BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PROPOSED NEW 35 ILL.ADM.CODE PART 225	)	PCB R06-25
CONTROL OF EMISSIONS FROM	)	
LARGE COMBUSTION SOURCES	)	

NOTICE OF FILING

To:

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Illinois Pollution Control Board
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ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that we have today filed with the Office of the Clerk of the Pollution Control Board PARTICIPANTS DYNEGY, MIDWEST GENERATION AND SIPC'S REPLY TO THE AGENCY'S RESPONSE TO MOTION TO REJECT REGULATORY FILING, copies of which are herewith served upon you.

/s/ **Kathleen C. Bassi**
Kathleen C. Bassi

Dated: April 5, 2006

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PARTICIPANTS DYNEGY, MIDWEST GENERATION, AND SIPC'S REPLY TO THE AGENCY'S RESPONSE TO MOTION TO REJECT REGULATORY FILING

NOW COME Participants, DYNEGY MIDWEST GENERATION, INC., MIDWEST GENERATION, LLC, and SOUTHERN ILLINOIS POWER COOPERATIVE (collectively "Participants"), by and through their attorneys, SCHIFF HARDIN LLP, pursuant to 35 Ill.Adm.Code §§ 101.500 and 101.504[1] and the Hearing Officer Order entered in this matter on March 16, 2006, allowing Participants to file a Reply to the Illinois Environmental Protection Agency's ("Agency") Response to the Motion to Reject ("Response"), and request that the Board deny the Agency's request that the Motion to Reject Regulatory Filing be denied and that the Board, instead, grant that motion. In support of this request, Participants state as follows:

I. BACKGROUND

On March 14, 2006, the Agency submitted the above-captioned matter (the "Mercury Proposal") to the Board for consideration pursuant to Section 28.5 of the Environmental Protection Act. On March 15, 2006, Participants filed a Motion to Reject Regulatory Filing with the Board, arguing that the Board does not have jurisdiction to consider the Mercury Proposal under Section 28.5. The Agency filed its Response to Participants' Motion on March 29, 2006.

[1] Hereinafter, references to 35 Ill.Adm.Code are to section number only.

II. THE BOARD HAS AUTHORITY TO DETERMINE ITS JURISDICTION OVER A MATTER.

The Agency argues in its Response that the Board's authority under Section 28.5 of the Environmental Protection Act ("Act"), 415 ILCS 5/28.5, is limited to performing the ministerial function of determining whether the Agency's submittal of a proposed rulemaking pursuant to Section 28.5 complies with the provisions of Section 28.5(e) and § 102.302(a), both of which list elements of a Section 28.5 submittal.[2] Response, pp. 1-4. However, the Agency overlooks settled law that provides that a governmental agency always has the authority to determine whether it has jurisdiction over an issue. *Metropolitan Distributors, Inc. v. Illinois Department of Labor*, 449 N.E.2d 1000, 1002 (Ill.App.Ct. 1st Dist. 1983); *Shapiro v. Regional Board of School Trustees of Cook County*, 451 N.E.2d 1282, 1288 (Ill.App.Ct. 5th Dist. 1983). In fact, unless an agency has jurisdiction over an issue, it cannot address the issue. *Shapiro*, 451 N.E.2d at 1288.

Agencies such as the Board are granted their powers, authorities, and responsibilities by the legislature. *Prairie Rivers Network v. IPCB*, 781 N.E.2d 372, 383 (Ill.App.Ct. 4th Dist. 2002); *Chemetco, Inc. v. Illinois Pollution Control Board and Illinois Environmental Protection Agency*, 488 N.E.2d 639, 642 (Ill.App.Ct. 5th Dist. 1986). Agencies are strictly limited to the powers, authorities, and responsibilities specifically prescribed in a statute. *In re Abandonment of Wells Located in Illinois by Leavell*, 796 N.E.2d 623, 626 (Ill.App.Ct. 5th Dist. 2003)

[2] Section 28.5(e) sets forth the statutorily required elements of a submittal made to the Board by the Agency, while § 102.302(a) provides additional detail regarding the formats that the Agency must utilize and other matters to allow the Board to meet the strict timeframes of Section 28.5. Essentially, pursuant to § 102.302(a), the Agency is performing a number of the tasks that the Board would normally do, such as formatting the proposal for publication in the *Illinois Register*. As the Agency controls when a Section 28.5 rulemaking is to be submitted, it has more time to perform those tasks than the Board, who must act within 14 days after receipt of a submittal.

("*Leavell*"). These restrictions include limitations on the scope of an agency's jurisdiction to act and any action beyond the scope of an agency's jurisdiction is void. *Leavell*, 796 N.E. 2d 623, 626.. With respect to both the Board's and the Agency's authority under Section 28.5, their respective jurisdictions to submit a proposed rulemaking and to consider a rulemaking submitted pursuant to Section 28.5 are limited by the constraints included in the language of Section 28.5. These limitations appear at the very beginning of Section 28.5 and serve as the prerequisite for everything that comes after, including the ministerial functions that the Agency jumps to almost immediately, overlooking the jurisdictional limitations.

First, as discussed in both Participants' Motion to Reject and in the Agency's Response, Section 28.5(a) identifies the applicability of the rule: "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. . . ." 415 ILCS 4/28.5(a) (Emphasis added). Therefore, only the Agency may propose rules pursuant to Section 28.5; this provision is not available to the Board or to the regulated or environmental community as proponents of rules. This is a jurisdictional matter pertaining to both the Board and the Agency. The Agency does not have authority under Section 28.5 to submit something other than a rule "required to be adopted" by the state under the Clean Air Act, and the Board does not have authority under Section 28.5 to consider a proposal that is not "required to be adopted" by the state under the Clean Air Act. Neither agency has jurisdiction under Section 28.5 unless the rule proposed is "required to be adopted" by the state under the Clean Air Act.

Second, the term "required to be adopted" is defined:

> 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), in part. (Emphasis added.) Section 28.5(c), part of the applicability provisions of Section 28.5, limits the use of Section 28.5 to only those federally required rules for which the U.S. Environmental Protection Agency ("USEPA") is "empowered" to impose sanctions. The term *empowered* is not defined in Section 28.5 or elsewhere in the Act. However, its plain meaning in this context is "to give official authority or legal power to." Merriam-Webster's Collegiate Dictionary, 10th ed. "To give official authority or legal power to" means that there must be a specific grant of authority to USEPA to impose sanctions. It does not suggest that this grant of authority can be only implied or analogized from other grants of authority as the Agency argues. Either the power is granted explicitly, or it does not exist. Therefore, unless USEPA is "empowered" by the Clean Air Act to levy a sanction against the state for failure to adopt a rule, neither the Agency nor the Board has jurisdiction to propose or consider, respectively, such a rule under Section 28.5.

Third, Section 28.5's applicability does not extend to identical in substances rules: "When the CAAA requires rules other than identical in substance rules to be adopted. . . ." 415 ILCS 5/28.5(d). As the Agency discusses in its Response, identical in substance rulemakings are a process available to the Board (Response, p. 19), but only when statutory prerequisites are satisfied. Section 7.2(b) of the Act sets forth the circumstances under which the Board may proceed with an identical in substance rulemaking. The only air pollution control rules that may proceed as identical in substance rulemakings are those required by Section 9.1(e). 415 ILCS 5/7.2(b). Identical in substance rulemakings are those where the state rule is to be exactly the same as the federal rule. With respect to air pollution control rules, such instances are limited to

updating the definition of *volatile organic material* ("VOM") to identify those substances that are not included within the definition because of their low level of reactivity. 415 ILCS 5/9.1(e). The Board may not utilize an identical in substance rulemaking process for any other circumstance relative to air pollution control.

The Agency also argues that in Board Resolution 92-2, the Board itself recognized limitations on its authority to determine whether it has jurisdiction over a rulemaking that the Agency claims is properly submitted under Section 28.5. Response, p. 2 (citing Member Flemel's dissent to the Board's undertaking even a mechanical review of a proposal based upon a checklist of the elements discussed above). The Agency also cites to its own comments on Resolution 92-2 (October 29, 1992), objecting to the mechanical review, consistent with Member Flemel's dissent. Response, p. 2. However, a review of the Agency's comments reveals that the Agency did not discuss the jurisdictional issues raised by Participants relative to the Mercury Proposal. Board Resolution 92-2 does not suggest that the Board has somehow limited its responsibility to determine jurisdiction over a rulemaking proposed pursuant to Section 28.5, nor would the Board have the authority to so limit its jurisdiction, as conference of jurisdiction is statutory. That is not to say that the Board acted improperly in Resolution 92-2 relative to examining jurisdictional questions. If the issue is not raised, there is no reason for the Board to assume that the Agency has acted improperly in submitting a proposal pursuant to Section 28.5. In other words, the Board assumes that the Agency has asserted proper jurisdiction unless some relevant jurisdictional matter is raised in the rulemaking.

Nevertheless, only when the jurisdictional limitations of Section 28.5 have been met can a rulemaking legally proceed under Section 28.5. Because Section 28.5 jurisdiction has not been seriously disputed in prior rulemakings, the Board has not, in its orders in previous Section 28.5

rulemakings, examined the issue of its jurisdiction and the relationship of that jurisdiction to the sanctions that USEPA is empowered to impose. However, to accept the Agency's interpretation of the scope of the Board's authority to examine its jurisdictional authority under Section 28.5 – *i.e.*, the Board has no such authority – would totally eviscerate rulemakings in Illinois. To take this notion to its logical extreme, although Section 28.5, by its language, is limited to rules "required to be adopted" under the Clean Air Act, if the Board cannot determine whether it has jurisdiction over a submitted rule and can conduct only a mechanical, ministerial review of the submittal to determine that all of the elements have been included in the package, the Agency could propose under Section 28.5 rules totally unrelated to the Clean Air Act, for example, underground storage tank ("UST") rules. Clearly, this proposition is ridiculous, and if the Agency were to propose UST rules pursuant to Section 28.5, the Board would reject them as not complying with the prerequisite requirements of Section 28.5 – *i.e.*, the Board would not have jurisdiction to consider UST rules pursuant to Section 28.5. However, under the Agency's view of the Board's authority to review its jurisdiction, the Board would not be able to reach the question of whether UST rules were required by the Clean Air Act or whether USEPA was empowered to impose sanctions if the state failed to adopt them. Though not so extreme in subject matter as a UST proposal under Section 28.5, the Mercury Proposal falls into the same category.

The Board does not have jurisdiction to consider this proposal pursuant to Section 28.5 of the Act because, though federal rules call for the state to adopt a mercury rule compliant with the cap requirements of the Clean Air Mercury Rule, 40 CFR 60.24(b)(1) and (h), USEPA is not empowered to impose sanctions on a state that fails to do so, thus not meeting the jurisdictional requirements of Section 28.5(c).

III. THE AGENCY INVITES AN INTERPRETATION OF "REQUIRES TO BE ADOPTED" THAT IS BROADER THAN ALLOWED BY THE ACT.

The Agency argues that the inclusion of Section 28.5 in a statute that contains Section 28.2 for "Federally required rules" and Section 7.2(b) for identical in substance rules results in unnecessary duplication among the provisions of the Act. Response, p. 19. The Agency is partially correct: there is duplication among provisions of the Act, but the Agency ignores or miscomprehends the differences among Sections 7.2(b), 28.2, and 28.5. The question of whether this duplication is necessary, to the extent that there is actual duplication – "overlap" may be a more appropriate description – is simply not relevant here. Presumably, if the General Assembly included these overlapping provisions, it did so advisedly. In this case, if the Agency wishes to rely only on the "federally required" element of Illinois' rulemaking provisions, then Section 28.2 would better suit its purposes.

However, the Agency appears to argue that Section 28.2 requires that the "federally required rule" can be "no different than the federal regulatory counterpart[; otherwise,] there would be no distinction in purpose or effect between Sections 28.2 and 28.5 of the Act." Response, p. 20. Apparently, the Agency is confusing Section 28.2 with Section 7.2(b) governing adoption of federal rules that are required to be identical in substance in order to gain or retain state authorization to administer federal regulatory programs. There is actually a significant distinction in purpose and effect of each of these three types of rulemaking.

Section 7.2(b) is limited, in the air context pursuant to Section 9.1(e), to the definition of *VOM*. The Board is to update the definition of *VOM* to reflect USEPA's changes to the definition, and this proceeds under the auspices of the Board alone. The Agency does not propose these amendments to the rules. The Board has no flexibility at all in how it is to amend the definition of *VOM*.

Section 28.2, which the Agency seldom uses in the air context, requires a certification that the proposed rule is federally required and imposes timeframes that are less restrictive than those in Section 28.5. Under Section 28.2, the Board must submit the rule for First Notice within six months of the Board's determination of whether there should be an economic impact study conducted; under Section 28.5, on the other hand, the Board must submit the rule for First Notice within 14 days after it has been submitted to the Board. 415 ILCS 28.5(f). Both Sections 28.2 and 28.5 require that the Illinois proposal be federally required. Unlike Section 28.5, however, Section 28.2 refers to "federally required rules" and does not limit the definition of "federally required rules" to those for which USEPA is "empowered to impose sanctions." Section 28.5, on the other hand, refers to "rules required to be adopted" and does limit the definition to those for which USEPA is empowered to impose sanctions. The question of sanctions, therefore, does not even arise under Section 28.2. Clearly, the General Assembly's view of the term "federally required rules" in Section 28.2 is markedly different from its view of rules "required to be adopted" in Section 28.5. If the Agency believes that a mercury proposal must proceed as a "federally required rule" under a provision of the Act other than Section 27, then proceeding under Section 28.2 would be more appropriate than under Section 28.5 – because of the distinction between the two statutory provisions, namely the requirement in Section 28.5 that USEPA be "empowered to impose sanctions." 415 ILCS 5/28.5(c). The Agency would not have this hurdle to overcome under Section 28.2.[3]

[3] The Act does not require the Agency to propose any rulemaking under either Section 27 or 28.2 or 28.5; rather, the Act is permissive on this point and allows the Agency to proceed: "When the Agency proposes a rule that it believes to be a required rule. . . ." (Section 28.2, 415 ILCS 5/28.2); "When the CAAA requires rules other than identical in substance rules to be adopted, upon request by the Agency. . . ." (Section 28.5, 415 ILCS 5/28.5(d)). Nothing precludes the Agency from proceeding under Section 27 with a federally required rulemaking. *See* Section 27, 415 ILCS 5/27. We note to the contrary that Section 9.1(e) requires that the

The Agency's argument regarding the overlapping provisions of Sections 28.2 and 28.5 was in response to Participants' argument that Section 28.5(j) recognizes that the entirety of a proposed rule may exceed what USEPA "required to be adopted" and for which it is empowered to impose sanctions, though the Agency's argument wanders through a strained interpretation of the relationship between Sections 111 and 110 of the Clean Air Act, addressed in more detail below. For purposes of the current issue, Participants do not dispute that the Agency and the Board should tailor federally required rules to comport with Illinois' needs and policies. Moreover, Participants do not dispute that rules proposed under Section 28.5 may differ in language to the extent that USEPA grants flexibility to the states in adopting a rule that is "required to be adopted." Participants do dispute whether a rule that far exceeds the scope of what is federally required can proceed under Section 28.5. Section 28.5(j) states that it cannot. In fact, Section 28.5(j) is a powerful indication that the General Assembly understood that the Board could determine substantively, not just ministerially, what regulatory proposals could properly be addressed under Section 28.5 and wanted the Board not, necessarily, to reject an entire proposal if part of it was proper under that provision and could be separated out of the Agency's submittal.

The Board is authorized to consider rules that are "required to be adopted" and for which USEPA is empowered to impose sanctions under Section 28.5. If a rule or a portion of a rule does not meet these prerequisites, Section 28.5(j) provides that the Board may consider them under a separate docket under Title VII of the Act. The Board may also merely dismiss the rule or portion of a rule that exceeds what is "required to be adopted." It cannot, however, proceed

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definition of *VOM* be updated pursuant to the identical in substance procedures of Section 7.2(b): "In accordance with subsection (b) of Section 7.2, the Board shall adopt regulations identical in substance to the U.S. Environmental Protection Agency exemptions or deletions of organic compounds. . . ." 415 ILCS 5/9.1(e). (Emphasis added.)

under Section 28.5 with a rule that is not "required to be adopted" and for which USEPA is not empowered to impose sanctions upon a state for failure to adopt the rule.

The Agency admits that the Mercury Proposal is more stringent than what USEPA "requires to be adopted." Statement of Reasons, p. 18. If the rule were before the Board pursuant to Section 28.2 and even if the rule were appropriately before the Board under Section 28.5, the Board is precluded by the language in these two sections from considering those portions of the Mercury Proposal that exceed what is federally required and, in the case of Section 28.5, for which USEPA is empowered to impose sanctions. Arguably, under Section 28.2, the Board would have to merely dismiss those portions of the rule that exceed what is federally required to the extent that the excessive portions could be accurately determined.

The Agency points to comments it submitted in response to a Board member's questioning of the applicability of Section 28.5 to the proposal in PCB R99-10, where the Agency's comments addressed other rulemakings that were not identical to the federal requirement. Response, p. 17. Specifically, these comments referred to R98-24, the rule requiring enhanced vehicle inspection and maintenance ("I/M") in the Metro-East ozone nonattainment area when only "basic" I/M was required by the Clean Air Act. *See* Response, 17. The comments also referred to R94-21 regarding certain rules requiring reductions of VOM emissions from various industrial categories in order for the state to comply with the requirement of Section 182(b)(1) of the Clean Air Act. *See* Response, p. 17. Section 182(b)(1) of the Clean Air Act required states to submit and implement state implementation plans ("SIPs") that reduce mass emissions of VOM by 15% without specifying in the Clean Air Act how states were to obtain those reductions. The comments pointed to the various flexibilities available to the states, though rules implementing provisions that would result in the reduction of VOM emissions were

required. The reductions required under Section 182 referred to in the R99-10 comments were to be included in SIPs pursuant to Section 110 of the Clean Air Act. Enhanced I/M was required in the Metro-East area in order for the area to attain the 1-hour ozone standard and to meet rate of progress ("ROP") requirements. The additional reductions obtained through implementation of enhanced I/M over basic I/M were applied towards the 15% ROP reductions required by Section 182(b)(1). Likewise, the reductions obtained through increasing the stringency of the regulations for the various industrial categories identified in R94-21 were applied towards the 15% or 9% ROP reduction requirements of Section 182. Complying with the 15% and 9% ROP reduction requirements was federally required and USEPA was empowered to impose sanctions on the state if it failed to comply.

Neither those comments nor the Agency's arguments are apropos to the current question, which is whether USEPA is empowered to impose sanctions if Illinois fails to adopt the Mercury Proposal. The Agency has some flexibility in the manner in which it proposes to achieve compliance with the new source performance standards ("NSPS") for mercury. Participants' point in the Motion to Reject is that the flexibilities afforded a state do not justify or provide authorization in Illinois for the Agency to rely upon Section 28.5 for the rulemaking. Even if the Mercury Proposal were identical to a federal rule, because USEPA is not empowered to impose sanctions if Illinois fails to timely submit a mercury rule complying with the NSPS, Section 28.5 can never be applicable to any mercury rule. Of course, the Mercury Proposal is so radically more stringent than the NSPS that the rule is not federally required under any concept of that term. Moreover, the elements that make it so much more stringent cannot be separated from any elements that may be federally required such that the Board could separate the more stringent elements from the "required" elements, if there were any, pursuant to Section 28.5(j). Therefore,

the entire rule must be dismissed under Section 28.5, both because USEPA is not empowered to impose sanctions and because the Mercury Proposal is not federally required.

IV. SANCTIONS THAT USEPA IS EMPOWERED TO IMPOSE UNDER THE CLEAN AIR ACT DO NOT INCLUDE REGULATIONS REQUIRED UNDER SECTION 111 OF THE CLEAN AIR ACT.

The Agency argues that sanctions include not only the withholding of highway funds and increased new construction emissions offsets as set forth in Section 179(a) of the Clean Air Act, but also the withholding of Section 105 grant funding and the imposition of federal implementation plans ("FIPs"). Response, pp. 9-10. The Agency also argues that the federal plan that may be implemented pursuant to Section 111 is a FIP and, therefore, a sanction. Response, p. 16. With respect to its assertion that FIPs are sanctions, the Agency's argument is irrelevant because, as discussed below, a plan under Section 111 is not a SIP, and thus there can be no FIP. Even if a federal plan under Section 111 could be considered a FIP, the Agency is still incorrect in its interpretation of the Clean Air Act and strains logic in reaching its conclusions. The only sanctions available under the Clean Air Act are those listed in Section 179, *i.e.*, withholding highway funding, increased new source emissions offsets in nonattainment areas, and withholding Section 105 grant funds, in each case only for the failure to comply with mandates related to attaining or maintaining the national ambient air quality standards ("NAAQS"); the imposition of FIPs is not a sanction. Moreover, none of the Section 179 sanctions are even available for failure to adopt regulations meeting the Clean Air Mercury Rule ("CAMR")[4] caps because Section 111 of the Clean Air Act is not a program to which sanctions apply.

[4] 70 Fed.Reg. 28605 (May 18, 2005).

Section 179 of the Clean Air Act specifically limits the applicability of the sanctions to requirements related to SIPs:

> For any implementation plan or plan revision required under this part ["D, Plan Requirements for Nonattainment Areas" (table of contents) (Emphasis added.)] (or required in response to a finding of substantial inadequacy as described in section 7410(k)(5) [Section 110(k)(5)] of this title). . . .

42 U.S.C. § 7509(a). Nothing in Section 179 or the Clean Air Act as a whole suggests, let alone provides, that sanctions are available for any other purpose than requirements related to the NAAQS and SIPs, except for the reference contained in Sections 502(d) and (i). Participants recognize that Section 502 specifically references and applies the sanctions of Section 179. Section 502 is the only section of the Clean Air Act outside of Part D that applies any sanctions. Therefore, the applicability of Section 179 sanctions is limited, with the one exception, to requirements regarding NAAQS and SIPs. That exception applies to Title V permitting and is irrelevant here. There is simply nothing in Section 502 which suggests that sanctions described in Section 179 are available for a state's failure to adopt regulations implementing NSPS under Section 111.

Pursuant to Section 179, USEPA promulgated rules regarding the imposition of sanctions at 40 CFR § 52.31, 59 Fed.Reg. 39832 (August 4, 1994). These rules state at § 52.31(c):

> *Applicability.* This section shall apply to any State in which an affected area is located and for which the Administrator has made one of the following findings, with response to any part D SIP or SIP revision required under the Act. . . .

40 CFR § 52.31(c). (Emphasis added.) *Affected area* means:

> the geographic area subject to or covered by the Act requirement that is the subject of the finding and either, for purposes of the offset sanction under paragraph (3)(1) of this section and the highway sanction under paragraph (3)(2) of this section, is or is within an area designated nonattainment under 40 U.S.C. 7407(d)

> or, for purposes of the offset sanction under paragraph (3)(1) or this section, is or is within an area otherwise subject to the emission offset requirements of 42 U.S.C. 7503 [nonattainment New Source Review].

40 CFR § 52.31(a)(3). (Emphasis added.) In addition to the plain language in the Clean Air Act, USEPA interpreted that statutory language to apply only to plans required of the states to address NAAQS and SIPs and reflected that interpretation in its implementing rules.

The Agency argues that the withholding of grant funds issued to the state pursuant to Section 105 of the Clean Air Act constitutes a sanction under Section 179(a). Response, p. 15. The Agency is correct that withholding Section 105 grant funds may be a sanction under Section 179(a) when Section 179(a) applies, but that is irrelevant because Section 179(a) sanctions do not apply to state failures to adopt NSPS programs under Section 111. In footnote 6 in the Preamble to the § 52.31 rulemaking, USEPA stated:

> In addition, section 179(a) provides for an air pollution grant sanction that applies to grants that EPA may award under section 105. However, since it is not a sanction provided under section 179(b), it is not one of the sanctions that automatically apply under section 179(a).

59 Fed.Reg. 39832, 39833 (August 4, 1994). That withholding Section 105 grant funds is a sanction, however, does not expand the circumstances under which the sanction can be imposed.

The only circumstances under which a Section 179 sanction, including the grant sanction, can be imposed are those identified in the applicability language in Section 179(a), quoted above. USEPA cannot withhold Section 105 grant funding from the State of Illinois if the state fails to adopt rules and to implement a program required by the CAMR, because the foundation for the CAMR is not a Part D NAAQS or SIP requirement. Whether Section 105 grant funding applies to more than the attainment and maintenance of the NAAQS and the development and implementation of SIPs is irrelevant, because, pursuant to Section 179(a), USEPA's withholding

of those funds for any reason other than the state's failure to attain and maintain the NAAQS and to develop and implement SIPs is not a sanction. If USEPA does withhold Section 105 grant funds for the failure of states to perform actions called for under Section 111, the basis for the CAMR, it is merely acting within its budgetary constraints; it is not imposing a sanction pursuant to Section 179 or any other section of the Clean Air Act.

The Agency also argues that, according to *Commonwealth of Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996) ("*Browner*"), sanctions outside of Section 179 exist under the Clean Air Act. Response, p. 9. However, the court in that case referred to the "federal permit program implementation" under Section 502(d)(3) as a sanction. 80 F.3d 869, 882. The court, explaining the impact of this action, states that "the Commonwealth may choose to do nothing and let the federal government promulgate and enforce its own permit program within Virginia." 80 F.3d 869, 882. The court's reference to federal implementation of a Title V program as a sanction does not support the Agency's argument for several reasons.

As acknowledged above, Section 502(d) specifically provides for the imposition of sanctions pursuant to Section 179. Therefore, the imposition of sanctions pursuant to Section 502(d) is not outside of Section 179, as the Agency argues. Even if Section 502(d) provides that imposition of a federal Title V program is a sanction under Section 502, that is irrelevant to whether implementation of a federal program under Section 111 is a sanction. There is nothing in Section 111 or 179 that indicates that federal implementation of a program under Section 111 is a sanction, and the court does not refer to Section 111. Additionally, *Browner* addresses the Title V permit program in connection with a constitutional analysis, and it did not address the specific question at issue here: whether the Clean Air Act defines federal program implementation under Section 111 as a sanction within the meaning of the Clean Air Act. The

thrust of the case was an examination of the constitutionality of the Title V program and not what comprises a sanction in the first place. Such a passing *dicta* reference to sanctions is of no consequence, particularly when many courts have implied through similar or more compelling references that FIPs are not sanctions, as discussed below.

The Agency also cites *Commonwealth of Virginia v. United States*, 74 F.3d 517 (4th Cir. 1996) (*Virginia*), to support its contention that sanctions, in general, exist outside of Section 179 of the Clean Air Act and include FIPs. Response p. 10. However, the Agency has mischaracterized how the court views a FIP. In *Virginia*, contrary to the Agency's contention, the imposition of a FIP is not "clearly listed as a form of sanction." Response, p. 10. Rather, the court explains that "[t]he FIP provides an additional incentive for state compliance because it rescinds state authority to make the many sensitive technical and political choices that a pollution control regime demands." 74 F.3d 517, 521, quoting *Natural Resources Defense Council v. Browner*, 57 F.3d 1122, 1124 (D.C. Cir. 1995). (Emphasis added.) Moreover, the *Virginia* court describes the penalties under Section 179(b) specifically as "sanctions," distinguishing them from a mere "incentive" such as a FIP. 74 F.3d. 517, 520-21. If the court desired to characterize a FIP as a sanction, it would have done so since it knew to use such terminology for sanctions under Section 179(b). Nonetheless, the court chose to characterize a FIP as an incentive, a way to coax states into devising an acceptable SIP.

Many other cases fail to refer to FIPs as sanctions, while at the same time referring to penalties under Section 179 as such. For example, courts have stated that if a SIP is disapproved, then the state becomes "subject to sanctions, *see* CAA § 197, 42. U.S.C. § 7509, as well as to federally imposed clean air measures" under Section 110(c) of the Clean Air Act. *Wall v. USEPA*, 265 F.3d 426, 428 (6th Cir. 2001) (Emphasis added.); *see also Ober v. USEPA*,

84 F.3d 304, 306 (9th Cir. 1996) (stating that if a SIP is disapproved by USEPA, the state is subject to sanctions and the control measures of a FIP). In support of this distinction between penalties under Section 179(b) as sanctions and FIPs as incentives not regarded as sanctions, the Court of Appeals for the District of Columbia explains in *NRDC v. Browner* that "Congress established a number of incentives for states to comply with SIP submission deadlines," including mandatory sanctions, discretionary sanctions, and "imposition of a Federal Implementation Plan." 57 F.3d 1122, 1124. The court explains that while Section 179 requires USEPA to impose mandatory sanctions and Section 110(m) authorizes USEPA to impose discretionary sanctions, FIPs provide an "additional incentive" for state compliance. 57 F.3d 1122, 1124. Hence, once again, courts view FIPs as incentives, while at the same time, such courts view penalties under Sections 179 and 110(m) as sanctions. Thus, the Agency's argument that the Clean Air Act mandates sanctions apart from Sections 179 and 110(m) and includes FIPs as sanctions is supported neither by case law nor by the plain language of the Clean Air Act itself.

Regardless of the question of what comprises a sanction, however, the Agency is wrong in its interpretation of the Clean Air Act that sanctions would ever apply to a state action called for under Section 111. The Agency concludes that the "procedure similar to that provided by section 7410" (42 U.S.C. § 7411(d)(1)) and the "SIP-like procedure" and "SIP-like system" required by the CAMR (70 Fed.Reg. 28605, 28616 (May 18, 2005)) means that Section 110 of the Clean Air Act applies. Response, p. 16. Somehow, "similar to" has morphed into "pursuant to." These terms are definitely not the same. If Congress had intended the "procedure similar to that provided by section [110]" to be the Section 110 procedure, it would have said so; it would

have explicitly provided that state implementation plans, rather than something similar to state implementation plans, were required under Section 111. Congress chose not to do so.

Further, Congress had ample opportunity to make state actions called for under Section 111 subject to the planning requirements of Section 110 or to apply the Section 179 sanctions to Section 111 plans when it amended the Clean Air Act in 1990. However, Congress did not do that, either. Section 179 was added to the Clean Air Act with the 1990 Amendments. *Natural Resources Defense Council, Inc., v. Browner*, 57 F.3d 1122, 1122-25 (D.C. Cir 1995). Section 111 as it exists today, with minor amendments that demonstrate that Congress was not ignoring Section 111, predates the 1990 Amendments. *See Sierra Club v. Costle*, 657 F.2d 298, 317 (D.C. Cir. 1981) (explaining that Congress amended Section 111 in 1977, and through such amendments to Section 111, required EPA to revise standards of performance for electric power plants). Congress chose not to include Section 111 state plans among those for which USEPA could impose sanctions. Therefore, the State of Illinois cannot, through wishful pleading, change an action called for under Section 111 that is similar to a requirement under Section 110 into a Section 110 requirement and thereby argue that sanctions apply.

An excellent example of the distinction between what is sanctionable and what is not is the New Source Review Program. Under this program, states are required under Part D of the Clean Air Act to adopt regulations addressing construction by new sources in nonattainment areas ("NNSR"). 42 U.S.C. § 7503. Failure on the part of a state to adopt NNSR rules is sanctionable pursuant to Section 179. Participants understand that every state has adopted NNSR rules, and they are included in their SIPs. By contrast state plans implementing the prevention of significant deterioration program ("PSD") are included in Part C of the Clean Air Act and are not sanctionable. Approximately 13 states, including Illinois, do not have federally

approved state regulations addressing PSD. These states are either delegated authority (*e.g.*, Illinois) to implement PSD by USEPA or USEPA directly implements the program itself. These states, including Illinois, have not been subjected to sanctions as a result of not adopting and having approved their own state programs to address PSD. Likewise, states are not sanctioned for not implementing state-specific NSPS programs, Illinois included. The CAMR is an NSPS program, perhaps already covered by Illinois' delegation agreement.

The Agency is incorrect in its basic premise that USEPA is empowered to impose sanctions for a state's failure to take an action called for under Section 111 of the Clean Air Act and in its interpretation of what comprises a sanction, a question never truly reached since sanctions do not apply in the first place. Therefore, the Mercury Proposal cannot proceed pursuant to Section 28.5 of the Act, which relies upon the authority of USEPA to impose sanctions for the state's failure to act.

V. THE MERCURY PROPOSAL DOES NOT IMPLEMENT SECTION 9.10 OF THE ACT.

Section 9.10 of the Act clearly states that "[t]he Agency may file proposed rules with the Board to effectuate its findings provided to the Senate Committee on Environment and Energy and the House Committee on Environment and Energy. . . ." 415 ILCS 5/9.10(d), in part. (Emphasis added.) No other language in Section 9.10 of the Act allows the Agency to propose rules addressing nitrogen oxide, sulfur dioxide, or mercury. Rules proposed to implement Section 9.10 may only effectuate the findings made in the so-called Section 9.10 Report.[5]

The only place in the Section 9.10 Report that provides "findings" is the Executive Summary. There is, of course, discussion of mercury in the Section 9.10 Report. Response, p.

[5] Illinois Environmental Protection Agency, *Fossil Fuel-Fired Power Plants: Report to the House and Senate Environment and Energy Committees*, IEPA/BOA/04-020 (September 2004).

5. However, a "discussion of mercury" does not equate to a finding that the Mercury Proposal is implementing when the actual "finding" regarding mercury says:

> For mercury, the Illinois EPA believes that U.S. EPA should move forward in March 2005, pursuant to its Consent Decree, and promulgate national mercury standards for power plants that would not place Illinois at a competitive disadvantage. Although Illinois EPA strongly supports trading programs, mercury reduction cap and trade programs must be carefully designed so as to not create hot spots of elevated mercury.

Section 9.10 Report, p. ix. USEPA did, in fact, move forward and promulgate a national mercury standard in the CAMR. 70 Fed.Reg. 28605 (May 18, 2005). With respect to hot spots, USEPA explains that, "[a]s stated elsewhere in this action, EPA does not believe that utility-attributable hot spots will be an issue after implementation of CAIR and CAMR." 70 Fed.Reg. 28605, 28631 (May 18, 2005). Therefore, according to USEPA, the trading program was "carefully designed so as to not create hot spots of elevated mercury." Further, Participants maintain that the Mercury Proposal does, indeed, place them, and therefore Illinois, at a competitive disadvantage.[6]

Moreover, with all of the "vast coverage of mercury" and "lengthy discussion on mercury controls" (Response, p. 6) that is contained in the Section 9.10 Report, if the Agency believed that a finding other than the one quoted above was appropriate, then it could have and should have made it. But it did not, and it cannot create a "finding" now out of whole cloth to serve as the implementing authority for the Mercury Proposal. The Agency does not cite to any portion of the Section 9.10 Report that "contain[s] findings of the Illinois EPA that address the likely need for the control or reduction of mercury from coal-fired power plants," (Response, p. 7) (Emphasis added), and Participants have been unable to locate such findings. Moreover, a

[6] Without conceding that this rulemaking should proceed under Section 28.5, Participants will address this issue during the hearings on this rulemaking.

"likely need" cannot become, at a later date, a "finding" that serves as the implementing authority for the Mercury Proposal.

The fact of the matter is that the Mercury Proposal not only does not implement any "finding" that the Agency made in the Section 9.10 Report, it contradicts two findings. The Mercury Proposal contains no cap and trade proposal (CAMR does) and it will place Illinois at a competitive disadvantage. Section 9.10 cannot properly be relied upon as the implementing authority for the Mercury Proposal.

VI. CONCLUSION

WHEREFORE, for the reasons set forth above, Participants DYNEGY MIDWEST GENERATION, INC., MIDWEST GENERATION, LLC, and SOUTHERN ILLINOIS POWER COOPERATIVE reassert their Motion to Reject Filing and request that:

1. The Board reject the Agency's Mercury Proposal as being improperly premised on Sections 9.10 and 28.5 of the Act and dismiss the Mercury Proposal proceeding, with leave to refile under Section 27 of the Act; or

2. In the alternative, if the Board decides to accept for hearing the Mercury Proposal pursuant to Section 27 of the Act, the Board order the deletion of all references to Sections 9.10

and 28.5 and request the Department of Commerce and Community Affairs to conduct a full and formal economic impact study of the Agency's proposal pursuant to Section 27(b)(1) of the Act.

Respectfully submitted,

DYNEGY MIDWEST GENERATION, INC.,
MIDWEST GENERATION, LLC, and
SOUTHERN ILLINOIS POWER COOPERATIVE

by:

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Dated: April 5, 2006

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 5th day of April, 2006, I have served electronically the attached PARTICIPANTS DYNEGY, MIDWEST GENERATION AND SIPC'S REPLY TO THE AGENCY'S RESPONSE TO MOTION TO REJECT REGULATORY FILING, upon the following persons:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
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and by first-class mail with postage thereon fully prepaid and affixed to the following persons:

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