ILLINOIS POLLUTION CONTROL BOARD
April 20, 2006

IN THE MATTER OF:	)	
	)	
PROPOSED NEW 35 ILL. ADM. CODE 225	)	R06-25
CONTROL OF EMISSIONS FROM LARGE	)	(Rulemaking - Air)
COMBUSTION SOURCES (MERCURY)	)	

ORDER OF THE BOARD (by G.T. Girard, A.S. Moore):

On March 14, 2006, the Illinois Environmental Protection Agency (Agency) filed a proposal for rulemaking pursuant to Sections 9.10, 27, and 28.5 of the Environmental Protection Act (Act) (415 ILCS 5/9.10, 27, and 28 (2004)). The proposal addresses the control of mercury emissions from coal-fired electric generating units beginning in July 2009. On March 16, 2006, the Board accepted the proposal for first notice under the provisions of Section 28.5 of the Act (415 ILCS 5/28.5 (2004)), without commenting on the merits of the proposal.

On March 15, 2006, the Board received three filings, which objected to the acceptance of the proposal under the Section 28.5. The objectors maintain that the rule is not "required to be adopted" under the provisions of the Clean Air Act (CAA) (42 U.S.C. §7401 *et seq*.). The Agency responded to the objections on March 29, 2006. Replies were allowed by hearing officer order and received on April 5, 2006.

In today's order, the Board will summarize the arguments of the objectors and responses of the Agency. The Board will also summarize the two additional comments received concerning the issue of acceptance of the proposal under Section 28.5. Finally, the Board will explain why the Board had decided that proceeding under Section 28.5 is appropriate.

PROCEDURAL BACKGROUND

On March 14, 2006, the Agency filed a proposal for rulemaking, which regulates the emission of mercury. The Agency filed the proposal pursuant to the fast-track provisions for air rulemaking in Illinois that are found at Section 28.5 of the Act (415 ILCS 5/28.5 (2004)). By statute, the Board is required to adopt for first notice a fast-track proposal within 14 days of receipt of the proposal. Therefore, on March 16, 2006, the Board adopted the proposal for first notice under Section 28.5. The Board order described the additional statutory requirements for scheduling three hearings. By hearing officer order of the same date, the first hearing was scheduled to begin on May 8, 2006, the second hearing to begin on June 5, 2006, and the third hearing, if necessary, on June 19, 2006.

The Board's March 16 opinion and order did not address the March 15, 2006 filings objecting to proceeding under Section 28.5. The objectors and their specific[1] filings are from:

[1] Collectively, the groups will be referred to as the "objectors" while individually they will be referred to as Dynergy, Ameren, and Kincaid, respectively.

1. Dynegy, Midwest Generation, and Southern Illinois Power Company, "Motion to Reject Regulatory Filing" (ObjMot1)
2. Ameren Energy Generating Company, AmerenEnergy Generating Company, and Electric Energy Inc. "Objection to Use of Section 28.5 Fast Track Procedures for Consideration of Mercury Proposal" (ObjMot2)
3. Dominion Kincaid, Inc.[2] "Motion for Board to Reject the Illinois Environmental Protection Agency's Proposal to Add Mercury Rules Under Section 28.5 Fast-Track Rulemaking Procedures" (ObjMot3)

On March 29, 2006, the Agency filed separate responses to each of the objectors. The response to Dynegy will be referenced as "Resp1". The response to Ameren will be referenced as "Resp2". And the response to Kincaid will be referenced as "Resp3". On April 5, 2006, the Board received replies from Dynegy (Reply1), Ameren (Reply2), and Kincaid (Reply3).

In addition to the filings by the objectors and the Agency, the Board received filings from the Illinois Environmental Regulatory Group (IERG) and the Illinois Public Interest Research Group and the Environmental Law and Policy Center (IPIRG). IERG's comment (IERGResp) also objects to the use of the fast-track procedures for this rulemaking. IPIRG's comment (PC 25) supports the use of the fast-track procedures.

The Board also received on April 13, 2006, a motion to appear *pro hac vice* from James W. Ingram. Mr. Ingram is a member in good standing of the State Bar of Texas and is senior counsel at Dynegy Midwest Generation, Inc. The motion is granted.

STATUTORY BACKGROUND

Section 9.10 of the Act provides in pertinent part:

> The 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 in accordance with subsection (b) of this Section. Any such proposal shall not be submitted sooner than 90 days after the issuance of the findings provided for in subsection (b) of this Section. The Board shall take action on any such proposal within one year of the Agency's filing of the proposed rules. 415 ILCS 5/9.10 (2004).

Section 28.5 provides in 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).

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[2] On April 7, 2006, a motion to correct Dominion Kincaid, Inc. to Kincaid Generation, L.L.C. was filed by Kincaid. The Board grants the motion.

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(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 the State for failure to adopt such rules. All fast-track rules must be adopted under procedures set forth in this Section, unless another provision of this Act specifies the method for adopting a specific rule.

(d) When the CAAA requires rules other than identical in substance rules to be adopted, upon request by the Agency, the Board shall adopt rules under fast-track rulemaking requirements.

* * *

(j) 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 (2004).

ISSUES

There are two main issues raised by the objectors. The first is whether the Board has the authority to review a proposal to determine if Section 28.5 of the Act (415 ILCS 5/28.5 (2004)) may properly be used to adopt a proposed rule. The second is generally whether Section 28.5 is appropriate for use in this rulemaking. In addition, Dynegy raises the issue of whether or not the proposal is properly brought pursuant to Section 9.10 of the Act (415 ILCS 5/9.10 (2004)).

ARGUMENTS

The Board will now summarize the arguments of the parties. The Board will address the arguments by issue.

Board's Authority Under Section 28.5

The Board will summarize the arguments by Ameren and follow with the Agency's response to the arguments. Then the Board will address each of the replies filed by the objectors.

Ameren

Ameren objects to the rulemaking petition filed by the Agency pursuant to the fast-track procedures under Section 28.5. ObjMot2 at 1. Specifically, Ameren "request[s] that the Board decline to accept the Proposed Rule for a Section 28.5 proceeding." ObjMot2 at 5.

Ameren argues that the Board has authority to consider its objection and to decline to consider the proposed rule under Section 28.5. ObjMot2 at 5. Noting the Board's statutory role in defining environmental control standards, Ameren argues that "the Board has the ultimate

responsibility to ensure that its rulemaking procedures meet the requirements of the Act and the IAPA [Illinois Administrative Procedure Act]." *Id*.; *see* 415 ILCS 5/5(b) (2004). Ameren further argues that the Board has already acknowledged this responsibility. ObjMot2 at 5. Ameren notes that, in a resolution first providing procedures with regard to fast-track rulemaking, the Board stated that it has "inherent authority to determine what documents to 'accept.'" *Id*., citing Clean Air Act Rulemaking Procedures Pursuant to Section 28.5 of the Environmental Protection Act, as Added by P.A. 87-1213, RES 92-2, slip op. at 2 (Dec. 3, 1992) (affirming Oct. 29, 1992 resolution). Ameren further notes that the Board later codified its authority to review fast-track rulemaking proposals submitted by the Agency. *Id*., citing 35 Ill. Adm. Code 102.302(b). Stressing that those rules require the Board to file the proposed rule for first notice within 14 days (35 Ill. Adm. Code 102.304(a)), Ameren requests that the Board decline to accept the proposed rule for consideration under Section 28.5.[3] ObjMot2 at 5.

Agency Response To Objection

In its response to Ameren's objection, the Agency notes that Ameren cites Board Resolution 92-2 in support of its claim that the Board may reject a rulemaking proposal filed by the Agency under Section 28.5. Resp2 at 2, citing Clean Air Act Rulemaking Procedures Pursuant to Section 28.5 of the Environmental Protection Act, as Added by P.A. 87-1213, RES 92-2 (Oct. 29, 1992). According to the Agency, however, "a reading of Board Resolution 92-2 shows the Board stated no such thing." Resp2 at 2.

The Agency notes that the resolution followed a question-and-answer format. Resp2 at 2. The Board stated that it did so in order to resolve questions regarding interpretation of specific provisions of Section 28.5 and to provide guidance to participants in proceedings under that section. Clean Air Act Rulemaking Procedures Pursuant to Section 28.5 of the Environmental Protection Act, as Added by P.A. 87-1213, RES 92-2, slip op. at 1 (Oct. 29, 1992). The Board in that resolution first addressed the content of Agency proposals. *Id*.; *see* 415 ILCS 5/28.5(e) (2004). In response to a question asking whether the Board would conduct any type of review for compliance with those content requirements before stamping the proposal as received, the Board replied it "will conduct a review of the Agency proposal for minimal compliance with the requirements of subsection (e)." Resp2 at 2, citing Clean Air Act Rulemaking Procedures Pursuant to Section 28.5 of the Environmental Protection Act, as Added by P.A. 87-1213, RES 92-2, slip op. at 1 (Oct. 29, 1992). The Agency characterizes this review as one ensuring that the required elements of a rulemaking package are present when it is submitted. Resp2 at 3; Resp1 at 1; Resp3 at 1; *see* 35 Ill. Adm. Code 102.302(a). The Agency concludes that "[t]he Board did not raise the possibility that it could actually reject an Illinois EPA request for fast-track rulemaking for any reason other than for failure to comply with the content requirements set forth in Section 28.5(e)." Resp2 at 2-3.

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[3] The Board notes that, in 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 for consideration of its mercury proposal filed March 29, 2006, the Illinois Environmental Regulatory Group "supports the motions and objection filed by the utility companies in this matter and incorporates their arguments."

The Agency emphasizes that the Board granted an Agency motion to reconsider a number of the provisions of Resolution 92-2. Resp2 at 3. Specifically, the Agency objected to the Board's decision to review Agency proposals for compliance with content requirements. *Id.*; Resp1 at 2; Resp3 at 2. The Agency notes that the Board, having reconsidered the issue, stated that it would conduct "a short review of an Agency proposal for minimal compliance with the requirements of Section 28.5(e)." Clean Air Act Rulemaking Procedures Pursuant to Section 28.5 of the Environmental Protection Act, as Added by P.A. 87-1213, RES 92-2, slip op. at 2 (Dec. 3, 1992). The Agency further notes that the Board characterized this as a "technical review . . . intended to promote, not hinder, efficiency." Resp2 at 3; Resp1 at 2; Resp3 at 2, citing Clean Air Act Rulemaking Procedures Pursuant to Section 28.5 of the Environmental Protection Act, as Added by P.A. 87-1213, RES 92-2, slip op. at 3 (Dec. 3, 1992). Stressing the Board's statement that it "will not delay a proposal because of minor problems" and the Board's concern in the original resolution with filing a proposed rule for first notice within 14 days, the Agency suggests that the Board cannot undertake a substantive review of a proposal filed under Section 28.5. Resp2 at 2-3.

The Agency proceeds to argue that, when the Board codified its resolution, it did not change its view of its authority to review a rulemaking proposal submitted under Section 28.5. Resp2 at 4; Resp1 at 3; Resp3 at 3, citing Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130, R 00-20. The Agency claims that only one provision of the Board's revised procedural rules addresses the Board's authority to reject a Section 28.5 proposal. Resp2 at 4; Resp1 at 3; Resp3 at 3, citing 35 Ill. Adm. Code 102.302(a). Characterizing that provision as a "checklist of items to be included in a fast-track proposal" (Resp2 at 4), the Agency suggests that the Board's authority is limited to rejecting a proposal for filing only if it lacks one or more items from that checklist. Resp1 at 1; Resp3 at 1. The Board's procedural rules "do not claim the ability to decide the merits of a submission under Section 28.5." Resp2 at 4; Resp1 at 3; Resp3 at 3. Consequently, the Agency claims "the Board cannot refuse to accept the rulemaking under either Section 28.5 of the Act or Section 102.302(b) of the Board's rules." Resp1 at 4; Resp3 at 4.

Replies To Agency Response To Objections

On April 5, 2006, the Board received a reply from Ameren (Reply2), a joint reply from Dynegy, Midwest Generation, and SIPC (Reply1), and a reply from Kincaid Generation (Reply3). The Board separately addresses the arguments in those replies below.

Ameren Reply. Ameren argues that it has "clearly documented the Board's authority to reject the Proposal." Reply2 at 1. Ameren argues that, in adopting Resolution 92-2, the Board stated that "it had the 'inherent authority' to review the Agency's submission for compliance with the Act." Reply2 at 1-2, citing Clean Air Act Rulemaking Procedures Pursuant to Section 28.5 of the Environmental Protection Act, as Added by P.A. 87-1213, RES 92-2, slip op. at 2 (Dec. 3, 1992). Ameren further argues that, while the Board noted the short amount of time in which it could conduct that review, "it never strayed from its position that it had the authority to conduct this review and codified its position in its procedural rules." Reply2 at 2, citing 35 Ill. Adm. Code 102.302(b).

Ameren characterizes as "ridiculous" the Agency's claim that the Board can review a rulemaking proposal for technical compliance with the Act but cannot determine whether the rulemaking procedure would be lawful. Reply2 at 2. Ameren notes that procedures under Section 28.5 are a "significant departure from the Board's normal rulemaking process" and that they limit the Board's evaluation of the proposed language. *Id.* If the Board could not determine whether the procedures were even lawful, claims Ameren, then the Board would be frustrated in exercising its statutory authority. *Id*., citing 415 ILCS 5/5(b), (c) (2004).

Ameren characterizes the Agency's argument as a claim that the Agency alone has authority to determine whether the Board is authorized to proceed under Section 28.5. Reply2 at 2. Ameren argues that, in light of the history of Section 28.5, this argument is "untenable." Reply2 at 2-3. Ameren states that the Agency had originally proposed that it would adopt certain federally-required regulations, but the General Assembly rejected that proposal. Reply2 at 3. Instead, claims Ameren, the General Assembly adopted Section 28.5, which follows the general rulemaking procedures in the Act on an accelerated schedule. *Id*. Ameren suggests that this history shows intent to give the Board an independent role in procedures under Section 28.5. *See id*. "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." *Id*. Accordingly, Ameren submits that the Board has the authority based on its procedural rules to reject the Agency's proposal. *Id*.

Dynegy Reply. Dynegy argues that "the Agency overlooks settled law that provides that a governmental agency always has the authority to determine whether it has jurisdiction over an issue." Reply1 at 2, citing Metropolitan Distributors, Inc. v. Illinois Dept. of Labor, 449 N.E.2d 1000, 1002 (1st Dist. 1983); Shapiro v. Regional Bd. of School Trustees, 451 N.E.2d 1282, 1288 (5th Dist. 1983). However, Dynegy argues, agencies are limited to the authorities specifically prescribed in a statue. Reply1 at 2 (citation omitted).

Dynegy claims the language of Section 28.5 provides that only the Agency and not the Board or regulated entities can propose rules. Reply1 at 3. Dynegy further claims that Section 28.5 does not give the Board jurisdiction to consider a rule that is not "required to be adopted" by the state under the CAA. *Id*, citing 415 ILCS 5/28.5(a) (2004). Dynegy argues that neither the Agency nor the Board "has jurisdiction under Section 28.5 unless the rule proposed is 'required to be adopted.'" Reply1 at 3 (emphasis in original).

Dynegy further claims that application of Section 28.5 is limited to federally-required rules for which the United States Environmental Protection Agency (USEPA) is empowered to impose sanctions upon the state. Reply1 at 3-4, citing 415 ILCS 5/28.5(c) (2004). Dynegy further claims that the plain meaning of "empower" requires that "there must be a specific grant of authority to USEPA to impose sanctions." Reply1 at 4. Dynegy therefore concludes that, unless USEPA is explicitly empowered to sanction the state for failure to adopt a mercury rule, then the Agency lacks jurisdiction to propose and the Board lacks jurisdiction to consider that rule under Section 28.5. *Id*.

Dynegy notes the Agency's claim that the Board, in adopting Resolution 92-2, acknowledged limited authority to determine whether it had jurisdiction over a rulemaking filed under Section 28.5. Reply1 at 5, citing Clean Air Act Rulemaking Procedures Pursuant to Section 28.5 of the Environmental Protection Act, as Added by P.A. 87-1213, RES 92-2 (Oct. 29, 1992). Dynegy argues that "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." Reply1 at 5. In fact, argues Dynegy, the Board lacks authority to limit its own jurisdiction, as jurisdiction is conferred statutorily. *Id.*

Dynegy further argues that "Section 28.5 jurisdiction has not been seriously disputed in prior rulemakings." Reply1 at 5. Dynegy suggests that the Board, in the absence of such a dispute, has assumed that the Agency has properly invoked Section 28.5. *Id.* Accordingly, argues Dynegy, the Board has not "examined the issue of jurisdiction and the relationship of that jurisdiction to the sanctions that USEPA is empowered to impose." Reply 1 at 6. Dynegy claims that, if the Board accepts the Agency's argument that the Board can conduct only a technical review of a rule proposed under Section 28.5, then the Agency would be free to propose under Section 28.5 rules that are "totally unrelated to the Clean Air Act" and presumed to be facially invalid. *Id.* Dynegy describes this result as "ridiculous" and an illustration that the Board must have authority to consider whether it has jurisdiction over proposed rules filed with it. *Id.*

Kincaid Reply. Kincaid states that the Board "has the statutory authority to reject a proposal as not required to be adopted under the language of Section 28.5." Reply3 at 2. Kincaid argues that the Board's interpretation of Section 28.5 must be based on the presumption that the General Assembly did not intend any absurd or unjust result. *Id.* (citation omitted). Kincaid further argues that it would be absurd to require the Board to act accept and act upon this proposal without considering jurisdictional prerequisites. *Id.* Kincaid further suggests that it would be absurd to require the Board to adopt regulations that will be challenged and invalidated because the Board lacked jurisdiction to consider them. *Id.*

Kincaid argues that "the Board has the inherent authority to do all that is reasonably necessary to execute its specifically conferred statutory power." Reply1 at 2, citing People v. Archer Daniels Midland Corp. 140 Ill. App. 3d 823, 825 (3rd Dist. 1986). Because Section 28.5 gives the Board authority to promulgate certain rules on a fast-track schedule, Kincaid argues that the Board inherently may determine whether proposed rules are eligible for consideration under that section. Reply3 at 2-3. Kincaid further argues that "Illinois courts have upheld the ability of an agency to decline taking an action due to lack of jurisdiction." Reply3 at 3 (citations omitted).

With regard to Board Resolution 92-2, Kincaid argues that its mere existence shows "the Board's understanding that it has the power to interpret and apply Section 28.5." Reply3 at 3. Kincaid stresses that the Board, in addressing the Agency's motion to reconsider the resolution, stated that it "has inherent authority to determine what documents to 'accept'." *Id.*, citing Clean Air Act Rulemaking Procedures Pursuant to Section 28.5 of the Environmental Protection Act, as Added by P.A. 87-1213, RES 92-2, slip op. at 2 (Dec. 3, 1992). Kincaid also disputes the Agency's argument that Board Resolution 92-2 limits the Board to a technical review of

rulemaking petitions filed under Section 28.5. Reply3 at 3-4. Kincaid notes that Board Resolution 92-2 by its own terms addresses only specific subsections of Section 28.5 and is not an exhaustive review of that provision. Reply3 at 3. Kincaid argues that the Agency refers to language in the resolution regarding compliance with technical requirements for submissions under Section 28.5(e) and not regarding compliance with sections 28.5(a) and (c). *Id*.

Finally, Kincaid characterizes the Agency's interpretation of the Board's procedural rules as "strained." Reply3 at 4, citing 35 Ill. Adm. Code 102.302(b). Specifically, the Agency argues that the Board may only reject a proposal filed under Section 28.5 if it fails to meet the filing requirements of section 102.302(a). Reply3 at 4, citing 35 Ill. Adm. Code 102.302(a). Kincaid stresses that this language provides only that the Board "may" reject a proposal that fails to satisfy the content requirements. Reply3 at 4, citing 35 Ill. Adm. Code 102.302(b). "This section does not limit the Board's ability to reject a proposal for failure to meet the content requirements of subsection (a)." Reply3 at 4. Kincaid concludes that there is no basis in the Board's procedural regulations to conclude that the Board cannot determine whether a valid Section 28.5 rulemaking proposal has been submitted to it. *Id*.

Fast-Track Procedures

The issue of whether or not fast-track procedures are appropriate in this rulemaking hinges on two factors. One is whether or not the rules are "required to be adopted" as that phrase is used in Section 28.5 of the Act (415 ILCS 5/28.5 (2004)). The second is whether rules adopted using the fast-track procedures can be more stringent than the federal requirements upon which the rules are based. The following discussion will address each of these factors. The following paragraphs will be divided into those two areas with discussion of the objectors' motions, then the Agency response and finally the objectors' replies.

Defining "Requires to be Adopted" and Sanctions

Objectors' Motion. The objectors assert that only rules that the CAA "requires to be adopted" may be processed using the fast-track procedures. The objectors conclude that the proposal may not be processed using the fast-track procedures because the mercury emission proposal filed by the Agency is not a rule which the CAA "requires to be adopted".

Section 28.5 of the Act defines "requires to be adopted" as "those regulations or parts of regulation for which the USEPA is empowered to impose sanctions against the State for failure to adopt such rules." 415 ILCS 5/28/5 (2004). The objectors maintain that the plain language of Section 28.5 of the Act precludes the adoption of the proposal as a fast-track rule. ObjMot2 at 1. Because only those rules that the State must adopt or face sanctions may be processed using the fast-track procedures, the objectors argue that adoption of the proposal pursuant to the fast-track procedures exceeds the Board's authority and the rules will be rendered void. *Id*.

The objectors maintain that the CAA authorizes the imposition of sanctions in limited circumstances explained in Section 179 of the CAA (42 U.S.C. §7509). ObjMot3 at 2. Further, the term sanctions has been narrowly defined under the CAA. ObjMot2 at 5. Sanctions may be imposed if a state fails to submit a State Implementation Plan (SIP) or if the SIP has been

determined to be insufficient. The objectors assert that SIPs are required only for those contaminants for which national primary or secondary ambient air quality standards (NAAQS) have been established. ObjMot3 at 2. Objectors also point to Section 110(m) of the CAA (42 U.S.C. §7410) which allows the USEPA to impose sanctions on a less than statewide basis, but refers to Section 179 for the appropriate basis and procedures for imposing sanctions. *Id*.

The objectors assert that under the CAA, sanctions can be imposed only for deficiencies in a SIP to achieve compliance with a NAAQS adopted by the USEPA under Section 109 of the CAA (42 U.S.C. §7409). ObjMot3 at 3. The objectors note the USEPA has not adopted a NAAQS for mercury and mercury is not a criteria pollutant. Therefore, the objectors claim that mercury does not come within the purview of the SIP process and is not subject to the sanction provisions of Section 179. *Id*. Thus, the objectors maintain that USEPA may not impose sanctions against Illinois for failing to adopt mercury rules. *Id*.

In support to their argument that "sanctions" are limited to those delineated in Section 179, Ameren cite to several federal cases. Ameren asserts that "numerous courts have recognized the distinction between a [federal implementation plan] (FIP) and the 'sanctions' authorized under Section 179". ObjMot2 at 10. The objectors cite Virginia v. EPA, 74 F.3d 517 (4th Cir. 1996), Wall v. EPA, 265 F.3d 426 (6th Cir. 2001), Ober v. EPA, 84 F.3d 304 (9th Cir. 1996), and Appalachian Power Co. v. EPA, 249 F.3d 1032 (D.C. Cir. 2001). Ameren asserts that courts have noted the functional distinction that a FIP is a mechanism USEPA uses to ensure federal requirements are met, while a sanction is a punishment. ObjMot2 at 11, citing *e.g.*, Coalition for Clean Air. Southern California Edison Co., 971 F.2d 219 (9th Cir. 1992) and Natural Resources Defense Council v. Browner, 57 F.3d 1122 (D.C. Cir. 1995). Ameren also maintains the Agency recognizes the difference between sanctions and a FIP in that the Agency has, in previous rulemakings, listed sanctions and a FIP as different consequences for the failure to adopt the rule. ObjMot2 at 11.

Dynegy takes issue with the Agency's reliance on Virginia v. Browner, 80 F.3d 869 (4th Cir. 1996) in the statement of reasons for support of the proposal being brought pursuant to Section 28.5. ObjMot1 at 11. Dynegy asserts that the focus of the court in Virginia v. Browner was on constitutional questions under Title V of the CAA and not Section 111. *Id*. Dynegy maintains that the Title V provisions specifically refer back to Section 179 sanctions. *Id*. In contrast, argues Dynegy, Section 111 does not use the term sanction and does not refer to Section 179. *Id*.

The objectors argue that the adoption of a mercury rule is required pursuant to Section 111 of the CAA (42 U.S.C. §7411), which establishes standards of performance for limiting mercury emissions from new and existing coal-fired plants. ObjMot3 at 3. According to the objectors, Section 111(d) authorizes the USEPA to promulgate standards that the states must adopt. *Id*. The objectors concede that if a state fails to adopt a satisfactory plan, the USEPA has the authority to prescribe a plan for the state or enforce the existing plan. *Id*. However, the objectors maintain that prescribing a plan or enforcing a plan under Section 111(d) is not a sanction. *Id*. Ameren maintains that the parallel construction of "sanctions" in the CAA and Section 28.5 demonstrates that the Act does not contemplate other types of actions which might be described as "sanctions" to justify fast-track rulemaking. ObjMot2 a 13.

The objectors argue that Section 179 of the CAA (42 U.S.C. § 7509) enumerates the only sanctions in the CAA. ObjMot3 at 3. Further, the objectors maintain that failure to adopt a rule regulating the emission of mercury will not result in sanction under Section 179. *Id*. Therefore, the objectors assert this rulemaking does not propose "regulations or parts of regulation for which the USEPA is empowered to impose sanctions against the State for failure to adopt such rules" (415 ILCS 5/28/5 (2004)). Thus, the objectors maintain that the Board should not proceed with this rulemaking pursuant to Section 28.5. ObjMot3 at 4.

Agency Response. The Agency asserts that the USEPA may impose sanctions if Illinois fails to either codify the federal clean air mercury rule (CAMR) or to properly submit a plan to USEPA. The Agency maintains that the objectors' arguments are "clearly based on the premise" that the term sanctions, as used in Section 28.5, is to be "given the very same meaning and effect as that term is used in the CAA." Resp2 at 9. The Agency argues that there is nothing in Section 28.5 that indicates that such a proposition is correct. *Id*. The Agency concedes that taken in context the term "sanctions" may be analogous in both the Act and the CAA; however, the Federal framework for sanctions is instructive and not controlling. *Id*.

The Agency then looks to several cases for instruction on what the term "sanctions" may mean under the CAA. The Agency points to Virginia v. U.S., 74 F.3d 517 (4th Cir. 1996) wherein the Court of Appeals included the possibility of imposing a FIP as a sanction available under the CAA. The Agency maintains that the objectors suggest that the court differentiated between the imposition of a FIP and the imposition of sanctions; however, the Agency disagrees that the case supports this proposition. The Agency also takes issue with the objectors reliance on Natural Resources Defense Council v. Browner, 57 F.3d 1122 (D.C.Cir. 1995) as the Agency also believes that the court includes the imposition of a FIP as a sanction.

The Agency asserts that the NRDC court later found, more specifically, that federal sanctions would include the takeover of permit-issuing authority in a state. Resp2 at 10, citing Appalachian Power Company v. EPA 208 F.3d 1015 (D.C.Cir. 2000). In Appalachian Power, the Court referred to another case, which the Agency offers as additional support of its position. That case is Virginia v. Browner 80 F.3d 869 and in that case the court stated that "a third sanction eliminates the state's ability to manage its own pollution control regime." Resp2 at 10, citing Virginia v. Browner 80 F.3d at 874. The Agency concedes that the Illinois mercury proposal is not implementing the same type of program as covered in all of these cases; however, the Agency asserts that imposition of a "Title V program by the federal government upon a state is no different than the imposition of a FIP upon a state." Resp2 at 11. The Agency argues that neither a FIP nor a federally imposed Title V program are listed as sanctions under Section 179 of the CAA (42 U.S.C. § 7509); however both are firmly considered sanctions. The Agency asserts that this refutes the objectors' contention that only those items included under Section 179 are sanctions.

The Agency argues that regulations authorized by Section 111(d) of the CAA (42 U.S.C. § 7411) are "considered" as if the regulations were promulgated under 110 of the CAA (42 U.S.C. § 7410) and, the USEPA has the same authority as it would under Section 110(c). Resp2 at 15. Reading the language of the CAA together, the Agency asserts that the sanctions of

Section 110(m) are available to the USEPA for any Illinois failure to adopt mercury emission regulations. Resp2 at 16. Further, the Agency asserts that the preamble to the CAMR specifically states that USEPA has the authority to sanction a state by imposing a federal plan. *Id*.

Objectors' Replies. The objectors maintain that the language of Section 28.5 contains jurisdictional prerequisites that both the Board and the Agency must meet before a rulemaking may proceed under that section. Reply1 at 5. The objectors argue that the Board does not have jurisdiction to consider this proposal under Section 28.5 because USEPA is not empowered to impose sanctions if the Board fails to adopt a mercury rule compliant with the CAMR. Reply1 at 6. Dynegy further asserts that no mercury proposal could be adopted pursuant to Section 28.5 because USEPA cannot impose sanctions if Illinois fails to adopt the rule. Reply1 at 11.

The objectors argue that because a plan developed pursuant to Section 111 of the CAA (42 U.S.C. § 7411) are not SIPs, the imposition of a federal plan, also under that section, is not a FIP. Reply1 at 12. Dynegy states that even if a federal plan under Section 111 of the CAA could be considered a FIP, the Agency's interpretation of the CAA "strains logic" to reach the Agency's conclusions. *Id*. The objectors reiterate that the only sanctions available under the CAA are those specified under Section 179 of the CAA (42 U.S.C. § 7509). *Id*. Further, Section 179 sanctions are limited, with one exception, to requirements regarding NAAQS and SIPs. Reply1 at 12-13. In sum, the objectors maintain that Section 179 sanctions are not available for failure to implement a mercury rule. Reply1 at 13.

Dynegy also argues that the USEPA has interpreted the CAA, through rulemaking, as applying sanctions only to NAAQS and SIPs. Reply1 at 14. Dynegy agrees that withholding Section 105 grant funds can be a sanction when Section 179 sanctions apply. *Id*. However, Section 179 sanctions do not apply to a state's failure to adopt mercury rules. *Id*. Dynegy asserts that Congress choose not to include Section 111 state plans among those for which USEPA can impose sanctions and therefore Illinois cannot argue that sanctions apply. Reply1 at 18.

The objectors also reiterate and expand their arguments that the case law relied upon by the Agency does not support the Agency's position. Specifically, Dynegy notes that the program at issue in the Virginia v. Browner case was the Title V permit program under the CAA and not a program under Section 111 of the CAA (42 U.S.C. § 7411). Reply1 at 15. Further, Dynegy asserts that the Title V program references sanctions under Section 179, while Section 111 does not. *Id*. Finally, Dynegy maintains that the court addresses the Title V permit program in connection with a constitutional argument in Virginia v. Browner and the court did not specifically address the issue before the Board. *Id*.

IERG. IERG supports the objectors and incorporates their arguments. IERGResp at 2. IERG argues that CAMR was adopted under Section 111 of the CAA (42 U.S.C. § 7411) that deals with standard of performance. IERGResp at 3. IERG asserts that under Section 111(d), states are to submit an implementation plan that is similar to a SIP for a NAAQS. IERGResp at 4-5. IERG maintains that any potential imposition of a federal plan in this instance is not a sanction under the CAA. IERGResp at 5.

IPIRG. IPIRG supports the use of fast-track procedures to adopt mercury emissions. PC 25 at 1. IPIRG argues that fast-track rulemaking is necessary to ensure that the November 17, 2006 federal deadline is met. *Id*. IPIRG asserts that failure to meet that deadline could divest Illinois of the authority to develop a mercury reduction implementation plan and lead to sanctions. *Id*.

Rules the CAA "Requires to be Adopted" (Section 28.5(j))

Objectors' Motion. The objectors argue that even if a mercury proposal could proceed under Section 28.5 of the Act (415 ILCS 5/28.5 (2004)), only those portions of the rule, which are necessary to alleviate a sanction, can proceed. ObjMot1 at 13; ObjMot2 at 8. The objectors rely on Section 28.5(j) to support their argument. The objectors argue that a plain reading of Section 28.5(j) of the Act (415 ILCS 5/28.5(j) (2004)) establishes that only the portions of a proposal that satisfies the federal requirement can proceed under Section 28.5. ObjMot1 at 13. Therefore the objectors assert that the increment between what is federally required and what the Agency has proposed should be considered under Section 27 of the Act (415 ILCS 5/27 (2004)). *Id*.

The objectors assert that in this case the difference between what is federally required and what is proposed make it virtually impossible for the Board to separate out the provisions. ObjMot1 at 13. Therefore, the objectors argue that the Board must consider the entire proposal pursuant to Section 27. ObjMot1 at 14.

The objectors assert that the Agency acknowledges that the proposal is completely different than the regulatory requirements of CAMR. ObjMot2 at 9. Objectors point out that the CAMR requires Illinois to meet an emission budget by 2010 based on a 21% nation wide reduction. *Id*. Conversely, the objectors note that the proposal requires 90% reductions in-state by 2009. *Id*. CAMR also allows for trading of emissions credits, while the proposal prohibits out-of-state trading, according the objectors. *Id*. Based on these differences, Ameren argues that the Agency cannot "bootstrap its discretionary determination" to propose unrelated mercury regulations into a fast-track proceeding by claiming inaccurately that the regulations are required by the CAA. ObjMot2 at 10.

Agency Response. The Agency asserts that the procedures of Section 28.5 are not limited to adopting rules identical to the CAA where states have significant discretion to decide how to comply with the federal requirements. Resp2 at 5. Further, the Agency asserts that the CAA gives states the authority to go beyond what is in the federal rule. Resp2 at 6.

The Agency argues that Section 28.5 was not passed in a vacuum and should be read in conjunction with Section 28.2 and 7.2 of the Act (415 ILCS 5/28.2. 7.2 (2004)). Resp2 at 7. The Agency argues that the language of Section 28.5 should be read as not allowing the Board to use the fast-track procedures to regulate a substances like carbon dioxide, which the USEPA does not require be regulated. *Id*. The Agency points out that Section 7.2 of the Act provides procedures for adopting identical in substance rules and Section 28.2 of the Act contains a provision for "federally required" rules. *Id*.

The Agency asserts that if the objectors were correct and Section 28.5 were read to only allow fast-track procedures for regulations that are no different than the federal counterpart, then the Act would contain multiple statutory sections that serve the same purpose. Resp2 at 7-8. The Agency maintains that to have multiple statutory provisions which serve the same purpose would be absurd and inconvenient, which is exactly the consequence to be avoided when interpreting a statute. Resp2 at 8, citing Bowman v. American River Transportation Company, 217 Ill. 2d 75 (2005).

Objectors' Replies. Dynegy replies that the Agency appears to be confusing Sections 7.2, 28.2 and 28.5, which are actually significantly different. Reply1 at 7. Dynegy argues that the language of Section 28.2 refers to "federally required" while Section 28.5 refers to rules that the CAA "requires to be adopted" and clearly the General Assembly's language is markedly different. Reply1 at 8. Dynegy maintains that in order for the Board and the Agency to use the fast-track procedures, the rule must be one the CAA "requires to be adopted" and if a rule or a portion of the rule does not meet that requirement, the rule must be processed under Section 27. Reply1 at 9. Dynegy asserts that the Board is precluded from considering the mercury proposal under the fast-track procedures because portions of the rule are not rules that the CAA "requires to be adopted" to meet the federal standards. Reply1 at 10.

Dynegy concedes that the Agency has flexibility in the manner in which the Agency chooses to achieve compliance with mercury emission requirements. Reply1 at 11. However, Dynegy maintains that the flexibilities do not allow the Agency to use the fast-track procedures for adoption of the mercury emission requirements. *Id*.

Ameren concedes that Section 28.5 does not require an identical in substance rule, nor does it preclude a proposal more stringent than federal requirements. Reply2 at 10. However, Ameren charges this proposal goes well beyond the federal requirements of CAMR and much of the proposal should be split off. *Id*. Ameren asserts that the Agency developed a completely different rule than CAMR and expects that the Board will consider the proposal using the fast-track procedures merely because the proposal regulates the same substance. Reply2 at 11.

IERG. IERG asserts that the only authority given to the Board under the fast-track rulemaking for non-required parts of the mercury rulemaking is Section 28.5(j) of the Act (415 ILCS 5/28/5(j) (2004)). IERGResp at 6.

Use of Section 9.10 as Authority

Objectors' Motion. Dynegy asserts that the Agency's reliance on Section 9.10 of the Act (415 ILCS 5/9.10 (2004)) is erroneous and the mercury proposal does not qualify under that section. ObjMot1 at 4. Dynegy argues that Section 9.10 does not apply to this rulemaking as the proposal does not effectuate any findings from the report to the General Assembly prepared by the Agency pursuant to Section 9.10. ObjMot1 at 5. Dynegy maintains that the Agency made no findings regarding mercury in the report and made no final recommendation that would make it necessary or appropriate to propose a 90% reduction in mercury emissions. ObjMot1 at 5-6.

Therefore, Dynegy argues that the Board must "reject the proposal to the extent the proposal relies on or is premised upon Section 9.10 as its authority." ObjMot1 at 7.

Agency Response. The Agency asserts that citation to Section 9.10 is appropriate as the report to the General Assembly contains an extensive discussion of mercury. Resp1 at 4-5. The Agency's findings include the areas of health impacts, electricity reliability, and electricity cost and job impacts. *Id*. The Agency maintains that due to the vast coverage of mercury in the Section 9.10 report, the citation to Section 9.10 is a logical outgrowth. Resp1 at 6. The Agency also argues that Section 9.10(d) provides in part that the Agency may file proposed rules to effectuate the findings and clearly Section 9.10 bestows upon the Agency the discretion to propose regulations that control the emission of mercury. *Id*.

The Agency maintains that the Section 9.10 report does contain findings that address the likely need for control or reduction of mercury emissions. Resp1 at 7. The Agency asserts that Section 9.10 grants the Agency the discretion to propose regulations. *Id*. Further, the Agency argues that Section 9.10 does not limit the Agency's authority to propose or the Board's authority to adopt rules addressing the control of mercury emissions. Resp1 at 7-8.

Objectors' Replies. Dynegy argues that rules proposed to be implemented under Section 9.10 are those which effectuate the findings of the report to the General Assembly. Reply1 at 19. Dynegy maintains that the findings are in the "Executive Summary" of the report and there is a discussion of mercury. *Id*. However, Dynegy asserts that a discussion does not equate with an actual finding. Reply1 at 20. Dynegy opines that the Agency cannot create a finding now to serve as implementing authority for the mercury proposal. *Id*.

DISCUSSION

The Board now turns to a discussion of the issues. The Board will discuss each issue raised in the arguments above.

Board's Authority Under Section 28.5

The Board notes that its powers are limited to those vested in it by the Environmental Protection Act. *See* Chemetco, Inc. v. PCB, 140 Ill. App. 3d 283, 286 (5th Dist. 1986); 415 ILCS 5/5 (2004). The Board's role is analogous to a court of limited jurisdiction. The Board can act only pursuant to the authority conferred on it by statute, and any action outside the authority granted to it is void. Pickering v. Illinois Human Rights Comm'n., 146 Ill. App. 3d 340, 352 (2nd Dist. 1986); *see* Landfill, Inc. v. PCB, 74 Ill. 2d 541, 560 (Ill. 1978) (concluding prior to statutory amendment that challenged rules "are unauthorized administrative extensions of the Board's authority"). However, "[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 Manuf. Co. v. IEPA, 8 Ill. App. 3d 1018, 1024 (4th Dist. 1972).

When the Agency argues that the Board's review of this proposal is limited to technical or procedural issues, it disregards well-settled case law providing an agency has authority to

determine whether it has jurisdiction over a proceeding. For example, in Metropolitan Distributors, Inc. v. Dept. of Labor, 114 Ill. App. 3d 1090 (1st Dist. 1983), the petitioners sought in circuit court to enjoin the department from investigating claims regarding severance pay. The circuit court entered a permanent injunction, finding that severance pay lay outside the department's jurisdiction to investigate. Metropolitan Distributors, 114 Ill. App. 3d at 1092. The appellate court found that injunctive relief had been improperly granted and began its analysis by stating its agreement with the department "that the initial determination of whether an agency has jurisdiction over a particular matter should be made by the agency itself." *Id*. (citations omitted).

Similarly, in Shapiro v. Regional Bd. of School Trustees, 116 Ill. App. 3d 397 (1st Dist. 1983), the court faced the question whether a school board could reconsider its findings after determining that it had jurisdiction over a petition for detachment. Stressing that action on a defective petition results in a void order, the court stated that the school board, "like any other agency, may inquire into its jurisdiction to act at any time, at the request of any party or upon its own motion, since it simply has no power to act in the absence of that jurisdiction." Shapiro, 116 Ill. App. 3d at 405 (citations omitted).

These precedents also appear to reflect the principle that, in interpreting statutes, it must be presumed that the legislative enactment did not intend an absurd or unjust result. *See* Adams v. Northern Illinois Gas Co., 211 Ill. 2d 32, 64 (Ill. 2002) (citations omitted). If, as the Agency argues, "the Board cannot refuse to accept the rulemaking under either Section 28.5 of the Act or Section 102.302(b) of the Board's rules" (Reply3 at 4), then the Board simply cannot determine whether the proposed rules are required by the CAA or whether USEPA is empowered to impose a sanction if the state fails to adopt them. In effect, the Agency's decision to proceed under Section 28.5 would be reviewed only by the courts after adoption of the proposed rule. Taking the Agency's argument to its logical conclusion, even a proposal invoking Section 28.5 to adopt underground storage tanks rules would have to proceed toward adoption, consuming the resources of the Agency, the Board, regulated entities, and other participants. Such a proceeding would be virtually certain to be challenged and to be invalidated as outside the Board's authority under Section 28.5. Reviewing its own jurisdiction helps the Board avoid the absurd result of requiring the consumption of resources in a proceeding in which its statutory authority has been questioned.

The Board finds that the language of the Act and case law clearly authorize the Board to consider whether or not a proposal filed pursuant to Section 28.5 may proceed under that provision. Neither Board Resolution 92-2 nor the Board's procedural rules restrict the Board to a technical review of the Agency's proposal. By its own terms, Board Resolution 92-2 addresses specific provisions and "is not intended as an exhaustive review of the fast-track procedures. Clean Air Act Rulemaking Procedures Pursuant to Section 28.5 of the Environmental Protection Act, as Added by P.A. 87-1213, RES 92-2, slip op. at 1 (Oct. 29, 1992). While the resolution addresses the form of the rulemaking proposal under Section 28.5(e), it does not specifically address either sections 28.5(a) and (c) and does not prevent the Board from reviewing a proposal for compliance with those requirements. *Id*.; 415 ILCS 5/28.5 (2004). Upon reconsideration of the resolution, the Board emphasized that it "has inherent authority to determine what documents

to 'accept'" and that it "must have some method to determine whether the proposal is sufficient for the Board to take the action required by the statute." RES 92-2, slip op. at 2-3 (Dec. 3, 1992).

The Board's procedural rules by their terms do not prevent the Board from reviewing whether the proposal is within the Board's statutory authority. Section 102.302(a) provides ten requirements that a fast track proposal must satisfy. 35 Ill. Adm. Code 102.302(a); *see* 415 ILCS 5/28.5(e) (2004). Section 102.302(b) simply provides that, "[i]f the proposal fails to meet any of the requirements of subsection (a) of this Section, the Board *may* decide not to accept the proposal for filing." 35 Ill. Adm. Code 102.302(b) (emphasis added). While this language provides the Board one basis on which the Board may decline to consider a proposal under Section 28.5, it does not prevent the Board from considering its own statutory authority to proceed.

Thus, the Board finds that both the language of the Act and well-settled case law authorize the Board to consider whether or not a proposal filed pursuant to Section 28.5 may proceed under that provision. Further, the Act and case law establish that the Board has the discretion to determine when the Board has jurisdiction over a matter filed with the Board. Accordingly, the Board will consider below whether it may consider the Agency's proposal under Section 28.5.

Use of Fast-Track Procedures

In order to determine whether or not the Board may proceed with the proposal using the fast-track procedures, the Board must look to the language of the statute. The Board must determine what the phrase "requires to adopt" means as well as whether or not the proposal is more stringent than required by the federal guidance being implemented. The Board will discuss each of those issues in turn.

Defining "Requires to be Adopted" and Sanctions

The objectors argue that fast-track procedures cannot be used because the provisions of the CAA do not authorize USEPA to impose sanctions under Section 179 of the CAA (42 U.S.C. § 7509) for failure of Illinois to adopt a mercury emission rule. The arguments of the objectors focus on the word "sanctions" as that word is used in the CAA and the relationship of the CAA with Section 28.5 of the Act (415 ILCS 5/28/5 (2004)). The objectors and the Agency do agree that any Illinois failure to adopt a mercury emission regulation will result in the federal plan becoming enforceable in Illinois. The objectors and the Agency disagree on the characterization of a federal plan as a "sanction" pursuant to Section 28.5.

Both the Agency and the objectors reference several decisions by the federal courts that allegedly support their respective arguments. However, the Board has reviewed those cases and found that none of the cases are directly on point and the courts switch back and forth on whether or not to list imposition of a FIP as a sanction. Thus, the cases cited are not instructive in determining whether the Board should view imposition of a FIP as a sanction within the meaning of Section 28.5.

The Board is cognizant of the interrelationship of Section 28.5 and the CAA; however, the Board disagrees with the arguments by objectors that the sanctions in Section 179 are the same as the sanctions referred to in Section 28.5. Section 28.5 of the Act states that: "'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) (2004)). The Act does not state "impose sanctions as enumerated in Section 179 of the CAA" nor does the Act even state "impose sanctions as defined in the CAA".

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the legislature, "which is best evidenced by the clear and unambiguous language of the statute." People v Ward, 326 Ill. App. 3d 897, 762 N.E.2d 685, 689 (5th Dist. 2002). The best evidence of legislative intent is the language of the statute, "which must be given its plain and ordinary meaning." Paris v. Feder, 179 Ill. 2d 173, 688 N.E.2d 137, 139 (1997). The courts have also held that prior to looking at legislative history, the court "must first look to the words in the statute" to ascertain the intent of the legislature. City of East Peoria v. PCB, 117 Ill. App. 3d 673, 452 N.E.2d 1378, 1382 (3rd Dist. 1983). Thus, to ascertain the intent of the legislature, the Board looks to the plain language of the statute to be reviewed.

The Act does not define the term "sanction". The plain language of Section 28.5 reads that the fast-track procedures may be used if the failure to adopt the rule will result in a sanction being imposed by the USEPA. The word "sanction" is defined in *Black's Law Dictionary* (1996) as: "to punish (a person) by imposing a penalty such as a fine; to deter (conduct) by punishing the person who engages in it." The *American Heritage Dictionary* Second College Edition (1985) defines "sanction" as "the penalty for noncompliance specified in a law or decree." Clearly under the plain and ordinary meanings of "sanction", the imposition of a federal plan for the failure of the state to act is a sanction. Whether or not the federal CAMR is a FIP or a federal plan, any USEPA imposition of the "one size fits all" federal requirements will limit the ability of Illinois to develop a plan for mercury emissions tailored to Illinois' specific needs and conditions. The proposal before the Board proposes a mercury emission rule. The rule must be adopted by November 17, 2006, or CAMR may be implemented in Illinois. Therefore, the Board finds that the plain language of Section 28.5 authorizes the Agency to propose and the Board to process a mercury emission rulemaking proposal under the fast-track procedures.

Rules the CAA "Requires to be Adopted" (Section 28.5(j))

The objectors argue that Section 28.5(j) of the Act (415 ILCS 5/28.5(j) (2004)) requires the Board to "separate out" provisions which are not "required to be adopted" under the CAA regulations. However, in this proposal separation would be impossible, according to the objectors, so the Board should proceed with the entire proposal under Section 27 of the Act (415 ILCS 5/27 (2004)). The Agency believes that the proposal need not be identical to the federal requirement in order to proceed under the fast-track procedures.

The Board agrees with the Agency that a proposal need not be identical to the federal rules to proceed under Section 28.5. *See* 415 ILCS 5/28.5(d) (2004). The Board believes that the Agency has the flexibility to choose an approach that complies with the federal requirements,

while addressing the environmental protection needs of the State. The Board further believes that this would allow for a proposal more stringent than the federal requirements. In this regard, the federal requirements mandate that the States adopt regulations consistent with the CAMR to avoid the imposition of the federal plan and the Agency has proposed a rule to comply with the federal requirement. Although the Agency's proposal takes a different approach to reducing mercury emissions than the CAMR, the proposal is intended to comply with the federal mandate.

Regarding the objectors' argument, the Board recognizes that Section 28.5(j) allows the Board to consider the provisions of a proposal that are not "required to be adopted" pursuant to Section 27. However, the approach taken by the Agency to meet the federal mandate is not conducive to identifying and "separating out" portions of the proposal for consideration under Section 27. As such, the Board will proceed under the fast-track procedures, rather than risk failing to adopt the required portions of the proposal by November 17, 2006, in order to avoid potential sanctions. As this record develops, if the participants believe there are portions of the proposal which can be identified and separated out, the participants may raise this issue again at that time.

Use of Section 9.10 as Authority

Dynegy argues that the Board should reject the proposal to the extent that the proposal relies on Section 9.10 of the Act (415 ILCS 5/9.10 (2004)) for authority for the proposal. Dynegy makes this argument because Dynegy argues that the Section 9.10 report did not include findings regarding mercury. Therefore, Dynegy opines that reliance on Section 9.10 is inappropriate. The Agency disagrees with Dynegy and argues that the Section 9.10 report does contain findings concerning mercury.

The Board has reviewed the Section 9.10 report and the Board agrees with Dynegy that the Section 9.10 report does not include any specific findings regarding mercury emissions. However, the Board disagrees that any part of the proposal must be dismissed. The Agency also filed this rulemaking pursuant to Sections 27 and 28.5 of the Act (415 ILCS 5/27 and 28.5 (2004)). Under those two sections, the Agency has broad authority to bring proposals to the Board. The Board finds that the more appropriate course of action is to delete the reference to Section 9.10 from the authority note of the rule. The Board will make that change at second notice.

Public Participation Under Section 28.5

Finally, the Board will address an overriding theme of the objectors' arguments: that the time constraints of a rulemaking under Section 28.5 of the Act (415 ILCS 5/28.5 (2004)) somehow weakens or dilutes public participation rights. *See e.g.*, ObjMot1 at 14; ObjMot2 at 1-4; 17-18; PC 25 at 3-4. The central point of the arguments is that any shortening of the public's time to respond to the merits of a Clean Air Act-required rule is unfair. The Board disagrees. Section 28.5 does not limit the Board's duties in developing a rule, when a proposal is contested. The Board is convinced that the rule adoption process under Section 28.5 does not affect the quality of the final rule.

The Act, in Section 27, imposes no time constraints on the length or conduct of the hearing process. In the worst-case scenario, this has resulted in decades-long rulemaking. *See, e.g.*, Proposed Public Airport Noise Regulations, R77-4 (dismissed April 22, 1993). In adopting Section 28.5, the legislature determined that imposing time limits on the rulemaking process was a reasonable trade-off for avoidance of federal sanctions due to any Illinois failure to timely adopt rules.

The main effect of Section 28.5 is to move a proposal to hearing quickly, and to require that hearings move expeditiously. Section 28.5 requires the Board to schedule three hearing, to be continued day-to-day until business is complete. The purpose of the first hearing is Agency explanation of the proposal, the second hearing is testimony and comment from the public and regulated community, and the third hearing is Agency response to matters raised during and after the second hearing. The only required hearing is the first hearing. The Board may cancel the second hearing if no one requests that it be held, and the third hearing if the Agency so requests. Section 28.5 does not limit who may testify or comment, nor does Section 28.5 limit how long the testimony or comment may be.

In effect, Section 28.5 requires a greater degree of organization of the proposal before it is filed; the proponents cannot file a proposal and then proceed to develop the justification for the proposal. So, within roughly 60 days of the proposal, the regulated community and the public have available to them the rule text and the entire Agency justification, so that they may formulate responses to the proposal.

Section 28.5 does limit the length of time between hearings, the time by which final comments are due, and the time by which the Board must proceed to second notice. It is true that this, in turn, requires a greater degree of organization from anyone who wishes to make a response to the proposal than may be the case in a Section 27 rulemaking. But, to the extent that Section 28.5 rule proposals have been preceded by federal rulemaking under the Clean Air Act, the public and regulated community have usually had months, if not years, in which to marshal arguments and collect data in their support. Therefore, issues presented in a Section 28.5 rulemaking are not new to the public.

The Board concedes that the timely processing of Section 28.5 rule proposals can prove a challenge to Board resources, depending upon the number of other contested cases and rules on the Board's docket having statutory deadlines. But, the Board remains convinced that the quality of the rules adopted is undiminished, as are the public's participation rights.

CONCLUSION

The Board has carefully examined the arguments presented concerning the Board's authority under Section 28.5 of the Act (415 ILCS 5/28.5 (2004)), and the limits on what may be proposed as a fast-track rule. The Board finds that the Board does have the authority to reject a proposal filed by the Agency pursuant to Section 28.5, if the Board finds that the proposal does not meet the statutory requirements. The Board further finds that this proposal does meet the statutory requirements as the failure to adopt a mercury emission standard could result in USEPA enforcing the federal CAMR.

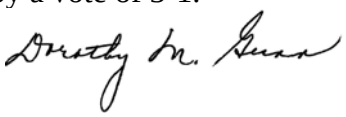
In addition, the Board agrees that Section 9.10 of the Act (415 ILCS 5/9.10 (2004)) was inappropriately cited as authority for the proposal and the reference will be stricken at second notice. Finally, the Board notes that the limitations of Section 28.5 do not restrict public participation in the rulemaking process.

Based on the foregoing, the Board denies the motions to reject the proposal pursuant to Section 28.5 and the Board will proceed as set forth in the March 16, 2006 opinion and order.

IT IS SO ORDERED.

Board Member T. E. Johnson dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 20, 2006, by a vote of 3-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board