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MAR 15 2006

STATE OF ILLINOIS
Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD

In The Matter of:)	
)	
Proposed New 35 Ill. Adm. Code 225)	No. R06-25
Control of Emissions from)	(Rulemaking – Air)
Large Combustion Sources)	

NOTICE OF FILING

TO:

John J. Kim, Managing Attorney
 Air Regulatory Unit
 Division of Legal Counsel
 Illinois Environmental Protection Agency
 1021 North Grand Avenue East
 P.O. Box 19276
 Springfield, IL 62794-9276

Virginia Yang
 Deputy Legal Counsel
 Ill. Dept. of Natural Resources
 One Natural Resources Way
 Springfield, IL 62702

Dorothy Gunn, Clerk
 Illinois Pollution Control Board
 James R. Thompson Center
 100 W. Randolph St., Suite 11-500
 Chicago, IL 60601-3218

Matthew Dunn
 Chief
 Division of Environmental Enforcement
 Office of the Attorney General
 188 West Randolph St., 20th Floor
 Chicago, IL 60601

PLEASE TAKE NOTICE that on March 15, 2006, I filed with the Office of the Clerk of the Pollution Control Board on behalf of Dominion Kincaid, Inc., its Motion for the Board to Reject the Illinois Environmental Protection Agency's Proposal to Add Mercury Rules Under Section 28.5 Fast-Track Rule Making Procedures. A copy of the Motion is herewith served upon you.

Respectfully submitted,

DOMINION KINCAID, INC.

By: 
 One of its attorneys

Bill S. Forcade
 JENNER & BLOCK LLP
 One IBM Plaza
 Chicago, IL 60611
 (312) 222-9350

THIS FILING IS SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Control of Emissions from
Large Combustion Sources

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DOMINION KINCAID, INC.'S MOTION FOR THE BOARD TO REJECT ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S PROPOSAL TO ADD MERCURY RULES UNDER SECTION 28.5 FAST-TRACK RULE MAKING PROCEDURES

NOW COMES DOMINION KINCAID, INC., by and through its attorneys, Jenner & Block, LLP, and moves the Illinois Pollution Control Board ("Board") to reject the Illinois Environmental Protection Agency's ("Agency") proposal to add mercury rules ("Mercury Proposal") under procedures described as "Clean Air Act rules; fast track" in Section 28.5, 415 ILCS 5/28.5, of the Illinois Environmental Protection Act ("Act"). 415 ILCS 5/1 *et. seq.* The Mercury Proposal does not meet the Section 28.5 prerequisites, and must be rejected.

I. THE MERCURY PROPOSAL DOES NOT MEET THE PREREQUISITES OF SECTION 28.5 OF THE ACT.

Section 28.5 of the Act authorizes the Board to employ expedited rule making procedures, but only in certain circumstances.

(c) For purposes of this Section, a "fast track" rulemaking proceeding is a proceeding to promulgate a rule that the CAAA requires to be adopted. For purposes of this Section, "requires to be adopted" refers only to those regulations or parts of regulations for which the United States Environmental Protection Agency is empowered to impose sanctions against the State for failure to adopt such rules. . . .

Section 28.5, 415 ILCS 5/28.5 (emphasis added). To qualify for fast-track procedures, the Administrator ("Administrator") of the United States Environmental Protection Agency ("USEPA")

must have authority under the Clean Air Act (“CAA”), 42 U.S.C.A. §§ 7401 to 7671, to impose sanctions against Illinois. The Mercury Proposal does not meet that standard.

II. THE ADMINISTRATOR CANNOT IMPOSE SANCTIONS ON ILLINOIS FOR FAILURE TO ADOPT A MERCURY RULE.

The CAA only authorizes the Administrator to impose sanctions in limited circumstances, which are described in Section 179 of the CAA, 42 U.S.C.A. § 7509.¹ The Administrator may impose sanctions only if he or she:

(1) finds that a State has failed, for an area designated nonattainment under section 7407 (d) of this title, to submit a plan, or to submit 1 or more of the elements (as determined by the Administrator) required by the provisions of this chapter applicable to such an area, or has failed to make a submission for such an area that satisfies the minimum criteria established in relation to any such element under section 7410 (k) of this title,

(2) disapproves a submission under section 7410 (k) of this title, for an area designated nonattainment under section 7407 of this title, based on the submission’s failure to meet one or more of the elements required by the provisions of this chapter applicable to such an area,

(3)

(A) determines that a State has failed to make any submission as may be required under this chapter, other than one described under paragraph (1) or (2), including an adequate maintenance plan, or has failed to make any submission, as may be required under this chapter, other than one described under paragraph (1) or (2), that satisfies the minimum criteria established in relation to such submission under section 7410 (k)(1)(A) of this title, or

(B) disapproves in whole or in part a submission described under subparagraph (A), or

(4) finds that any requirement of an approved plan (or approved part of a plan) is not being implemented.

42 U.S.C.A. § 7509(a)(1), (2), (3), and (4). (emphasis added)

Each of these subsections specify deficiencies for a State Implementation Plan (“SIP”) for national primary and secondary ambient air quality standards (“NAAQS”) submitted under Section

¹ Section 110(m) of the CAA, 42 U.S.C.A. 7410(m) allows the Administrator to impose sanctions on a less than State-wide basis, but refers the Administrator to Section 179, 42 U.S.C.A. § 7509, for the appropriate basis and procedures for imposing sanctions.

110 of the CAA, 42 U.S.C.A. § 7410. To qualify for sanctions, the Administrator must determine that all or a portion of such SIP is either missing, insufficient or not being enforced. The critical factor is that sanctions are limited to deficiencies in a SIP to achieve compliance with NAAQS adopted by USEPA under Section 109, 42 U.S.C. § 7409. USEPA has not adopted any NAAQS for mercury.² Mercury is not a criteria pollutant. Controlling mercury does not come within the purview of the SIP process in Section 110 of the CAA, 42 U.S.C.A. § 7410, and is not subject to the sanction provisions of Section 179 of the CAA, 42 U.S.C.A. § 7509. Therefore, USEPA may not impose sanctions against Illinois for failure to adopt mercury rules.

III. USEPA HAS ADOPTED MERCURY RULES AS STANDARDS OF PERFORMANCE FOR NEW AND EXISTING STATIONARY SOURCES UNDER SECTION 111 OF THE CAA.

On March 15, 2005, the Administrator of USEPA signed the Clean Air Mercury Rule (“CAMR”), under authority of Section 111 of the CAA, 42 U.S.C.A. § 7411, which establishes “standards of performance” limiting mercury emissions from new and existing coal-fired electric utility steam generating units and creates a market-based cap-and-trade program to reduce nationwide mercury emissions. 70 Fed. Reg. 28606 (May 18, 2006). Section 111(d), 42 U.S.C.A. § 7411(d), authorizes U.S. EPA to promulgate standards of performance that States must adopt. If a State fails to submit a satisfactory plan, or fails to enforce its plan, U.S. EPA has the authority to prescribe a plan for the State or USEPA may enforce the existing plan. Section 111(d)(2), 42 U.S.C.A. § 7411(d)(2). Prescribing a plan, or enforcing an existing plan, under Section 111(d)(2), 42 U.S.C.A. § 7411(d)(2), is not a sanction. USEPA has stated how it will act if a State fails to submit a plan under the CAMR:

² See 40 CFR Part 50, for a list of the ambient air quality standards adopted by USEPA

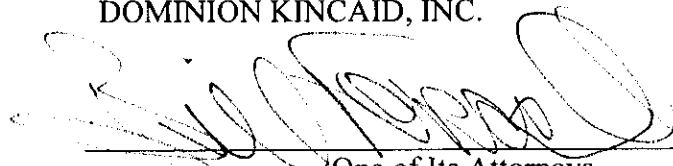
If a State fails to submit a State plan as proposed to be required in today's final rule, EPA will prescribe a Federal plan for that State, under CAA section 111(d)(2)(A). EPA proposes today's model rule as that Federal plan.

70 Fed. Reg. 28632. As described above, the CAA does not authorize USEPA to impose sanctions for failure to submit an approvable State plan for mercury. If Illinois fails to submit an approvable plan, USEPA will impose the Federal plan, not sanctions.

Since CAMR was adopted under Section 111 of the CAA, 42 U.S.C.A. § 7411, no regulation to implement CAMR in Illinois can proceed under Section 28.5 of the Act, 415 ILCS 5/27 and, for this reason, the Board should reject the Mercury Proposal. Dominion Kincaid, Inc. does not object to the Agency filing a mercury proposal under other statutory provisions, such as Section 27, 415 ILCS 5/27.

Respectfully submitted,
DOMINION KINCAID, INC.

by:



One of Its Attorneys

Dated: March 15, 2006

Bill S. Forcade
Jenner & Block LLP
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

CERTIFICATE OF SERVICE

I, Bill S. Forcade, an attorney, hereby certify that I served a copy of the foregoing document, via first-class mail, postage fully prepaid, upon the following this 15th day of March, 2006:

John J. Kim
Managing Attorney
Air Regulatory Unit
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

Dorothy Gunn
Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph St., Suite 11-500
Chicago, IL 60601-3218

Virginia Yang
Deputy Legal Counsel
Ill. Dept. of Natural Resources
One Natural Resources Way
Springfield, IL 62702

Matthew Dunn
Chief
Division of Environmental Enforcement
Office of the Attorney General
188 West Randolph St., 20th Floor
Chicago, IL 60601

By: 

Bill S. Forcade