

ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS  
Pollution Control Board

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

NOTICE OF FILING

TO:

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PLEASE TAKE NOTICE that on April 5, 2006, I filed with the Office of the Clerk of the Pollution Control Board, Dominion Kincaid, Inc.'s Reply in Support of Its Motion for The Board to Reject Illinois Environmental Protection Agency's Proposal to Add Mercury Rules Under Section 28.5 Fast-Track Rule Making Procedure, a copy of which is herewith served upon you.

Respectfully submitted,

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By:   
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THIS FILING IS SUBMITTED ON RECYCLED PAPER

**CERTIFICATE OF SERVICE**

I, Bill S. Forcade, an attorney, hereby certify that I served a copy of the foregoing document, via first-class mail, postage fully prepaid, upon the following parties this 5th day of April, 2006:

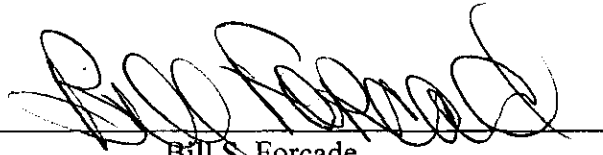
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Bill S. Forcade

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STATE OF ILLINOIS  
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In The Matter of:

Proposed New 35 Ill. Adm. Code Part 225 ) R06-25  
Control of Emissions from ) (Rulemaking – Air)  
Large Combustion Sources )  
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**DOMINION KINCAID, INC.'S REPLY IN SUPPORT OF ITS MOTION FOR THE BOARD TO REJECT ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S PROPOSAL TO ADD MERCURY RULES UNDER SECTION 28.5 FAST-TRACK RULE MAKING PROCEDURES**

NOW COMES DOMINION KINCAID, INC., by and through its attorneys, Jenner & Block, LLP, and, pursuant to the March 16, 2006 Hearing Officer Order, hereby replies to Illinois Environmental Protection Agency's ("IEPA") response to Dominion Kincaid, Inc.'s ("Dominion") motion to reject the IEPA's "Proposed New 35 Ill. Adm. Code 225 Control of Emissions from Large Combustion Sources" (the "Mercury Proposal") under procedures described as "Clean Air Act rules; fast track" in Section 28.5, 415 ILCS 5/28.5, of the Illinois Environmental Protection Act (the "Act"). 415 ILCS 5/1 *et. seq.* The Illinois Pollution Control Board ("IPCB" or the "Board") has the authority to, and by law should, exercise its authority to reject this proposal as improper under Section 28.5. The imposition of a federal plan is not a sanction and, therefore, the Mercury Proposal does not meet the Section 28.5 prerequisites, and must be rejected.

**I. THE IPCB HAS AUTHORITY TO REJECT THE MERCURY PROPOSAL AS IMPROPER UNDER SECTION 28.5.**

The IEPA argues that the IPCB lacks the authority to reject the Mercury Proposal, or any proposal for that matter, as failing to meet the prerequisites of Section 28.5. The IEPA misconstrues the IPCB's regulations and prior Board resolutions and ignores the plain language of

the Act. The IPCB has the statutory authority to reject a proposal as not required to be adopted under the language of Section 28.5.

Section 28.5 of the Act applies only to the promulgation of rules “required to be adopted” by the Clean Air Act (“CAA”). 415 ILCS 5/28.5. The rules of statutory construction require that the legislature’s intent be given effect and that the interpreting body presume that the legislature did not intend any absurdity or injustice. *See, e.g., Adams v. Northern Illinois Gas Co.*, 211 Ill.2d 32, 64 (2004). It would be an absurd result to require the Board to accept a proposal under Section 28.5 and adopt regulations that would later be found void for failing to meet the prerequisite for consideration under that section, without any authority to decline such acceptance. *Landfill, Inc. v. Pollution Control Bd.*, 74 Ill. 2d 541, 553 (1978) (where the Board is not authorized to promulgate a rule, such invalid rules are void). It would be contrary to the language of the statute and intent of the legislature that the IPCB must accept and act upon a proposal that is not authorized by the statute.

As an administrative agency, the IPCB powers are defined by statute. “[A]dministrative agencies are limited to the powers vested in them by statute, and their rules and regulations are valid only when they are in furtherance of the intention of the legislature as stated within the four corners of the statute.” *Chemetco, Inc. v. Illinois Pollution Control Bd.*, 140 Ill. App. 3d 283, 286 (5th Dist. 1986). At the same time, “[a]s an administrative agency, the Board has the inherent authority to do all that is reasonably necessary to execute its specifically conferred statutory power.” *People v. Archer Daniels Midland Corp.*, 140 Ill. App. 3d 823, 825 (3rd Dist. 1986) (citing *A.E. Staley Mfg. Co. v. Env’t Prot. Agency*, 8 Ill. App. 3d 1018, 1023 (4th Dist. 1972)). Section 28.5 gives the IPCB the authority to review and promulgate certain rules on a fast tracked schedule. Inherent in that authority is the ability to determine that the proposed rules meet the prerequisites for consideration

under that section. Illinois courts have upheld the ability of an agency to decline taking an action due to lack of jurisdiction. *See, e.g., Merisant Co. v. Kankakee County Bd. of Review*, 352 Ill. App. 3d 622 (3rd Dist. 2004) (upholding Property Tax Appeal Board decision to dismiss an appeal based on lack of jurisdiction, based on the rule of law that an agency derives its jurisdiction from its enabling statute and cannot act beyond the statute); and *Pickering v. Illinois Human Rights Comm'n*, 146 Ill. App. 3d 340, 352 (2nd Dist. 1986) (upholding Human Rights Commission dismissal of a charge of unlawful discrimination where the Commission refused to hear the charge because it lacked jurisdiction and stating, "[a]n administrative agency is analogous to a court of limited jurisdiction and can act only pursuant to the authority conferred on it by statute...Any action outside the authority granted by its enabling statute is void."). *See also Chemetco, Inc. v. Illinois Pollution Control Bd.*, 140 Ill. App. 3d 283 (involving review of Board's rejection of settlement agreement due to lack of jurisdiction to approve the agreement to determine substantive issue of jurisdiction not authority to reject the agreement as outside its jurisdiction).

The IEPA has improperly expanded the interpretation of Section 28.5 in the Board's 1992 Resolutions. Resolution 92-2 clearly states that it addresses only specific provisions of Section 28.5 and is not an exhaustive review of the entire section. Res. 92-2, October 29, 1992, at 1. The statements to which the IEPA refers are limited to whether the Board will review a proposal for compliance with the format and submission requirements of Section 28.5(e), not whether the Board will review the proposal for compliance with Section 28.5(a) and (c). The very existence of Resolution 92-2 evidences the Board's understanding that it has the power to interpret and apply Section 28.5. Moreover, in the December 3, 1992 Resolution and Order, the Board clearly stated that "the Board has inherent authority to determine what documents to 'accept.'" Res. 92-2, December 3, 1992, at 2. In addition, the Board stated that it believed it was bound by Section 28.5

and “intend[ed] to comply with all provisions of the Act.” Res. 92-2, December 3, 1992, at 5. Contrary to IEPA’s arguments, Resolution 92-2 does not constrain the Board’s actions under Section 28.5 to a mere minimal review for formalities nor does it evidence any intent on the part of the Board to do so.

The IEPA also argues a strained reading of Section 102.302(b) of the Board’s rules. The IEPA argues that under Section 102.302(b) the Board may only reject a Section 28.5 proposal for failure to meet the requirements of Section 102.302(a). This section does not limit the Board’s ability to reject a proposal for failure to meet the content requirements of subsection (a). Rather, it says only that the Board “may” reject a proposal on those grounds. 35 Ill. Adm. Code 102.302(b).

If the Board has such extremely limited authority under Section 28.5, then IEPA could propose hazardous waste regulations under Section 28.5 and the Board would be required to act on this facially invalid proposal. There is no statutory or regulatory basis for the argument that the IPCB is without power to determine the validity of pursuing a Section 28.5 fast track rulemaking for a proposal submitted to the Board.

**II. THE IMPOSITION OF A FEDERAL PLAN IS NOT A SANCTION AND, THEREFORE, THE MERCURY PROPOSAL DOES NOT MEET THE PREREQUISITES OF SECTION 28.5 OF THE ACT.**

Under Section 28.5, a rulemaking may proceed under an expedited schedule only where it is required to be adopted under the CAA. 415 ILCS 5/28.5. As discussed in more detail in Dominion’s Motion, “‘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. The Administrator of the United States Environmental Protection Agency has authority to impose sanctions against a state only under Section 179 of the CAA. 42 U.S.C.A. § 7509. The sanctions that can be imposed are limited to highway sanctions and imposing offsets. 42 U.S.C.A. § 7509(b). Despite the clear language of

the CAA and its own admission that it is reasonable to read the term “sanctions” in the Act as analogous to the meaning of “sanctions” in the CAA, the IEPA argues that the imposition of a federal implementation plan is a “sanction” within the meaning of Section 28.5. Therefore, IEPA argues, because a federal implementation plan would be imposed if mercury controls are not adopted by the State of Illinois, the Mercury Proposal is “required to be adopted” under Section 28.5.

The IEPA argues that courts have held that a federal plan should be considered a sanction under the CAA. On the contrary, numerous federal courts have treated sanctions under the CAA as distinct from imposing a federal implementation plan. *See, e.g., Appalachian Power Co. v. Env'tl. Prot. Agency*, 249 F.3d 1032, 1037 (D.C.Cir. 2001) (“States that fail to comply with [SIP] requirements are subject to various sanctions and the imposition of a Federal Implementation Plan”) (emphasis added); *West Virginia Chamber of Commerce v. Browner*, 166 F.3d 336 (Table) (4th Cir. 1998) (“If the state does not timely submit an approvable revised SIP..., the EPA must impose specified sanctions within fixed deadlines, and must eventually promulgate its own Federal Implementation Plan”) (emphasis added); and *Ober v. Env'tl. Prot. Agency*, 84 F.3d 304, 306 (9th Cir. 1996) (“If disapproved, the state is subject to sanctions and the control measures of the Federal Implementation Plan”). In addition, contrary to IEPA’s characterization, the court in *Natural Resources Defense Council v. Browner*, 57 F.3d 1122, 1123-4 (D.C. Cir. 1995) lists the various incentives available under the CAA, including “mandatory sanctions, discretionary sanctions, and imposition of a Federal Implementation Plan.” The Court lists the imposition of a federal plan as one of several “incentives,” not sanctions. *See also Virginia v. Env'tl. Prot. Agency*, 74 F.3d 517, 521 (4th Cir. 1996) (differentiating the imposition of a federal plan from the sanctions of offsetting and withholding federal funds).

Moreover, although not authoritative on the issue, the IEPA's own submissions to the IPCB demonstrate that the imposition of a federal plan is different from the imposition of federal sanctions. As discussed in *Ameren Energy Generating Company, AmerenEnergy Resources Generating Company and Electric Energy Incorporated Objection to Use of Section 28.5 Fast Track Rulemaking Procedures for Consideration of Mercury Proposal*, the IEPA's Statement of Reasons for R01-16 concerning the NOx SIP Call listed three potential impacts for failing to approve the proposal, one of which was sanctions, another of which was the possibility of issuance of a federal implementation plan. *Ameren Objection*, at 11-12. *See also In re Emission Reduction Market System Adoption of 35 Ill. Adm. Code 205 and Amendments to 35 Ill. Adm. Code 106*, R97-13, December 5, 1996 (citing IEPA statement of reasons listing withholding of highway funds and offset requirement and not the imposition of a federal implementation plan as the sanctions available under the CAA). In addition, the two rulemakings cited by the IEPA as instances in which the Board accepted its argument that imposing a federal plan was a sanction are not persuasive as the Board never addressed the issue of sanctions.

The Comments of the Illinois Public Interest Research Group and the Environmental Law and Policy Center ("IPIRG Comments") support the fast track rulemaking of the Mercury Proposal, arguing that the imposition of a federal plan is a sanction because "it divests Illinois of planning authority it possesses if it acts by the November 17th deadline." Comments of the Illinois Public Interest Research Group and the Environmental Law and Policy Center in Support of Fast-Track Rulemaking, March 29, 2006, at 2. The IPIRG Comments fail to cite any authority for this argument other than to say that it is a sanction because Illinois can no longer formulate its own plan after November 17. This argument ignores the specific language in Section 179 of the CAA, 42



U.S.C.A. § 7509. Sanctions are defined by federal statute, not by the wishes of the regulatory proponents.

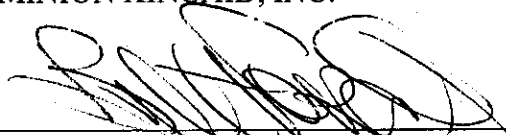
The IEPA and other commenters have failed to provide any persuasive rationale for interpreting the term “sanctions” in Section 28.5 of the Act as anything other than the “sanctions” that can be imposed under the CAA. Therefore, the imposition of a federal implementation plan is not a “sanction” under Section 28.5, and the IPCB lacks the authority to consider the Mercury Proposal under the fast track rulemaking procedures of that section of the Act.

### III. CONCLUSION

For the reasons stated above and in its Motion to Reject, Dominion respectfully requests the IPCB grant its motion for the board to reject IEPA’s Mercury Proposal under Section 28.5 fast-track rulemaking procedures.

Respectfully submitted,  
DOMINION KINCAID, INC.

by:

  
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One of Its Attorneys

Dated: April 5, 2006

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