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

Marie Tipsord
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph St., Suite 11-500
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 RESPONSE TO DOMINION KINCAID, INC.'S MOTION TO REJECT ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S PROPOSAL, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/_____
Charles E. Matoesian
Assistant Counsel
Division of Legal Counsel

DATED: March 29, 2006

1021 North Grand Avenue East
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THIS FILING IS SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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	)	R06-25
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RESPONSE TO DOMINION KINCAID, INC.'S MOTION TO REJECT ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S PROPOSAL

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 Dominion Kincaid, Inc.'s ("DKI") Motion to Reject the Illinois EPA's Proposal Under Section 28.5 Fast Track Procedures ("motion to reject" or "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 ACT

In the motion to reject, DKI initially argues that the Illinois EPA's mercury rulemaking proposal does not meet the prerequisites of Section 28.5 of the Act. 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 Environmental Protection Act ("Act") (415 ILCS 5/28.5) 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.

[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.

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 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 DKI acknowledges 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, DKI 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. ILLINOIS IS SUBJECT TO SANCTIONS FOR FAILURE TO ADOPT A MERCURY RULE

Even if the Board had the authority to look beyond the limited statutory review it has acknowledged by resolution and rule, the Illinois EPA's mercury proposal would still be considered well within the criteria set forth in Section 28.5(c) of the Act. Specifically, the Illinois EPA's 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, would subject Illinois to sanctions from USEPA.

The argument proffered by DKI is that no sanctions may be imposed upon Illinois for a failure to either adopt CAMR or properly file a State plan with USEPA. Motion to reject, p. 3. This argument is premised on the notion that a sanction would not take place if a Federal plan was imposed upon Illinois by USEPA if Illinois failed to adopt CAMR or properly file a State plan. The question then is whether a Federal plan in this situation is a sanction as that term is used in Section 28.5 of the Act.

DKI approaches this question 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 Clean Air Act ("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 DKI’s arguments should be set aside.

A. The Mercury Proposal May Be Filed Pursuant To Section 28.5

Initially, it should be noted that there is no impediment to the Illinois EPA's proposal proceeding under Section 28.5 simply 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 motion to reject 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.[2] 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 Illinois EPA's decision to propose mercury regulations that are no less stringent than CAMR is consistent with 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

[2] 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.

> 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[3] (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 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. 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 DKI's position were correct then there

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

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]

B. Imposition Of A Federal Plan Is A Sanction

DKI's challenge to Illinois EPA's assertion that sanctions are possible under CAMR must fail because the imposition of a Federal plan is a recognized sanction. Courts and the Board have held that a Federal plan is to be considered a sanction pursuant to the CAA. 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' (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 *Virginia* court clearly listed the imposition of a FIP as a form of sanction, and further characterized a FIP as an "additional incentive for state compliance," citing to the

[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).

case of *Natural Resources Defense Council v. Browner*.[5] But that characterization aside, the *Virginia* court clearly 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 not to the exclusion of a FIP being considered as a sanction.

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."[6] The D.C. Circuit referred to *Virginia v. Browner* for a further discussion.[7] 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 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 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.

[5] 57 F.3d 1122, 11254 (D.C. Cir. 1995).
[6] *Appalachian Power Company v. EPA*, 208 F.3d 1015, 1017 (D.C. Cir. 2000).
[7] *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996).

As to the practice of 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 Federal plan 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.

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).

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. In the motion to reject, DKI states that the critical factor is that sanctions are limited to deficiencies in a SIP to achieve compliance with national ambient air quality standard ("NAAQS") adopted by USEPA, and also observes that USEPA has not adopted any NAAQS for mercury. Motion to reject, p. 3.

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.

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 to reject.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/_____
Charles E. Matoesian
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DATED: March 29, 2006

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STATE OF ILLINOIS)
) **SS**
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)

CERTIFICATE OF SERVICE

I, the undersigned, an attorney, state that I have served electronically the attached RESPONSE TO DOMINION KINCAID, INC.'S MOTION TO REJECT ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S PROPOSAL upon the following persons:

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Marie Tipsord
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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
PROTECTION AGENCY,

/s/_____
Charles E. Matoesian
Assistant Counsel
Division of Legal Counsel

Dated: March 29, 2006

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