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
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Illinois Pollution Control Board
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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 AMEREN ENERGY GENERATING COMPANY, AMERENENERGY RESOURCES GENERATING COMPANY, AND ELECTRIC ENERGY INCORPORATED'S OBJECTION TO USE OF SECTION 28.5 FAST TRACK PROCEDURES FOR CONSIDERATION OF MERCURY PROPOSAL, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/_____
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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 Ameren Energy Generating Company, AmerenEnergy Resources Generating Company, and Electric Energy Incorporated's ("Objectors," collectively) Objection to Use of Section 28.5 Fast Track Procedures for Consideration of Mercury Proposal ("Objection"). The Illinois EPA requests that the Board enter an order denying the Objection. In support of this request, the Illinois EPA states as follows:

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

Objectors dispute whether the Illinois EPA's proposal is required to be adopted as stated in Section 28.5 of the Environmental Protection Act ("Act") (415 ILCS 5/28.5). It is instructive to quote this Section once again. Section 28.5 states in pertinent part:

> (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.

415 ILCS 5/28.5(c). The primary dispute is whether any sanctions may be imposed upon Illinois for a failure to either codify the Clean Air Mercury Rule ("CAMR"), 70 *Fed. Reg*. 28606 (May 18, 2005), or to properly submit a plan to the United States Environmental Protection Agency ("USEPA") pursuant to CAMR.

A preliminary point needs to be made, however. The Objectors cite to Board Resolution 92-2 for the proposition that the Board may reject an Illinois EPA Rulemaking Proposal under Section 28.5. Objection at 5.[1] However, a reading of Board Resolution 92-2 shows the Board stated no such thing. In Board Resolution 92-2, the Board on its own motion generated and answered fourteen questions concerning various aspects of recently adopted Section 28.5 of the Act that it felt to be ambiguous. *See, In the Matter of: Clean Air Act Rulemaking Procedures pursuant to Section 28.5 of the Environmental Protection Act, as added by P.A. 87-1213*, Res 92-2, October 29, 1992.

Among the questions discussed by the Board was the following:

> 1. Question: Will the Board conduct any type of review of an Agency proposal for compliance with the requirements of Section 28.5(e) before stamping the proposal as received?
>
> Answer: The Board will conduct a review of the Agency proposal for minimal compliance with the requirements of subsection (e).

Res. 92-2, October 29, 1992, at 1.

The Board then stated that because of the tight deadlines in Section 28.5, "the Board will have a difficult time filing the rule for first notice within 14 days...." *Id*. at 2. 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

[1] The Objection contains unnumbered pages; however, the Illinois EPA has paginated these unnumbered pages and cites to them accordingly.

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.

Therefore, the Board held only that its review was limited to a procedural review so as to ensure that all components of a rulemaking package are present in an Illinois EPA submission. The Board discussed this issue further in an order dated December 3, 1992[2] to an Illinois EPA motion to reconsider this limited procedural review. 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.

This review is thus determining whether all items found on the checklist in Section 28.5(e) are present. It is worth mentioning further that Board Member Ronald Flemal filed a dissent over even this limited review stating, "However, I do not believe

[2] 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.

that it is within either the letter or spirit of Section 28.5 for the Board to reserve for itself the authority to refuse acceptance of proposals submitted under Section 28.5." 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.

The Board codified its resolutions in PCB R00-20, *In the Matter 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, in this respect, the procedural rules 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. Indeed, 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 Objectors' request that the Board not accept the Illinois EPA's proposed rulemaking under Section 28.5 does not make any reference to Section 102.302(b) of the Board's rules. Clearly, this is because the Objectors 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 the requirements of Section 28.5(e) of the Act. Thus, the Objectors 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.

Should the Board find that it can entertain this Objection, then the Board's past rulings on the subject of Section 28.5 are worth noting. The Objectors' main point is that the Illinois EPA's proposal cannot proceed under Section 28.5 because it is different from USEPA's proposal in CAMR. At the first hearing in PCB R99-10, *In the Matter of: Hospital/Medical/Infectious Waste Incinerators Adoption of 35 Ill. Adm. Code 229* ("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 Objection 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 SOCMI; 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. Moreover, the Objectors' contention that the rules must be no more stringent than the Federal proposal flies in the face of Section 116 of the Clean Air Act ("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[4] (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. As illustrated above, the only concern of the CAA is that the state's

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[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 SOCMI; 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.

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

rule be no less stringent. Section 28.5 was not passed in a vacuum and more importantly does not limit the State to any particular provision of the CAA. As the Objectors point out, the purpose of Section 28.5 was to speed along the rulemaking process, not to limit the State's authority or flexibility. 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 Objectors' 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.[5]

[5] 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.,

II. IMPOSITION OF A FEDERAL PLAN IS A SANCTION

The Objectors' second argument is that the Illinois EPA's assertion that sanctions are possible under CAMR is incorrect because the imposition of a Federal plan is not a sanction. The Objectors, without any cite to authority, state, "the CAA states plainly that a FIP is not a "Sanction" under the CAA...". Objection at 10.

This statement, which is the underpinning of the Objectors' arguments, 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 Objectors' arguments should be set aside.

Looking then to the definition of "sanctions," courts and the Board have held contrary to the position of the Objectors. In *Virginia v. US*, the Court of Appeals for the Fourth Circuit stated, "Title I imposes sanctions on states that fail to comply with its provisions." *Virginia v. US*, 74 F.3d 517, 520 (4th Cir. 1996). 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'

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air quality standards, but the states are given discretion and responsibility in selecting the means to meet those ends).

(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.

The Objectors go on to suggest that the court in *Virginia* differentiated between the imposition of a FIP and the imposition of "Sanctions." Objection at 10. However, nothing in *Virginia* supports this reading. The court clearly listed the imposition of a FIP as a form of sanction. Indeed, the Objectors' quote that a FIP is an "additional incentive for state compliance" is itself a quote supplied by the *Virginia* court from *Natural Resources Defense Council v. Browner*.[6] But the *Virginia* court considered the imposition of a FIP to be a sanction. Furthermore, the court in *NRDC* lists all of the forms of sanctions as incentives, not just the FIP. *NRDC*, 57 F.3d at 1124. The court in *NRDC* did describe the scheme of "incentives" in the CAA, but did not intend the meaning suggested by the Objectors. Nor did the court in *Virginia* find such meaning.

More importantly, the court that decided *NRDC*, that is the Court of Appeals for the District of Columbia, in the later case of *Appalachian Power Co. v. EPA* clearly stated, "[i]f a State decided not to participate, or if EPA disapproved the State's program, federal sanctions would kick in, including a cut-off of highway funds and an EPA takeover of permit-issuing authority within the [sic] state."[7] The D.C. Circuit referred to *Virginia v. Browner* for a further discussion.[8] Once again, the Fourth Circuit in *Virginia v. Browner* discussed the sanctions arrangement of the CAA and after discussing the deprivation of highway funds and increased offsets stated "[a] third sanction eliminates the state's ability to manage its own pollution control regime." *Virginia v. Browner*, 80 F.3d at 874. Under that sanction, USEPA would develop and implement its own Title V

[6] 57 F.3d 1122, 11254 (D.C. Cir. 1995).
[7] *Appalachian Power Company v. EPA*, 208 F.3d 1015, 1017 (D.C. Cir. 2000).
[8] *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996).

program. *Id*. Although the Illinois mercury proposal is not submitted under Title V, the imposition of a Title V program by the federal government upon a state is no different than the imposition of a FIP upon a state. This flatly contradicts the Objectors' contention that all sanctions in the CAA are limited to those listed in Section 179. Instead, neither imposition of a FIP nor a federally-imposed Title V program are listed as sanctions under Section 179 of the CAA, however, both are firmly considered to be sanctions under the CAA and have been so recognized by courts.

The Objectors cite a similarly named, although unrelated case by the D.C. Circuit, *Appalachian Power Co. v. EPA*, to bolster its position that sanctions do not include the imposition of a FIP.[9] In that case, the court stated in passing, "[s]tates that fail to comply with these requirements are subject to various sanctions and the imposition of a Federal Implementation Plan ('FIP')." *Appalachian Power Co. v. EPA*, 249 F.3d at 1037. This passing reference in no way repudiates the D.C. Circuit's analysis in the 2000 case of *Appalachian Power*. This is particularly true, considering that the 2000 case cites *Virginia v. Browner* for support, a case that labeled the imposition of a Title V program as a sanction. As such, the *Appalachian Power* case of 2001, cited by the Objectors, cannot be viewed as having any particular relevance to the instant dispute over sanctions.[10]

Next, the Objectors cite two cases for the proposition that courts have noted a "functional distinction" between a FIP and sanctions as if these were two different creatures. One case cited is the aforementioned *NRDC v. Browner* that has already been

[9] *Appalachian Power Company v. EPA*, 249 F.3d 1032, 1017 (D.C. Cir. 2001).
[10] The Objectors note two additional cases that similarly mention the issue of sanctions in passing. *See*, *Wall v. EPA*, 265 F.3d 426 (6th Cir. 2001) and *Ober v. EPA*, 84 F.3d 304 (9th Cir. 1996). Again, however, these brief, ambiguous references cannot stand against the clear analyses offered by the cases cited by the Illinois EPA.

shown to be misinterpreted by the Objectors. That case was cited to for the vague statement that a FIP is an "additional incentive." Yet, as noted above, the court in *NRDC v. Browner* called all forms of sanctions "incentives." *NRDC v. Browner*, 57 F.3d at 1123-24.

The second notation is to a footnote in *Coalition for Clean Air v. Southern California Edison Co.*[11] That case stated that a FIP was intended to take the place of a defective SIP and is meant to "supplement rather than to replace state planning." *Coalition for Clean Air*, 971 F.2d at 227. However, that case concerns USEPA's role in promulgating FIPs and how State powers interact with this role. The action was brought by environmental groups to force USEPA to impose a FIP. *Id*. at 221. The footnote considered whether a state could attempt to submit a satisfactory SIP before a FIP was imposed. *Id*. at 226-227. The court agreed, and in that light noted that a FIP does not have to completely replace a defective SIP. Rather, it can correct deficiencies or fill in gaps. *Id*. There is no reason to cut the FIP from whole cloth when a patch will do.

The Objectors next assert that the Illinois EPA has previously taken the position that a FIP is not a sanction, citing the rulemaking in PCB R01-16. Objection at 11. However, all the Illinois EPA did in that rulemaking was list the many detrimental actions possible. While the possibility of imposition of a FIP was listed separately from other sanctions as found in Section 179 of the CAA, it was done in the context of demonstrating that it was important that the Board understand all of the implications from not proceeding under Section 28.5. The Illinois EPA did not state that the imposition of a FIP was not a sanction; rather the Illinois EPA noted that a FIP is not specifically listed in Section 179 of the CAA.

[11] 971 F.2d 219 (9th Cir. 1995).

Of greater relevance, when proceeding under Section 28.5 in PCB R99-10, the Illinois EPA clearly 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 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. And again in PCB R98-28, *In the Matter of: Municipal Sold Waste Landfills - Non-Methane Organic Compounds 35 Ill. Adm. Code 201.103, 201.146, and Part 220* ("PCB R98-28"), the Illinois EPA made the same argument. In both cases, the Board agreed with the Illinois EPA and adopted the subject rules pursuant to Section 28.5 of the Act.

In fact, the Board has always agreed with the Illinois EPA that the imposition of a FIP is a sanction. In PCB R99-10, the Board stated in its order sending the proposal to First Notice that:

> Pursuant to Section 28.5 of the Act (415 ILCS 5/28.5 (1996)), the Board is required to proceed within set timeframes toward the adoption of the regulation. The Board has no discretion to adjust these timeframes under any circumstances. Today the Board sends this proposal to first notice under the Illinois Administrative Procedure Act (5 ILCS 100 (1996)) without commenting on the merits of the proposal.

PCB R99-10, First Notice Opinion and Order, December 3, 1998, at 2. The Board need not have said anymore, the statements above are all that were necessary. The issue of sanctions was squarely before the Board, as it is required that they be in a Section 28.5 proceeding. Moreover, it does not matter whether the Board considers proceedings under Section 28.5 to satisfy a three part test as the Illinois EPA states in its Statement of Reasons (federally required, not identical in substance, and susceptible to sanctions by

the USEPA for failure to adopt) or, as the Objectors state, that the issues of sanctions and being federally required are one in the same. In fact, if the inquiry into being federally required and the existence of sanctions are, as the Objectors state, "the same inquiry and the one cannot be considered in absence of the other,"[12] then the matter is all the more clear. There was no question that the rules at issue in PCB R99-10 and PCB R98-28 were federally required. If that is the same as the question over whether sanctions applied then the Board, and apparently the Objectors, agree that the imposition of a FIP is a sanction. If the Board accepts the one, then it accepts the other. The false distinction between imposing a FIP and imposing higher offsets or withholding highway funds cannot stand.

Lastly, the Objectors assert that because the Illinois EPA's proposal is "substantially different" from the federal proposal, it cannot proceed under Section 28.5. This proposition has no bearing on the dispute. The Illinois EPA may determine how best to effectuate USEPA's goals considering the situation in Illinois. Objectors may disagree with that method, but that does not mean that the proposal is unsuitable for a fast-track proceeding.

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

[12] Objection at 12.

> 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
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> 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 current rulemaking, sanctions under Section 105 of the CAA are further available to USEPA. Objectors take issue with the Illinois EPA's noting of this provision, but the discussion is only to illustrate 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 Objectors 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 same authority as 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.

Objectors make much of the Illinois EPA not listing Section 179 sanctions in the Statement of Reasons to the current rulemaking 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 Objection. 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.

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.

III. RULE WILL NOT BE DEEMED VOID AND UNENFORCEABLE

The Objectors further assert that if the Board proceeds under Section 28.5 the resulting rule will be successfully challenged and is thus void and unenforceable. There is no basis for this speculation. Of course there is a possibility, however remote, that the Joint Committee on Administrative Rules or a court could suspend or overturn a rule, but on what grounds? The Objectors' contention that the Board is not following its required procedures rests on the proven falsehood that the imposition of a Federal plan is not a sanction. As stated *supra*, the required procedures set forth in Section 102.302(b) of the Board's rules have been carried out. According to the Objectors, the Board would nonetheless be proceeding to force a rule on the regulated community. But, as has been demonstrated, the Illinois EPA has proposed and the Board has held that the imposition of a Federal plan is a sanction. More importantly, several appeals courts have as well.

The Objectors' argument hinges on what could most charitably be called a split in the circuits. As has been shown, several courts, including the D.C. Circuit, have stated that imposing a FIP is a sanction. The only real support for the Objectors' position is ambiguous references by two courts. Compared to the clear and considered opinions of

the Fourth and D.C. Circuits, and noting that the Seventh Circuit has not ruled on this issue, it is highly unlikely that a court would go against the opinion of the Board on an interpretation of an environmental statute and overturn the rule. Any reviewing court would give at least some deference to the Board, and the weight of Federal appellate court decisions favors the Illinois EPA's position.

The Objectors' final assertion is that "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." Objection at 17. The Objectors further claim that "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." *Id*. Objectors cite to the *Report of the Attorney General's Task Force on Environmental Legal Issues [sic] 1992* for the Task Force's summary of USEPA's comments expressing reservation about Illinois' capacity to comply with the strict time frames for rulemaking under the Clean Air Act. Objection at 3. The recommendations of the Task Force in response to State promulgation of rules implementing the Clean Air Act Amendments of 1990 are as follows:

> The Task Force finds that Illinois' timely implementation of Clean Air Act Amendments is critically important, both because air quality affects the health and welfare of every Illinois citizen and because the strict penalty provisions of the amendments would have a serious adverse impact on the State. *Thus, the rulemaking program for implementation of the Clean Air Act Amendments needs to be designed in such a way that Federal rulemaking deadlines can be met*. The current rulemaking process should be streamlined to ensure that such implementation is accomplished in a timely manner. (Emphasis added)

Report of the Attorney General's Task Force On Environmental Legal Resources 1992 at 30. The fast-track rulemaking proceedings under Section 28.5 of the Act alleviate the

concerns expressed by the Task Force. Section 28.5 of the Act contains stringent time frames for the filing of first notice, the submission of pre-filed testimony, the scheduling of hearings, the adoption of a second notice order, and the adoption of the final order and submission to the Secretary of State for publication and certification. Truncated public participation and review by the Board are inherent in a proceeding under Section 28.5; however, this issue is irrelevant to a Section 28.5 analysis. Furthermore, the Objectors' contention that the record in this rulemaking proposal will differ from the record compiled under CAMR and be subject to intensive attack is also immaterial and speculative at best. Objection at 17. Such is the possibility for any rulemaking proposal, whether carried out under Section 28.5 or not.

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

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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

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STATE OF ILLINOIS)
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CERTIFICATE OF SERVICE

I, the undersigned, an attorney, state that I have served electronically the attached ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO AMEREN ENERGY GENERATING COMPANY, AMERENENERGY RESOURCES GENERATING COMPANY, AND ELECTRIC ENERGY INCORPORATED'S OBJECTION TO USE OF SECTION 28.5 FAST TRACK PROCEDURES FOR CONSIDERATION OF MERCURY PROPOSAL upon the following persons:

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Illinois Pollution Control Board
James R. Thompson Center
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Illinois Pollution Control Board
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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
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/s/_____
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