

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)	
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AMENDMENTS TO 35 ILL. ADM.)	R2023-018
CODE PARTS 201, 202, AND 212)	(Rulemaking – Air)
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NOTICE OF FILING

To: Attached Service List

PLEASE TAKE NOTICE that today I have electronically filed with the Office of the Clerk of the Illinois Pollution Control Board the **JOINT POST-HEARING COMMENT OF DYNEGY AND MIDWEST GENERATION** and a **CERTIFICATE OF SERVICE**, which are attached and copies of which are herewith served upon you.

Dated: March 7, 2023

Respectfully submitted,

Dynergy Midwest Generation, LLC; Illinois Power Generating Company; and Kincaid Generation, LLC

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**JOINT POST-HEARING COMMENT
OF DYNEGY AND MIDWEST GENERATION**

Dynegy Midwest Generation, LLC; Illinois Power Generating Company; and Kincaid Generation, LLC (collectively, “Dynegy”) and Midwest Generation, LLC (“MWG”) (collectively, the “Companies”) by their attorneys, ArentFox Schiff LLP, and pursuant to 35 Ill. Admin. Code § 102.108 and the Hearing Officer’s February 21, 2023 Order, are pleased to submit this Joint Post-Hearing Comment.

The Companies oppose promulgation of the Illinois Environmental Protection Agency’s (“IEPA”) proposed rule revisions in this proceeding (the “Proposed Rule”). The Companies can support the Proposed Rule, however, if the Illinois Pollution Control Board (the “Board”) includes limited relief from the opacity standards for their coal-fired boilers as proposed in their prefiled testimony. The Companies propose a narrowly tailored addition to the Proposed Rule in order to establish an alternative averaging period to demonstrate compliance with the applicable opacity standards for each Company’s remaining operating coal-fired boilers in Illinois during periods of startup, malfunction, and breakdown (“SMB”). The Companies appreciate the Board’s consideration of their proposal.

PROCEDURAL STANDARDS

IEPA filed the Proposed Rule with the Board under Illinois's fast-track rulemaking process for "rules proposed by IEPA and required to be adopted by the State under the Clean Air Act." 415 Ill. Comp. Stat. 5/28.5. The Board is authorized to revise IEPA's proposed rules after the comment period concludes, based on the record of the proceeding. *Id.* at 5/28.5(1). The Board "must consider the economic impact of the rule based on the record," *id.* at 5/28.5(g), and, as with all regulatory proceedings, must consider "the technical feasibility and economic reasonableness of ... reducing" the pollution at issue, *id.* at 5/27(a).

BACKGROUND

On December 7, 2022, IEPA filed the Proposed Rule amending Parts 201, 202, and 212 of Title 35 (Environmental Protection) of Illinois's Administrative Code. Rulemaking Proposal Entitled "Amendments to 35 Ill. Adm. Code Parts 201, 202, and 212" (Dec. 7, 2022), *In the Matter of: Amendments to 35 Ill. Adm. Code Parts 201, 202, and 212*, R2023-018 (hereinafter "Statement of Reasons"). As part of its Proposed Rule, IEPA is proposing to remove certain provisions from Parts 201 and 212 that, in some circumstances, allow sources to exceed emissions standards in Illinois during SMB events. Statement of Reasons at 30; *see, e.g.*, 35 Ill. Admin. Code §§ 201.261, 201.262, 201.263, 201.264, 201.265, 212.124(a). IEPA is proposing to remove these provisions based on recent United States Environmental Protection Agency ("U.S. EPA") decisions and statements related to State Implementation Plans ("SIPs") that include exemptions, discretionary exceptions, or affirmative defenses related to exceedances that occur during SMB. *See generally* Statement of Reasons.

Original Implementation of Illinois's SMB Provisions

The majority of the SMB provisions addressed in IEPA's proposal were originally adopted by the Board in April 1972. See Opinion and Order of the Board (Apr. 13, 1972), *In the Matter of: Emission Standards*, R1971-023 (adopting Sections 201.261–201.265 (then Rules 105(b)–(f)) and Section 212.124 (then Rule 202(c)). In adopting the SMB provisions, the Board explained the following:

No machine works perfectly all the time. Further, startup conditions may result in less than optimum emission control. The policy of this Rule is that insofar as is practicable, efforts shall be made to reduce the incidence and duration of startups and excessive emissions during startup periods; and that, except in special cases, equipment whose pollution controls are out of order should not be operated, just as an automobile should not be operated when its brakes are out of commission. Clearly the latter principle cannot be absolute, for it may not be worth blacking out the entire Midwest to prevent emissions from a partly malfunctioning boiler precipitator. We cannot resolve the myriad of individual variations in a single rule.

Opinion and Order of the Board at 9 (Apr. 13, 1972), R1971-023. The Board recognized that sources may be unable to comply with applicable emission limitations or standards during startup because “startup conditions may result in less than optimum emission control.” *Id.* The Board further recognized that unavoidable malfunctions and breakdowns do occur and that, in certain circumstances, continued operation is required even though emissions may be in excess of the generally applicable standard. *Id.*

U.S. EPA's SIP Calls

Based on this history and the plain language of the provisions, U.S. EPA and other entities have historically characterized Illinois's regulation of SMB events as exemptions. In 2011, Sierra Club filed a petition for rulemaking with U.S. EPA that included requests concerning the treatment of source excess emissions in state rules during periods of startup, shutdown, or malfunction. In

that petition, Sierra Club stated that Illinois's SMB provisions were "discretionary exemptions"¹ from otherwise applicable SIP emission limitations." *State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction* 78 Fed. Reg. 12,460, 12,514 (Feb. 22, 2013). U.S. EPA agreed, classifying Illinois's SMB provisions as "exemptions." *Id.* ("The EPA agrees that together Ill. Admin. Code tit. 35 § 201.261, Ill. Admin. Code tit. 35 § 201.262, and Ill. Admin. Code tit. 35 § 201.265 can be read to create exemptions by authorizing a state official to determine in the permitting process that the excess emissions during startup and malfunction will not be considered violations of the applicable emission limitations."); *id.* at 12,515 ("The EPA believes that these provisions allow for exemptions from the otherwise applicable emission limitations, . . ."). In its Final SIP Call in 2015, U.S. EPA reiterated that Illinois's SMB provisions functioned as exemptions from emission standards. *State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction,*

¹ In this Post-Hearing Comment, the Companies refer to "exemptions" from and "exceptions" to opacity and emissions standards synonymously because exceptions and exemptions function synonymously. See 80 Fed. Reg. 33,904 ("The general-duty provisions that apply as part of the *SSM exemption* are not alternative emission limitations; they merely define an *unlawful exemption* to an emission limitation. States have discretion to fix this issue in a number of ways, including by removing the *exceptions* entirely, by replacing these *exceptions* with alternative emission limitations including specific control technologies or work practices that do ensure continuous limits on emissions or by reformulating the entire emission limitation." (emphasis added)); compare 80 Fed. Reg. 33,842 (defining "automatic exemption" as "a generally applicable provision in a SIP that would provide that if certain conditions existed during a period of excess emissions, then those exceedances would not be considered violations of the applicable emission limitations.") with Black's Law Dictionary, *Exception* ("In statutory law. An exception in a statute is a clause designed to reserve or exempt some individuals from the general class of persons or things to which the language of the act in general attaches."), <https://thelawdictionary.org/exception/#:~:text=25.5.An%20exception%20is%20an,Proc.>

80 Fed. Reg. 33,840, 33,965 (June 12, 2105) (“[T]he Petitioner objected to three generally applicable provisions in the Illinois SIP which together have the effect of providing discretionary exemptions from otherwise applicable SIP emission limitations.”).

Industry Comment on the SMB Provisions and U.S. EPA SIP Calls

Other participants to this rulemaking, particularly Illinois Environmental Regulatory Group (“IERG”), also submitted evidence to the Board showing that Illinois’s SMB provisions function as exemptions. IERG submitted prefiled testimony of Kelly Thompson, stating “it has been the regulated community’s long-standing interpretation that having such an authorization in a permit means that the facility is authorized to exceed the applicable limitation during SMB and Illinois EPA will not initiate an enforcement action for such exceedances. In essence, it has been the regulated communities’ understanding that these provisions have provided an exemption to the applicable emission standard during periods of SMB.” Pre-Filed Testimony of Kelly Thompson and David R. Wall for the Illinois Environmental Regulatory Group at 11 (Feb. 6, 2023), *In the Matter of: Amendments to 35 Ill. Adm. Code Parts 201, 202, and 212*, R2023-018 (hereinafter “IERG Prefiled Testimony”).

Dynegy and Midwest Generation’s Operations and CAAPP Permit Conditions

Dynegy operates permitted coal-fired boilers at the Baldwin Energy Complex, I.D. No. 157851AAA (“Baldwin”), located at 10901 Baldwin Road, Baldwin, Illinois (Randolph County); Kincaid Power Station, I.D. No. 021814AAB (“Kincaid”), located on Route 104, four miles west of Kincaid, Illinois (Christian County); and the Newton Power Station, I.D. No. 079808AAA (“Newton”), located at 6725 North 500th Street, Newton, Illinois (Jasper County). There are two permitted coal-fired boilers at Baldwin, denominated as Boilers 1 and 2, two permitted coal-fired

boilers at Kincaid, denominated as Boilers 1 and 2 and one permitted coal-fired boiler at Newton, denominated as Boiler 1.

Baldwin Boilers 1 and 2 were built in 1967, have a nominal capacity of 5,788 mmBtu/hr, each, and are served by separate stacks. Kincaid Boilers 1 and 2 were built in 1967 and 1968, have nominal capacities of 6634 and 6406 mmBtu/hour, and are served by a single stack. Newton Boiler 1 was built in 1972, has a nominal capacity of 6,000 mmBtu/hour, and is served by a single stack. Opacity from the stacks at each Station is monitored by continuous opacity monitoring systems (“COMS”).

Emissions from the Baldwin and Kincaid coal-fired boilers are controlled by numerous air pollution control equipment and measures, including the following: particulate matter (“PM”) emissions are controlled by electrostatic precipitators (“ESPs”); nitrogen oxide (“NO_x”) emissions are controlled by over-fire air (“OFA”) and selective catalytic reduction (“SCR”) systems; and mercury emissions are controlled by activated carbon injection (“ACI”) systems, which injects a sorbent such as activated carbon into the flue gas of each boiler prior to its ESP, or by burning refined coal. Further, PM emissions from the Baldwin coal-fired boilers are also controlled by baghouses, and sulfur dioxide (“SO₂”) emissions are controlled by flue gas desulfurization (“FGD”) systems. SO₂ emissions from the Kincaid coal-fired boilers are controlled by the use of Powder River Basin low sulfur sub-bituminous coal and a dry sorbent injection (“DSI”) FGD system, which injects a dry sorbent material such as sodium bicarbonate into the flue gas of each boiler prior to its ESP.

Emissions from Newton Boiler 1 are controlled by numerous air pollution control equipment and measures, including the following: PM emissions are controlled by an ESP equipped with Flue Gas Conditioning (“FGC”) system, the FGC system injects SO₂ upstream of

the ESP and is operated on an as-needed basis; SO₂ emissions are controlled by a DSI FGD system, which injects a dry sorbent material such as sodium bicarbonate into the flue gas prior to the ESP; NO_x emissions are controlled by low-NO_x burners and OFA systems; an ACI system controls mercury emissions by injecting a sorbent such as activated carbon into the flue gas prior to the ESP, and calcium bromide may be applied to the coal fired in the boiler from time to time to further reduce mercury emissions.

MWG operates permitted coal-fired boilers at Powerton Generating Station, I.D. No. 179801AAA (“Powerton”), located at 13082 East Manito Road, Pekin, IL (Tazewell County). Powerton has four coal-fired boilers, supplying steam to two electrical generators. Boilers 51 and 52 serve one generator (Unit 5), and boilers 61 and 62 power the other generator (Unit 6) (these boilers, collectively with Dynegy’s boilers and as applicable to the specific facilities, will be referred to as “Affected Units”). The Powerton Affected Units utilize various air pollution control equipment and measures, including the following: PM emissions are controlled by ESPs, SO₂ emissions are reduced by each Affected Unit burning low-sulfur Powder River Basin coal as its primary fuel; SO₂ emissions are controlled by dry sorbent injection into the duct work at a points prior to the ESPs; NO_x emissions are controlled by OFA systems, rich reagent injection systems, and selective non-catalytic reduction systems; and mercury emissions are controlled by activated carbon injection into the flue gas prior to the ESPs.

The Baldwin, Kincaid, Newton, and Powerton (the “Stations”) Clean Air Act Permit Program (“CAAPP”) Permits specify applicable opacity standards under the Illinois regulations, and each permit provides an exception to the applicable opacity standards during SMB. *See* Dynegy’s Prefiled Testimony of Cynthia Vodopivec at 10 (Feb. 6, 2023), *In the Matter of: Amendments to 35 Ill. Adm. Code Parts 201, 202, and 212*, R2023-018 (hereinafter “Vodopivec

Prefiled Testimony”); *see also* Midwest Generation’s Prefiled Testimony of Sharene Shealey at 6 (Feb. 6, 2023), *In the Matter of: Amendments to 35 Ill. Adm. Code Parts 201, 202, and 212*, R2023-018 (hereinafter “Shealey Prefiled Testimony”).

Each of the Stations’ CAAPP permits further include a Compliance Assurance Monitoring (“CAM”) plan. *See* Vodopivec Prefiled Testimony, Ex. A at 81–88 (Baldwin), Ex. B at 92–97 (Kincaid), Ex. C at 79–83 (Newton); Shealey Prefiled Testimony, Ex. A at 100–104 (Powerton).

According to U.S. EPA, the purpose of a CAM plan is as follows:

[CAM] is intended to provide a reasonable assurance of compliance with applicable requirements under the Clean Air Act (CAA) for large emission units that rely on pollution control device equipment to achieve compliance. Monitoring is conducted to determine that control measures, once installed or otherwise employed, are properly operated and maintained so that they continue to achieve a level of control that complies with applicable requirements. The CAM approach establishes monitoring for the purpose of: (1) documenting continued operation of the control measures within ranges of specified indicators of performance (such as emissions, control device parameters, and process parameters) that are designed to provide a reasonable assurance of compliance with applicable requirements; (2) indicating any excursions from these ranges; and (3) responding to the data so that the cause or causes of the excursions are corrected.

U.S. EPA, Office of Air Quality Planning & Standards, *Technical Guidance Document: Compliance Assurance Monitoring, Revised Draft* (Aug. 1998), <https://www.epa.gov/sites/default/files/2016-05/documents/cam-tgd.pdf>.

1. Dynegy’s Baldwin and Kincaid CAAPP Permits

As specified in Condition 5.2.2(b) of the Baldwin and Kincaid CAAPP permits, the Baldwin and Kincaid Affected Units are subject to the 30% opacity limitation set forth at “35 IAC 212.123(a), except as allowed by 35 IAC 212.123(b) or 212.124.” Vodopivec Prefiled Testimony at 10–11; Ex. A at 16; Ex. B at 13 (emphasis added). Section 212.124 is titled “Exceptions” and lays out a number of exceptions to Illinois’s opacity limitations set forth in Sections 212.122 and 212.123. 35 Ill. Admin. Code § 212.124. There are four subsections, plus subparagraphs, setting

forth the exceptions to the opacity limitations. *Id.* The first of these is most pertinent to the Kincaid and Baldwin permits. Section 212.124(a) provides: “Sections 212.122 and 212.123 of this Subpart shall apply during times of startup, malfunction and breakdown except as provided in the operating permit granted in accordance with 35 Ill. Adm. Code 201.” 35 Ill. Admin. Code § 212.124(a). Meaning that Section 212.123 (the section setting forth the applicable opacity limitations) does not apply to the Baldwin or Kincaid Affected Units during times of startup, malfunction and breakdown, to the extent provided by their CAAPP permits.

The SMB authorizations/exceptions applicable to the Baldwin and Kincaid Affected Units are set forth in Conditions 7.1.3(b) and (c) of their CAAPP permits (for all permits, the “SMB Authorizations”). Vodopivec Prefiled Testimony at 11–13; Ex. A at 49–50; Ex. B at 54. Condition 7.1.3(b) contains the exception from opacity standards during startups. *Id.* (“[T]he Permittee is authorized to operate an affected boiler in violation of the applicable standards identified or cross-referenced in Condition 5.2.2(b) (35 IAC 212.123) . . . during startup. This authorization is provided pursuant to 35 IAC 201.149, 201.261 and 201.262 . . .”). Further, Condition 7.1.3(c) of the Baldwin and Kincaid permits contains the exception from opacity standards during malfunctions and breakdowns. *Id.* (“[T]he Permittee is authorized to continue operation of an affected boiler in violation of the applicable standards identified or cross-referenced in Condition 5.2.2(b) (35 IAC 212.123) . . . in the event of a malfunction or breakdown of an affected boiler, including the coal crusher, the ash removal system, or the electrostatic precipitator. This authorization is provided pursuant to 35 IAC 201.149, 201.261, and 201.262, as the Permittee has applied for such authorization in its application, generally explaining why such continued operation would be required to provide essential service or to prevent injury to personnel or severe damage to equipment . . .”). Finally, Conditions 7.1.3(b)(iv) and (c)(v) reference 35 Ill. Admin.

Code § 201.265, stating that authorization for “excess emissions” provides a prima facie defense to enforcement actions, “provided that the Permittee has fully complied with all terms and conditions connected with such authorization.” *Id.*

2. Dynegy’s Newton CAAPP Permit

As specified in Condition 5.2.2(c) of the Newton CAAPP permit, the Newton Affected Unit is subject to the 20% opacity limitation set forth at “35 IAC 212.122(a), except as allowed by 35 IAC 212.122(b) or 212.124” *See* Vodopivec Prefiled Testimony at 13; Ex. C at 16 (emphasis added). And, as described above, Section 212.124 sets forth exceptions to both Section 212.122 and Section 212.123. *See* 35 Ill. Admin. Code § 212.124. The SMB exceptions to the Section 212.122 opacity limitations for the Newton Affected Unit are set forth in Conditions 7.1.3(b) and (c) of the Newton CAAPP permit. These conditions largely mirror the corresponding conditions in the Baldwin and Kincaid CAAPP permits for exceptions to the opacity limitations, with the differences being outlined in Cynthia Vodopivec’s testimony. *See id.* at 14.

3. MWG’s Powerton CAAPP Permit

This classification of Illinois’s SMB provisions as exceptions continues through Midwest Generation’s Powerton CAAPP permit. Condition 7.1.4(a) provides that the Affected Units are subject to “the standard in Condition 5.2.2(b) [35 Ill. Admin. Code § 212.123].” *See* Shealey Prefiled Testimony at 6, Ex. C at 49. Condition 5.2.2(b) provides in relevant part: “No person shall cause or allow the emission of smoke or other particulate matter, with an opacity greater than 30 percent . . . pursuant to 35 IAC 212.123(a), except as allowed by 35 IAC 212.123(b) and 212.124.” *Id.*, Ex. C at 16 (emphasis added). And, as described above, Section 212.124 sets forth exceptions to both Section 212.122 and Section 212.123. *See* 35 Ill. Admin. Code § 212.124. The SMB exceptions to the Section 212.123 opacity limitations for the Powerton Affected Unit are set

forth in Conditions 7.1.3(b) and (c) of the Powerton CAAPP permit. These conditions largely mirror the corresponding conditions in the Dynegy CAAPP permits for exceptions to the opacity limitations; a more detailed description is provided in Sharene Shealey's testimony. *See id.* at 6–8 ¶¶ 7–11.

POSITION

The Companies propose to codify an opacity limit during SMB events, utilizing an alternative averaging period and a limit on the maximum opacity level, to address the 2015 Final SIP Call, as an addition to IEPA's Proposed Rule (the "Joint Proposal"). This is intuitively and demonstrably more stringent than the current SMB exception in the Stations' CAAPP permits, which contains no limit on the duration of an event or level of opacity. Clearly, adding opacity limits that apply during SMB events, when no such limits currently exist, passes any test used to determine whether a rule is more stringent with such requirements than without. Adding in additional work practice standards designed to minimize the frequency, duration, and level of opacity during SSM periods, again when no such standards exist in the current rule, further demonstrates that the Joint Proposal is more stringent than current regulations.

The Joint Proposal would be codified as a new subsection to 35 Ill. Admin. Code § 212.124. It complements the Proposed Rule as an additional revision to the regulations, and it would not require any change to the revisions in the Proposed Rule. If the Board adopts IEPA's Proposed Rule and the Companies' Joint Proposal, these revised regulations, viewed together, could and should be approved into the Illinois SIP. The Joint Proposal would not add any risk of SIP disapproval for IEPA's Proposed Rule as it does not alter the Proposed Rule.

I. Joint Proposal – Overview

Dynergy and MWG presented nearly identical proposals through their witnesses' prefiled testimony. *Compare* Vodopivec Prefiled Testimony at 17–19 *with* Shealey Prefiled Testimony at 10–12. The proposals differed only with respect to which boilers were included and which opacity standard (20% or 30%) applied. The Companies have combined their proposals into a Joint Proposal, which is attached for review as **Exhibit A**. The Joint Proposal is identical to the proposal in Dynergy's prefiled testimony, except that it includes the Powerton Affected Units and the proposed citation has been changed from Section 212.124(d) to Section 212.124(e).

Under the Joint Proposal, when compliance cannot be demonstrated with Section 212.122 or 212.123 on a six-minute average basis during times of SMB, the Companies would have the option to demonstrate compliance with the State 20% or 30% opacity limitation for the Newton Affected Unit or the Baldwin, Kincaid or Powerton Affected Units, respectively, using a three-hour averaging period (the "Alternative Averaging Period"). This would be accomplished for a given six-minute block period when the Alternative Averaging Period is needed by taking the average opacity measurements from the COMS for those six minutes and the preceding 174 minutes of data. This Alternative Averaging Period is modeled on each Affected Unit's CAM plan for the applicable state PM limitation, which utilize three-hour opacity data to provide a reasonable assurance of compliance with the PM limitations promulgated to assure compliance with the various PM National Ambient Air Quality Standards ("NAAQs").

The Joint Proposal includes recordkeeping and reporting obligations and work practice requirements that are more stringent than those required by existing Illinois regulations. It would not affect any additional permit-specific terms that IEPA established as a condition for utilizing the current SMB exceptions. The Joint Proposal would be codified as a new subsection to Section

212.124, and, as explained further in Part D below, it would not require any change to the revisions proposed by IEPA's Proposed Rule.

II. The Current SMB Authorizations Are Exceptions to the Opacity Standards

U.S. EPA, environmental advocacy groups, and the Companies all agree—the current regulatory SMB provisions are *exceptions* to the applicable opacity standards. And, IEPA's implementation of these provisions when issuing CAAPP permits for each Station expressly authorizes the Companies to exceed the applicable regulatory opacity standards during SMB, with no express limit to the magnitude or duration of such excess opacity. The Board's opacity regulations leave no doubt that the SMB authorizations in the Companies' CAAPP permits are exceptions. These authorizations fall within the scope of Section 212.124(a)—the first provision under the unambiguous title, "Exceptions."

This plain interpretation is supported by (1) U.S. EPA classifying Illinois's SMB provisions as exemptions, (2) Sierra Club classifying Illinois's SMB provisions as exemptions in its petition challenging certain SIPs, and (3) other participants in this rulemaking classifying the SMB provisions as exemptions. In Sierra Club's petition that prompted U.S. EPA's Initial SIP Call, Sierra Club described Illinois SMB provisions as "discretionary exemptions from otherwise applicable SIP emission limitations." 78 Fed. Reg. at 12,514. U.S. EPA agreed in both its Initial and Final SIP Calls, classifying Illinois's SMB provisions as "exemptions." *Id.* And testimony in this rulemaking makes clear that this is how Industry has understood Illinois's SMB provisions. *See, e.g.,* IERG Prefiled Testimony at 9 ("[I]t has been the regulated community's long-standing interpretation that having such an authorization in a permit means that the facility is authorized to exceed the applicable limitation during SMB and Illinois EPA will not initiate an enforcement action for such exceedances. In essence, it has been the regulated communities' understanding that

these provisions have provided an exemption to the applicable emission standard during periods of SMB.”); Vodopivec Prefiled Testimony at 12–13; Shealey Prefiled Testimony at 6–9 ¶¶ 7–14.

The Stations’ CAAPP permits clearly state that the Companies are “authorized” to operate “in violation of” the applicable opacity standards during SMB, subject to permit-specific terms that apply in order to qualify for the exception. They further grant the Companies “permit shields,” which provide that “compliance with the conditions” of the permits “shall be deemed compliance with applicable requirements.” IEPA now takes the position in this rulemaking that Section 212.124(a)—the first paragraph in the section titled “Exceptions”—is not actually an exception, and that permit “authorized” exceedances of the standards are, in reality, violations of law. Statement of Reasons at 18 (“[T]he Agency still considers excess emissions during [SMB] to be violations, and the advance permission granted in the operating permit under Part 201 simply allows a source to assert a prima facie defense should those violations be the subject of an enforcement proceeding.”). This interpretation is incompatible with the plain language of the permits and regulations; it is the opposite of what the permits and regulations say.

When the Companies’ CAAPP permits authorize violations of the opacity standards, the word “violation” is used to mean a numeric exceedance of the applicable standard, not a violation of law. The word “violation” is commonly used in this manner in Clean Air Act parlance. *See, e.g.,* 40 C.F.R. Part 50, App. R ¶ 1(a) (using “violated” to mean “not met”: “the Pb NAAQS were violated (*i.e., not met*)”); 80 Fed. Reg. at 33,977 (defining “excess emissions” to mean “emission that would be considered violations of the applicable emission limitation”). This is the only possible interpretation of “violation” in the context of these permit conditions. IEPA has clear discretion to authorize the Companies to exceed the opacity limitations during SMB events, and that is exactly what it did. It strains credulity to say that an “authorized” violation of a standard

is, in fact, prohibited, *i.e.*, a violation of the law. And because Condition 8.1 of each Station's CAAPP permit states that compliance with the relevant permit conditions "shall [be] deemed compliance" with underlying regulatory requirements, compliance with the SMB Authorizations cannot be considered non-compliance or a violation of law.

IEPA argues that these authorizations do nothing more than provide a prima facie defense to an enforcement action. *See* Statement of Reasons at 18. Not so. The Companies agree that 35 Ill. Admin. Code § 201.265 and the CAAPP permits provide a prima facie defense to an enforcement action, in case a plaintiff alleges that an opacity exceedance constitutes a violation of law. 35 Ill. Admin. Code § 201.265 ("The granting of permission to operate during a malfunction or breakdown, or to violate the standards or limitations of Subchapter c of this Chapter during startup, and full compliance with any terms and conditions connected therewith, shall be a prima facie defense to an enforcement action alleging a violation of Section 201.149.") But the provision of a prima facie defense does not negate the authorization to exceed the standard in the first place; to the contrary, the defense relies on the authorization. The prima facie defense makes sense *only* because the Companies are *authorized* to exceed the standards. The authorization (the "granting of permission" to exceed the standards, contingent on "compliance" with related "terms and conditions") is the express basis for the prima facie defense in Section 201.265.

The Board's opacity regulations confirm the obvious—when IEPA grants SMB authorizations, as it did in the Stations' CAAPP permits, those authorizations are "exceptions." The Stations' CAAPP permits state that the Affected Units are subject to either the 20% or 30% opacity limitation, "except as allowed by . . . 212.124." Section 212.124 is titled "Exceptions" and provides a number of exceptions to the limitations set forth in Sections 212.122 and 212.123. 35 Ill. Admin. Code § 212.124. The first of these exceptions, Section 212.124(a), states: "Sections

212.122 and 212.123 of this Subpart shall apply during times of startup, malfunction and breakdown except as provided in the operating permit granted in accordance with 35 Ill. Adm. Code 201.” *Id.* § 212.124(a) (emphasis added). This means that the opacity limits in Sections 212.122 and 212.123 do not apply to the Affected Units during SMB, to the extent provided by their CAAPP permits. As U.S. EPA acknowledges, an exemption provides that a source does not have to meet a limit during specified events. 80 Fed. Reg. at 33,977. Simply put, the CAAPP permit SMB authorizations for opacity are exceptions to the opacity standards.

III. U.S. EPA Allows SIPs to Include Alternative Emission Limits During Specified Modes of Operations.

In its 2015 Final SIP Call, U.S. EPA stated that it is appropriate for states to promulgate rules that contain components applicable to different modes of operation and numerical emission limitations that have differing levels and forms for different modes of operations. *See* 80 Fed. Reg. at 33,977–79. U.S. EPA recognized that there are mechanisms states can employ that do not violate the Clean Air Act to address excess emissions that may occur during certain events. Specifically, U.S. EPA provided as follows:

While automatic exemptions and director’s discretion exemptions from otherwise applicable emission limitations for SSM events are not consistent with the CAA, SIPs may include criteria and procedures for the use of enforcement discretion by air agency personnel Similarly, SIPs may, rather than exempt excess emissions, include emission limitations that subject those emissions to alternative numerical limitations or other control requirements during startup and shutdown events or other normal modes of operation, so long as those components of the emission limitations meet applicable CAA requirements and are legally and practically enforceable.

Id. at 33,978. U.S. EPA does not “interpret section 110(a)(2) or section 302(k) to require that an emission limitation in a SIP provision be composed of a single, uniformly applicable numerical emission limitation. The text of section 110(a)(2) and section 302(k) does not require states to impose emission limitations that include a static, inflexible standard.” *Id.* Instead, the Clean Air

Act requires that the “SIP provision impose limits on emissions on a continuous basis, regardless of whether the emission limitation as a whole is expressed numerically or as a combination of numerical limitations, specific control technology requirements and/or work practice requirements applicable during specific modes of operation, and regardless of whether the emission limitation is static or variable.” *Id.* at 33,978–79. “For example, so long as the SIP provision meets other applicable requirements, it may impose different numerical limitations for startup and shutdown.” *Id.* at 33,979.

IV. The Joint Proposal is Consistent with U.S. EPA Recommendations from the 2015 Final SIP Call

The 2015 Final SIP Call includes a short section titled, “Recommendations for Development of Alternative Emission Limitations Applicable During Startup and Shutdown.” 80 Fed. Reg. at 33980. In this section, U.S. EPA recommends that alternative requirements be narrowly tailored and take into account considerations such as the technological limitations of the specific source category and the control technology that is feasible. *Id.* U.S. EPA goes on to recommend seven specific criteria “as appropriate considerations for developing emissions limitations in SIP provisions.” *Id.* (emphasis added). But before providing any of these seven considerations, U.S. EPA “encourages states to explore . . . approaches” similar to those taken in New Source Performance Standards (“NSPS”) regulations. *Id.* U.S. EPA concludes its recommendations by admonishing that alternative emission limitations “cannot allow an inappropriately high level of emissions or an effectively unlimited or uncontrolled level of emissions.” *Id.*

While U.S. EPA’s recommendations are not legal requirements, the Companies carefully drafted the Joint Proposal to satisfy U.S. EPA’s recommendations. This is particularly evident

when comparing the Joint Proposal to the startup, shutdown, and malfunction exclusion provided by relevant NSPS regulations, as U.S. EPA encourages states to do.

A. The Joint Proposal is limited to just a handful of specific sources.

U.S. EPA recommends considering whether the alternative limitation applies to only “specific, narrowly defined source categories using specific control strategies (*e.g.*, cogeneration facilities burning natural gas and using selective catalytic reduction).” *Id.* The Joint Proposal is, in fact, even more narrowly tailored.

The Joint Proposal applies to a total of only nine specifically enumerated coal-fired boilers, located at just four coal-fired power stations. By focusing on nine specific units, the Board (and, ultimately, U.S. EPA) can know exactly which emission units may benefit from the proposal, and how the proposal will affect each specific emission unit. This provides a clear picture of what impact the proposal will have on the operation of (and related emissions from) those units.

Consequently, U.S. EPA’s first consideration weighs in favor of promulgating the Joint Proposal.

B. It is technically infeasible to avoid all opacity exceedances during SMB.

U.S. EPA recommends considering whether control strategies are technically infeasible. *Id.* The Companies’ testimony and responses to Board questions demonstrate that it is technically infeasible to ensure compliance with opacity 100% of the time during SMB.

MWG’s witness, Sharene Shealey, testified that “it is infeasible for the company to comply with the opacity standards 100% of the time during periods of SMB.” Shealey Prefiled Testimony at 9 ¶ 15. Dynegy’s witness, Cynthia Vodopivec, likewise testified that the Dynegy Affected Units cannot comply with their opacity limitations 100% of the time during periods of SMB. Vodopivec Prefiled Testimony at 17. Ms. Vodopivec provided some examples explaining why.

Some of these opacity events are caused by ESP malfunctions. ESPs are large, complex systems that place an electrical charge on particles, which are then collected on oppositely charged collector plates. These systems, like all others, may experience problems even with the most vigilant operating and maintenance measures and procedures. Unexpected issues that can occur that may result in lower control efficiency and increased opacity include loss of adequate power to collector plates, inability to rap and clean the collector plates sufficiently, and broken electrodes or related equipment.

Id. at 17–18.

Ms. Vodopivec emphasized that the “risk of exceedances occurs even at the [Dynegy] Affected Units that are controlled by both ESPs and baghouses.” *Id.* at 18. This risk is supported by data Dynegy submitted on March 1, 2023, in response to questions it received at the February 16, 2023 hearing (“Dynegy’s Response to Questions”). The third page of Exhibit A to Dynegy’s Response to Questions presents 6-minute opacity data for Baldwin boiler 2 (which is controlled by both an ESP and a baghouse) for a three-hour period on December 24, 2022. Dynegy’s Responses to Questions Received at Hearing, Ex. A at 1 (Mar. 1, 2023), *In the Matter of: Amendments to 35 Ill. Adm. Code Parts 201, 202, and 212*, R2023-018 (hereinafter “Dynegy’s Responses”). Four of those six-minute periods (beginning at 10:06, 11:06, 11:24, and 11:48) recorded average opacity of 30%. *Id.* Those six-minute periods complied with the applicable 30% standard, but they came precariously close to exceeding the standard. They stand in stark contrast to typical opacity for that boiler; in 2022, the average opacity was just 3%. Dynegy’s Responses at 2.

These data demonstrate that equipping a coal-fired boiler with both an ESP *and* a baghouse is no guarantee that the boiler could comply with a 30% opacity standard (or a 20% standard). But, even if adding baghouses could allow the Companies to assure compliance 100% of the time, there is no way that baghouses could be designed, procured, and installed prior to the Board’s final action on IEPA’s Proposed Rule. The Companies would require time to add baghouses to those

Affected Units not currently equipped with them. And that investment of resources would need to be weighed against the fact that Dynegey has announced it plans to retire the Kincaid and Newton Affected Units by July 17, 2027, Vodopivec Prefiled Testimony at 6–7, and MWG plans to retire its Affected Units on or before January 1, 2030. Shealey Prefiled Testimony at 5 ¶ 5.

Consequently, U.S. EPA’s second consideration weighs in favor of promulgating the Joint Proposal.

C. The Joint Proposal imposes work practices designed to minimize the frequency and duration of operation in SMB.

U.S. EPA recommends considering whether the “alternative emission limitation requires that the frequency and duration of operation in startup or shutdown mode are minimized to the greatest extent practicable.” 80 Fed. Reg. at 33,980.

The Joint Proposal imposes work practices designed to minimize the frequency and duration of operation in SMB. Specifically, Section 212.124(e)(3)(B) of the Joint Proposal requires compliance with the following work practices as a condition of relying on the Alternative Averaging Period: “Use good engineering practices and best efforts to minimize the frequency and duration of operation in startup, malfunction and breakdown.” **Ex. A.**

As such, the third consideration weighs in favor of promulgating the Joint Proposal.

D. IEPA has already determined that compliance with the Alternative Averaging Period would assure compliance with applicable State PM limitations.

U.S. EPA recommends considering whether, “[a]s part of its justification of the SIP revision, the state analyzes the potential worst-case emissions that could occur” based on the applicable alternative emission limitation.” 80 Fed. Reg. at 33,980.

If the Board promulgates the Joint Proposal and IEPA submits it to U.S. EPA for incorporation into the Illinois SIP, IEPA will be able to represent that it considered the potential

worst-case emissions that could occur during SMB. That representation would not require any complex new analysis. In fact, the analysis has already been done.

IEPA has already determined that compliance with the Alternative Averaging Period in the Joint Proposal would assure compliance with applicable state PM limitations—the pollutant the opacity standard is intended to address. The Alternative Averaging Period is modeled on the Affected Units' federally enforceable CAM plans to assure continuous compliance with the applicable PM standards. Those CAM plans utilize opacity as an “indicator,” and set the indicator level at either 20% (Newton) or 30% (Baldwin, Kincaid and Powerton) over a rolling 3-hour period. The CAM plans are intended to provide a reasonable assurance of compliance with the PM standards to ensure compliance with the PM NAAQs² and are incorporated in the Stations' CAAPP permits. U.S. EPA reviewed those permits and did not object to them.

For example, the CAM plans for the Dynegy Affected Units state as follows: “The opacity indicator level has been established at a level that provides reasonable assurance that particulate matter emissions are in compliance when opacity is equal to or less than the indicator level.” Vodopivec Prefiled Testimony, Ex. A at 84, 85, 87 (Baldwin), Ex. B at 96, 97 (Kincaid), Ex. C at 83 (Newton). The Powerton CAM plan uses slightly different language to draw the same conclusion: “Opacity less than 30 percent averaged over a rolling 3-hour period is an indicator of proper ESP operation and provides reasonable assurance of meeting the 0.1 lb/mmBtu PM limit.” Shealey Prefiled Testimony, Ex. A at 104.

By using a three-hour average of data, the Board and U.S. EPA can be assured that use of the Alternative Averaging Period would ensure that the Affected Units' opacity during SMB

² See U.S. EPA, *Compliance Assurance Monitoring* (last updated Sept. 6, 2022), [https://www.epa.gov/air-emissions-monitoring-knowledge-base/compliance-assurance-monitoring#:~:text=Compliance%20assurance%20monitoring%20\(CAM\)%20is,device%20equipment%20to%20achieve%20compliance](https://www.epa.gov/air-emissions-monitoring-knowledge-base/compliance-assurance-monitoring#:~:text=Compliance%20assurance%20monitoring%20(CAM)%20is,device%20equipment%20to%20achieve%20compliance).

events does not exceed the applicable state PM limitations. As such, it is consistent with the Illinois SIP for PM emissions.

Moreover, the Joint Proposal is more stringent than the SMB Authorizations currently applicable to the Affected Units. As discussed above, the current SMB Authorizations do not include any limit on the duration of opacity events or the maximum level of opacity during such events. In fact, Dynegey's Response to Questions included actual opacity data from Newton and Kincaid that exceeded 20% or 30%, respectively, on a three-hour average basis—opacity levels currently authorized but that would be prohibited under the Joint Proposal. Dynegey's Responses, Ex. A at 1–2. This demonstrates that opacity (and emissions) would be no higher, and may in fact be lower, under the Joint Proposal than currently allowed under the SMB Authorizations.

For these reasons, the fourth consideration weighs in favor of promulgating the Joint Proposal. Notably, these reasons also demonstrate that the Joint Proposal would not “allow an inappropriately high level of emissions or an effectively unlimited or uncontrolled level of emissions.” 80 Fed. Reg. at 33,980.

E. The Joint Proposal would minimize any impact on ambient air quality.

U.S. EPA recommends considering whether the “alternative emission limitation requires that all possible steps are taken to minimize the impact of emissions”. 80 Fed. Reg. at 33,980. Based on the work practices described in Section IV.C and F of this Comment, coupled with the points addressed in Section IV.D, it is clear that the Joint Proposal (a) would have no negative impact (and may, in fact, have a positive impact) on ambient air quality, when compared with the current SMB Authorizations, and (b) would not interfere with any applicable requirement concerning attainment and reasonable further progress.

Consequently, the fifth consideration weighs in favor of promulgating the Joint Proposal.

F. The Joint Proposal imposes work practices designed to minimize opacity.

U.S. EPA recommends considering whether the “alternative emission limitation requires that, at all times, the facility is operated in a manner consistent with good practice for minimizing emissions and the source uses best efforts regarding planning, design, and operating procedures.” 80 Fed. Reg. at 33,980.

The Joint Proposal imposes work practices designed to minimize opacity, which has the effect of also minimizing the particulate emissions that result in opacity. Specifically, Section 212.124(e)(3)(A) of the Joint Proposal requires compliance with the following work practices as a condition of relying on the Alternative Averaging Period: “Operate the coal-fired boiler and related air pollution control equipment in a manner consistent with good engineering practice for minimizing opacity during such startup, malfunction or breakdown.”

As such, the sixth consideration weighs in favor of promulgating the Joint Proposal.

G. The Joint Proposal imposes detailed recordkeeping and reporting requirements.

U.S. EPA recommends considering whether the alternative emission limitation requires that the owner or operator’s actions are documented by properly signed, contemporaneous operating logs or other relevant evidence. 80 Fed. Reg. at 33,980.

Section 212.124(e)(2) of the Joint Proposal imposes detailed recordkeeping requirements as a condition to relying on the Alternative Averaging Period *and* requires that those records be reported to IEPA. The Companies based these requirements on the recordkeeping requirements that IEPA currently imposes as part of the SMB Authorizations in the CAAPP permits for these Stations.

The seventh consideration, like the other six, weighs in favor of promulgating the Joint Proposal.

H. The Joint Proposal is more stringent than the relevant NSPS SSM exclusion

U.S. EPA “encourages states to explore . . . approaches” to startup and shutdown events such as those taken in NSPS regulations. 80 Fed. Reg. 33,916. A fitting example is contained in the Newton CAAPP permit. In addition to being subject to the state 20% opacity limit, the Newton Affected Unit is also subject to a 20% opacity limit pursuant to NSPS, Subpart D. As summarized by Condition 7.1.4(a)(iii) of the Newton CAAPP permit, “Opacity from the affected boiler shall not exceed 20 percent, as measured on a six minute average, except for one 6 minute period per hour of not more than 27 percent pursuant to NSPS, 40 CFR 60.42(a)(2).” Vodopivec Prefiled Testimony, Ex. C at 49.

Of note, the permit goes on to provide an SMB exception to the 20% NSPS limitation, pursuant to 40 C.F.R. §§ 60.8(c) and 60.11(c), stating that the “limitations do not apply during startup, shutdown, and malfunctions, as defined by 40 CFR 60.2,” though such exceedances “are still subject to recordkeeping and reporting requirements under the NSPS.” Vodopivec Prefiled Testimony, Ex. C at 49 (Condition 7.1.4(a)(iv)). This SMB exception is broader (and less stringent) than the Joint Proposal because it applies to *all* shutdowns, irrespective of whether the excess opacity occurs during periods of malfunction or breakdown. And the NSPS startup, shutdown, and malfunction exception imposes no opacity limit.

Because the Joint Proposal is *narrower* than the NSPS startup, shutdown, and malfunction exception, it should be approved.

V. The Joint Proposal Compliments IEPA’s Proposed Rule and does not Jeopardize Approvability

The Joint Proposal does not require or suggest altering any of the revisions IEPA proposes through its Proposed Rule. Rather, the Companies drafted the Joint Proposal to fit squarely within the framework contemplated by IEPA’s proposed revisions to Section 201.149:

No person shall cause or allow the continued operation of an emission source during malfunction or breakdown of the emission source or related air pollution control equipment if such operation would cause a violation of the applicable standards or limitations set forth in Subchapter c of this Chapter except as specifically provided for by such standard or limitation. ~~unless the current operating permit granted by the Agency provides for operation during a malfunction or breakdown.~~ No person shall cause or allow violation of the applicable standards or limitations set forth in that Subchapter during startup except as specifically provided for by such standard or limitation. ~~unless the current operating permit granted by the Agency provides for violation of such standards or limitations during startup.~~

The underscored text, which IEPA proposes to add to Section 201.149, expressly contemplates that individual standards and limitations in Subchapter C (including the Part 212 opacity standards) may specifically provide for exceptions for emissions or opacity during SMB events. That is precisely what the Joint Proposal would do.

CONCLUSION

The Joint Proposal would provide narrowly tailored relief to allow the Companies to continue compliant operation of the Affected Units, recognizing that it is not possible to avoid opacity exceedances 100% of the time during periods of SMB. The Joint Proposal includes limits that would apply during periods of SMB, as well as work practices designed to minimize the frequency, duration and level of opacity during such periods, and so it is more stringent than the existing regulations and SMB provisions in the Stations' CAAPP permits. The proposal would not result in any greater opacity—or emissions—than currently authorized. As such, it will not result in backsliding. The Companies drafted the Joint Proposal to satisfy all of U.S. EPA's recommendations in its Final SIP Call for such provisions. For these reasons the Companies believe the Joint Proposal ultimately could and should be approved into the Illinois SIP.

The Companies respectfully request that, if the Board adopts IEPA's Proposed Rule, it also adopt the Companies' Joint Proposal, so that they can continue operating the Affected Units in compliance with state opacity requirements during SMB, as they generate reliable power.

Dated: March 7, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 7th day of March, 2023:

I have electronically served true and correct copies of the Joint Post-Hearing Comment of Dynegy and Midwest Generation by electronically filing with the Clerk of the Illinois Pollution Control Board and by e-mail upon each person listed in the attached service list.

My e-mail address is Sarah.Lode@afslaw.com.

The number of pages in the e-mail transmission is 32.

The e-mail transmission took place before 5:00 p.m.

 /s/ Sarah L. Lode

Sarah L. Lode

Dated: March 7, 2023

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EXHIBIT A

Section 212.124 Exceptions

e) During times of startup of coal-fired boiler 1 or 2 at the Baldwin Energy Complex, coal-fired boiler 1 or 2 at the Kincaid Power Station, coal-fired boiler 1 at the Newton Power Station, or coal-fired boiler 51, 52, 61, or 62 at the Powerton Generating Station, or of malfunction or breakdown of these boilers or the air pollution control equipment serving these boilers, when average opacity exceeds 20 or 30 percent for a six-minute period, as applicable pursuant to Section 212.122(a) or 212.123(a) of this Subpart, compliance with Section 212.122(a) or 212.123(a) may alternatively be demonstrated for that six-minute period as follows.

1) Alternative Averaging Period.

Compliance for that six-minute period may be determined based on a three-hour average of opacity, utilizing opacity readings for those six minutes and the immediately preceding 174 minutes.

2) Recordkeeping and Reporting

A) Any person relying on the Alternative Averaging Period in Section 212.124(e)(1) of this Subpart shall maintain records of such average opacity calculations and shall report such calculations to Illinois EPA as part of the next quarterly excess emissions report for the source.

B) For periods of startup, such report shall include:

1) The date, time, and duration of the startup.

2) A description of the startup.

3) The reason(s) for the startup.

4) An indication of whether or not written startup procedures were followed. If any written startup procedures were not followed, the report shall include any departures from established procedures and any reason the procedures could not be followed.

5) A description of any actions taken to minimize the magnitude or duration of opacity that requires utilization of the Alternative Averaging Period in Section 212.124(e)(1) of this Subpart.

6) An explanation whether similar incidents could be prevented in the future and, if so, a description of the actions taken or to be taken to prevent similar incidents in the future.

- 7) Confirmation of fulfillment of the requirements of Section 212.124(e)(3) of this Subpart.
- C) For periods of malfunction and breakdown, such report shall include:
- 1) The date, time, duration (i.e., the length of time during which operation continued with opacity in excess of 20 or 30 percent, as applicable, on a six-minute average basis) until corrective actions were taken or the boiler was taken out of service.
 - 2) A description of the incident.
 - 3) Any corrective actions used to reduce the magnitude or duration of opacity that requires utilization of the Alternative Averaging Period in Section 212.124(e)(1) of this Subpart.
 - 4) Confirmation of fulfillment of the requirements of Sections 212.124(e)(2)(D) and (e)(3) of this Subpart.
- D) Any person who causes or allows the continued operation of a coal-fired boiler during a malfunction or breakdown of the coal-fired boiler or related air pollution control equipment when such continued operation would require reliance on the Alternative Averaging Period in Section 212.124(e)(1) of this Subpart to demonstrate compliance with Section 212.122 or 212.123 of this Subpart, as applicable, shall immediately report such incident to the Agency by telephone, facsimile, electronic mail, or such other method as constitutes the fastest available alternative, except if otherwise provided in the operating permit. Thereafter, any such person shall comply with all reasonable directives of the Agency with respect to the incident.

3) Work Practices

Any person relying on the Alternative Averaging Period in Section 212.124(e)(1) of this Subpart must comply with the following Work Practices.

- A) Operate the coal-fired boiler and related air pollution control equipment in a manner consistent with good engineering practice for minimizing opacity during such startup, malfunction or breakdown.
- B) Use good engineering practices and best efforts to minimize the frequency and duration of operation in startup, malfunction and breakdown.