BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PROPOSED NEW 35 ILL. ADM. CODE 225	)	R06-25
CONTROL OF EMISSIONS FROM	)	(Rulemaking – Air)
LARGE COMBUSTION SOURCES	)	
35 Ill. Adm. Code 225.100, 200	)	
	)	
	)	

NOTICE OF FILING

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Please take notice that on April 5, 2006, the undersigned caused to be filed with the Clerk of the Illinois Pollution Control Board the **Petitioners' Reply to IEPA Response to Objection to Use of Section 28.5 Fast Track Procedures**, a copy of which is herewith served upon you.

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PETITIONERS' REPLY TO IEPA RESPONSE TO OBJECTION TO USE OF SECTION 28.5 FAST TRACK PROCEDURES

Petitioners, Ameren Energy Generating Company, AmerenEnergy Resources Generating Company and Electric Energy Incorporated ("Petitioners"), pursuant to the Hearing officer order of March 16, 2006 file this Reply to IEPA's Response to Petitioners' Objections ("Response") to the use of the fast track procedures of Section 28.5 to consider the IEPA's mercury proposal ("Proposal"). The Response relies on an idiosyncratic view of both the Illinois Environmental Protection Act (415 ILCS 5/1 et seq. "Act") and the Clean Air Act (42 U.S.C. 1857 et seq., "CAA") which finds no support in either statute, and flies in the face of most rules of statutory interpretation. The Board, however, is constrained by the actual language of the Act which requires that it determine that it is not authorized to use Section 28.5 to consider this proposal.

I. The Board has the Authority to Reject the Agency's Fast Track Proposal

Petitioners clearly documented the Board's authority to reject the Proposal. When confronted with the first Section 28.5 proceeding, the Board took the unusual step of adopting a resolution describing its procedures for its new rulemaking process. In that resolution, it stated plainly that it had the "inherent authority" to review the Agency's

submission for compliance with the Act and stood firm in that position against strenuous Agency objections. The Board did note that the Act constrained the time allowed for review which practically limited the level of review which could be achieved, but it never strayed from its position that it had the authority to conduct this review and codified its position in its procedural rules at Section 102.302(b).[1]

In the Response, the IEPA claims that the Board could only review its rules for procedural compliance and not for content. Yet it is ridiculous to state that the Board can review a proposal for mechanical and technical compliance with the Act yet has no authority to determine whether the proceeding it is about to undertake is even lawful. The Act specifically authorizes the Board to "determine, define and implement the environmental control standards" and "to act for the State in regard to the adoption of standards for submission to the United States under any federal law respecting environmental protection." (415 ILCS 5/5(b) and (c)). Section 28.5 represents a significant departure from the Board's normal rulemaking process and severely limits both public participation and Board evaluation of the proposal. It would completely undercut the Board's duty to comply with its authorizing statute to determine that the Board could not decide whether its procedures were lawful.

The IEPA's argument is essentially that it and not the Board has the sole authority to determine whether the Board is authorized to consider a certain proposal under Section 28.5. This would mean that the IEPA's decision to submit a proposal pursuant to Section 28.5 could be reviewed, if at all, only by the circuit courts. Yet the history of Section 28.5

[1] In the first of many mischaracterizations of Petitioners' Objection, IEPA states that Petitioners did not make any reference to Section 102.302(b). (Response at p. 4) In fact, Petitioners state in the first paragraph of their Objection that they bring the Objection pursuant to Section 102.302(b) and specifically discuss the Section in arguing for the Board's authority to reject the Proposal. (Objection at p. 4)

as described in the Objection (and which the IEPA does not refute) documents that this argument is untenable. As the IEPA acknowledges, Section 28.5 was implemented to solve the specific problem of expeditiously adopting certain federally required regulations. The IEPA originally proposed that it and not the Board would adopt these regulations, yet that proposal was rejected by the General Assembly. Instead Section 28.5, in keeping with the rulemaking structure already in the Act, requires the Agency to submit and the Board to adopt the proposed rule, albeit on a very circumscribed timetable. Nothing in this history, or in the statute itself, suggests that the Board could embark on a legally unauthorized procedure, simply because the IEPA told it to.[2]

The Board clearly and correctly believed that it had the authority to reject IEPA proposals which did not comply with Section 28.5 and codified that belief in its Resolution 92-2 and its procedural rules. As a result, the Board has the authority to reject this Proposal.

II. The Proposal is not Required to be Adopted under Section 28.5

As the Objection discussed and as the IEPA agrees, Section 28.5 only considers a proposal to be "required to be adopted" by the CAA if it is a regulation or part of a regulation "for which the USEPA is empowered to impose sanctions against the State for failure to adopt such rules." (Section 28.5(c)). Petitioners clearly demonstrated that the federal plan which could be imposed should Illinois not adopt CAMR is not a "sanction" as that term is used in the CAA and that the Proposal was so different than CAMR that it could not be said to be a rule required to be adopted to comply with CAMR. The IEPA's

[2] In an odd passage, the IEPA relies on Board Member Flemal's *dissent* to the Board's 1992 Resolution in support of the proposition that the Board lacks the authority to reject proposals that do not meet the statutory requirements of Section 28.5. (Response at p. 3-4) It need hardly be said that since Dr. Flemal saw fit to dissent to the Board's Resolution on this point, the Resolution must stand for the proposition that the Board has the authority to reject a Section 28.5 proposal which fails to meet statutory requirements.

Response was a confused hodge-podge of assumptions and wishful thinking not remotely supported by the Act or the CAA. The Board should find that the Proposal is not required to be adopted under Section 28.5.

A. A Federal Plan is Not a Sanction

Petitioner's Objection was straightforward and direct. USEPA is not authorized to impose sanctions against a state for its failure to adopt rules to implement CAMR. The term "sanctions" is used in the CAA to refer to specific, defined actions that the USEPA can take under certain conditions. Section 179 and Section 110(m) specifically authorize the use of "sanctions" when a state fails to adopt amendments to its State Implementation Plan ("SIP") to address compliance or non-compliance with National Ambient Air Quality Standards ("NAAQS"). "), and define specifically what those sanctions can be. In contrast, FIPs are defined, and imposition authorized, by section 110 (c). Hence, the CAA distinguishes between FIPs and sanctions. Similarly, EPA also treats FIPs and sanctions distinctly. Indeed, while EPA routinely calls the sanction actions authorized by the statute "sanctions,"[3] it does not refer to FIPs as sanctions, but rather as FIPs.[4] Since mercury is not a criteria pollutant under Title I for which a NAAQS has been adopted, none of the sanction provisions in Title I can apply. Therefore the actions specified and identified as "sanctions" under the CAA can not be imposed with respect to state CAMR proposals.

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[3] E.g., 58 Fed. Reg. 51,270 (Oct. 1, 1993)((rulemaking on "Application Sequence for Clean Air Act Section 179 Sanctions").

[4] E.g., in halting the sanctions clock for Virginia's failure to submit a plan to implement the NOx SIP Call, EPA stated: "when EPA finds that the State has made a complete SIP submittal under the SIP Call, then the 18-month [sanctions] clock [for emission offsets], or additional 6-month clock [for highway funds], stops and the sanctions would be lifted. In addition, CAA section 110 (c) provides that EPA can promulgate a FIP." 67 Fed. Reg. 48,032 (July 23, 2002)("Notice of halting sanctions clocks for the Commonwealth of Virginia's failure to submit required State Implementation Plan for the [NOx] Sip Call.").

Section 111 of the CAA itself furthers this statutory distinction between FIPs and "sanctions." Section 111(d)(2) identifies the steps USEPA can take when a state fails to adopt a federally mandated emissions guidelines under Section 111 (d)(1). In contrast to Section 110, which relates to plans to achieve attainment with the NAAQS, Section 111(d)(2) limits those steps to the adoption of a federal plan similar to plans adopted under Section 110(c) (FIPs) when a state fails to adopt its own plan. While Congress did reference Section 110(c) in defining the steps EPA could take in section 111(d)(2) it did not reference any of the other provisions available to EPA under Section 110, including sanctions available under section 110(m) or the related sanctions provision of section 179. The conclusion is inescapable that had Congress intended the Section 110 (m) or 179 sanctions to apply to Section 111 NSPS standards, it could have and would have done so. Having chosen not to link the Section 110 (m) and 179 sanctions to Section 111, Congress again, explicitly distinguished between sanctions and FIPs, and authorized the imposition of one but not the other when a state fails to adopt emission guidelines under Section 111 (d). There is no statutory basis to characterize the federal NSPS plan as a "sanction" within the meaning of the CAA.

The IEPA begins its assault on this inescapable conclusion by arguing that while "sanctions" under Section 28.5 probably referred to the "sanctions" of the CAA, there is nothing in the language of the Act which demands this conclusion and that the reference to the CAA is "instructive" but not "controlling." The plain language of Section 28.5, however, belies this approach. It authorizes fast track rulemakings only for "a rule which the CAAA requires to be adopted" and then defines that rule as "a regulation or part of a

regulation for which the USEPA is empowered to impose sanctions against the State for failure to adopt such rules." Since the term "sanction" is not defined in the Act but depends instead on the extent of the authority of the USEPA under the CAA, it cannot seriously be contended that "sanctions" means something other than how it is used in the CAA.

Additionally, as IEPA correctly points out at p. 8 of its Response, in enacting the fast track statute, "[t]he Illinois General Assembly was fully aware of the requirements of the CAA and the interplay of its sections." On that basis, the IEPA has no basis to suggest that the General Assembly did not mean to reference the specific and defined CAA "sanctions," when it limited Fast Track proceedings to those actions for which EPA is authorized to impose sanctions under the CAA. Nor is it plausible to suggest, as IEPA must, that the General Assembly meant to include FIPs as "sanctions" even though the CAA treats these separately, and despite the General Assembly's "knowledge of the interplay of the [CAA] sections." If a knowledgeable General Assembly meant to include FIPs, it would have said FIPs. Instead, it plainly meant to include "sanctions" and not FIPs, and to that end said "sanctions" but did not say "FIPs."

More fundamentally, IEPA's position sweeps too broadly. Since EPA is largely empowered to implement, through a FIP or a FIP-like process, any regulations states are minimally "required" to adopt under the CAA, IEPA's position that a FIP, or FIP-like procedure, constitutes a "sanction" authorizing use of the Section 28.5 procedures means that fast track is available for every proceeding to adopt air regulations which IEPA might submit. IEPA even admits as much in its Response at 7, arguing that the only limitation on use of fast track proceedings would be to "regulate a pollutant such as

carbon dioxide which is not required to be regulated by the USEPA." It is plain that if the General Assembly had intended for Fast Track procedures to be available for any rule required under the CAA it could and have and would have said so. Instead, the General Assembly defined "required to be adopted" as a rule that can result in "sanctions" if not adopted. Consequently, "sanctions" must mean something more than that which results if a state fails to adopt a rule require by the Act (i.e., a FIP). By equating "sanctions" with FIPs, IEPA would ignore this statutory definition, since EPA's FIP authority is commensurate with its authority to require a state to adopt a rule. That position violates fundamental rules of statutory construction, and defies common sense.

This conclusion is buttressed by the history of Section 28.5 recited in the Objection. Section 28.5 was adopted in order to avoid the enhanced sanctions allowed under the Clean Air Act of 1990 which applied exclusively to the failure to adopt or amend non-attainment plans. The concern regarding the financial penalties, defined as "sanctions" under Section 179 drove the General Assembly, not the concern that the USEPA could impose its own plan for achieving emissions guidelines under Section 111(d).

The IEPA also attempts to argue, at p. 16 of its Response, that Section 111 should be read as identical to Section 110 and that because Section 110 allows for Section 110 (m) and 179 sanctions, Section 111 should be interpreted to allow sanctions as well. This proposition is simply made up out of whole cloth, without statutory support or precedent. First, this argument relies upon the fanciful proposition that because section 111 (d) directs EPA to use "a procedure" similar to that under the FIP provisions of section 110 (c)(specifying required "findings" and timeframes) , it somehow also authorizes EPA to

impose substantive sanctions under section 110. As discussed above this attempt to meld Section 111(d) plans and Section 110(m) sanctions is contradicted by the language and structure of the CAA. Second, none of the U.S. EPA regulations providing for imposition of sanctions under sections 110 (m) and 179 suggests these sanctions are available for failure to adopt requirements under section 111 (d). None of the preambles supporting those regulations makes any such suggestion and EPA has never in the past actually imposed or attempted to impose sanctions from section 110 on states for failure to submit regulations required under section 111. Third, the regulations actually issued by USEPA to implement the requirement in section 111 (d) to "establish procedures" do not, in fact, contain any authority for EPA to do anything other than issue a plan for the state and contain no indication that sanctions under Section 110(m) or Section 179 can be imposed.[5]

The Agency also cites from cases in which courts characterized federal plans as sanctions to respond to the cases cited by Petitioners where courts characterized sanctions as different from the adoption of plans. In fact, in none of these cases was the question of whether a federal plan is a "sanction" *under the CAA,* which the Board must resolve here, before these courts. In *Virginia v. US,* the issue was whether the authorities provided to EPA under the CAA to prompt states to adopt required regulations were sufficiently punitive that they rose to the level of unconstitutional "coercion" of a state.[6] In this context, it clearly does not matter whether the EPA actions were "sanctions" under the CAA or not; it only matters whether the actions have the potential to be coercive of state action. In *NRDC v. Browner,* the court never in fact called FIPs sanctions, but rather

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5 40 C.F.R. § 60.27.

6 74 F.3d 517, 523 (4th Cir. 1996).

clearly distinguished between "sanction" under Section 179, and FIPs: "The 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. . . .In contrast to the mandatory sanctions, which each state can avoid merely by correcting the submission deficiency, FIP promulgation can be avoided only if EPA has actually approved the state's SIP."[7] Thus, while the court did describe a FIP as an "incentive" it did not describe it as a "sanction," and, in fact, when discussing both sanctions and FIPs together carefully distinguished between the two. In each of these cases, the courts were merely writing descriptions of the penalties for failing to adopt certain CAA standards and did so with varying levels of accuracy. None of them stand for the proposition that Congress intended the term "sanctions" under the CAA to include federal plans and FIPs.

Finally, the IEPA argues that the Board accepted the IEPA's conclusion that a federal plan is a sanction in two other proceedings and is bound by that precedent here. Yet this argument too falls on closer examination. While it is true that the Board accepted both rules for fast track proceedings, it is also true that the specific objections raised by Petitioners here were not raised and briefed before the Board in those cases. Its acceptance of the rules in those cases cannot be taken as precedent requiring the rejection of Petitioners' arguments. Further, in the only case in which the Board asked for further discussion to support the fast track rulemaking, the issue was not whether a sanction could be imposed but whether the Agency's proposal was consistent with the federal rule. IEPA Response to Comments (R99-10, February 8, 1999). If the Act does not authorize

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[7] 57 F.3d 1122, 1124 (D.C. Cir. 1995).

the Board to accept this proposal for fast track, its prior acceptance of other proposals cannot waive this statutory infirmity.

B. The Proposal is not required to be Adopted by CAMR

The IEPA spends much of its brief responding to an argument, never made by Petitioners, that Fast Track must be rejected because the Proposal is not identical to CAMR. Petitioners clearly acknowledged that Section 28.5 does not require an identical rule ands that it does not preclude a proposal more stringent than the federal rule. Yet the IEPA blithely ignores those portions of Section 28.5, discussed by Petitioners, which specifically limit the fast track proceedings to Agency proposals necessary to comply with those portions of the federal rules required to be adopted by the states to avoid sanctions. Since the Proposal here goes well beyond the requirements of CAMR, assuming for the sake of this argument that CAA sanctions could be imposed, much of this Proposal contains requirements which should be split off from those considered as necessary to comply with CAMR.

As stated in the Objection, Section 28.5 contains language specifically limiting its application to narrow portions of rules for which the EPA is authorized to impose sanctions. Section 28.5(c) refers to "regulations or parts of regulations" for which the USEPA is empowered to impose sanctions and Section 28.5(j) states that the Board may evaluate proposed rules that are not required to be adopted by the CAA in a second docket. The Act clearly states that the Board should limit the fast track process only to those regulations which are federally required and to exclude rules which are not so required.

Even assuming for the sake of this argument that sanctions could be imposed, the Proposal submitted by the IEPA is not required under CAMR. It strains credulity to contend that a 90% in-state reduction of mercury by 2009 is in any way "required" in order to meet EPA's mandate of about a 70% national mercury aggregate reduction, with trading, by 2018. Instead of addressing that which is "required" by CAMR (i.e. a phased compliance with specific state mercury emissions budgets), the IEPA chose to develop a completely different rule than CAMR and expects the Board to determine that this rule can be considered under fast track merely because it regulates the same substance as the federal rule. A difference of this sort between the IEPA rule and CAMR cannot plausibly be chalked up to an exercise in state discretion in implementing a federal mandate. It is, without question, a very different rule than is required by CAMR, and IEPA may not bootstrap a unique state mercury rule into a fast track proceeding simply because it is required to regulate mercury emissions.

II. **Conclusion**

In its Objection, Petitioners documented that Section 28.5 did not authorize the Board to accept the Proposal for a fast track proceeding. The Proposal is not "required by" CAMR in that there are no federal sanctions, as that term is defined in the CAA and used by EPA, which could be imposed for failure to adopt the rule and in that the Proposal itself involves significantly more than that which would be required to meet CAMR. As a result, it is neither fanciful nor speculative to identify the consequences should the Board use Section 28.5 to adopt this proposal. Given its statutory infirmities, the rule could be, in turn, suspended by JCAR, reversed by the appellate court, or not accepted by USEPA. Petitioners do not argue that the Board cannot consider this

Proposal under its normal rulemaking authority: indeed such consideration would allow the regulated community, the interested parties and the Board the ability to give the rule the close analysis and evaluation it deserves. But considering the rule under Section 28.5 would be outside of the Board's statutory authority, wasteful of public and private resources and a failure to allow appropriate public participation of a difficult and important topic.

For all these reasons, Petitioners respectfully request the Board to reject the proposed mercury rule from consideration under the fast track process of Section 28.5.

Dated this 5th day of April, 2006.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James T. Harrington, one of the attorneys for Petitioners, hereby certify that I served a copy of **Petitioners' Reply to IEPA Response to Objection to Use of Section 28.5 Fast Track Procedures** upon those listed on the attached Notice of Filing on April 5, 2006 via First Class Mail, postage prepaid.

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