substantially unrelated mercury regulations into a fast track proceeding simply by claiming, inaccurately, that such regulations are required under the CAA.

4. Imposition of a Federal Mercury Plan is not a "Sanction" Under the CAA

The IEPA claims that EPA's issuance of a federal plan to impose CAMR in Illinois would constitute a sanction which authorizes fast track procedures under Section 28.5 but this claim is completely unsupported by the plain language of either the Act or the CAA. States failing to implement CAMR are subject to a federal plan which is similar to a Federal Implementation Plan ("FIP"), issued by USEPA. But the CAA states plainly that a FIP is not a "Sanction" under the CAA, nor is it authorized pursuant to the sanction provisions of the CAA at Section 179 or Section 110.

Numerous courts have recognized the strict distinction between a FIP and the "sanctions" authorized under section 179. *See e.g. Virginia v. EPA*, 74 F.3d 517, 521 (4th Cir. 1996) (Noting the availability of sanctions under 179, but differentiating these from the imposition of a FIP which is merely an "additional incentive for state compliance"); *Wall v. EPA*, 265 F. 3d 426, 428 (6th Cir. 2001) (Noting that disapproval of a SIP leaves a state "subject to sanctions...as well as to federally imposed clean air measures") (emphasis added); *Ober v. EPA*, 84 F.3d 304, 306 (9th Cir. 1996) ("If [a SIP]

is disapproved, the state is subject to sanctions and the control measures of the Federal Implementation Plan") (emphasis added); *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1037 (D.C. Cir. 2001) ("States that fail to comply with [the SIP] requirements are subject to various sanctions and the imposition of a Federal Implementation Plan") (emphasis added).

Courts have also noted the functional distinction that a FIP is a mechanism for USEPA to ensure that federal requirements are met in a state when the state fails to act but sanctions are a mechanism to punish states for failing to adopt required regulations. *See Coalition for Clean Air v. Southern California Edison Co.*, 971 F.2d 219, 222, 227 n.10 (9th Cir. 1992) (EPA's adoption of a FIP is merely meant to "meet the requirements of the Act and take the place of the disapproved SIP" and is meant to "supplement rather than to replace state planning"); *Natural Resources Defense Council v. Browner*, 57 F.3d 1122, 1124 (D.C. Cir. 1995) ("The FIP provides an additional incentive for state compliance because it rescinds state authority to make the many sensitive technical and political choices that a pollution control regime demands...[and] ensures that progress toward NAAQS attainment will proceed notwithstanding inadequate action at the state level").

Moreover, the Agency itself has recognized the difference between "sanctions" under Section 179 and the issuance of a FIP. In the most recent fast track rulemaking which involved amendments to the Illinois SIP to comply with the EPA's NOx SIP Call, (R01-16), the Agency's Statement of Reasons justified the fast track proceedings by identifying three potential impacts: 1) the possibility of "sanctions" issued under section 179; 2) the possibility that EPA could reclassify one of the non-attainment areas subject

to the SIP Call; and 3) the possibility of issuance of a FIP. Yet the Agency characterized only one of these possibilities as "sanctions" and that was the possibility of financial penalties under Section 179. Having previously asserted in a legal pleading the clear difference between sanctions and a FIP, the Agency cannot now claim that the two are one and the same.

In sum, the use of the term "sanctions" in Section 28.5(c) refers only to either loss of highway funding, or the more stringent off-set siting criteria for new or modified sources, for failure to adopt regulations necessary to adopt or amend a SIP to include EPA requirements necessary to address non-attainment areas for criteria pollutants. Because the CAMR does not and cannot subject the state to sanctions under the CAA, the Board is not authorized to use the fast track procedure to adopt the Proposed Rule.

5. The IEPA's Arguments Do Not Support its Fast Track Request

In order to bolster its claim that the Board should use the fast track procedure, the IEPA creates a three part test: whether the rule is federally required, whether the USEPA could issue sanctions if the rule is not adopted and whether the rule is identical in substance. Yet the first two points of this test are one and the same. Section 28.5 defines "requires to be adopted" as only those regulations for which the USEPA is empowered to impose sanctions for a state's failure to adopt them. By segregating these two points, the IEPA is asking the Board to consider, inappropriately, whether a rule might be federally required without considering whether it is subject to sanctions. As Section 28.5 makes clear, this is the same inquiry and the one cannot be considered in absence of the other.

Having accurately determined that the two sections of the CAA which actually do identify specified "sanctions" with respect to a state's failure to adopt certain CAA plans

do not apply to CAMR, the IEPA attempts to concoct other "sanctions." None of which are specifically referenced in the CAA. The parallel construction of the fast track statute and the CAA's identified "sanctions" provisions demonstrate that the fast track rulemaking does not contemplate that other types of actions which might be described as "sanctions" in some other circumstances can justify a fast track rulemaking.

The Agency's assertion that a federally adopted plan is a sanction, is without merit. Assuming for the purposes of this argument that this plan is similar to a FIP, USEPA's authority to impose a FIP resides in section 110(c), not in the sanctions provisions of sections 110(m) and 179. The sanctions provisions of the CAA list available sanctions, and a FIP is not one of them. Consequently, the CAA treats sanctions and FIPs as distinct. Nor does a FIP impose the type of "power of the purse" consequences on which IEPA bases its newly discovered CAA sanctions. A FIP under CAMR would simply adopt the EPA model rule, at no cost to the state, which EPA has asserted is the best choice for states: "States may choose to participate in the EPA-administered cap-and-trade program, which is a fully approvable control strategy for achieving all of the emissions reductions required under the final rule in a more cost-effective manner than other control strategies. States may simply reference the model rule in their State rules, and thereby comply with the requirements for Statewide budget demonstrations detailed elsewhere."[6]

IEPA's claim that the "USEPA has the authority to impose sanctions under the principle of 'cooperative federalism'" also has no legal basis. A simple review of the cases cited by IEPA demonstrates that cooperative federalism is not a grant of authority to the USEPA to issue sanctions, but a judicial acknowledgement of constitutional

[6] 70 Fed. Reg. at 28.625.

authority to adopt legislation, like to CAA, to induce states to take certain actions. As the Supreme Court stated in *New York v. U.S.*, 505 U.S. 144, 167 (1992), this is a recognition of "Congress' power to offer states the choice of regulating [an] activity according to federal standards or having state laws preempted by federal regulation." While the idea of cooperative federalism may allow Congress to adopt certain types of laws, the powers of USEPA to issue sanctions can only be authorized by Congress in the specific language of a given statute. As stated above, the specific language of the CAA authorizes sanctions only in certain situations, which, the IEPA acknowledges, do not apply to CAMR.

Similarly IEPA's claim that USEPA could withhold Section 105 grants as a sanction is simply circular. USEPA has authority to withhold section 105 grant monies from states, but its authority is not general, nor is that authority found in Section 105 or its implementing regulations. Nothing in Section 105 allows the USEPA to terminate or withhold a grant issued pursuant to that Section for a state's failure to adopt a specified plan. Rather, USEPA's authority to withhold Section 105 grants for state failures to act is found in Section 179(a), and is limited by the terms of that Section. Section 179(a) provides that "In addition to any other sanction applicable as provided in this Section, the Administrator may withhold all or part of the grants for support of air pollution planning and control programs that the Administrator may award under Section 7405 of this title." As discussed, sanctions available under Section 179 apply exclusively to state failures to adopt provisions related to NAAQS pollutants, but not mercury. As the IEPA does not rely upon Section 179 as a basis for its fast track authority, IEPA can provide no authority, nor is there any, for the proposition that the USEPA can withhold Section 105 grant funds in the event that a state fails to adopt a state plan consistent with CAMR.

Finally, IEPA notes that the Board has previously used fast track rulemaking to adopt certain new source performance standards which had been authorized by the USEPA pursuant to Section 111 like CAMR. In these earlier cases, the Board did so in reliance on IEPA's misplaced assertion that fast track authority was appropriate. Yet in both of these cases, the Board's use of the fast track proceeding was not challenged and the Board never considered, in response to such arguments, whether fast track was appropriate. Consequently, those decisions are neither correct nor precedent. Petitioners here cannot be said to have waived their right to strict enforcement of Section 28.5 by the failure of the Board to consider these issues in prior proceedings.

B. IF THE BOARD ADOPTS THE PROPOSED RULE THROUGH SECTION 28.5 THE RULE WILL BE VOID AND UNENFORCEABLE

The Board's adoption of the Proposed Rule through Section 28.5 will result in a rule that will be successfully challenged and is thus void and unenforceable. The Joint Committee on Administrative Rule ("JCAR") and the appellate courts are empowered to suspend or overturn a rule developed through an extralegal procedure and it is not clear that the USEPA would accept the rule as meeting the CAMR requirements. The Proposed Rule could also be challenged in any action brought to enforce the rule.

JCAR has the authority to suspend a rule which is not adopted through appropriate rulemaking procedures. The IAPA specifically empowers JCAR to evaluate agency compliance with rulemaking procedures (5 ILCS 100/5 - 110) and also allows JCAR to suspend rules which it determines do not meet an agency's statutory authority. (5 ILCS 100/5 – 115(b)). Based on the foregoing, JCAR is likely to find that the Board failed to follow statutory procedures in adopting the Proposed Rule.

Similarly, Illinois courts have held that administrative agencies, including the Board, must follow regulatory procedures and have held that rulemakings are void when the agencies did not follow the required procedures. *Waste Management of Illinois, Inc. v. Pollution Control Board*, 595 N.E. 2d 1171 (1st Dist. 1992). Because of legislative concerns with administrative agencies failing to follow their statutory requirements, the IAPA specifically authorizes parties that successfully challenge administrative rules to recover their attorneys' fees. (5 ILCS 100/10-55(c)). Not only would the Proposed Rule be void, but the state would have to pay the party that successfully demonstrates it.

Further, CAMR requires that states submitting a plan to comply with CAMR must demonstrate that the state had legal authority to adopt the mercury emissions standards. *See* 70 Fed. Reg. at 28,650 (to be codified at 49 CFR 60.24(h)(4)). As discussed above, Illinois will be unable to make this demonstration as there is a clear lack of statutory authority to utilize fast track procedures in this instance. Without a valid rule, the EPA may reject the CAMR plan on the basis of a failure of such legal authority alone.[7] If the CAMR plan is rejected, the Board will either have to schedule a second rulemaking proceeding to adopt the Proposed Rule with the appropriate legal authority, and the state may be subject to a federally imposed CAMR plan until that rule is adopted. *See* 42 U.S.C. § 7411(d)(2)(A) (describing EPA's authority to prescribe a plan for a state similar to its authority under Section 110(c) should the state fail to adopt a satisfactory plan).

A second rulemaking would mean that the fast track proceeding would be a spectacular waste of public and private resources. The Board is clearly aware how resource intensive the fast track process can be especially when there is no agreement

[7] Even if USEPA accepts the Illinois mercury rule it could be reversed by the U.S. Court of Appeals. See *CBE v. USEPA*, 649 F.2d 522 (7th Cir. 1981).

between the stakeholders and the Agency. The Board should not engage in the futile exercise of adopting a rule without proper procedures when such rule is likely to be void and will subject the Board and the Agency to extraordinary and needless expense.

C. APPLIED TO THE PROPOSED RULE, SECTION 28.5 UNFAIRLY LIMITS STAKEHOLDER RIGHTS TO PARTICIPATE

Section 28.5 expedites the Board's normal rulemaking process in ways which limit the ability of stakeholders to participate and the Board's ability to consider the ramifications of the proposal and develop potential options. The record presented by the Agency will depart significantly from the record compiled in the CAMR rulemaking and will be the subject both of intensive attack and extensive additions by stakeholders. There is no stakeholder consensus on the Proposed Rule and only ineffective attempts to build one by the Agency.[8] As a result, the draconian time frames for the fast track process severely limit the ability of stakeholders to participate meaningfully in the process and develop an appropriate record before the Board.

The time frames will also limit the Board's ability to fully consider the massive and conflicting record that is certain to be compiled or to consider potential options to the Proposed Rule. Under fast track, the Board only has 30 days between the close of the record and the date on which it must issue its final decision. Despite the complexity and controversy of the Proposed Rule, the fast track process gives the Board little time to consider and digest the information, review the testimony in the record, draft any changes to the language of the regulation and draft an opinion describing its determinations.

Finally, whatever determination the Board makes is not subject to stakeholder review and comment. Section 28.5 prohibits the Board from making any changes to the

[8] While the Agency held several meetings and took questions and comments, it stated that neither the schedule nor the amount of reductions were open for further discussion.

Agency's initial proposal until it issues its Second Notice opinion. That notice is issued at the end of the public rulemaking process after which the Board cannot make any significant changes except in response to comments by JCAR. Assuming that the Board should determine that the Agency's Proposed Rule is flawed or unsupported by the record, its determination and whatever revised regulations it chooses to issue will not be subject to any public comment.

While the Board has, on occasion, determined to hold additional hearings after its second notice and issued a new second notice after the hearings, it cannot do so in the context of the Section 28.5 due to the statutory time frames. Therefore, the Board decision on the final rule, made at the end of a controversial and difficult rulemaking, will be the one feature of the Proposed Rule not subject to public challenge.

III. CONCLUSION

The Board is not authorized to adopt the Proposed Rule through the fast track rulemaking proceeding of Section 28.5. Section 28.5 can only be used to adopt rules required to be adopted pursuant to the Clean Air Act Amendments of 1990 and for which EPA is empowered to impose sanctions against the State. USEPA can only issue financial sanctions against the state in limited circumstances, none of which apply to mercury. The Proposed Rule is proposed to respond to CAMR which the EPA adopted pursuant to Section 111 of the CAA regarding new source performance standards and not pursuant to Section 110 regarding SIPs to achieve attainment. Illinois is therefore not subject to sanctions under the CAA should it fail to adopt rules to respond to CAMR.

Use of the Section 28.5 procedures limits the ability of stakeholders to participate in the Board process and the ability of the Board to consider stakeholder comments. If

adopted through Section 28.5, this rule will be subject to a suspension by JCAR, being overturned in the courts and being rejected by EPA as lacking legal authority.

If the Board chooses to proceed with this proposal through the fast track process, it will violate the Act, abdicate its responsibility to have a full public hearing of these issues with full participation by all stakeholders and will result in a rule that will be void when completed. As a result, choosing this process will not only be outside the Board's statutory authority but would be a waste of public and private resources. For these reasons, Petitioners respectfully request the Board to reject the use of the Section 28.5 process to adopt the Proposed Rule.

Dated this 15th day of March, 2006.

Respectfully submitted,

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