BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PROPOSED NEW 35 ILL. ADM. CODE	)	R06-025
225 CONTROL OF EMISSIONS FROM	)	(Rulemaking – Air)
LARGE COMBUSTION SOURCES	)	

NOTICE OF FILING

TO: Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA ELECTRONIC MAIL)

Marie E. Tipsord, Esq.
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601
(VIA FIRST CLASS MAIL)

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board a **RESPONSE IN SUPPORT OF UTILITY MOTIONS AND OBJECTION TO THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S USE OF SECTION 28.5 OF THE ILLINOIS ENVIRONMENTAL PROTECTION ACT FOR CONSIDERATION OF ITS MERCURY PROPOSAL and AFFIDAVIT OF DEIRDRE K. HIRNER**, on behalf of the Illinois Environmental Regulatory Group, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: /s/ N. LaDonna Driver
One of Its Attorneys

Dated: March 29, 2006

Katherine D. Hodge
N. LaDonna Driver
HODGE DWYER ZEMAN
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CERTIFICATE OF SERVICE

I, N. LaDonna Driver, the undersigned, hereby certify that I have served the attached **RESPONSE IN SUPPORT OF UTILITY MOTIONS AND OBJECTION TO THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S USE OF SECTION 28.5 OF THE ILLINOIS ENVIRONMENTAL PROTECTION ACT FOR CONSIDERATION OF ITS MERCURY PROPOSAL, and AFFIDAVIT OF DEIRDRE K. HIRNER** upon:

Ms. Dorothy M. Gunn
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

via electronic mail on March 29, 2006; and upon:

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by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois, on March 29, 2006.

/s/ N. LaDonna Driver
N. LaDonna Driver

IERG:001/R Dockets/Fil/COS – R06-25 Response in Support of Utilities Motion to IEPA's Proposal – KDH NLD

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PROPOSED NEW 35 ILL. ADM. CODE	)	R06-025
225 CONTROL OF EMISSIONS FROM	)	(Rulemaking – Air)
LARGE COMBUSTION SOURCES	)	

ILLINOIS ENVIRONMENTAL REGULATORY GROUP'S RESPONSE IN SUPPORT OF UTILITY MOTIONS AND OBJECTION TO THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S USE OF SECTION 28.5 OF THE ILLINOIS ENVIRONMENTAL PROTECTION ACT FOR CONSIDERATION OF ITS MERCURY PROPOSAL

NOW COMES the Illinois Environmental Regulatory Group ("IERG"), by and through its attorneys, HODGE DWYER ZEMAN, and submits its Response in Support of Utility Motions and Objection to the Illinois Environmental Protection Agency's Use of Section 28.5 of the Illinois Environmental Protection Act in the above-captioned matter:

I. INTRODUCTION

On May 18, 2005, the United States Environmental Protection Agency's ("USEPA") Clean Air Mercury Rule ("CAMR") was published as a final rule in the Federal Register. *Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units*, 70 Fed. Reg. 28606 (May 18, 2005) (to be codified at 40 C.F.R. pts. 60, 72, 75). CAMR establishes requirements for emissions of mercury from coal-fired electric utility steam generating units. As set forth more fully herein, CAMR requires that Illinois submit a plan to USEPA that demonstrates how Illinois' mercury reduction strategy will meet the assigned statewide mercury emission budget established in CAMR.

On March 14, 2006, the Illinois Environmental Protection Agency ("Illinois EPA") filed its proposed mercury regulations with the Illinois Pollution Control Board ("Board"). *See In the Matter of: Proposed New 35 Ill. Adm. Code 225 Control of Emissions from Large Combustion Sources,* PCB No. R06-25 (March 14, 2006) ("Proposed Mercury Rule"). The Illinois EPA submitted its proposal to the Board as a fast-track rulemaking pursuant to Section 28.5 of the Illinois Environmental Protection Act ("Act"), which allows for the expedited review of regulations that are "proposed by the Agency and required to be adopted by the State under the Clean Air Act as amended by the Clean Air Act Amendments of 1990 (CAAA)." 415 ILCS 5/28.5(a). Only rules required to be adopted by the State under the Clean Air Act and the 1990 Amendments ("CAAA") can be fast-tracked under Section 28.5 of the Act.

On March 15, 2006, several utilities filed motions and an objection to the use of Section 28.5 fast-track procedures as proposed by Illinois EPA in this proceeding. *Objection to Use of Section 28.5 Fast Track Procedures for Consideration of Mercury Proposal* (filed by Ameren Energy Generating Company, AmerenEnergy Resources Generating Company and Electric Energy Incorporated), R06-25 (March 15, 2006); *Participants Dynegy Midwest Generation and SIPC's Motion to Reject Regulatory Filing*, R06-25 (March 15, 2006); and *Dominion Kincaid, Inc.'s Motion for the Board to Reject Illinois Environmental Protection Agency's Proposal to Add Mercury Rules Under Section 28.5 Fast-Track Rule Making Procedures*, R06-25 (March 15, 2006).

IERG supports the motions and objection filed by the utility companies in this matter and incorporates their arguments here. IERG is an affiliate of the Illinois State Chamber of Commerce, and is a not-for-profit Illinois corporation comprised of 57

member companies engaged in power generation, industry, commerce, manufacturing, agriculture, trade, and transportation, which are regulated by governmental agencies that promulgate, administer or enforce environmental laws, regulations, rules or policies. IERG's members therefore have a significant stake in how environmental requirements are established. IERG sets forth herein the reasons for its concern with the Illinois EPA's approach in this proceeding, with respect the procedures of Section 28.5 of the Act. IERG urges the Board to find that the Proposed Mercury Rule does not meet the Section 28.5 requirements for a fast-track proceeding.

II. THE PROPOSED MERCURY RULE DOES NOT COMPLY WITH THE REQUIREMENTS OF SECTION 28.5 OF THE ACT

The Act provides for fast-track rulemakings pursuant to Section 28.5, which states, in pertinent part:

> (a) This Section shall apply solely to the adoption of rules proposed by the Agency and required to be adopted by the State under the Clean Air Act as amended by the Clean Air Act Amendments of 1990 (CAAA).
>
> ****
>
> (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 a State for failure to adopt such rules... .

415 ILCS 5/28.5.

As provided above, the Board only has authority under Section 28.5 to fast-track rules that are required to be adopted by the State under the CAAA. CAMR was adopted under Section 111 of the Clean Air Act, which deals with "standards of performance." 70 Fed. Reg. at 28607. The preamble to the CAMR provides a detailed discussion of how USEPA determined CAMR with respect to the relevant provisions of Section 111 of

the Clean Air Act. Specifically, USEPA stated that it was addressing new sources under Section 111(b) (which requirements are effective upon promulgation) and existing sources under Section 111(d). 70 Fed. Reg. at 28607. Section 111 of the Clean Air Act is very clear on the State's roles and responsibilities for standards for new and existing sources:

> **(c) State implementation and enforcement of standards of performance**
>
> **(1)** Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State... .
>
> ****
>
> **(d) Standards of performance for existing sources; remaining useful life of source**
>
> **(1)** The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title [State implementation plans for national primary and secondary ambient air quality standards] under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source ....and (B) provides for the implementation and enforcement of such standards of performance... .
>
> **(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 7410(c) of this title in the case of failure to submit an implementation plan... .

42 U.S.C. § 7411(c) and (d). (Emphasis and explanation added.)

It is noteworthy that the standards promulgated for new sources under Section 111(b), according to Section 111(c), may be the subject of a State procedure for implementation and enforcement, but are otherwise effective on promulgation by USEPA. Second, USEPA has established, in CAMR, the procedure referenced in Section

111(d) for States to submit a plan for implementation and enforcement of existing source standards, that is similar to a state implementation plan ("SIP") for national ambient air quality standards ("NAAQS"). Section 111(d) is clear that the existing source standards are not part of, nor are they required to be included in, a SIP for NAAQS. Equally noteworthy is Section 111(d)(2)(A)'s clear provision of the consequences for a State's failure to provide the plan called for by Section 111(d) – USEPA will prescribe a plan for the State. Thus, the only thing that can happen in such a circumstance is the imposition of a federal plan. Indeed, USEPA stated, in its preamble to CAMR, that:

> 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. at 28632.

As set forth above, Section 28.5 only applies to rules that are required by the CAAA to be adopted, which are only those rules or parts of rules for which sanctions can be imposed for failure to adopt. The utilities have meticulously provided clear and convincing arguments that any potential imposition of a federal plan in this instance is not a "sanction." The Clean Air Act itself states plainly that the only consequence for a State's failure to provide a plan under Section 111(d) is imposition of a federal plan. IERG therefore supports the utilities' argument that the Illinois EPA's proposed rulemaking does not meet the Act's requirements for a Section 28.5 rulemaking.

As discussed above, and in detail in the utilities' motions and objection, the Illinois EPA's proposal is not a rule, as filed, that is required by the CAAA. Even assuming, for the sake of argument, that there are parts of the Proposed Mercury Rule that are required by the CAAA, there are certainly parts of the Proposed Mercury Rule

that are outside of CAMR and are not required by the CAAA. The Illinois EPA's Statement of Reasons goes to great length in challenging CAMR under Section 111 of the Clean Air Act, and distancing the Proposed Mercury Rule from CAMR. Statement of Reasons at 10-17. Again, assuming that there are any parts of the Proposed Mercury Rule that are required by the CAAA, the only authority given to the Board under Section 28.5, with respect to the non-required parts of the Proposed Mercury Rule, is to split the non-required parts into a separate docket. Section 28.5(j) provides:

> The Board shall adopt rules in the fast-track rulemaking docket under the requirements of this Section that the CAAA requires to be adopted, and may consider a non-required rule in a second docket that shall proceed under Title VII of this Act.

415 ILCS 5/28.5(j).

The Illinois General Assembly, through consultation with the Illinois EPA, the public, and the regulated community, chose to limit fast-track proceedings to rules required to be adopted by the CAAA where sanctions can be imposed for failure to adopt such rules. 415 ILCS 5/28.5. This is not a limitation that should be ignored, as the Illinois EPA seemingly does in its Proposed Mercury Rule. Without such a limitation, the Act would allow any proposed regulations related to the Clean Air Act to be fast-tracked, thus bypassing the deliberative proceedings of a rulemaking. IERG participated in the development of this section of the Act and has always maintained the position that this limitation is necessary.[1] Otherwise, all Clean Air Act regulations would be subject to the fast-track timeframe, providing less meaningful opportunities for public comment on the proposed regulations.

[1] Please see attached Affidavit of Deirdre K. Hirner.

IERG has also advocated the proper use of accelerated rulemaking procedures in other air rulemaking proceedings. In *In the Matter of: RACT Deficiencies – Amendments to 35 Ill. Adm. Code Parts 211 and 215,* R89-16 (Feb. 8, 1990), the Illinois EPA sought to amend Parts 211 and 215 of the Board's air regulations under the federally required rules procedures of Section 28.2. The Board severed the rulemaking into two dockets because it concluded that sections of the proposed rulemaking were not federally required. The Board placed the non-federally required provisions in subdocket B "to address these proposed amendments under Section 28 of the Act." *Id.* at 1. The Board explained that it was "persuaded by the thorough analysis" of the Industry Group and by the "lack of analysis in the Agency's response" when it found that portions of the proposed regulations were not "required." *Id.* at 8.

Although the *RACT Deficiencies* rulemaking was not filed pursuant to Section 28.5, but rather pursuant to the federally required rules procedures of Section 28.2, the Board must be careful of its statutory rulemaking authority in this proceeding, as it clearly was in the *RACT Deficiencies* proceeding. It is certainly the Illinois EPA's responsibility to propose regulations consistent with statutory requirements. Yet, as set forth above, and in the utilities' motions and objection, the Proposed Mercury Rule simply does not meet the statutory parameters for a Section 28.5 fast-track rulemaking. The Board must so find and ensure that any action to promulgate the Proposed Mercury Rule does not occur outside the Board's rulemaking authority.

III. CONCLUSION

IERG supports the motions and objection of the utilities filed in opposition to the use of Section 28.5 fast-track procedures for the Proposed Mercury Rule. This

proceeding involves no regulations that are required to be adopted under the Clean Air Act, as amended. The only consequence for any failure by Illinois to provide a plan implementing CAMR's requirements is the federal imposition of CAMR's model rule. Thus, there are no sanctions at issue here that would allow the use of fast-track procedures under Section 28.5. The Board should not proceed on this rulemaking beyond the bounds of its statutory authority. Therefore, IERG maintains that the Section 28.5 fast-track procedures may not be used for the Proposed Mercury Rule.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

By: /s/ N. LaDonna Driver
One of Its Attorneys

Dated: March 29, 2006

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AFFIDAVIT

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

Deirdre K. Hirner, being first duly sworn on oath, affirms that the facts set forth in the Illinois Environmental Regulatory Group's Response in Support of Utility Motions and Objection to the Illinois Environmental Protection Agency's Use of Section 28.5 of the Illinois Environmental Protection Act for Consideration of Its Mercury Proposal, are true and correct.

Deirdre K. Hirner, Executive Director
Illinois Environmental Regulatory Group
3150 Roland Avenue
Springfield, Illinois 62703

Subscribed and sworn to before me
this 29th day of March 2006.

Connie M. Werts
Notary Public

"OFFICIAL SEAL"
Connie M. Werts
Notary Public, State of Illinois
My Commission Exp. 05/24/2008