

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE

TO: Dorothy Gunn	Marie Tipsord
Clerk	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
James R. Thompson Center	James R. Thompson Center
100 West Randolph St., Suite 11-500	100 West Randolph St., Suite 11-500
Chicago, IL 60601-3218	Chicago, IL 60601-3218

SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO PARTICPANTS DYNEGY, MIDWEST GENERATION, AND SIPC'S MOTION TO REJECT REGULATORY FILING, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/
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Assistant Counsel
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DATED: March 29, 2006

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**THIS FILING IS SUBMITTED
ON RECYCLED PAPER**

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NOW COMES the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Illinois EPA”), by one of its attorneys, and, pursuant to the Illinois Pollution Control Board (“Board”) Rules at 35 Ill. Adm. Code 101.500 and 101.504, hereby responds to Participants Dynegy, Midwest Generation, and SIPC'S Motion to Reject Regulatory Filing ("Motion"). The Illinois EPA requests that the Board enter an order denying the Motion. In support of this request, the Illinois EPA states as follows:

I. THE BOARD HAS LIMITED AUTHORITY PURSUANT TO SECTION 28.5 OF THE ENVIRONMENTAL PROTECTION ACT

In the Motion, Participants argue that the Illinois EPA’s Mercury Rulemaking Proposal ("Rulemaking Proposal") does not meet the prerequisites of Section 28.5 of the Environmental Protection Act (“Act”) (415 ILCS 5/28.5). However, that argument assumes that the Board has a broader scope of review in terms of rulemaking proposals than is actually conferred by Section 28.5.

The Board has held that its review of a rulemaking proposal submitted by the Illinois EPA pursuant to Section 28.5 of the Act is limited to a procedural review so as to ensure that all components of a rulemaking package are present in the submission. The Board discussed this issue in a Board resolution docketed as Board Resolution 92-2 and

dated October 29, 1992.¹ In the resolution, the Board noted that its review of a rulemaking proposal under Section 28.5 is to be a minimal one, limited to determining whether the Illinois EPA has complied with all the filing requirements of Section 28.5(e) of the Act. Res. 92-2, October 29, 1992, at 1. Again, the Board limited its authority to a procedural review of a submission. "First, the Agency objects to the Board's decision to conduct a review of Agency proposals for minimal compliance with the requirements of Section 28.5(e)...the Board refuses to delete the provision that we will conduct a short review of an Agency proposal for minimal compliance with the requirements of Section 28.5(e)." Res. 92-2, December 3, 1992, at 2.

Furthermore, "[t]he Board stresses that its decision to undertake a technical review of the proposal for compliance with the statutorily-required elements is intended to promote, not hinder, efficiency....the Board will review the proposal only for minimal compliance, and will not delay a proposal because of minor problems." Res. 92-2, December 3, 1992, at 2-3.

Therefore, the Board has made clear its position that its review of a proposal filed pursuant to Section 28.5 of the Act is limited to determining whether all items found on the checklist in Section 28.5(e) are present. Indeed, in a dissent, a Board member questioned whether even this limited review was authorized or necessary. Res. 92-2, Dissenting Opinion of R. C. Flemal, October 29, 1992. Clearly, the Board felt that it had authority for only a limited procedural review of Section 28.5 proposals.

This position is further evidenced through the Board's actions in adopting its procedural regulations. The Board codified its resolutions in PCB R00-20, *In the Matter*

¹ Board Resolution 92-2, dated October 29, 1992, is captioned "Resolution of the Board." In addition, the Board issued a "Resolution and Order of the Board" under the same docket number, dated December 3, 1992.

of: Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, but did nothing to question the view of authority described in Resolution 92-2. Rather, the rules on fast track proposals adopted by the Board are limited to matters of procedure and do not claim the ability to decide the merits of a submission under Section 28.5. Looking to the Board's procedural rules on Clean Air Act Amendment fast track proceedings found in Subpart C of Part 102 of the Board's rules, there is but one provision that discusses the Board's ability to reject a rulemaking proposal submitted pursuant to Section 28.5 of the Act. However, that section, Section 102.302(b), provides that the Board may decide not to accept a proposal for filing if the proposal fails to meet the requirements of Section 102.302(a). 35 Ill. Adm. Code 102.302(a) and (b). Section 102.302(a) of the Board's rules is a checklist of items to be included in a fast-track proposal, including the requirements of Section 28.5(e) of the Act.

The motion to reject does not make any reference to Section 102.302(b) of the Board's rules. Clearly, this is because the Participants acknowledge that the Illinois EPA has satisfied all of the filing requirements of Section 102.302(a) of the Board's rules (and by reference therein the requirements of Section 28.5(e) of the Act). Thus, the Participants failed to invoke the one provision, statutory or regulatory, that actually confers authority upon the Board to reject a proposal submitted pursuant to Section 28.5 of the Act.

The Board did not raise the possibility that it could actually reject an Illinois EPA request for fast-track rulemaking for any reason other than for failure to comply with the content requirements set forth in Section 28.5(e). Furthermore, subsection (e) of Section 28.5 deals only with the format of a submission under Section 28.5, not its merits.

Indeed, the Board felt nothing was ambiguous or worth questioning in Section 28.5(c), the subsection at issue.

Thus, the limited scope of review of an Illinois EPA fast track rulemaking proposal conferred upon the Board by the Act is parallel to the requirements of a fast track rulemaking imposed upon the Illinois EPA by the Act. The Illinois EPA has met the filing requirements of Section 28.5(e) of the Act and Section 102.302(a) of the Board's rules, and therefore the Board cannot refuse to accept the rulemaking under either Section 28.5 of the Act or Section 102.302(b) of the Board's rules.

II. SECTION 9.10 OF THE ENVIRONMENTAL PROTECTION ACT IS A VALID SOURCE OF AUTHORITY

Participants claim that the Illinois EPA "erroneously relies upon Section 9.10 as implementation authority" for the Rulemaking Proposal. Motion at 5. Specifically, Participants cite to Section 9.10(c) of the Act (415 ILCS5/9.10(c)) that provides, in part, that "[t]he Agency may file proposed rules with the Board to effectuate its findings provided to the Senate Committee on Environment and Energy and the House Committee on Environment and Energy..." and claim that the Illinois EPA made no such findings in its report, *Fossil Fuel-Fired Power Plants: Report to the House and Senate Environment and Energy Committees* ("Section 9.10 Report"), to be implemented under Section 9.10 for its Rulemaking Proposal. *Id.*

Contrary to Participants' claims, however, the Illinois EPA prepared "this report of its findings to date based on consideration of a broad spectrum of issues including health benefits, the impact on the reliability of the power grid, the impact on consumer utility rates and the impact on jobs and Illinois' economy." Section 9.10 Report at iii. The Executive Summary of the Section 9.10 Report outlines "the Illinois EPA's major

findings to-date in the areas of health impacts, electricity reliability, electricity costs and jobs impact and presents outstanding issues that must be addressed before determining the most prudent approach to reducing power plant emissions in Illinois." *Id.*

Furthermore, each of these outlined areas in the Executive Summary specifically includes the Illinois EPA's findings on each such area, *see* Section 9.10 Report at iv through ix, and concludes with Recommendations as follows:

It is clear that power plants are a considerable source of air pollution and that reducing emissions will benefit public health. However, moving forward with a state-specific regulatory or legislation strategy without fully understanding all of the critical impacts on jobs and Illinois' economy overall as well as consumer utility rates and reliability of the power grid would be irresponsible.

Illinois EPA recommends that the Governor continue demanding that the federal government act nationally to reduce power plant emissions. Further, Illinois EPA recommends that the Governor and General Assembly insist that the competing issues of health, jobs, electric service reliability and affordable consumer rates be fully and completely reconciled in light of the many unanswered questions presented in this report. While this work is already underway – and will continue – it can ultimately only be completed once the national emission reduction strategy solidifies and the timing and features of a national program are known.

Id. at ix.

Participants further contend that the Illinois EPA "formulated no final recommendations or findings regarding potential new restrictions on power plant emissions" specifically related to mercury emissions from coal-fired power plants necessitating the imposition of state regulations or to support the Illinois EPA's rejection of the Clean Air Mercury Rule ("CAMR") cap and trade program. Motion at 6-7. However, the Section 9.10 Report contains an extensive discussion of mercury. For example, the Section 9.10 Report states that in 1999, coal-fired power plants were estimated to have emitted 48 tons of mercury nationally (approximately 37 percent of the manmade total). Section 9.10 Report at 4. In addition, the chapter on air pollution

control technologies for reducing power plant emissions in the Section 9.10 Report includes a lengthy discussion on mercury controls. *Id.* at 12-14. The Section 9.10 Report also includes a chapter on federal legislative and regulatory proposals that contain mercury reductions. *Id.* at 17-24. Lastly, the chapter on costs and market impacts of power plant emission reduction proposals discusses national multi-pollutant proposals, including the United States Environmental Protection Agency's ("USEPA") Mercury Reduction Proposal. *Id.* at 60-70.

Due to the vast coverage of mercury in the Section 9.10 Report, and Section 9.10 of the Act's requirement that the Illinois EPA issue "findings that address the potential need for the control or reduction of emissions from fossil fuel-fired electric generating plants," it is a logical outgrowth that a state regulatory proposal for mercury emissions from coal-fired power plants may emerge. Such a conclusion is further supported by subsection (c) of Section 9.10, which the Illinois EPA cited to in the Statement of Reasons to the Rulemaking Proposal, that states as follows:

(c) Nothing in this Section is intended to or should be interpreted in a manner to limit or restrict the authority of the Illinois Environmental Protection Agency to propose, or the Illinois Pollution Control Board to adopt, any regulations applicable or that may become applicable to the facilities covered by this Section that are required by federal law.

415 ILCS 5/9.10(c). Furthermore, this provision, when read in conjunction with subsection (d), which provides, in pertinent part, that the Illinois EPA "*may* file proposed rules with the Board to effectuate its findings[.]" clearly bestows upon the Illinois EPA the discretion to propose regulations that address the control and reduction of mercury emissions from coal-fired power plants in Illinois (emphasis added).

In addition, as to Participants' claim that the Section 9.10 Report lacked a finding to support the Illinois EPA's rejection of the CAMR cap and trade program, the publication date of the Section 9.10 Report of September 2004 was well in advance of USEPA's publication on May 18, 2005, of the final decision to regulate mercury emissions under Section 111 of the Clean Air Act ("CAA") including a cap and trade program. *70 Fed. Reg.* 28606. Such proposal, among two others, to regulate mercury emissions under Section 111 of the CAA from coal-fired utility units was initially set forth in a notice of proposed rulemaking ("NPR") on January 30, 2004. *69 Fed. Reg.* 4652. A supplemental notice of proposed rulemaking ("SNPR") on March 16, 2004, included proposed rule provisions for the NPR and a model cap and trade rule. *69 Fed. Reg.* 12398. However, as stated above, the final decision to regulate mercury emissions under Section 111 of the CAA and a cap and trade program did not appear until May 18, 2005, nearly 8 months after the Illinois EPA's publication of the Section 9.10 Report. Accordingly, while the Illinois EPA found that mercury reduction cap and trade programs must be carefully designed so as not create hot spots of elevated mercury, there was no basis for a finding in the Section 9.10 Report by the Illinois EPA rejecting the CAMR cap and trade program because certainty did not yet exist at the federal level, as the Illinois EPA concluded was necessary for a full and complete analysis prior to decision making in Illinois. Section 9.10 Report at 70.

In sum, the Section 9.10 Report does contain findings of the Illinois EPA that address the likely need for the control or reduction of mercury emissions from coal-fired power plants. Under Section 9.10 of the Act, the Illinois EPA is granted the discretion to propose regulations to the Board to effectuate those findings. Furthermore, Section 9.10

of the Act does not limit or restrict the Illinois EPA's authority to propose, or the Board to adopt, regulations that address the control and reduction of mercury emissions from coal-fired power plants in Illinois. Accordingly, Section 9.10 of the Act is a valid source of authority for the Rulemaking Proposal.

III. THE RULEMAKING PROPOSAL IS PROPER UNDER SECTION 28.5 OF THE ENVIRONMENTAL PROTECTION ACT

Participants object to the Illinois EPA's assertion that the imposition of a Federal plan is a sanction under the CAA. This objection is clearly based on the premise that the term "sanctions" as used in Section 28.5 of the Act is to be given the very same meaning and effect as that term is used in the CAA. However, there is nothing in Section 28.5 that so indicates. While taken in context with the other terminology of Section 28.5, there is reason to believe that the word "sanctions" as used by the Illinois General Assembly is to be analogous to "sanctions" as described in the CAA. But absent that clear and direct connection in Section 28.5, the best inference that can be drawn is that the Federal framework of sanctions is instructive but not necessarily controlling. That said, the Illinois EPA's position is still on solid footing, while the Participants' arguments should be set aside.

Specifically, Participants take issue with the Illinois EPA's reliance on *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996), stating that the case "provides no support" for the Illinois EPA's argument. Motion at 10. Furthermore, Participants suggest that the *Virginia v. Browner* case focused on constitutional issues and hence is not relevant to the instant dispute. A thorough reading of *Virginia v. Browner*, however, shows otherwise. It is true that *Virginia v. Browner* was concerned with the constitutionality of the various sanctions available under the CAA. Even so, prior to making a constitutional analysis the

court laid out the structure of the pertinent sections of the CAA that were at issue. In an analysis remarkably similar to what is argued by the Illinois EPA, the court explains that USEPA sets standards, the states submit plans to achieve those standards, and USEPA reviews and approves those programs so long as they meet the minimum standards that the CAA requires. *Virginia v. Browner*, 80 F.3d at 873.

After this description, the court unmistakably explains that if a state fails to submit a permit program or the USEPA disapproves a program, "the state becomes subject to sanctions designed to encourage compliance." *Id.* The court then lists those sanctions. "One sanction deprives states of certain federal highway funds." *Id.* "A second sanction increases the pollution offset requirements already imposed on private polluters within ozone nonattainment areas." *Id.* at 874. And then, "[a] third sanction eliminates the state's ability to manage its own pollution control regime...EPA develops and implements its own Title V permitting program within the noncomplying state." *Id.* This is not a casual use of the label sanction as the Participants allege. Motion at 11. The court was clearly explaining the mechanics of the CAA. The court did not say that something had to be listed in Section 179(a) of the CAA to be considered a sanction. The court did not equivocate and suggest half-heartedly that implementing a Federal plan might be a sanction. Rather, the court looked at the plain meaning and effects of the CAA and understood that forcing a state to accept a plan devised by another authority, and designed to fulfill the needs of that separate authority, was a sanction in every sense. After analyzing how the sanctions design worked, the court went on to decide the issue of the constitutionality of each form of sanction. Here again, the court held "[t]he final sanction, federal permit plan implementation...also is constitutional." *Id.* at 882.

The Participants further attempt to distinguish *Virginia v. Browner* by noting that it concerns the Title V permitting program in Section 502 of the CAA. This is not relevant, because the principle at hand, that sanctions exist outside of Section 179(a), is what matters. The court realized that the imposition of a Federal plan is a sanction. Section 502 imposes a federal permitting plan. Section 111(d)(2)(A) imposes a FIP-like plan. Both are sanctions. Section 179(a) may list sanctions which are common to the various CAA programs but that does not exclude the programs from having additional, program-specific sanctions. The D.C. Circuit adopts this structure as well. *See, Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000).

The Fourth Circuit more clearly states this in *Virginia v. United States*, 74 F.3d 517 (4th Cir. 1996). In *Virginia v. US*, the Court of Appeals stated, "Title I imposes sanctions on states that fail to comply with its provisions." *Virginia v. US*, 74 F.3d at 520. The court then noted that States may be prevented from spending federal highway money. *Id.* Next, the court stated that USEPA may "subject private industry to more stringent permitting requirements. * * * [F]inally, EPA must impose a 'federal implementation program' (FIP) on those areas of a state that are in nonattainment." *Id.* at 521. The imposition of a FIP is clearly listed as a form of sanction.

As under Section 502, it does not matter that the FIP is not listed in Section 179(a). It is still a sanction. Section 111(d)(2)(A) states:

(2) The Administrator shall have the same authority --

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 110(c) in the case of failure to submit an implementation plan, and

42 USC 7411(d)(2)(A).² Section 110(c) of the CAA concerns imposition of a FIP.

CAMR states:

If a State fails to submit a State plan as proposed to be required in the 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. 28606, 28632 (May 18, 2005). The federal plan to be imposed under CAMR is the same type of sanction as found in Sections 110(c) or 502 of the CAA.

The Participants next take issue with the Illinois EPA's reference to two previous rulemakings under Section 111(d) of the CAA wherein the Board proceeded under Section 28.5 authority. These are PCB R99-10, *In the Matter of: Hospital/Medical/Infectious Waste Incinerators Adoption of 35 Ill. Adm. Code 229* ("PCB R99-10") and PCB R98-28, *In the Matter of: Municipal Solid Waste Landfills-Non-Methane Organic Compounds 35 Ill. Adm. Code 201.103, 201.146, and Part 220* ("PCB R98-28"). The Participants argue that because the Board did not specifically address the sanctions issue in its Opinions and Orders, such issue was not before the Board and thus of no value to the Illinois EPA. This is a red herring, however. If the Participants' argument that the Board has the jurisdiction and responsibility to consider and require demonstration of sanctions in the context of Section 28.5 of the Act, then it follows that the concept of requiring that "sanctions" are applicable is always before the Board in a Section 28.5 analysis; it would have to be inherent in the Section 28.5 process, and the Board could not approve any proposed Section 28.5 rule otherwise. More importantly, in both rulemakings the Illinois EPA plainly stated:

Imposition of a federal plan is a sanction. The State's authority to implement the most appropriate control measures would be constrained, and U.S. EPA would have the authority to reduce the funding that the

² All citations to the CAA are as found on USEPA's website, www.epa.gov.

Agency receives to administer CAA programs. For these reasons, this rulemaking properly appears before the Board pursuant to the fast-track provisions of Section 28.5 of the Act.

PCB R99-10, Statement of Reasons at 8; PCB R98-28; Statement of Reasons at 6. In both cases, the Board agreed with the Illinois EPA and adopted the subject rules pursuant to Section 28.5 of the Act. By accepting the proposal under Section 28.5, it must be assumed that the Board also considered the issue and concluded that that both rules were federally required and the State was subject to sanctions if no plan was submitted to USEPA. Put another way, if the Participants are correct that the Board is obligated under Section 28.5 to find that sanctions are a key component in an Illinois EPA fast track proposal, then the Participants must acknowledge and conclude that the Board, in past situations, has done exactly that. The Participants cannot have their argument both ways, claiming past acceptances by the Board of rulemakings under Section 28.5 do not necessarily mean that the Board considered and agreed with the Illinois EPA's position (which is the same as that presented here) regarding sanctions. The Board does not have to explicitly state that sanctions are before it because it is axiomatic that they are.

Thus, because imposing a Federal plan is a well-recognized sanction, the issue is only whether USEPA can impose a Federal plan under CAMR. In the preamble to CAMR, USEPA listed its authority:

Existing sources are addressed under CAA section 111(d). EPA can issue standards of performance for existing sources in a source category only if it has established standards of performance for new sources in that same category under section 111(b), and only for certain pollutants. (See CAA section 111(d)(1).) Section 111(d) authorizes EPA to promulgate standards of performance that States must adopt through a State Implementation Plans (SIP)-like process, which requires State rulemaking action followed by review and approval of State plans by EPA. If a State fails to submit a satisfactory plan, EPA has the authority to prescribe a plan for the State. (See CAA section 111(d)(2)(A).) Below in this

document, we discuss in more detail (i) the applicable standards of performance for the regulatory requirements, (ii) the legal authority under CAA section 111(d) to regulate Hg from coal-fired Utility Units, and (iii) the legal authority to implement a cap-and-trade program for existing Utility Units.

70 *Fed. Reg.* 28607 (May 18, 2005). As the authority for CAMR is Section 111(d) of the CAA, it is worth quoting relevant parts of it in full. Section 111(d) states in pertinent part:

(d)(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 110 under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) [or emitted from a source category which is regulated under section 112] [or 112(b)] but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

(2) The Administrator shall have the same authority --

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 110(c) in the case of failure to submit an implementation plan, and

* * *

42 USC 7411(d).

Plainly, regulations under Section 111(d) are considered as if they are being promulgated under Section 110 and the Administrator of the USEPA has the same authority as he would under Section 110(c). Section 110(c)(1) states:

(c)(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator --

(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under section 110(k)(1)(A), or

(B) disapproves a State implementation plan submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

42 USC 7410(c)(1). Section 110(k)(1)(A) states:

(k) Environmental Protection Agency Action on Plan Submissions.--

(1) Completeness of plan submissions.--

(A) Completeness criteria.--Within 9 months after the date of the enactment of the Clean Air Act Amendments of 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this Act.

42 USC 7410(k)(1)(A). As seen in Section 111(d)(1) of the CAA, the procedure for rulemakings shall be similar to that under Section 110 of the CAA. This alone authorizes that sanctions under Section 110(m) are available to the USEPA. The CAMR preamble specifically states that USEPA has the authority to sanction a state by imposing a Federal plan. USEPA could also use the sanctions listed under Section 179 of the CAA through the grant of authority in Section 110 of the CAA. Section 179(a) states:

(a) State Failure.--For any implementation plan or plan revision required under this part (or required in response to a finding of substantial inadequacy as described in section 110(k)(5)), if the Administrator--

* * *

(3)(A) determines that a State has failed to make any sub-mission as may be required under this Act, 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 Act, other than one

described under paragraph (1) or (2), that satisfies the minimum criteria established in relation to such submission under section 110(k)(1)(A), or

* * *

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 105.

42 USC 7479(a).

As noted in the Illinois EPA's Statement of Reasons in the Rulemaking Proposal, sanctions under Section 105 of the CAA are further available to USEPA pursuant to Section 179(a) of the CAA. Participants may take issue with the Illinois EPA's noting of this provision, but the fact that such a sanction is also available to USEPA in this present situation is undeniable. This option further illustrates the wide variety of sanctions available to USEPA.

No one disputes that USEPA can impose a Federal plan under Section 111(d)(2)(A) of the CAA, as it is explicitly stated under the CAMR. The Participants are correct when stating that no national ambient air quality standard ("NAAQS") exists for mercury. The question is therefore are sanctions available to USEPA under Section 179 of the CAA as well as under Section 111(d)(2)(A) of the CAA? The answer has to be yes. When granting authority to the Administrator under Section 111 to have the authority available under Section 110, Congress had to mean something. It would not grant meaningless authority. Rather, in Section 111(d)(1) it explains that the Administrator shall act as if he were proceeding under Section 110 for "any air pollutant (i) *for which air quality criteria have not been issued* or which is not included on a list published under section 108(a) [or emitted from a source category which is regulated under section 112] [or 112(b)] *but (ii) to which a standard of performance under this*

section would apply if such existing source were a new source..." (emphasis added). 42 USC 7411(d)(1).

By establishing performance standards for mercury emissions from new coal-fired electric generating units ("EGUs"), USEPA has brought mercury emissions from existing coal-fired EGUs under Section 110 authority. The SIP-like process that USEPA speaks of is for those air pollutants that have no NAAQS but are treated the same by virtue of the Section 111(d)(1) grant of authority. USEPA's process thus makes sense. Having removed mercury emissions from coal-fired EGUs from under Section 112 of the CAA, such emissions must be governed and enforced somewhere. Without an official NAAQS how would USEPA enforce its authority? It can do so because Section 111(d)(1) treats such "orphan" pollutants under Section 110 as if they have air quality criteria (NAAQS) established for them. This is the meaning of the SIP-like process. The Administrator has the same authority as under Section 110 and the process is considered the same.

Participants make much of the Illinois EPA not listing Section 179 sanctions in the Statement of Reasons to the Rulemaking Proposal and so assert that the Illinois EPA has conceded that such sanctions are not available under Section 111 of the CAA. However, as previously discussed, the Board has always held that imposition of a Federal plan is a sanction. Thus, the Illinois EPA followed its previous practice of stating in the statement of reasons that the imposition of a Federal plan is a sanction. Further analysis was not necessary as Section 28.5 of the Act does not require a thorough examination of every sanction available to USEPA; only that sanctions are available. The Illinois EPA is only providing this detailed analysis in response to this Motion. More importantly, the

imposition of a Federal plan as a sanction is clearly authorized by Section 111(d)(2)(A) of the CAA, the authority for CAMR. No further discussion is necessary.

Lastly, the Participants question whether the Illinois EPA proposal is federally required because CAMR does not require everything that the Illinois EPA proposes. That is unimportant. At the first hearing in PCB R99-10, a Board member questioned whether the proposal was required to be adopted by the State under Section 28.5(a). The Illinois EPA filed a Response to Comments that bears on the instant Motion and is worth quoting. The Response states, in pertinent part, as follows:

Section 28.5 is clearly not limited to the adoption of rules that are required to be identical to federal rules but is intended to encompass many Clean Air Act requirements where states have significant discretion in deciding how to comply with the federal requirements.

In past rulemakings, the Board has clearly interpreted Section 28.5 to apply in cases analogous to this proposal in which the rulemaking proposal itself was required by the Clean Air Act, but where its provisions clearly went beyond the minimal requirements the State Plan must meet to comply with the Clean Air Act. See, In the Matter Of: Enhanced Vehicle Inspection and Maintenance (I/M) Regulations: Amendments to 35 Il. Adm. Code 240, R98-24, July 8, 1998, Adopted Rule, Final Order (rulemaking where procedures for enhanced inspection and maintenance were promulgated for both the Chicago and Metro-East ozone non-attainment areas, even though the Clean Air Act only requires “basic” inspection and maintenance testing in Metro-East).

Additionally, the Board has interpreted Section 28.5 to apply to the 9 percent and 15 percent Rate of Progress Plans, in which Section 182 of the Clean Air Act required Illinois to promulgate a series of regulations under Section 110 of the Clean Air Act which together made up the Illinois State Implementation Plan (SIP) for achieving the required amount of emissions reductions. See, In the Matter of 15 Percent Rate-of-Progress Plan Rules: Part IV: Tightening Surface Coating Standards; Surface Coating of Automotive/Transportation and Business Machine Plastic Parts; Wood Furniture Coating; Reactor Processes & Distillation Operation Processes in SOCFI; Bakery Ovens, R94-21, April 20, 1995. Although Illinois was required to develop a SIP that achieved the requisite reductions, the Clean Air Act gave the State the flexibility to develop the individual regulations to meet the SIP requirement.

PCB R99-10, Response to Comments, February 3, 1999, at 2-3.³ Following consideration of the Illinois EPA's response to comments, the Board accepted PCB R99-10 under Section 28.5 of the Act. The Participants' contention that the rules must be no more stringent than the Federal proposal also flies in the face of Section 116 of the CAA. Section 116 states:

Except as otherwise provided in sections 119(c), (e), and (f) (as in effect before the date of the enactment of the Clean Air Act Amendments of 1977), 209, 211(c)(4), and 233 (preempting certain State regulation of moving sources) *nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.*

42 USC 7416 (emphasis added). As the last sentence clearly states, the CAA gives states specific authority under Section 111 (the authority for CAMR) to go beyond what is in the Federal rule. The only concern of the CAA is that the state's rule be no less stringent. The CAMR says as much when it states, "[a]s proposed in the SNPR, EPA is finalizing that each State must submit a demonstration that it will meet its assigned Statewide emission budget..." 70 *Fed. Reg.* at 28632. That is all, no prohibition on more stringent

³ In PCB R94-21, *In the Matter of: 15% ROP Plan Control Measures for VOM Emissions-Part IV: Tightening Surface Coating Standards; Surface Coating of Automotive/Transportation and Business Machine Plastic Parts; Wood Furniture Coating; Reactor Processes and Distillation Operation Processes in SOCFI; and Bakery Ovens; Amendments to 35 Ill. Adm. Code Parts 211, 218 and 219, May 9, 1995*, the Illinois EPA proposed control measures under Section 28.5 for the 15% rate of progress plan for numerous emission control standards. One measure concerned wood furniture coatings. The Illinois EPA proposed lowering the Volatile Organic Material threshold for wood furniture coating operations from 100 tons per year to 25 tons per year. Board Order, Second Notice, January 26, 1995, at 22. An objector noted in comments during First Notice that the wood coating measure satisfied elements of Section 182(b)(1) of the CAA, 42 U.S.C. 7511a, relating to reasonable further progress (not a rule which was due before December 31, 1996) and that the Illinois EPA was not relying on that provision because it did not expect any emissions reductions from the provision (only no increase in emissions). *Id.* at 23. The Board merely stated that it agreed with the Illinois EPA, however, noting that if the amendments were not accepted the Illinois EPA would have to identify other measures to meet the 15% reduction requirement.

requirements. And, as the Illinois EPA pointed out in its Statement of Reasons, the CAMR gives great flexibility to the states in developing their plans. The Participants' argument is that a "different" rulemaking is not within the range provided for by CAMR is wrong, since that standard is not correct. The Illinois EPA's proposal may be different than CAMR, but so long as it is no less stringent and is within the flexibility afforded by CAMR, then there is no inherent prohibition.

Section 28.5 was not passed in a vacuum and more importantly does not limit the State to any particular provision of the CAA. The purpose of Section 28.5 was to speed along the rulemaking process, not to limit the State's authority or flexibility as Participants demand. If such were the will of the Illinois General Assembly it would no doubt have stated so. A more likely meaning for Section 28.5's "required by the Federal government" language was that the State could not use the fast-track provisions in Section 28.5 for a proposal to regulate a pollutant such as carbon dioxide which is not required to be regulated by the USEPA.

Moreover, the Illinois General Assembly did provide separate statutory authority for occasions when the Illinois EPA sought to merely mimic federal requirements. Section 7.2 of the Act creates a provision for rules that are "Identical in Substance" to Federal regulations. 415 ILCS 5/7.2. In addition, Section 28.2 of the Act creates provisions for "Federally-Required" rules. 415 ILCS 5/28.2. Both contain compressed timelines for adoption of rules by the Board. If the Participants' position were correct then there would be much duplication between these various provisions of the Act.

Again, quoting from PCB R99-10:

Section 28.5 was therefore intended to address the types of rules that are federally required but for which the state retains a great deal of discretion. Section 28.5 is

distinguishable from the “identical in substance” rulemaking procedures found at 415 ILCS 5/28.4. Section 28.5 does not limit coverage to rules that must be adopted in substantially the same form as final federal regulations; it applies to the adoption of rules “required to be adopted by the State under the Clean Air Act, “which should not be interpreted to limit the state’s discretion to craft the rules it deems appropriate.

This process is representative of the structure established by the Clean Air Act whereby States and the federal government work in tandem to ensure that its goals are met. One of the major aspects of this structure is that U.S. EPA establishes standards but States are afforded discretion to determine the appropriate approach to meet these standards.

PCB R99-10, Response to Comments, February 3, 1999, at 3-4.

When undertaking the interpretation of a statute, a court must presume that, when the legislature enacted a law, it did not intend to produce absurd, inconvenient or unjust results. *Bowman v. American River Transportation Company*, 217 Ill.2d 75, 83 (2005). If the language of Section 28.5 of the Act is interpreted to mean that the only proposals fit for proceeding pursuant to that section are those which are no different than the federal regulatory counterpart, then there would be no distinction in purpose or effect between Sections 28.2 and 28.5 of the Act. To have multiple statutory sections that serve the very same purpose would be absurd and inconvenient, exactly the consequence that must be avoided. Section 28.5 must be construed to allow for the filing of a proposal that may very well be different (even significantly or radically so) from its federal source rule, so long as the state proposal is no less stringent. At the very least, the fact that a proposed rule is different is no reason to refuse acceptance of consideration of the rule pursuant to Section 28.5 of the Act.

The Illinois General Assembly was fully aware of the requirements of the CAA and the interplay of its sections. It is illogical to think that the Illinois General Assembly would constrain the Illinois EPA's authority by refusing it the right to tailor federal rules-

-where discretion exists--to Illinois' circumstances. More to the point, the entire nature of the federal-state relationship in the field of environmental regulation is one of the Federal government determining the goals, but allowing states to submit plans to achieve these goals.⁴

Accordingly, the CAMR is federally required, imposition of a Federal plan is a sanction and the Illinois proposal to control mercury emissions from coal-fired EGUs is not an identical in substance rulemaking. USEPA has further stated that it will impose the CAMR as a Federal plan if Illinois does not submit a plan to control mercury by November 17, 2006. The Illinois EPA proposal is a classic Section 28.5 submission.

WHEREFORE, for the reasons set forth above, the Illinois EPA requests that the Board enter an order denying the Motion.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ _____
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DATED: March 29, 2006

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⁴ See *Commonwealth of Virginia, et al. v. Environmental Protection Agency, et al.*, 108 F.3d 1397 (D.C. Cir. 1997) (describing the structure of the CAA whereby the federal government determines the ends, i.e., air quality standards, but the states are given discretion and responsibility in selecting the means to meet those ends).

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)
)

CERTIFICATE OF SERVICE

I, the undersigned, an attorney, state that I have served electronically the attached ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO PARTICIPANTS DYNEGY, MIDWEST GENERATION, AND SIPC'S MOTION TO REJECT REGULATORY FILING upon the following persons:

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James R. Thompson Center
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Chicago, IL 60601-3218

Marie Tipsord
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Illinois Pollution Control Board
James R. Thompson Center
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and mailing it by first-class mail from Springfield, Illinois, with sufficient postage affixed to the following persons:

SEE ATTACHED SERVICE LIST

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

/s/ _____
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