

IN CIRCUIT COURT OF THE 7TH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

Dynergy Midwest Generation, Inc., Kincaid)
Generation, L.L.C., and Midwest Generation, L.L.C.,)

Plaintiffs,)

vs.)

Illinois Pollution Control Board and Illinois)
Environmental Protection Agency,)

Defendants.)

2006CH - 213

Case No.

FILED

APR 03 2006 CIV.-3



Clerk of the
Circuit Court

COMPLAINT

Plaintiffs Dynergy Midwest Generation, Inc., Kincaid Generation, L.L.C., and Midwest Generation, L.L.C. ("Plaintiffs"), by and through their attorneys, and complaining of Defendants Illinois Pollution Control Board and the Illinois Environmental Protection Agency state as follows:

INTRODUCTION

1. Plaintiffs bring this action for declaratory and injunctive relief against Defendants the Illinois Pollution Control Board ("IPCB") and the Illinois Environmental Protection Agency ("IEPA") as a result of IPCB's illegal rulemaking procedure and the IEPA's illegal filing of a proposed rule with the IPCB.

2. On or before March 14, 2006, the IEPA filed the "Proposed New 35 Ill. Adm. Code 225 Control of Emissions from Large Combustion Sources (Mercury)" (the "Mercury Proposal") for rulemaking before the IPCB. On March 16, 2006, the IPCB issued an opinion and order accepting the Mercury Proposal for rulemaking under procedures described as "Clean Air Act rules; fast track" in Section 28.5 of the Illinois Environmental Protection Act (the "Act"), 415 ILCS 5/28.5, and setting an expedited hearing schedule.

3. Plaintiffs bring this action seeking a Declaratory Judgment that Defendant IPCB has acted outside its authority by illegally accepting, and that Defendant IEPA has acted outside its authority by illegally filing with the IPCB, the Mercury Proposal under the fast track rulemaking procedures of Section 28.5 of the Act in violation of Illinois law.

4. Plaintiffs bring this action seeking a Declaratory Judgment that Defendant IPCB has acted outside its authority by illegally adopting and imposing a schedule under the fast track rulemaking procedures of Section 28.5 of the Act for rulemaking activities with respect to the Mercury Proposal that is not subject to Section 28.5 of the Act.

5. Plaintiffs bring this action seeking a Declaratory Judgment finding that the procedures described as “Clean Air Act rules; fast track” in Section 28.5 of the Act are facially unconstitutional; and that the application of Section 28.5 and the expedited hearing schedule adopted by the IPCB in the Mercury Proposal are unconstitutional as applied in that the schedule deprives Plaintiffs and other similarly situated entities of their procedural due process rights.

6. Plaintiffs seek a preliminary and permanent injunction prohibiting the IEPA and IPCB from continued action on the Mercury Proposal under authority of Section 28.5 of the Act, and enjoining the IEPA and IPCB from proceeding on the Mercury Proposal on the expedited hearing schedule set by the IPCB.

THE PARTIES

7. Plaintiff Dynegy Midwest Generation, Inc. (“Dynegy”) is an Illinois corporation with a principal place of business in Decatur, Illinois. Dynegy is an independent electric power producer, not a regulated public utility, in the business of generating and selling electrical power from five (5) coal-fired steam generating stations located in central and southern Illinois.

8. Plaintiff Kincaid Generation, L.L.C. (“Kincaid”) is a Virginia corporation with a principal place of business in Kincaid, Illinois. Kincaid is an independent electric power producer, not a regulated public utility, in the business of generating and selling electrical power from a coal-fired steam generating station located in Kincaid, Illinois.

9. Midwest Generation, LLC (“Midwest Generation”) is a Delaware limited liability company with its principal place of business in Chicago, Illinois. Midwest Generation is an independent electric power producer, not a regulated public utility, in the business of generating and selling electrical power from six (6) coal-fired steam generating stations located in northern and central Illinois.

10. As independent power producers, Plaintiffs sell electricity in a competitive marketplace.

11. Defendant IPCB is an Illinois administrative agency, created by Section 5 of the Act, 415 ILCS 5/5, with principal offices in Springfield, Illinois, and Chicago, Illinois. Defendant IEPA is also an Illinois administrative agency, created by Section 4 of the Act, 415 ILCS 5/4, with a principal office in Springfield, Illinois.

JURISDICTION AND VENUE

12. This Court has jurisdiction over the present action under the Illinois Code of Civil Procedure, 735 ILCS 5/2-701.

13. Venue is proper in this forum pursuant to Section 2-103(a) of the Illinois Code of Civil Procedure. 735 ILCS 5/2-103(a). Both of the Defendants have a principal office located in Springfield, Illinois, which lies in Sangamon County, Illinois.

FACTUAL BACKGROUND

14. The IPCB is a quasi-legislative and quasi-judicial administrative agency responsible for adopting environmental regulations and deciding certain environmental disputes and cases brought pursuant to the Act. The IPCB determines, defines and implements environmental control standards under the Act. 415 ILCS 5/5.

15. The Act authorizes the IPCB, *inter alia*, to implement rulemaking procedures under Title VII of the Act, including Section 28.5.

16. The rulemaking procedures of Section 28.5 allow for the expedited adoption of proposed regulations such that the time frame for participant or IPCB consideration is very abbreviated, the opportunity for interested parties to comment on and otherwise participate in the rulemaking is severely limited, changes can be made to the initial IEPA proposal only when the IPCB issues its Second Notice opinion, and ordering an economic impact analysis is generally discretionary with the Board but precluded if such analysis would interfere with the fast track deadlines set forth in Section 28.5.

Mercury Regulation

17. On March 15, 2005 the Administrator of the United States Environmental Protection Agency (“USEPA”) approved final regulations under the §111 of the Clean Air Act regulating emissions of mercury from coal-fired electric utility steam generating units. These regulations, generally referred to as the Clean Air Mercury Rule or “CAMR”, were published in the Federal Register on May 18, 2005. 70 Fed. Reg. 28606. Pursuant to these regulations, if states desire to promulgate state regulations to implement CAMR, the state rules should be promulgated by November 17, 2006. The CAMR mandates reduction of emissions by imposing nationwide mercury emission caps of 38 tons in 2010 through 2017 and 15 tons beginning in 2018. If adopted in Illinois, the federal rule would impose caps in the State of Illinois of 1.594

tons in 2010 through 2017 and 0.629 tons beginning in 2018. When fully implemented, CAMR's emission caps would reduce mercury emissions from coal-fired electric utility steam generating units by about 70%.

18. USEPA had been working to develop mercury regulations at least since 2000, illustrating the complexity of the issue. In addition, USEPA designed the CAMR to be integrated with another regulatory program developed in the same period, the Clean Air Interstate Rule (CAIR). One of the bases for USEPA's CAMR is that CAIR will yield benefits -- "co benefits" -- for the control of mercury.

19. On or about March 14, 2006, the IEPA filed the Mercury Proposal for rulemaking before the IPCB pursuant to Sections 9.10, 27, and 28.5 of the Act, 415 ILCS 5/9.10, 27, 28.5. The co-benefits supporting the federal CAMR will be completely lost in Illinois under the Mercury Proposal.

20. As operators of electric generation stations in Illinois, Plaintiffs are subject to the environmental regulations of the State of Illinois, including through permits issued by the IEPA.

21. The regulations in the Mercury Proposal are intended to control mercury emissions from coal-fired electric generating units.

22. If the Mercury Proposal is adopted, Plaintiffs, as operators of coal-fired electric generating units, will be subject to the requirements of the proposed regulations and will have to install costly and unnecessary pollution control equipment, far in excess of what is federally required.

23. Plaintiffs are recognized interested parties and participants in the rulemaking process for the Mercury Proposal, pursuant to appearances filed by Plaintiffs before the IPCB on or about March 14, 2006.

Fast-Track Rulemaking

24. As stated above, the Mercury Proposal was filed pursuant to Section 28.5 of the Act. Section 28.5 of the Act authorizes the IPCB to employ expedited rulemaking procedures only in limited circumstances.

25. Section 28.5 of the Act states:

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

...

(c) For purposes of this Section, a “fast track” rulemaking proceeding is a proceeding to promulgate a rule that the CAAA requires to be adopted. For purposes of this Section, “requires to be adopted” refers only to those regulations or parts of regulations for which the United States Environmental Protection Agency is empowered to impose sanctions against the State for failure to adopt such rules....

Section 28.5, 415 ILCS 5/28.5 (emphasis added).

26. The Clean Air Act (“CAA”) authorizes the Administrator of the USEPA to impose sanctions against a State where he or she with respect to a state implementation plan (“SIP”) or revision of such a plan:

(1) finds that a State has failed, for an area designated nonattainment under section 7407(d) of this title, to submit a plan, or to submit 1 or more of the elements (as determined by the Administrator) required by the provisions of this chapter applicable to such an area, or has failed to make a submission for such an area that satisfies the minimum criteria established in relation to any such element under section 7410(k) of this title,

(2) disapproves a submission under section 7410(k) of this title, for an area designated nonattainment under section 7407 of this title, based on the submission's failure to meet one or more of the elements required by the provisions of this chapter applicable to such an area,

(3)(A) determines that a State has failed to make any submission as may be required under this chapter, other than one described under paragraph (1) or (2), including an adequate maintenance plan, or has failed to make any submission, as may be required under this chapter, other than one described under paragraph (1) or (2), that satisfies the minimum criteria established in relation to such

submission under section 7410(k)(1)(A) of this title, or (B) disapproves in whole or in part a submission described under subparagraph (A), or

(4) finds that any requirement of an approved plan (or approved part of a plan) is not being implemented...

42 U.S.C.A. § 7509(a)(1), (2), (3), and (4)(emphasis added).

27. Pursuant to Section 7509 of the CAA, EPA is empowered to impose sanctions only for failure of a state to adopt rules in its SIP to achieve attainment of the National Ambient Air Quality Standards (“NAAQS”) adopted by the USEPA. The sanctions that can be imposed are limited to highway sanctions, imposing offsets and denials of certain grants for failures related to NAAQS SIPs. 42 U.S.C.A. § 7509.

28. The USEPA has not adopted a NAAQS for mercury, nor has USEPA requested states to develop SIPs for mercury. Therefore, the Administrator of the USEPA can not impose sanctions within the meaning of Section 28.5 on the State of Illinois for failure to implement mercury controls.

29. The USEPA’s remedy against a state for failing to enact the mercury controls at issue is limited to prescribing a plan for the state. In the event Illinois does not enact mercury controls, the USEPA will impose the federal plan for mercury controls under CAMR; it can not impose sanctions against the State for failure to enact mercury controls.

30. Where the limited circumstances allowing expedited rulemaking under Section 28.5 are not present, the IPCB employs the other rulemaking procedures provided for in Title VII of the Act.

31. The rulemaking procedures historically employed by the IPCB under Section 27 of the Act, 415 ILCS 5/27, afford a full opportunity to question the underlying rationale, including the requirement of a full and formal economic impact study of the proposed regulation

by the Department of Commerce and Community Affairs, and provide significant opportunity for comment and participation in the rulemaking process.

32. In order to protect their rights to participate in the rulemaking process, on or about March 15, 2006, Plaintiffs and other similarly situated entities filed motions before the IPCB to reject the Mercury Proposal under the Section 28.5 fast track rulemaking procedures as unauthorized because it did not satisfy the prerequisites for applicability of Section 28.5 of the Act.

33. Notwithstanding these motions, on March 16, 2006, the IPCB issued an opinion and order accepting the Mercury Proposal for rulemaking under the Section 28.5 fast track rulemaking procedures.

34. In its March 16, 2006 order, the Board stated the following:

The proposal indicates that the rulemaking is intended to meet certain obligations of the State under the federal Clean Air Act (42 U.S.C. § 7401 *et seq.*). More specifically, the proposal is brought to satisfy the State's obligation to submit a state implementation plan (SIP) to address the requirements of Clean Air Mercury Rule (CAMR) (*see* 70 Fed. Reg. 28606 (May 18, 2005)) and Section 9.10 of the Act. Prop. at 1, citing 415 ILCS 5/9/10 (2004). The proposal addresses serious deficiencies present in the CAMR including:

the unnecessary delay in achieving mercury emission reductions, the inherent concerns associated with a cap and trade program to control a persistent, bioaccumulative toxin, the inadequate mercury reductions contained in the CAMR, and the legal basis upon which CAMR was adopted. Prop. at 1.

This proposal was filed pursuant to Section 28.5 of the Act (415 ILCS 5/28.5 (2004)) and is accepted for hearing.

Opinion and Order of the Board, In the Matter of Proposed New 35 Ill. Adm. Code 225 Control of Emissions from large Combustion Sources (Mercury), R06-25 (Rulemaking-Air) (Ill. Poll. Control Bd. March 16, 2006).

35. Also in its March 16, 2006 order, the Board set the following expedited schedule (the "Schedule") pursuant to Section 28.5 of the Act:

First Notice	on or before March 28, 2006
First Hearing	on or before May 8, 2006
Second Hearing	on or before June 7, 2006
Third Hearing	on or before June 21, 2006
Second Notice	July 22, 2006 or August 11, 2006
Final Filing	21 days after receipt of Joint Committee on Administrative Rules certificate of no objection

Opinion and Order of the Board, In the Matter of Proposed New 35 Ill. Adm. Code 225 Control of Emissions from large Combustion Sources (Mercury), R06-25 (Rulemaking-Air) (Ill. Poll. Control Bd. March 16, 2006).

36. The Board appears to be treating Plaintiffs' motions as motions for reconsideration because they are still pending before the IPCB despite the acceptance of the Mercury Proposal and the adoption of the expedited hearing Schedule by the IPCB under Section 28.5 of the Act. The IPCB has set a briefing schedule on the motions, and with the last brief due April 5, 2006, and the fact that the IPCB only meets every two weeks (scheduled for April 6 and April 20), the first hearing date may have passed before the IPCB rules on the motions.

37. The IEPA's responses to Plaintiffs' motions assert that the IPCB has no authority to determine whether the IPCB has jurisdiction to proceed with rulemaking under Section 28.5 with respect to the Mercury Proposal.

Impact of Unlawful Fast Track Proceedings

38. Plaintiffs operate electric generation stations in Illinois, providing electricity to numerous business and residential customers in various areas of the State of Illinois. Those generating stations include twelve coal-fired electric generating plants (more than half of the coal-fired generating units in the state). Coal-fired generating units will be subject to the CAMR, if Illinois fails to adopt an alternative proposal. The same coal-fired generating units

would be regulated by the Mercury Proposal if that proposal is adopted by the IPCB. The affected coal-fired generating units produce a significant portion of the electricity generated in the state. The Mercury Proposal would require, starting in 2009, significant mercury emission reductions at coal-fired generating units in the state. The Mercury Proposal requires more significant and earlier mercury emission reductions than CAMR. Further, the Mercury Proposal precludes trading of emission allowances, which is permitted under CAMR, thereby substantially increasing the costs of compliance. The full impact of the Mercury Proposal is still being assessed by Plaintiffs, and time is required to complete that assessment. Based upon analyses to date, however, the emission reduction requirements of the Mercury Proposal, if adopted by the IPCB, would impose significant mercury control costs upon Plaintiffs beyond the costs required to comply with CAMR. The increased cost of compliance due to the Mercury Proposal, if adopted, would increase the cost of power generation by the Plaintiffs and, ultimately, could lead to competitive disadvantages and increase the cost of electricity to consumers.

39. In addition, Plaintiffs are informed and believe that the IEPA will file, in the near future, with the IPCB an additional regulatory proposal to address the Clean Air Interstate Rule ("CAIR") under Section 28.5 of the Act, the fast track rule making procedures. This regulatory proposal will implement federal requirements to control oxides of sulfur and particulate matter. Plaintiffs are informed and believe that the hearing schedule required for the CAIR proposal will require hearings to be conducted contemporaneously with the hearings presently scheduled by the IPCB for the Mercury Proposal. The coal-fired electric generating facilities, including Plaintiffs, affected by the Mercury Proposal will also be affected by the CAIR proposal.

40. Plaintiffs are not required to exhaust administrative remedies before bringing this action because this action addresses the authority of the IPCB and IEPA to proceed under

Section 28.5 and exhaustion would be futile here. The same questions of law presented today will be present if the rulemaking proceeds under the proposed schedule. However, the harm caused to Plaintiffs by inadequate opportunity to prepare for hearings, and therefore to create an adequate administrative record, cannot be cured later.

41. If fast track rulemaking under Section 28.5 is permitted to proceed, the Plaintiffs do not have an adequate remedy at law. The Plaintiffs will not be able to prepare adequately and present testimony for the administrative record that describes the individual harm that each will incur. Because appeals of rulemakings are limited to the information developed in the administrative record, 415 ILCS 5/41(b), the record will be deficient and will deny the Plaintiffs their opportunity to participate adequately in a rulemaking that will have a significant impact on their businesses. The interests of the public have been addressed by the federal government in the administrative proceedings prior to promulgation of the CAMR, but because the Mercury Proposal is different and more stringent than CAMR, the interests of the Plaintiffs will not be addressed adequately if the state rulemaking does not allow adequate participation. However, there is no way to measure the damages that the Plaintiffs will incur should the rulemaking proceed.

42. The Plaintiffs are likely to prevail on the merits of their claim that the IPCB is not authorized to proceed under Section 28.5 because the CAA does not empower USEPA to impose sanctions for failure to adopt the Mercury Proposal as a rule and the proposed mercury rule is not required by federal law. Thus, IPCB's proceeding under Section 28.5 is *ultra vires*, and denies Plaintiffs due process of law.

43. The Plaintiffs would be irreparably harmed if a preliminary injunction does not issue enjoining the IPCB from conducting fast track rulemaking under Section 28.5 of the Act.

For the reasons discussed above, the Plaintiffs would not have an adequate opportunity to comment on, analyze and challenge as appropriate the Mercury Proposal, and any evidence presented in support of that proposal, under Section 28.5. A trial on the merits in this action may not and likely would not occur until after the hearing process under the expedited Schedule adopted by the Board under Section 28.5 had commenced and may have been completed. Depending on the time to complete a trial, a final rule under Section 28.5 might even issue before a decision could be rendered on the merits in this action.

44. As stated above, coal-fired generating units will be subject to the CAMR, if Illinois fails to adopt an alternative proposal. Therefore, the interests of the public have been and continue to be protected by the federal CAMR. The IEPA simply disagrees with the federal position. Such policy disagreement does not justify proceeding with the IEPA's preferred policy position under fast track rulemaking.

45. The balance of harms favors the Plaintiffs. Plaintiffs are harmed by the Defendants proceeding to promulgate a rule in an unnecessarily hasty manner that deprives the Plaintiffs of an opportunity for meaningful participation. In addition, the unnecessarily hasty consideration of the Mercury Proposal will result in wasted expense, effort, and resources of the IEPA, IPCB, as well as, the public if that rule is ultimately ruled invalid because it was adopted under Section 28.5. These harms greatly exceed any inconvenience to the IEPA or IPCB regarding an illegal proceeding under Section 28.5.

46. The compressed hearing Schedule adopted by the IPCB under Section 28.5 of the Act denies the Plaintiffs due process of law, failing to allow participation in a meaningful time and in a meaningful manner. For instance, the IEPA will present its testimony regarding the Mercury Proposal during the First Hearing. Since the Plaintiffs must submit, to all persons listed

on the service list, the testimony that they will present to rebut the IEPA's proposal 15 days prior to the Second Hearing, that leaves Plaintiffs with at most two weeks (depending on the length of the First Hearing which could last several days) to prepare a full rebuttal in response to the IEPA's case. A proceeding to decide an issue as complex as whether the Mercury Proposal is a valid and lawful rule under applicable criteria with only two weeks of preparation denies the Plaintiffs due process of law. Such a proceeding does not allow sufficient time to consider and present evidence regarding the significant potential cost, the feasibility and environmental benefit issues raised by the proposal, and the extent to which the proposal implements CAMR, an already complex proposal.

47. If the IEPA proceeds with the CAIR proposal as Plaintiffs have been informed, Plaintiffs and other similarly affected coal-fired electric generating facilities, to protect their interests, will need to participate in the two contemporaneous regulatory proceedings, the CAIR proposal and Mercury Proposal. Participating in two such proceedings at the same time would further contract Plaintiffs' time and resources for fully participating in the rulemaking process, acting to impinge on Plaintiffs' rights even more.

48. The IPCB denies the Plaintiffs further opportunity to be heard by proposing to cancel the Third Hearing if the IEPA does not intend to introduce additional materials. Hearing Officer Order, Conduct of Hearing, March 16, 2006. The Second Hearing is open for testimony from all interested parties, not just the Plaintiffs. If the IPCB cancels the Third Hearing, the Plaintiffs will be denied any chance for a response to these parties' testimony. Moreover, the pre-filed testimony for the third hearing, if the IEPA chooses to request the hearing, is due to the IPCB 10 days prior to the start of that hearing, thereby requiring submittal likely before all of the interested parties, including Plaintiffs, have presented their case in the Second Hearing. The pre-

filed rebuttal testimony would be due before any party would know what must be included in the testimony to rebut testimony presented in the Second Hearing. Due process requires the IPCB to grant an opportunity for the Plaintiffs to respond, and, hence, such response cannot hinge on whether or not the IEPA decides to introduce additional materials, and there must be sufficient time for Plaintiffs to hear and evaluate all the testimony of the Second Hearing before having to submit rebuttal testimony.

COUNT I
DECLARATORY JUDGMENT THAT IEPA HAS UNLAWFULLY FILED AND IPCB
HAS UNLAWFULLY ACCEPTED THE MERCURY PROPOSAL FOR RULEMAKING
UNDER SECTION 28.5 OF THE ACT AND RELATED PRELIMINARY AND
PERMANENT INJUNCTIVE RELIEF

49. Plaintiffs reallege and incorporate paragraphs 1 through 48 of this Complaint as if fully set forth in this Count I.

50. Plaintiffs bring this cause of action against Defendants IPCB and IEPA seeking a declaration that, as a matter of law, the IEPA improperly filed the Mercury Proposal with the IPCB under Section 28.5 and that the IPCB is improperly proceeding under Section 28.5 of the Act with respect to that proposal. Further Plaintiffs seek preliminary and permanent injunctive relief enjoining the IPCB from proceeding with rulemaking under Section 28.5 of the Act with respect to the Mercury Proposal.

51. Plaintiffs have a real, tangible, and protectible interest in the rulemaking at issue as operators of electric generation stations that will be directly affected by the approval of the proposed regulations, as Plaintiffs will be required to control mercury emissions under standards imposed by such regulations, causing a substantial and costly impact on their operations.

52. Plaintiffs have a real, tangible, and protectible interest as participants in the Mercury Proposal rulemaking in the procedures employed to consider and adopt the Mercury

Proposal in that, if the rulemaking proceeds unlawfully under Section 28.5 of the Act, they will be denied a meaningful opportunity to investigate the rationale supporting the regulation and will be denied a meaningful opportunity to provide comments on the Mercury Proposal.

53. A real and actual controversy exists between Plaintiffs and Defendants as to the propriety of proceeding under the “fast track” rulemaking procedures.

54. As an administrative agency, the IPCB is limited to the rulemaking powers granted it under Illinois law by the Illinois General Assembly.

55. The IPCB is authorized to employ expedited rulemaking procedures under Section 28.5 of the Act only where the adoption of such regulation is “required to be adopted” as defined in that section.

56. As stated above, “required to be adopted” refers only to situations in which the USEPA has the power to impose sanctions against the State. Under the CAA, the USEPA can only impose sanctions against a State for NAAQS-related deficiencies in the SIP. Because the USEPA has not enacted a mercury NAAQS or called for the development of a SIP for mercury, the Administrator of the USEPA can not impose sanctions on the state of Illinois for failure to implement mercury controls.

57. Because the USEPA can not impose sanctions on the State of Illinois for failure to implement mercury controls, the State of Illinois is not “required to adopt” these controls as defined under Section 28.5 of the Act. Further, Section 28.5 of the Act can not apply to the Mercury Proposal as a whole because that proposal is more stringent than, and is therefore not required by, CAMR.

58. Therefore, as a matter of law, by implementing the “fast track” rulemaking procedures of Section 28.5 of the Act for the Mercury Proposal, the IPCB has acted outside its authority.

59. Accordingly, Plaintiffs are entitled to a declaratory judgment that, as a matter of law, by filing the Mercury Proposal with the IPCB the IEPA acted without authority and in violation of Illinois law, and by initiating fast track procedures under Section 28.5 of the Act, the IPCB acted without authority and is, therefore, in violation of Illinois law.

60. Plaintiffs are also entitled to preliminary and permanent injunctions enjoining the IPCB and IEPA from proceeding with the rulemaking concerning the Mercury Proposal under Section 28.5 of the Act. For the reasons set forth above, Plaintiffs do not have an adequate remedy at law, they have a likelihood of success on the merits at trial, they have a protectible right to an adequate rulemaking process under Section 27 of the Act, they would be irreparably harmed if the IPCB and IEPA are not preliminarily enjoined from proceeding with rulemaking under Section 28.5, and the benefit of such a preliminary injunction to Plaintiffs outweighs any burden on the IPCB, the IEPA or the public.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs pray for Judgment against Defendants the Illinois Pollution Control Board and the Illinois Environmental Protection Agency as follows:

A. For declaratory judgment that actions of the Defendant IEPA in filing the Mercury Proposal under Section 28.5 and of the Defendant IPCB in accepting that filing under Section 28.5 and implementing the Section 28.5 rulemaking procedures are outside the scope of their authority and, therefore, in violation of Illinois law;

B. For preliminary and permanent injunctive relief prohibiting Defendants IEPA and IPCB from proceeding to consider and adopt the Mercury Proposal pursuant to Section 28.5 of the Act; and

C. For such other relief as this Court deems just and proper.

COUNT II
DECLARATORY JUDGMENT THAT IPCB AND IEPA CANNOT PROCEED
ON THE EXISTING SCHEDULE AND RELATED INJUNCTIVE RELIEF

61. Plaintiffs reallege and incorporate paragraphs 1 through 60 of this Complaint as if fully set forth in this Count II.

62. Plaintiffs bring this cause of action against Defendants IPCB and IEPA seeking a declaration that, as a matter of law, the Schedule was improperly adopted and imposed under Section 28.5 of the Act and that, if rulemaking may proceed under Section 27 of the Act in the existing IPCB docket for the Mercury Proposal, that the IPCB must adopt a different and appropriate schedule under Section 27 of the Act. Further, Plaintiffs seek preliminary and permanent injunctive relief enjoining the IPCB from proceeding with rulemaking pursuant to the Schedule adopted under Section 28.5.

63. Plaintiffs as operators of electric generation stations have a protectible property right in their businesses, which will be directly impacted by the regulations proposed in the Mercury Proposal as those regulations will require installation of costly, substantial, and unnecessary control equipment.

64. Plaintiffs have a real, tangible and protectible interest as participants in the Mercury Proposal rulemaking in the procedures employed to consider and adopt the Mercury Proposal in that, if the rulemaking unlawfully proceeds under Section 28.5 of the Act, they will

be denied a meaningful opportunity to investigate the rationale supporting the regulation and denied a meaningful opportunity to provide comments on the Mercury Proposal.

65. A real and actual controversy exists between Plaintiffs and Defendants as to the propriety of proceeding under the “fast track” rulemaking Schedule adopted by the IPCB.

66. The Act sets forth the procedures under which the IPCB may proceed with a rulemaking, limiting the fast track rulemaking process to certain circumstances that the Mercury Proposal does not meet.

67. The IPCB adopted and imposed the expedited Schedule under Section 28.5. For the reasons set forth above, rulemaking concerning the Mercury Proposal may not proceed under Section 28.5 of the Act. Therefore, the Schedule, which was adopted pursuant to Section 28.5, is unlawful.

68. Accordingly, Plaintiffs are entitled to a declaratory judgment that, as a matter of law, by adopting and imposing the fast track Schedule under Section 28.5 of the Act the IPCB acted without authority and is, therefore, in violation of Illinois law, and that, if rulemaking may proceed under Section 27 of the Act in the existing IPCB docket for the Mercury Proposal, that the IPCB must adopt a different and appropriate schedule under Section 27 of the Act.

69. Plaintiffs are also entitled to preliminary and permanent injunctions enjoining the IPCB and IEPA from proceeding with the rulemaking concerning the Mercury Proposal under the Schedule adopted by the IPCB pursuant to Section 28.5 of the Act. For the reasons set forth above, Plaintiffs do not have an adequate remedy at law, they have a likelihood of success on the merits at trial, they have a protectible right to the rulemaking process required under Section 27 of the Act, they would be irreparably harmed if the IPCB and IEPA are not preliminarily

enjoined from proceeding with rulemaking under the Schedule, and the benefit of a preliminary injunction to Plaintiffs outweighs any burden on the IPCB, the IEPA or the public.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs pray for Judgment against Defendants the Illinois Environmental Protection Agency and Illinois Pollution Control Board as follows:

A. For declaratory judgment that the Schedule was improperly adopted and imposed by the Defendant IPCB under Section 28.5 of the Act and that, if rulemaking may proceed under Section of the Act in the existing IPCB docket for the Mercury Proposal, that the IPCB must adopt a different and appropriate schedule under Section 27 of the Act;

B. For preliminary and permanent injunctive relief enjoining the Defendants IPCB and IEPA from proceeding with rulemaking concerning the Mercury Proposal pursuant to the Schedule; and

C. For such other relief as this Court deems just and proper.

COUNT III
DECLARATORY JUDGMENT THAT SECTION 28.5 OF THE
ENVIRONMENTAL PROTECTION ACT IS UNCONSTITUTIONAL
ON ITS FACE AND RELATED INJUNCTIVE RELIEF

70. Plaintiffs reallege and incorporate paragraphs 1 through 69 of this Complaint as if fully set forth in this Count III.

71. Plaintiffs seek a declaration that Section 28.5 of the Act, on its face, violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 2 of the Illinois Constitution. A real and existing controversy exists between Plaintiffs and Defendants concerning the legality of rulemaking under Section 28.5 of the Act with respect to the Mercury Proposal.

72. Stakeholders have a real, tangible and protectible right and an interest in meaningful participation in the rulemaking process.

73. Stakeholders also have a real, tangible and protectible right to protect their interest in their businesses that will be directly impacted by proposed regulations.

74. Section 28.5 severely limits the ability of stakeholders to participate in the rulemaking process as it abridges the opportunity for review and comment, and limits the information available to the stakeholders and the IPCB. For example, it does not require a full economic impact analysis and, as set forth above, it severely limits the opportunity for participation by interested parties in the rulemaking process. Therefore, Section 28.5 impairs the ability of the IPCB to fully consider proposed regulations.

75. By severely limiting stakeholders' ability to participate in the rulemaking process, Section 28.5 fails to provide stakeholders with adequate constitutional due process safeguards.

76. The expedited procedures of Section 28.5 of the Act harm stakeholders such as Plaintiffs in that those procedures are not in accordance with law and deny stakeholders their right to procedural due process.

77. Section 28.5 of the Act is unconstitutional on its face under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 2 of the Illinois Constitution as it acts to deprive Plaintiffs and other parties with an interest in the rulemaking process in Illinois of their right to procedural due process.

78. Plaintiffs are also entitled to preliminary and permanent injunctive relief enjoining the IPCB from proceeding with rulemaking under Section 28.5 with respect to the Mercury Proposal. For the reasons set forth above, Plaintiffs do not have an adequate remedy at law, they have a likelihood of success on the merits at trial, they have a protectible right to a constitutional

rulemaking process, they would be irreparably harmed if the IPCB and IEPA are not preliminarily enjoined from proceeding with rulemaking under Section 28.5 of the Act, and the benefit of a preliminary injunction to Plaintiffs outweighs any burden on the IPCB, the IEPA or the public.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs pray for Judgment against Defendants Illinois Pollution Control Board and the Illinois Environmental Protection Agency as follows:

- A. For declaratory judgment that Section 28.5 of the Act is unconstitutional on its face as violating the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 2 of the Illinois Constitution;
- B. For preliminary and permanent injunctive relief prohibiting Defendants IPCB and IEPA from proceeding to consider and adopt the Mercury Proposal pursuant to Section 28.5 of the Act; and
- C. For such other relief as this Court deems just and proper.

COUNT IV
DECLARATORY JUDGMENT THAT SECTION 28.5 OF THE
ENVIRONMENTAL PROTECTION ACT AND THE EXPEDITED
HEARING SCHEDULE ADOPTED BY THE IPCB ARE UNCONSTITUTIONAL
AS APPLIED AND RELATED INJUNCTIVE RELIEF

79. Plaintiffs reallege and incorporate paragraphs 1 through 78 of this Complaint as if fully set forth in this Count IV.

80. Plaintiffs seek a declaration that Section 28.5 of the Act, as applied, and the expedited hearing Schedule adopted by the IPCB violate the Due Process Clause of the 14th Amendment to the Constitution of the United States and Article I, Section 2 of the Illinois

Constitution. A real and existing controversy exists between Plaintiffs and Defendants concerning the legality of that Schedule.

81. Plaintiffs as operators of electric generation stations have a protectible property right in their business, which will be directly impacted by the regulations proposed in the Mercury Proposal as those regulations will require installation of costly, substantial, and unnecessary control equipment.

82. Plaintiffs have a real and protectible procedural right and are entitled to meaningfully participate in a full and fair rulemaking process as interested parties and participants that have filed appearances before the IPCB.

83. The Act sets forth the procedures under which the IPCB may proceed with a rulemaking, limiting the expedited rulemaking process to certain circumstances that the Mercury Proposal does not meet.

84. By acting outside of its authority and improperly proceeding under the expedited hearing Schedule, the IPCB will deprive Plaintiffs of their rights and interests in participating in the rulemaking process by abridging the rulemaking process.

85. Moreover, the IPCB's decision to improperly proceed under the expedited hearing Schedule abridges the procedural safeguards which protect Plaintiffs from being deprived of their property interest in their business without due process of the law.

86. If the Mercury Proposal is adopted without adequate opportunity for Plaintiffs to consider and provide comment on the regulation, Plaintiffs will be denied due process of law.

87. As a direct and proximate result of the IPCB's improper expedited hearing Schedule, Plaintiffs and other similar entities operating electric generating stations in Illinois will

be deprived of their right to procedural due process under the United States and Illinois Constitutions.

88. Accordingly, Plaintiffs are entitled to a declaratory judgment that Section 28.5, as applied, and the expedited hearing Schedule is unconstitutional.

89. Plaintiffs are also entitled to preliminary and permanent injunctive relief enjoining the IPCB and IEPA from proceeding with rulemaking under the Schedule adopted under Section 28.5 with respect to the Mercury Proposal. For the reasons set forth above, Plaintiffs do not have an adequate remedy at law, they have a likelihood of success on the merits at trial, they have a protectible right to a constitutional rulemaking process, they would be irreparably harmed if the IPCB and IEPA are not preliminarily enjoined from proceeding with rulemaking under the Schedule, and the benefit of a preliminary injunction to Plaintiffs outweighs any burden on the IPCB, the IEPA or the public.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs pray for Judgment against Defendants the Illinois Pollution Control Board and the Illinois Environmental Protection Agency as follows:

A. For declaratory judgment that Section 28.5 of the Environmental Protection Act, as applied, and the expedited hearing Schedule set by the IPCB on March 16, 2006, is unconstitutional as applied in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 2 of the Illinois Constitution;

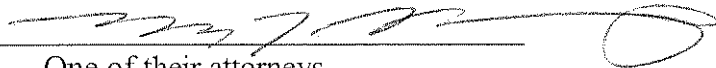
B. For preliminary and permanent injunctive relief prohibiting Defendants IPCB and IEPA from proceeding to consider and adopt the Mercury Proposal pursuant to the expedited hearing Schedule set by the IPCB on March 16, 2006; and

C. For such other relief as this Court deems just and proper.

Dated: April 3, 2006

Respectfully submitted,

Dynergy Midwest Generation, Inc., Kincaid
Generation, L.L.C., and Midwest Generation,
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