BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SOUTHERN ILLINOIS POWER COOPERATIVE,	)	
Petitioner,	)	
v.	)	**PCB _____**
	)	**(Permit Appeal – Air)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE OF FILING

To: Pollution Control Board, Attn: Clerk
James R. Thompson Center
100 W. Randolph
Suite 11-500
Chicago, Illinois 60601

Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution control Board the original and nine copies of the **Appeal of CAAPP Permit** of **Southern Illinois Power Cooperative** and the **Appearances** of Sheldon A. Zabel, Kathleen C. Bassi, Stephen J. Bonebrake, Joshua R. More, and Kavita M. Patel, copies of which are herewith served upon you.

Kathleen C. Bassi

Dated: November 2, 2005

Sheldon A. Zabel
Kathleen C. Bassi
Stephen J. Bonebrake
Joshua R. More
Kavita M. Patel
SCHIFF HARDIN, LLP
6600 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
312-258-5500
Fax: 312-258-5600

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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v.	)	**PCB _____**
	)	**(Permit Appeal – Air)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

APPEARANCE

I hereby file my appearance in this proceeding, on behalf of Southern Illinois Power Cooperative.

Kathleen C. Bassi

Dated: November 2, 2005

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Respondent.	)	

APPEARANCE

I hereby file my appearance in this proceeding, on behalf of Southern Illinois Power Cooperative.

Stephen J. Bonebrake

Dated: November 2, 2005

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Joshua R. More
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	)	**(Permit Appeal – Air)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

APPEARANCE

I hereby file my appearance in this proceeding, on behalf of Southern Illinois Power Cooperative.

Joshua R. More

Dated: November 2, 2005

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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v.	)	**PCB _____**
	)	**(Permit Appeal – Air)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

APPEARANCE

I hereby file my appearance in this proceeding, on behalf of Southern Illinois Power Cooperative.

Kavita Patel
Kavita M. Patel

Dated: November 2, 2005

Sheldon A. Zabel
Kathleen C. Bassi
Stephen J. Bonebrake
Joshua R. More
Kavita M. Patel
SCHIFF HARDIN, LLP
6600 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
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Fax: 312-258-5600

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SOUTHERN ILLINOIS POWER COOPERATIVE,	)	
Petitioner,	)	
v.	)	**PCB** _____
	)	**(Permit Appeal – Air)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached **Appeal of CAAPP Permit** of **Southern Illinois Power Cooperative** and **Appearances** of Sheldon A. Zabel, Kathleen C. Bassi, Stephen J. Bonebrake, Joshua R. More, and Kavita M. Patel,

by electronic delivery upon the following person:

Pollution Control Board, Attn: Clerk
James R. Thompson Center
100 W. Randolph
Suite 11-500
Chicago, Illinois 60601

and by electronic and first class mail upon the following person:

Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276

Kathleen C. Bassi

Dated: November 2, 2005

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Kathleen C. Bassi
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SOUTHERN ILLINOIS POWER COOPERATIVE,	)	
Petitioner,	)	
v.	)	**PCB _____**
	)	**(Permit Appeal – Air)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

APPEARANCE

I hereby file my appearance in this proceeding, on behalf of Southern Illinois Power Cooperative.

Sheldon A. Zabel

Dated: November 2, 2005

Sheldon A. Zabel
Kathleen C. Bassi
Stephen A. Bonebrake
Joshua R. More
Kavita M. Patel
SCHIFF HARDIN, LLP
6600 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
312-258-5500
Fax: 312-258-5600

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SOUTHERN ILLINOIS POWER COOPERATIVE, MARION GENERATING STATION,	)	
Petitioner,	)	
v.	)	**PCB _____**
	)	**(Permit Appeal – Air)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

APPEAL OF CAAPP PERMIT

NOW COMES Petitioner, Southern Illinois Power Cooperative ("Petitioner" or "SIPC"), pursuant to Section 40.2 of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/40.2) and 35 Ill.Adm.Code § 105.300 *et seq.*, and requests a hearing before the Board to contest the decisions contained in the permit "issued" to Petitioner on September 29, 2005, under the Clean Air Act Permit Program ("CAAPP" or "Title V") set forth at Section 39.5 of the Act (415 ILCS 5/39.5). In support of its Petition, Petitioner states as follows:

I. BACKGROUND
(35 Ill.Adm.Code § 105.304(a))

1. On November 15, 1990, Congress amended the Clean Air Act (42 U.S.C. §§ 7401-7671q) and included in the amendments at Title V a requirement for a national operating permit program. The Title V program was to be implemented by states with approved programs. Illinois' Title V program, the CAAPP, was fully and finally approved by the U.S. Environmental Protection Agency ("USEPA") on December 4, 2001 (66 Fed.Reg. 72946). The Illinois

Environmental Protection Agency ("Agency" or "IEPA") has had the authority to issue CAAPP permits since at least March 7, 1995, when the state was granted interim approval of its CAAPP (60 Fed.Reg. 12478). Illinois' Title V program is set forth at Section 39.5 of the Act, 35 Ill.Adm.Code 201.Subpart F, and 35 Ill.Adm.Code Part 270.

2. The Marion Generating Station ("Marion" or the "Station"), Agency I.D. No. 199856AAC, is an electric generating station owned and operated by SIPC. The Marion Station has four generating units. Unit 123 is a circulating fluidized bed boiler which utilizes coal and coal refuse as its primary fuels. Unit 123 has a nominal maximum gross summer capacity of 111 MW. Sulfur emissions are controlled by limestone injection into the boiler. Combustion temperature control, supplemented by a selective non-catalytic reduction system, limit NOx emissions and a baghouse controls emissions of particulate matter.

3. Unit 4 is equipped with a flue gas desulphurization unit, a selective catalytic reduction unit and an ESP to control emission. Unit 4 has a cyclone-fired boiler which also utilizes coal and coal refuse as its primary fuel. Unit 4 has a nominal maximum gross summer capacity of 172 MW.

4. Units 5 and 6 are gas-fired combustion turbines which can utilize either natural gas or distillate oil as fuel. Units 5 and 6 each have a nominal maximum gross summer capacity of 80 MW each. The units use low NOx combustion systems when firing gas and water injection when firing oil to control NOx emissions. The quality of the fuels limits emissions of other pollutants.

5. The Agency received the original CAAPP permit application for the Station on September 8, 1995, and assigned Application No. 95090124. Petitioner updated this application from time to time throughout the ten years that IEPA took to review the application. The

CAAPP permit application was timely submitted and updated, and Petitioner requested and was granted an application shield, pursuant to Section 39.5(5)(h). Petitioner has paid fees as set forth at Section 39.5(18) of the Act since submitting the application for a CAAPP permit for the Station. Marion's state operating permit has continued in full force and effect since submittal of the CAAPP permit application, pursuant to Sections 9.1(f) and 39.5(4)(b) of the Act.

6. The Agency issued a final draft permit for public review on June 4, 2003. SIPC filed written comments with the Agency regarding the draft permit on September 26, 2003.[1] The Agency issued a proposed permit for the Station on October 6, 2003. This permit was not technically open for public comment, as it had been sent to USEPA for its comment as required by Title V. Subsequently, in December 2004, the Agency issued a draft revised proposed permit for Petitioner's and other interested persons' comments. SIPC again commented. The Agency issued a second draft revised proposed permit in July 2005 and allowed the Petitioner and other interested persons 10 days to comment. At the same time, the Agency released its preliminary Responsiveness Summary, its draft of its response to comments, and invited comment on that document as well. SIPC submitted comments on this version of the permits and on the preliminary Responsiveness Summary on August 1, 2005. The Agency submitted the revised proposed permit to USEPA for its 45-day review on August 15, 2005. The Agency did not seek further comment on the permit from the Petitioner or other interested persons, and SIPC has not submitted any further comments, based upon the understanding that the Agency had every intention to issue the permit at the end of USEPA's review period.

[1] SIPC has attached the appealed permit to this Petition. However, the draft and proposed permits and other documents referred to herein should be included in the administrative record that the Agency will file. Other documents referred to in this Petition, such as cases or Board decisions, are easily accessible. In the interests of economy, SIPC is not attaching such documents to this Petition.

7. The final permit was "issued" on September 29, 2005.[2] Although some of Petitioner's comments have been addressed in the various iterations of the permit, it still contains terms and conditions that are not acceptable to Petitioner, including conditions that are contrary to applicable law and conditions that first appeared, at least in their final detail, in the August 2005 proposed permit and upon which Petitioner did not have the opportunity to comment. For these reasons, Petitioner hereby appeals the permit. This permit appeal is timely submitted within 35 days following purported issuance date of the permit. Petitioner requests that the Board review the permit and order the Agency to correct and reissue the permit, without further public proceeding, as appropriate.

II. EFFECTIVENESS OF PERMIT

8. Pursuant to Section 10-65(b) of the Illinois Administrative Procedures Act ("APA"), 5 ILCS 100/10-65, and the holding in *Borg-Warner Corp. v. Mauzy*, 427 N.E. 2d 415 (Ill.App.Ct. 1981) ("*Borg-Warner*"), the CAAPP permit issued by the Agency to the Station does not become effective until after a ruling by the Board on the permit appeal and, in the event of a remand, until the Agency has issued the permit consistent with the Board's order. Section 10-65(b) provides that "when a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license shall continue in full force and effect until the final agency decision on the application has been made unless a later date is fixed by order of a reviewing court." 5 ILCS 100/10-65. The *Borg-Warner* court found that with respect to an appealed environmental permit, the "final agency decision" is the final decision by the Board in an appeal, not the issuance of the permit by the Agency. *Borg-Warner*, 427 N.E. 2d 415 at 422; *see also IBP, Inc. v. IL Environmental*

[2] *See* USEPA/Region 5's Permits website at < http://www.epa.gov/region5/air/permits/ilonline.htm > → "CAAPP permit Records" for the complete "trail" of the milestone action dates for this permit.

Protection Agency, 1989 WL 137356 (Ill. Pollution Control Bd. 1989); *Electric Energy, Inc. v. Ill. Pollution Control Bd.*, 1985 WL 21205 (Ill. Pollution Control Bd. 1985). Therefore, pursuant to the APA as interpreted by Borg-Warner, the entire permit is not yet effective and the existing permits for the facility continue in effect.

9. The Act provides at Sections 39.5(4)(b) and 9.1(f) that the state operating permit continues in effect until issuance of the CAAPP permit. Under Borg-Warner, the CAAPP permit does not become effective until the Board issues its order on appeal and the Agency has reissued the permit. Therefore, SIPC currently has the necessary permits to operate the Station.

10. In the alternative, to avoid any question as to the limitation on the scope of the effectiveness of the permit under the APA, SIPC requests that the Board exercise its discretionary authority at 35 Ill.Adm.Code § 105.304(b) and stay the entire permit. Such a stay is necessary to protect SIPC's right to appeal and to avoid the imposition of conditions before it is able to exercise that right to appeal. Further, compliance with the myriad of new monitoring, inspection, recordkeeping, and reporting conditions that are in the CAAPP permit will be extremely costly. To comply with conditions that are inappropriate, as SIPC alleges below, would cause irreparable harm to SIPC, including the imposition of these unnecessary costs and the adverse effect on SIPC's right to adequate review on appeal. SIPC has no adequate remedy at law other than this appeal to the Board. SIPC is likely to succeed on the merits of its appeal, as the Agency has included conditions that do not reflect "applicable requirements," as defined by Title V, and has exceeded its authority to impose conditions or the conditions are arbitrary and capricious. *See Lone Star Industries, Inc. v. IEPA*, PCB 03-94 (January 9, 2003); *Nielsen & Brainbridge, L.L.C. v. IEPA*, PCB 03-98 (February 6, 2003); *Saint-Gobain Containers, Inc. v. IEPA*, PCB 04-47 (November 6, 2003); *Champion Laboratories, Inc. v. IEPA*, PCB 04-65

(January 8, 2004); *Noveon, Inc. v. IEPA*, PCB 04-102 (January 22, 2004); *Ethyl Petroleum Additives, Inc., v. IEPA*, PCB 04-113 (February 5, 2004); *Oasis Industries, Inc. v. IEPA*, PCB 04-116 (May 6, 2004). Moreover, the Board has stayed the entirety of all the CAAPP permits that have been appealed. *Additionally see Bridgestone/Firestone Off Road Tire Company v. IEPA*, PCB 02-31 (November 1, 2001); *Midwest Generation, LLC – Collins Generating Station v. IEPA*, PCB 04-108 (January 22, 2004); *Board of Trustees of Eastern Illinois University v. IEPA*, PCB 04-110 (February 5, 2004). The Board should continue to follow this precedent.

11. Finally, a large number of conditions included in this CAAPP permit are appealed here. To require some conditions of the CAAPP permit to remain in effect while the contested conditions are covered by the old state operating permits creates an administrative environment that would be, to say the least, very confusing. Moreover, the Agency's failure to provide a statement of basis, discussed below, renders the entire permit defective. Therefore, SIPC requests that the Board stay the entire permit for these reasons.

12. In sum, pursuant to Section 10-65(b) of the APA and *Borg-Warner*, the entirety of the CAAPP permit does not become effective until the completion of the administrative process, which occurs when the Board has issued its final ruling on the appeal and the Agency has acted on any remand. (For the sake of simplicity, hereafter the effect of the APA will be referred to as a "stay".) In the alternative, SIPC requests that the Board, consistent with its grants of stay in other CAAPP permit appeals, because of the pervasiveness of the conditions appealed throughout the permit, to protect SIPC's right to appeal and in the interests of administrative efficiency, stay the entire permit pursuant to its discretionary authority at 35 Ill.Adm.Code § 105.304(b). In addition, such a stay will minimize the risk of unnecessary litigation concerning the question of a stay and expedite resolution of the underlying substantive issues. The state

operating permits currently in effect will continue in effect throughout the pendency of the appeal and remand. Therefore, the Station will remain subject to the terms and conditions of those permits. As the CAAPP permit cannot impose new substantive conditions upon a permittee (*see* discussion below), emissions limitations are the same under both permits. The environment will not be harmed by a stay of the CAAPP permit.

III. ISSUES ON APPEAL
(35 Ill.Adm.Code §§ 105.304(a)(2), (3), and (4))

13. As a preliminary matter, the CAAPP permits issued to the Station and 20 of the other coal-fired power plants in the state on the same date are very similar in content. The same language appears in virtually all of the permits, though there are subtle variations to some conditions to reflect the differences among the stations. For example, not all stations have the same types of emissions units. Some units in the state are subject to New Source Performance Standards ("NSPS"), perhaps New Source Review ("NSR") or Prevention of Significant Deterioration ("PSD"), or other state or federal programs, while others are not. As a result, the appeals of these permits filed with the Board will be equally as repetitious but with elements of uniqueness reflecting these differences. Further, the issues on appeal span the gamut of simple typographical errors to extremely complex questions of law. Petitioner's presentation in this appeal is by issue, generally per unit type, identifying the permit conditions giving rise to the appeal and the conditions related to them that would be affected, should the Board grant Petitioner's appeal.

14. The Act does not require a permittee to have participated in the public process; it merely needs to object, after issuance, to a term or condition in a permit in order to have standing to appeal the permit issued to him. *See* Section 40.2(a) of the Act (the applicant may appeal while others need to have participated in the public process). However, SIPC, as will be

evidenced by the administrative record, has actively participated to the extent allowed by the Agency in the development of this permit. Nevertheless, there are conditions in the permit that Petitioner has only now determined are unacceptable for various reasons set forth below, and SIPC, therefore, may not have commented on them previously. In other instances, also as discussed in further detail below, the Agency did not provide SIPC with a viable opportunity to comment, leaving SIPC with appeal as its only alternative as a means of rectifying inappropriate conditions. These issues are properly before the Board in this proceeding. Petitioner appeals all conditions related to the conditions giving rise to this appeal, however, whether such related conditions are expressly identified or not below.

15. Section 39.5(7)(d)(ii) of the Act grants the Agency the authority to "gapfill." "Gapfilling" is the inclusion in the permit of periodic monitoring requirements, where the underlying applicable requirement does not include them. This language faithfully reflects 40 CFR § 70.6(a)(iii)(B), the subject of litigation in *Appalachian Power Company v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000). The court in *Appalachian Power* found that state authorities are precluded from including provisions in permits requiring more frequent monitoring than is required in the underlying applicable requirement unless the applicable requirement contained no periodic testing or monitoring, specified no frequency for the testing or monitoring, or required only a one-time test. *Appalachian Power* at 1028.

16. The *Appalachian Power* court also noted that "Title V does not impose substantive new requirements" and that test methods and the frequency at which they are required "are surely 'substantive' requirements; they impose duties and obligations on those who are regulated." *Appalachian Power* at 2026-27. (Quotation marks and citations in original

omitted.) Thus, where the permitting authority, here the Agency, becomes over-enthusiastic in its gapfilling, it is imposing new substantive requirements contrary to Title V.

17. The Agency, indeed, has engaged in gapfilling, as some of the Board's underlying regulations do not provide specifically for periodic monitoring. *C.f.*, 35 Ill.Adm.Code 212.Subpart E. However, the Agency has also engaged in over-enthusiastic gapfilling in some instances, as discussed in detail below. These actions are arbitrary and capricious and are an unlawful assumption of regulatory authority not granted by Section 39.5 of the Act. Moreover, contrary to *Appalachian Power*, they, by their nature, unlawfully constitute the imposition of new substantive requirements. Whenever Petitioner identifies inappropriate gapfilling as the basis for its objection to a term or condition of the permit, Petitioner requests that the Board assume this preceding discussion of gapfilling as part of that discussion of the specific term or condition.

18. In a number of instances specifically identified and discussed below, the Agency has failed to provide required citations to the applicable requirement. "Applicable requirements" are those substantive requirements that have been promulgated or approved by USEPA pursuant to the Clean Air Act which directly impose requirements upon a source, including those requirements set forth in the statute or regulations that are part of the Illinois SIP. Section 39.5(1). General procedural-type requirements or authorizations are not substantive "applicable requirements" and are not sufficient basis for a substantive term or condition in the permit.

19. The Agency has cited generally to Sections 39.5(7)(a), (b), (e), and (f) of the Act or to Section 4(b) of the Act, but it has not cited to the substantive applicable requirements that serve as the basis for the contested conditions in the permit. Only applicable requirements may

be included in the permit,[3] and the Agency is required by Title V to identify its basis for inclusion of a permit condition (Section 39.5(7)(n)). If the Agency cannot cite to the applicable requirement and the condition is not proper gapfilling, the condition cannot be included in the permit. The Agency has confused general data- and information-gathering provisions with "applicable requirements." They are not the same. Section 4(b) of the Act cannot be converted into an applicable requirement merely because the Agency includes it as the basis for a condition. Failure to cite the applicable requirement is grounds for the Board to remand the term or condition to the Agency.

20. Another general deficiency of the CAAPP permitting process in Illinois is the Agency's refusal to develop and issue a formal statement of basis for the permit's conditions. This statement of basis is to explain the permitting authority's rationale for the terms and conditions of the permit. It is to explain why the Agency made the decision it did, and it is to provide the permittee the opportunity to challenge the Agency's rationale during the permit development process or comment period. Title V requires the permitting authority to provide such a statement of basis. Section 39.5(7)(n) of the Act. The Agency's after-the-fact conglomeration of the very short project summary produced at public notice, the permit, and the Responsiveness Summary are just not sufficient. When the permittee and the public are questioning rationale in comments, it is evident that the Agency's view of a statement of basis is not sufficient. Further, the Responsiveness Summary is prepared after the fact; it is not provided during permit development. Therefore, it cannot serve as the statement of basis. The lack of a viable statement of basis, denying the permittee notice of the Agency's decision-making

[3] *Appalachian Power*,208 F.3d at 1026.

rationale and the opportunity to comment thereon, makes the entire permit defective and is, in and of itself, a basis for appeal and remand of the permit and stay of the entire permit.

21. The Agency "issued" the CAAPP permit that is the subject of this appeal to SIPC on September 29, 2005, at 7:18 p.m. The Agency notified SIPC that the permits had been "issued" through an email sent to Leonard Hopkins, an SIPC employee. The email indicated that the permits were available on USEPA's website, where Illinois' permits are housed. However, that was not the case. An attempt was made to view the permit on the website after 7:30 p.m. on September 29, and the permit was not there.

22. The issuance date of the permits becomes important because it is the date that starts the clock for filing an appeal. USEPA's website identifies September 29, 2005, as that date. If this is also the effective date, many deadlines would be triggered, including the expiration date and the date by which certain documents must be submitted to the Agency. More critical, however, is the fact that once the permit becomes effective, SIPC would be obliged to comply with it, regardless of whether it had any recordkeeping systems in place, any additional control equipment that might be necessary, and so forth. It took the Agency over two years to issue the final permit; the first draft permit was issued June 4, 2003. Over that course of time, the Agency issued numerous versions of the permit, changing it considerably. Therefore, to expect SIPC to have anticipated the final permit to the degree necessary to be able to comply on the evening of September 29, 2005, is unreasonable.

23. Moreover, publication of the permit on a website is not "official" notification in Illinois. SIPC cannot be deemed to "have" the permit until the original, signed version of the permit has been delivered. Neither Illinois' rules nor the Act have been amended to reflect

electronic delivery of permits. Therefore, until the permit is officially delivered to SIPC, it should not be deemed effective.

24. Prior to the advent of pervasive use of computers and reliance on the internet for communication, the Agency sent permits to sources through the U.S. mails, just as this CAAPP permit was delivered on October 4, 2005. Neither the Act nor the regulations specify when permits should become effective. Prior to the advent of Title V, however, sources have not been subject to such numerous and detailed permit conditions and exposed to enforcement from so many sides. Under Title V, not only the Agency through the Attorney General, but also USEPA and the general public can bring enforcement suits for violation of the least matter in the permit. If the issuance date is the effective date, this has the potential for tremendous consequences to the permittee and is extremely inequitable.

25. If the effective date was September 29, 2005, that would create an obligation to perform quarterly monitoring and submit quarterly reports, see e.g. Conditions 7.1.10-2(a) and 7.2.10-2(a), for the third quarter of 2005 which consists of less than thirty hours of operation. The requirement to perform quarterly monitoring for a quarter that consists of less than thirty hours of operation will not generate data that is sufficient to assure compliance with the applicable requirements and is, therefore, arbitrary and capricious.

26. A more equitable and legal approach would be for the Agency to delay the effective date of a final permit for a period of time reasonably sufficient for sources to implement any new compliance systems necessary because of the terms of the permit or at least until after the time to for the source to appeal the permit has expired so that an appeal can stay the permit until the Board can rule.

27. Consistent with the APA, the effective date of the permit, contested herein, is stayed, and SIPC requests that the Board order the Agency to establish an effective date some period of time after the permittee receives the permit following remand and reissuance of the permit to allow the permittee sufficient time to implement the systems necessary to comply with all the requirements of this very complex permit, or such longer period of time that the Board may find more appropriate.

Overall Source Conditions
(Section 5)

(i) Recordkeeping of and Reporting HAP Emissions

28. The CAAPP permit issued to the Station requires SIPC to keep records of emissions of mercury, hydrogen chloride, and hydrogen fluoride – all HAPs – and to report those emissions at Conditions 5.6.1(a) and (b) (recordkeeping) and 5.7.2 (reporting). The Agency has not provided proper statutory or regulatory basis for these requirements other than the general provisions of Sections 4(b) and 39.5(7)(a), (b), and (e) of the Act. Citations merely to the general provisions of the Act do not create an "applicable requirement."

29. In fact, there is no applicable requirement that allows the Agency to require this recordkeeping and reporting. There are no regulations that limit emissions of HAPs from the Station. While USEPA has recently promulgated the Clean Air Mercury Rule ("CAMR") (70 Fed.Reg. 28605 (May 18, 2005)), Illinois has not yet developed its corresponding regulations. The Agency correctly discussed this issue relative specifically to mercury in the Responsiveness Summary by pointing out that it cannot add substantive requirements through a CAAPP permit or through its oblique reference to the CAMR. *See* Responsiveness Summary in the Administrative Record, p. 21. However, the Agency was incorrect in its discussion in the Responsiveness Summary by stating that it can rely upon Section 4(b), the authority for the

Agency to gather information, as a basis for requiring recordkeeping and reporting of mercury emissions through the CAAPP permit. The Agency has confused its duty to gather data pursuant to Section 4(b) and its authority to gapfill, with the limitation on its authority under Title V to include only "applicable requirements" in a Title V permit. *See Appalachian Power*. Even by including only recordkeeping and reporting of HAP emissions in the permit, the Agency has exceeded its authority, just as seriously as if it had included emissions limitations for HAPs in the permit. Section 4(b) does not provide the authority to impose this condition in a CAAPP permit.

30. Further, the Agency's own regulations, which are part of the approved program or SIP for its Title V program, preclude the Agency from requiring the recordkeeping and reporting of HAP emissions that it has included at Conditions 5.6.1(a) and (b) and 5.7.2. The Agency's Annual Emissions Reporting rules, 35 Ill.Adm.Code Part 254, which Condition 5.7.2 specifically addresses, states as follows:

> Applicable Pollutants for Annual Emissions Reporting
>
> Each Annual Emissions Report shall include applicable information for all regulated air pollutants, as defined in Section 39.5 of the Act [415 ILCS 5/39.5], except for the following pollutants:
>
> * * *
>
> b) A hazardous air pollutant emitted by an emission unit that is not subject to a National Emissions Standard for Hazardous Air Pollutants (NESHAP) or maximum achievable control technology (MACT). For purposes of this subsection (b), emission units that are not required to control or limit emissions but are required to monitor, keep records, or undertake other specific activities are considered subject to such regulation or requirement.

35 Ill.Adm.Code § 254.120(b). (Brackets in original; emphasis added.) Power plants are not subject to any NESHAPs or MACT standards. *See* 69 Fed.Reg. 15994 (March 29, 2005) (USEPA withdraws its listing of coal-fired power plants under Section 112(c) of the Clean Air Act). The Agency has not cited any other applicable requirement that provides it with the authority to require SIPC to keep records of and report HAP emissions. Therefore, pursuant to the provisions of § 254.120(b) of the Agency's regulations, the Agency has no regulatory basis for requiring the reporting of HAPs emitted by coal-fired power plants.

31. Consistent with the APA, Conditions 5.6.1(a) and (b) *in toto* and Condition 5.7.2 as it relates to reporting emissions of HAPs in the Annual Emission Report, contested herein, are stayed, and SIPC requests that the Board order the Agency to amend the permit accordingly.

(ii) Retention and Availability of Records

32. Conditions 5.6.2(b) and (c) switch the burden of copying records the Agency requests from the Agency, as stated in Condition 5.6.2(a), to the permittee. While SIPC generally does not object to providing the Agency records reasonably requested and is reassured by the Agency's statement in the Responsiveness Summary that its "on-site inspection of records and written or verbal requests for copies of records will generally occur at reasonable times and be reasonable in nature and scope" (Responsiveness Summary, p. 18) (emphasis added), SIPC may not be able to print and provide data within the span of an inspector's visit where the records are electronic and include vast amounts of data. Moreover, most of the electronic records are already available to the Agency through its own or USEPA's databases, and where this is the case, SIPC should not be required to again provide the data absent its loss for some unforeseen reason, and certainly should not have to print out the information. Further, SIPC is troubled by the qualifier *generally* that the Agency included in its statement.

33. Consistent with the APA, Conditions 5.6.2(b) and (c), contested herein, are stayed, and SIPC requests that the Board order the Agency to amend them in a manner to correct the deficiencies outlined above.

(iii) Submission of Blank Record Forms to the Agency

34. SIPC may be confused as to what the Agency expects with respect to Condition 5.6.2(d). Initially, SIPC thought this condition required submission of the records that are required by Conditions 7.1.9, 7.2.9, 7.3.9, 7.4.9, 7.5.9, 7.6.9, and 7.7.9. However, upon further consideration of Condition 5.6.2(d), SIPC has come to believe that through this Condition, the Agency is requiring SIPC to submit blank copies of its records, apparently – the Agency having failed to articulate any reason or basis – so that the Agency can check them for form and type of content. If this latter is the correct interpretation of this condition, the condition is unconscionable. There is no basis in law for such a requirement and it must be deleted.

35. Each company has the right, and responsibility to develop and implement internal recordkeeping systems and bears the responsibility for any insufficiencies it makes in doing so. Absent a statutory grant or the promulgation of reporting formats through rulemaking, the Agency has no authority to oversee the development of recordkeeping or reporting formats. The Agency has the authority to require that certain information be reported but cites no authority, because there is none, to support this condition.

36. Nor does the Agency provide a purpose for this condition, which is an excellent example of why a detailed statement-of-basis document should accompany the CAAPP permits, including the drafts, as required by Title V. One can only assume that the Agency's purpose for this condition is to review records that permittees plan to keep in support of the various recordkeeping requirements in the permit in order to assure that they are adequate. However,

there is no regulatory or statutory basis for the Agency to do this, and it has cited none. Moreover, if the Agency's purpose for requiring this submission is to determine the adequacy of recordkeeping, then without inherent knowledge of all the details of any given operation, it will be difficult for the Agency to determine the adequacy of recordkeeping through an off-site review. If the Agency finds records that are submitted during the prescribed reporting periods inadequate, the Agency has a remedy available to it through the law. It can enforce against the company. That is the risk that the company bears.

37. Further, if the company is concerned regarding the adequacy of its planned recordkeeping, it can ask the Agency to provide it some counsel. Providing such counsel or assistance is a statutory function of the Agency. Even then, however, the Agency will qualify its assistance in order to attempt to avoid reliance on the part of the permittee should there be an enforcement action brought. An interpretation of this condition could be that by providing blank recordkeeping forms to the Agency, absent a communication from the Agency that they are inadequate, enforcement against the permittee for inadequate recordkeeping is barred, so long as the forms are filled out, because they are covered by the permit shield.

38. Additionally, the Agency has violated SIPC's due process rights under the Constitution by requiring submission of these documents before SIPC had the opportunity to exercise its right to appeal the condition, as granted by the Act at Section 40.2. The Act allows permittees 35 days in which to appeal conditions of the permit to which it objects. The Agency's requirement at Condition 5.6.2(d) that SIPC submit blank forms within 30 days of issuance of the permit significantly undermines SIPC's right to appeal – and the effectiveness of that right – or forces SIPC to possibly violate the terms and conditions of the permit to fully preserve its rights. Although the condition is not effective, it is stayed, because the appeal may not be filed

until 35 days after issuance, there could at least be a question whether SIPC was in violation from the time the report was due until the appeal was filed. SIPC submits that the effect of the appeal, the stay, relates back to the date of issuance, but it is improper to even create this uncertainty. This denies SIPC due process and so is unconstitutional, unlawful, and arbitrary and capricious.

39. Consistent with the APA, Condition 5.6.2(d), contested herein, is stayed, and SIPC requests that the Board order the Agency to delete it from the permit. In the alternative, SIPC requests that the Board interpret this condition such that if the Agency fails to communicate any inadequacies it finds in blank recordkeeping forms submitted to it, that should be deemed a determination by the Agency that the forms are adequate, the records kept on them are adequate to satisfy the applicable permit provisions and enforcement would be barred.

NOx SIP Call
(Section 6.1)

40. Condition 6.1.4(a) says, "Beginning in 2004, by November 30 of each year. . . ." While this is a true statement, *i.e.*, the NOx trading program in Illinois commenced in 2004, it is inappropriate for the Agency to include in the permit a condition with a retroactive effect. By including this past date in an enforceable permit condition, the Agency has exposed SIPC to potential enforcement under this permit for acts or omissions that occurred prior to the effectiveness of this permit. It is unlawful for the Agency to require retroactive compliance with past requirements in a new permit condition. *Lake Envtl., Inc. v. The State of Illinois*, No. 98-CC-5179, 2001 WL 34677731, at *8 (Ill.Ct.Cl. May 29, 2001) (stating "retroactive applications are disfavored in the law, and are not ordinarily allowed in the absence of language explicitly so providing. The authoring agency of administrative regulations is no less subject to these settled principles of statutory construction than any other arm of government.") This language should

be changed to refer to the first ozone season occurring upon effectiveness of the permit, which, for example, if the permit appeal is resolved before September 30, 2006, would be the 2006 ozone season. Rather than including a specific date, SIPC suggests that the condition merely refer to the first ozone season during which the permit is effective.

41. For these reasons, Condition 6.1.4(a) is stayed pursuant to the APA, and SIPC requests that the Board order the Agency to amend the language to avoid retroactive compliance with past requirements.

Boilers
(Sections 7.1 and 7.2)

(i) Opacity as a Surrogate for PM

42. Historically, power plants and other types of industry have demonstrated compliance with emissions limitations for particulate matter (PM) through periodic stack tests and consistent application of good operating practices. Prior to the development of the CAAPP permits, opacity was primarily a qualitative indicator of the possible need for further investigation of operating conditions or even for the need of new stack testing. However, in the iterations of the permit since the publication of the October 2003 proposed permit, the Agency has developed an approach in which opacity serves as a quantitative surrogate for exceedances of the PM emissions limitation. For the first time in the August 2005 proposed permit, the Agency required Petitioner to identify the opacity measured at the 95th percentile confidence interval of the measurement of compliant PM emissions during the last and other historical stack tests as the upper bound opacity level that triggers reporting of whether there may have been an exceedance of the PM limit without regard for the realistic potential for a PM exceedance. These reporting requirements are quite onerous, particularly for the units that tested at the lowest levels of PM

and opacity. The inclusion of these conditions exceeds the scope of the Agency's authority to gapfill and so are arbitrary and capricious and must be stricken from the permit.

43. The following permit provisions all either directly, or through cross-references or linkages to other permit provisions, are premised on a determinable, quantitative and consistent relationship between opacity and particulate emissions that is scientifically unsupportable and, therefore, improper and legally invalid. As to Unit 123:§§7.1.9(c(ii); 7.1.9.(c)(iii)(B), (C) and (E); 7.1.9 (f)(i) and (ii)C); 7.1.9(g)(D) and (E); 7.1.10-1(a)(i), (ii) and (iii); 7.1.10-2(a)(i)(E); 7.1.10-2(d)(iv), (v) and (vi); 7.1.10-3(a); and 7.1.12(b). As to Unit 4: §§7.2.9(c)(ii) and (iii)(B); 7.2.9(f)(ii)(C)(V); 7.2.9(g)(ii)(D)(III); 7.2.10-1(a); 7.1.10-2(a)(i)(E); 7.2.10-2(d)(iv); 7.2.10-2(d)(v)(C) and (D); 7.2.10-3(a); and 7.2.12(b).

44. The only available and reliable PM emission level measurement is stack testing. Constantly testing a stack to determine a continuous level of PM emissions is impossible, and it would be unreasonable for the Agency or anyone else to expect such. SIPC understands that, pursuant to some of the consent decrees settling a number of USEPA's enforcement actions against coal-fired power generators, some companies, including one in Illinois, will be testing continuous PM monitoring devices. The PM CEMS are not yet at a point of refinement where they can even be considered credible evidence of PM emissions levels; at least, SIPC is not aware of any case in which government or citizens suing under Section 304 of the Clean Air Act have relied upon PM CEMS as the basis of a case for PM violations. As a result, sources must rely upon the continuity or consistency of conditions that occurred during a successful stack test to provide reliable indications of PM emissions levels.

45. Historically, opacity has never been used as a reliable, quantitative surrogate for PM emissions levels. The Agency itself acknowledged that opacity is not a reliable indicator of

PM concentrations (*see* Responsiveness Summary, pp. 15-16, 42-44). While increasing opacity may indicate that PM emissions are increasing, this is not always the case nor is a given opacity level an indicator of a given PM level at any given time, let alone at different times. Other states, in Region 5 rely upon periodic stack testing to demonstrate compliance with PM emissions with no surrogates between tests other than generally operating the stations according to good, efficient practices, including proper operation of the pollution control. Relying on stack testing and operational practices is currently the best and most appropriate approach to assuring compliance with PM emissions limitations. Moreover, the compliance methods for PM emissions limitations in the NSPS applicable to Unit 123 and the NSPS applicable to Unit 4 are only through stack testing, not through opacity as a surrogate for PM.

46. Despite the Agency's implications to the contrary in the Responsiveness Summary (*see* Responsiveness Summary, pp. 42-44), the permit does make opacity a surrogate for PM compliance. When the Agency requires even estimates of PM levels or guesses as to whether there is an exceedance, and how much of an exceedance, of PM based upon opacity, opacity has been quantitatively tied to PM compliance. Further, the opacity level triggers reporting that the opacity/PM surrogate level has been exceeded and so there may have been an exceedance of the PM level regardless of any evidence to the contrary. For example, if the opacity/PM surrogate level of, say, 15% is exceeded, this must be reported despite the fact that all fields in the electrostatic precipitator were on and operating, stack testing indicated that the PM emissions level at the 95th percentile confidence interval is 0.04 lb/mmBtu/hr, and the likelihood that there was an exceedance of the applicable PM emissions limitation is extremely unlikely. The purpose of such reporting eludes Petitioner. It does not assure compliance with the PM limit and so inclusion of these conditions exceeds the Agency's gapfilling authority and

is, thus, unlawful and arbitrary and capricious. Moreover, this unnecessary reporting requirement is a new substantive requirement; according to Appalachian Power, not allowed under Title V.

47. Contrary to the Agency's assertion in the Responsiveness Summary that opacity provides a "robust means to distinguish compliance operation of a coal-fired boiler and its ESP from impaired operation" (Responsiveness Summary, p. 43), the robustness is actually perverse. First, of course, Unit 123 has a baghouse not an ESP so the response is totally inapposite for that unit. Second, relying upon opacity as a surrogate for PM emissions levels has the perverse result of penalizing the best-operating units. That is, the units for which the stack testing resulted in very low opacity and very low PM emissions levels are the units for which this additional reporting will be most frequently triggered. For example, if stack testing resulted in PM emissions of 0.008 lb/mmBtu and the opacity during the test at the 95th percentile confidence interval was 1%, the source could be required to submit reports stating that the unit may have exceeded the PM limit every operating hour for the quarter. Clearly, this condition will result in overly burdensome reporting that serves no purpose. As such, it exceeds the Agency's authority to gapfill, is unlawful, and is arbitrary and capricious.

48. Further, this condition effectively creates an improper low opacity limitation. In order to avoid the implication that there may have been an exceedance of the PM limit, the opacity limit becomes the level that is the upper bound at the 95th percentile confidence interval in the PM testing. By including these conditions, the Agency has created a new, substantive limitation without having complied with proper rulemaking procedures. This is unlawful and beyond the scope of the Agency's authority under Section 39.5 of the Act and violates the provisions of Title VII of the Act. *See Appalachian Power.*

49. These conditions invite sources to perform stack testing under operating conditions that are less than normal, *i.e.*, to "detune" the units, in order to push the bounds of compliance with the PM limit in order to avoid the unnecessary recordkeeping and reporting the conditions require, particularly for the typically best operating units. That is, to identify more realistically the operating conditions that would result in emissions closer to the PM limit,[4] SIPC would have to perform stack tests on Unit 4 with some elements of the ESP turned off, even though they would not be turned off during normal operation. Testing in a manner that generates results close to the PM limit may result in opacity that exceeds the opacity limit. Nevertheless, in order to avoid the unnecessary and clearly arbitrary and capricious recordkeeping and reporting requirements included in these conditions, such stack testing is called for, despite the fact that the results of such tests will not reflect normal operation of the boiler. This is counter-intuitive, and the antithesis of good air pollution control practices, yet this is what the Agency is essentially demanding with these conditions. Moreover, arguably, sources could operate at these detuned levels and still be in compliance with their permits and the underlying regulations but emit more pollutants into the atmosphere than they typically do now. This result illustrates the perversity of the condition.

50. SIPC believes that periodic stack testing and good operational practices fills the gap. Periodic stack testing according to the schedule in the permit is sufficient to assure compliance with the PM limit and satisfy the periodic monitoring requirements of Section 39.5(7)(d)(ii) of the Act according to the *Appalachian Power* court. In fact, "periodic PM

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[4] SIPC's policy is that the boilers be operated in a compliant manner. During stack tests, SIPC has consistently operated the boilers in a normal mode, meaning that all pollution control devices are operating, the boiler is operating at normal and maximum load, and so forth. PM test results typically are nowhere near the PM limit. PM emissions levels during the Station's last stack tests were at 0.0085 lbs/mmBtu for Unit 123 and 0.09 lbs/mmBtu for Unit 4, well in compliance with the PM limitation.

emission measurements" testing, is the Agency's own phrase in Conditions 7.1.7 and 7.2.7 and is consistent with the findings of *Appalachian Power*.

51. In conjunction with its attempt to relate opacity to PM, the Agency requires in Conditions 7.1.10-2(d)(vi)(A) and (B) and 7.2.10-2(d)(v)(A) and (B) detailed information regarding recurring and new causes of opacity exceedances in a calendar quarter. The Agency has not defined recurring and new. The requirements are invalidly ambiguous and overly burdensome. How requiring the reporting of this information falls within the Agency's authority to gapfill is unclear: another example of the need for a statement of basis. Obviously, understanding the causes of opacity exceedances and eliminating them, to the degree possible, is in SIPC's best interests. SIPC addresses the causes of opacity internally to the best of its ability. It does not require the Agency to look over its shoulder, and providing the information to the Agency does nothing to further compliance with the limit.

52. As with Condition 5.6.2(d) discussed above, Conditions 7.1.9(c)(ii) and 7.2.9(c)(ii) deny SIPC due process. Conditions 7.1.9(c)(ii) and 7.2.9(c)(ii) require that the "[r]ecords . . . that identify the upper bound of the 95% confidence interval (using a normal distribution and 1 minute averages) for opacity measurements . . . , considering an hour of operation, within which compliance with [the PM limit] is assured, with supporting explanation and documentation. . . . shall be submitted to the Illinois EPA in accordance with Condition 5.6.2(d)." Obviously, if Condition 5.6.2(d) denies SIPC due process, Conditions 7.1.9(c)(ii) and 7.1.9(c)(ii) do as well for the same reasons. SIPC was not granted the opportunity to appeal the condition before it may have been required to submit to the Agency information that SIPC believes does not provide useful, reliable information. SIPC is particularly loathe to provide the

Agency with this information because it believes that the information will be misconstrued and misused.

53. Finally, Conditions 7.1.10-2(d)(vii) and 7.2.10-2(d)(vii) require SIPC to submit a glossary of "common technical terms used by the permittee" as part of its reporting of opacity/PM exceedance events. If the terms are "common," it eludes SIPC as to why, then, they require definition. Moreover, this requirement does not appear anywhere else in the permit. If "common technical terms" do not require definition in other contexts in this permit, then surely they do not require definition in this context. This requirement should be deleted from the permit.

54. Consistent with the APA, the permit conditions contested herein, and any other related conditions that the Board finds appropriate are stayed, and SIPC requests that the Board order the Agency to either delete or appropriately revise these conditions.

(ii) Reporting the Magnitude of PM Emissions

55. The Agency also requires SIPC to determine and report the magnitude of PM emissions during startup and operation during malfunction and breakdown. *See* Conditions 7.1.9(f)(ii)(C)(V), 7.1.9(h)(ii)(E)(III), and 7.1.10-2(d)(v)(A)(III), 7.2.9(f)(ii)(C)(V), 7.2.9(h)(ii)(E)(III) and 7.2.10-2(d)(v)(A)(III). Compliance with these conditions is an impossibility and, therefore, the inclusion of these conditions in the permit is arbitrary and capricious. SIPC does not have a means for measuring the magnitude of PM emissions at any time other than during stack testing. There is not a certified, credible, reliable alternative to stack testing to measure PM emissions.

56. Conditions 7.1.10-2(d) and 7.2.10-2(d) contain repetitive and redundant, and possibly conflicting requirements. One such requirement is sufficient and more is arbitrary and

capricious. In addition, SIPC also objects to these conditions to the extent that they require reporting based on the use of opacity as a surrogate for PM.

57. Further, Conditions 7.1.10-2(d)(v)(A)(V) and 7.2.10-2(d)(iv)(A)(V) require SIPC to identify "[t]he means by which the exceedance [of the PM emissions limit] was indicated or identified, in addition to the level of opacity." SIPC believes that this means that it must provide information relative to any other means, besides opacity – which, as discussed in detail above, SIPC believes is an inappropriate and inaccurate basis for determining whether there are exceedances of the PM limit, let alone the magnitude of any such exceedance – that SIPC relied upon to determine there was an exceedance of the PM limit. Besides stack testing or perhaps total shutdown of the ESP and the baghouse, there are none. This is a nonsensical and impossible requirement.

58. Consistent with the APA, these permit conditions are stayed and SIPC requests that the Board order the Agency to delete these conditions from the permit.

(iii) PM Testing

59. Conditions 7.1.7(a)(i) and 7.2.7(a) impose stack testing requirements based on the degree of over-compliance achieved by the units at the last test. First, this effectively punishes a unit based on its degree of over-compliance. Second, by imposing a monitoring requirement not directed at the applicable requirement but at the degree of over-compliance, these conditions in effect impose a more stringent emission standard and the Agency is without authority to do this in a Title V permit. Therefore, these requirements are without legal basis and are arbitrary and capricious.

60. SIPC interprets the language in Condition 7.2.7(a)(i) to mean that stack testing that occurs after December 31, 2003, and no later than two years after the effective date of that

condition, satisfies the initial testing requirement included in the permit. However, the language is not perfectly clear, and SIPC requests clarification.

61. The Agency has included a requirement in the permit at Condition 7.1.7(b)(iii) and 7.2.7(b)(iii) that SIPC perform testing for PM10 condensibles.[5] First, this requirement is beyond the scope of the Agency's authority to include in a CAAPP permit, as such testing is not an "applicable requirement," as discussed in detail below. Second, even if the condition were appropriately included in the permit, which SIPC does not by any means concede, the language of the Conditions are not clear as to the timing of the required testing, largely because of the lack of clarity of these Conditions.

62. With respect to the inclusion of this requirement at all in a CAAPP permit, however, SIPC believes that the Agency has exceeded its authority and that the requirement should be removed from the permit. The Agency stated in the Responsiveness Summary at page 18, "The requirement for using both Methods 5 and 202 is authorized by Section 4(b) of the Environmental Protection Act." Section 4(b) of the Act says,

> The Agency shall have the duty to collect and disseminate such information, acquire such technical data, and conduct such experiments as may be required to carry out the purposes of this Act, including ascertainment of the quantity and nature of discharges from any contaminant source and data on those sources, and to operate and arrange for the operation of devices for the monitoring of environmental quality.

415 ILCS 5/4(b). Whatever the scope of the Agency's duty, this provision does not make testing for PM10 condensibles an "applicable requirement" under Title V. As discussed above, an

[5] *Condensible* is the Board's spelling in the regulations and in scientific publications, thus the spelling of it here despite the Agency's chosen spelling in the permit that is the preferred spelling in the Webster's dictionary. *See* 35 Ill.Adm.Code § 212.108.

"applicable requirement" is one applicable to the permittee pursuant to a federal regulation or a SIP.

63. However, just because Method 202 is one of USEPA's reference methods does not make it an "applicable requirement" pursuant to Title V. The Station is subject to certain federal NSPS and state requirements as to particulate emissions. It is not and never has been located in a PM10 nonattainment area.[6] The Board's PM regulations are structured such that particular PM10 requirements apply to identified sources located in the PM10 nonattainment areas.[7] No such requirements apply now or have ever applied to the Station.

64. The measurement method for PM, referencing only Method 5 or derivatives of Method 5, is at 35 Ill.Adm.Code § 212.110. This section of the Board's rules applies to the Station. The measurement method for PM10, on the other hand, is found at 35 Ill.Adm.Code § 212.108, Measurement Methods for PM-10 Emissions and Condensible PM-10 Emissions. This section references both Methods 5 and 202, among others. Not subject to PM10 limitations, the Station is not subject to § 212.108, contrary to the Agency's attempt to expand its applicability in the Responsiveness Summary by stating, "Significantly, the use of Reference Method 202 is not limited by geographic area or regulatory applicability." Responsiveness Summary, p. 18. This is certainly a true statement if one is performing a test of condensibles but it is limited by regulatory applicability. This statement does not, and cannot, expand the requirements of § 212.110 to include PM10 condensible testing when the limitations applicable to the source pursuant to 212.Subpart E are for only PM, not PM10. Therefore, there is no basis for the Agency to require in the CAAPP permit, which is limited to including only applicable

[6] In fact, there are no longer any PM10 nonattainment areas in the state. *See* 70 Fed.Reg. 55541 and 55545 (September 22, 2005), redesignating to attainment the McCook and Lake Calumet nonattainment areas, respectively.

[7] Presumably, these sources will remain subject to those requirements as part of Illinois' maintenance plan.

requirements and such monitoring, recordkeeping, and reporting that are necessary to assure compliance with applicable requirements, that the Station be tested pursuant to Method 202.

65. The Agency concedes in the Responsiveness Summary that Method 202 is not an applicable requirement:

> The inclusion of this requirement in these CAAPP permits, which relates to full and complete quantification of emissions, does not alter the test measurements that are applicable for determining compliance with PM emissions standards and limitations, which generally do not include condensable [sic] PM emissions. In addition, since condensable [sic] PM emissions are not subject to emission standards. . . .

Responsiveness Summary, p. 18. (Emphasis added.) Further, the Agency says, "Regulatorily, only filterable[8] PM emissions need to be measured." Responsiveness Summary, p. 18. The Agency attempts to justify inclusion of the requirement for testing condensibles by stating that the data are needed to "assist in conducting assessments of the air quality impacts of power plants, including the Illinois EPA's development of an attainment strategy for PM2.5" or by stating that "the use of Reference Method 202 is not limited by geographic area or regulatory applicability." Responsiveness Summary, p. 18. Under the Board's rules, it is limited to testing for PM10, and so, at least in Illinois, its "regulatory applicability" is, indeed, limited. These attempted justifications do not convert a method for testing for condensibles into an applicable requirement to test for condensibles.

66. While the Agency has a duty under Section 4(b) to gather data, it must be done in compliance with Section 4(b) and any other applicable limitations. Section 4(b), however, does not create or authorize the creation of permit conditions. The Board's rules serve as the basis for permit conditions. Therefore, SIPC submits that requiring SIPC to conduct such testing is not

[8] *I.e.*, non-gaseous PM; condensibles are gaseous.

appropriate and imposing the requirement in the CAAPP permit is not appropriate. It is unlawful and exceeds the Agency's authority.

67. The requirement for Method 202 testing must be deleted from the permit. Consistent with the APA, Conditions 7.1.7(b)(iii) and 7.2.7(b)(iii) and the requirement to test using Method 202 in those Conditions contested herein, are stayed, and SIPC requests that the Board order the Agency to delete the requirements for Method 202 testing from the permit.

(iv) Measuring CO Concentrations

68. The CAAPP permit issued to the Station requires SIPC to conduct, as a work practice, quarterly "combustion evaluation" that consist of "diagnostic measurements of the concentration of CO in the flue gas." *See* Conditions 7.1.6-1(a) and 7.2.6. *See also* Conditions 7.1.9(a)(viii) and 7.2.9(a)(vii) (related recordkeeping requirement), 7.1.10-1(a)(iv) and 7.2.10-1(a)(iv) (related reporting requirement), and 7.1.12(d) and 7.2.12(d) (related compliance procedure requirement). Including these provisions in the permit is not necessary to assure compliance with the underlying standard, is not required by the Board's regulations, and, therefore, exceeds the Agency's authority to gapfill. Maintaining compliance with the CO limitation has historically been a work practice, thus its inclusion in the work practice condition of the permit. Sophisticated control systems are programmed to maintain boilers in an optimal operating mode, which serves to minimize CO emissions and maximize boiler efficiency. It is obvious, because it is in the best interests of the Station to operate its boilers optimally and because ambient CO levels are so low,[9] compliance with the CO limitation has been

[9] The highest one-hour ambient measure of CO in the state in 2003 was in Peoria: 5.3 ppm; the highest 8-hour ambient measure in the state was in Maywood: 3.5 ppm. Illinois Environmental Protection Agency, *Illinois Annual Air Quality Report 2003*, Table B7, p. 57. The one-hour standard is 35 ppm, and the 8-hour ambient standard is 9 ppm. 35 Ill.Adm.Code § 243.123. Note: The *Illinois Annual Air Quality Report 2003* is the latest available data on Illinois EPA's website at www.epa.state.il.us → Air → Air Quality Information → Annual Air Quality Report → 2003 Annual Report. The 2004 report is not yet available.

accomplished through combustion optimization techniques historically at power plants. There is no reason to change this practice at this point. Ambient air quality is not threatened, and stack testing has demonstrated that emissions of CO at the Station, less than 25 ppm during the latest stack test for Unit 4 and 60-80 ppm for Unit 123, are significantly below the standard of 200 ppm.

69. In the case of CO, requiring the Station to purchase and install equipment to monitor and record emissions of a pollutant that stack testing demonstrates it complies with – by a comfortable margin – and for which the ambient air quality is in compliance by a huge margin, is unnecessary, overly burdensome and, therefore, arbitrary and capricious. In order to comply with the "work practice"[10] of performing "diagnostic testing" that yields a concentration of CO, SIPC must purchase and install or operate some sort of monitoring devices. Because there are no CO monitors at the Station, SIPC is effectively required to purchase and install at least one monitoring device for each of the coal-fired units to comply with this condition with no environmental purpose served.

70. Furthermore, the Agency has failed to provide any guidance as to how to perform diagnostic measurements of the concentration of CO in the flue gas. SIPC understands that a sample can be extracted from any point in the furnace or stack using a probe. This sample can then be preconditioned (removal of water or particles, dilution with air) and analyzed. The way in which the sample is preconditioned and analyzed, however, varies. Given the lack of guidance and the variability in the way the concentration of CO in the flue gas can be measured, the data generated is not sufficient to assure compliance with the CO limit and is, therefore,

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[10] SIPC questions how the requirement that the Agency has included in Conditions 7.1.6(a) and 7.2.6 is classified as a "work practice." To derive a concentration of CO emissions, SIPC will have to engage in monitoring or testing – far more than the work practice of combustion optimization that has been the standard historically.

arbitrary and capricious. Stack testing, on the other hand, does yield data sufficient to assure compliance with the CO limit.

71. In addition, the permit requires at Conditions 7.1.9(f)(i), 7.1.9(f)(ii)(C)IV), 7.1.9(g)(i), 7.1.9(g)(ii)(E)(III), 7.1.10-1(a)(IV), 7.1.12(d), 7.2.9(f)(1), 7.2.9(f)(ii)(C)(V), 7.2.9(g)(i), 7.2.9(g)(ii)(D)(III), 7.2.10-1(a)(iv), and 7.2.12(d) that SIPC provide estimates of the magnitude of CO emitted during startup and operation during malfunction and breakdown with related record-keeping, reporting and compliance procedures. The monitoring device that SIPC would utilize for the required quarterly diagnostic evaluations would have to be some kind of portable CO monitor. So far as Petitioner knows, portable CO monitors are not equipped with continuous readout recordings. Rather, they must be manually read. What the Agency is effectively requiring is that someone continually read the portable CO monitor during startup, which could easily take as long as 12 hours for Unit 4 and 24 hours for Unit 123, and during malfunctions and breakdowns, which by their nature are of unpredictable duration. In the first case (startup), the requirement is unreasonable and overly burdensome and perhaps dangerous in some weather conditions; in the second case (malfunction and breakdown), in addition to the same problems that are applicable during startup, it may be impossible for SIPC to comply with the condition.

72. The requirement to perform diagnostic measurements of the concentration of CO in the flue gas is arbitrary and capricious because the Agency has failed to provide any guidance as to how to perform the diagnostic measurements. SIPC can only speculate as to how to develop and implement a formula and protocol for performing diagnostic measurements of the concentration of CO in the flue gas in the manner specified in these Conditions.

73. USEPA has not required similar conditions in the permits issued to other power plants in Region 5. Therefore, returning to the work practice of good combustion optimization to maintain low levels of CO emissions is approvable by USEPA and is appropriate for CO in the permit issued to the Station.

74. Consistent with the APA, the referenced conditions to the extent they require the quarterly diagnostic measurements and estimates of CO emissions during startup and malfunction/breakdown, and the related record-keeping, reporting and compliance procedures, contested herein, and any other related conditions that the Board finds appropriate, are stayed, and SIPC requests that the Board order the Agency to amend these conditions to reflect a requirement for work practices optimizing boiler operation (to the extent this is not contrary to the detuning necessary to establish reasonable opacity surrogates), to delete any requirement for estimating the magnitude of CO emitted during startup and malfunction and breakdown, and to amend the corresponding recordkeeping, reporting, and compliance procedures accordingly.

(v) Startup Provisions

75. As is allowed by Illinois' approved Title V program, CAAPP permits provide an affirmative defense against enforcement actions brought against a permittee for emissions exceeding an emission limitation during startup. Conditions 7.2.9(f)(ii)(c) and 7.2.9(f)(ii)(c) require additional recordkeeping and reporting if start-ups take longer than 9 and 6 hours respectively. In prior drafts of the permit, the Agency had allowed 24 and 8 hours, respectively. The Agency provided no explanation for the change in the number of hours that triggers the additional recordkeeping and reporting. SIPC has no idea why or on what factual basis the Agency chose these time periods as Unit 4 requires 12 hours under ideal conditions and Unit 123 requires 24 hours under ideal conditions. The timeframe is so short that it is rather absurd to

include the provision for "additional" recordkeeping, as the recordkeeping will be required for virtually every startup.

76. The provisions in the Board's rules allowing for operation of a CAAPP source during startup are located at 35 Ill.Adm.Code 201.Subpart I. These provisions, at § 201.265 refer back to § 201.149 with respect to the affirmative defense available. The rules nowhere limit the length of time allowed for startup, and the records and reporting required by § 201.263, the provision that the Agency cited as the regulatory basis for these conditions does not address startup at all; it is limited in its scope to records and reports required for operation during malfunction and breakdown where there are excess emissions. Therefore, one must conclude that the records that the Agency requires here are the result of gapfilling and are limited to what is necessary to assure compliance with emissions limits.

77. The appropriate timeframe before additional recordkeeping should be triggered is the length of the startup as provided in the CAAPP permit application. Requiring additional recordkeeping does not provide any additional information necessary to assure compliance with the permit and so cannot be characterized as gapfilling. SIPC is already required to provide a variety of information regarding startups. Emissions of SO_2, NOx, and opacity during startup are continuously monitored by the CEMS/COMS. SIPC has already established that the magnitude of emissions of PM and CO cannot be provided (*see* above). The additional information that the Agency requires in these Conditions does nothing to assure compliance with the emissions limitations, which is the purpose of the permit in the first place, and so exceeds the Agency's authority to gapfill. Moreover, this "additional" information would serve no purpose even if it was required after a reasonable time for startup.

78. Consistent with the APA, the Conditions contested herein, are stayed, and SIPC requests that the Board order the Agency to delete them.

(vi) Malfunction and Breakdown Provisions

79. Illinois' approved Title V program allows the Agency to grant sources the authority to operate during malfunction and breakdown, even though the source emits in excess of its limitations, upon certain showings by the permit applicant. The authority must be expressed in the permit, and the Agency has made such a grant of authority to SIPC for the Station. This grant of authority serves only as an affirmative defense in an enforcement action.

80. Conditions 7.1.10-3(a)(i) and 7.2.10-3(a)(i) requires that SIPC notify the Agency "immediately" if it operates during malfunction and breakdown and there could be PM exceedances. There is currently no proven or certified methodology for measuring PM emissions other than through stack testing. Therefore, the Agency is demanding that SIPC notify it of the mere supposition that there have been PM exceedances. The Agency has provided no regulatory basis for reporting suppositions. At the very least, SIPC should be granted the opportunity to investigate whether operating conditions are such that support or negate the likelihood that there may have been PM emissions exceedances during the malfunction and breakdown, though SIPC does not believe that even this is necessary, since the Agency lacks a regulatory basis for this requirement in the first place. The condition as written exceeds the scope of the Agency's authority to gapfill and so is unlawful, arbitrary and capricious.

81. Also in Conditions 7.1.10-3(a)(i) and 7.2.10-3(a)(i), the Agency has deleted the word *consecutive* as a trigger for reporting opacity and potential PM exceedances during an "incident" in the final version of the permit. Versions prior to the July 2005 version include the word consecutive. Its deletion completely changes the scope and applicability of the condition.

It was not until the draft revised proposed permit issued in July 2005 that the Agency deleted the concept of consecutive 6-minute averages of opacity from this condition. In the December 2004 version of the permit, the word *consecutive* had been replaced with *in a row*, but the concept is the same.

82. The Agency has provided no explanation for this change. As the actual opacity exceedance could alone comprise the "incident," SIPC believes that it is more appropriate to include the word *consecutive* in the condition. Random, intermittent exceedances of the opacity limitation, possibly days apart, do not necessarily comprise a malfunction/breakdown "incident." On the other hand, a prolonged period of opacity exceedance does possibly indicate a malfunction/breakdown "incident." Likewise, a timeframe is not included in Conditions 7.1.10-3(a)(ii) and 7.2.10-3(a)(ii), which appears to refer to the same "incident" that is addressed by Conditions 7.1.10-3(a)(i) and 7.2.10-3(a)(i) and, therefore, suffers the same infirmity.

83. Consistent with the APA, the Conditions contested herein are stayed, and SIPC requests that the Board order the Agency to delete them from the permit as they relate to PM and revise them to correct the errors as to opacity.

(vii) Stack Testing Requirements

84. Conditions 7.1.7(e) and 7.2.7(e) identify detailed information that is to be included in the stack test reports, including target levels and settings. To the extent that these requirements are or can be viewed as enforceable operational requirements or parametric monitoring conditions, SIPC contests this condition. Operation of an electric generating station depends upon many variables – ambient air temperature, cooling water supply temperature, fuel supply, equipment variations, and so forth – such that different settings are used on a daily basis. Stack testing provides a snapshot of operating conditions within the scope of the operational

paradigm set forth elsewhere in the permit at Condition 7.1.7(b) that is representative of normal or maximum operating conditions, but using those settings as some type of monitoring device would be inappropriate.

85. Consistent with the APA, the Conditions contested herein are stayed, and SIPC requests that the Board order the Agency to delete them from the permit as they relate to PM and revise them to correct the errors as to opacity.

(viii) Retesting for PM Emission

86. Condition 7.1.7(a)(ii) requires retesting Unit 123 if it is operated in any calendar quarter for more than 24 hours at load more than 5% higher than the load during the most recent PM test. Condition 7.2.7(a)(ii) imposes a similar requirement on Unit 4 but with a 2% trigger.

87. No statement of the basis or the reasons for this requirement is given and, particularly, why one unit is treated differently than the other. Both SIPC units are, relatively, small units and these are extremely constricting and unnecessary limitations (about 11 MW on Unit 123 and 17 MW on Unit 4). The existing state operating permits have a similar provision but with a 10% trigger and the Agency's failure to explain the basis for the change or the differential between the units is not the inclusion of an applicable requirement or appropriate gapfilling and, therefore, is arbitrary and capricious.

88. Consistent with the APA, the conditions contested herein are stayed, and SIPC requests that the Board order the Agency to delete or appropriately revise them.

Coal Handling Equipment, Coal Processing Equipment, Ash Equipment and Limestone Handling Equipment
(Sections 7.3, 7.4, 7.5 and 7.6)

(i) Fly Ash Handling v. Fly Ash Process

89. No processing occurs within the fly ash system. It is a handling and storage operation the same as coal handling and storage. The Agency recognizes in Condition 7.5.5 that the NSPS for Nonmetallic Mineral Processing Plants does not apply "because there is no equipment used to crush or grind ash." This underscores SIPC's point that the fly ash handling system is not a process.

90. Because the fly ash operations at the Station are not a process, they are not subject to the process weight rate rule at § 212.321(a). Section 212.321(a) is not an applicable requirement under Title V, since the fly ash operation is not a process. The process weight rate rule is not properly an applicable requirement and so is included in the permit improperly. Condition 7.5.4(c) and all other references to the process rate weight rule or § 212.321(a), included in the permit, should be deleted.

91. Because the fly ash operation is not a process, reference to it as a process is inappropriate. The word *process* and its derivatives in Section 7.5 of the permit should be changed to *operation* and its appropriate derivatives or, in one instance, to *handled*, to ensure that there is no confusion as to the inapplicability of § 212.321(a).

92. Consistent with the APA, the entireties of Conditions 7.5.3, 7.5.4, 7.5.6, 7.5.7, 7.5.8, 7.5.9, 7.5.10, 7.5.11 and 7.5.12, all of which are contested herein, are stayed, and SIPC requests that the Board order the Agency to delete the Conditions 7.5.4(c) and 7.5.9(b)(ii), all other references to the process weight rate rule, including in Section 10 as to ash operations, and

add Condition 7.5.5(b) identifying § 212.321(a) as a requirement that is not applicable to the Station.

(ii) Opacity Testing Requirements for Coal Handling, Coal Processing, Fly Ash Handing and Limestone Operations

93. The final permit provides at Condition 7.5.7(a)(ii) that SIPC conduct opacity testing for a period of at least 30 minutes "unless the average opacities for the first 12 minutes of observation (two six-minute averages) are both less than 5.0 percent." The original draft and proposed permits (June 2003 and October 2003, respectively) contained no testing requirement for fly ash handling. This testing requirement first appeared in the draft revised proposed permit of December 2004, and at that time allowed for testing to be discontinued if the first 12 minutes' observations were both less than 10%. In the second draft revised proposed permit (July 2005), the Agency inexplicably reduced the threshold for discontinuation of the test to 5%.

94. The Agency provided no explanation for (1) treating ash handling differently than coal handling, coal processing or limestone operations or (2) reducing the threshold from 10% to 5%. Because the Agency did not provide SIPC an explanation for this change at the time nor did it provide SIPC with an adequate opportunity to comment on the change, the inclusion of this change was improper and the condition is arbitrary and capricious. Condition 7.5.7(a)(ii) is inextricably entwined with 7.5.7(a), and so SIPC must appeal the entire condition.

95. For these reasons, Condition 7.5.7(a), which is contested herein, is stayed, and SIPC requests that the Board order the Agency to delete Condition 7.5.7(a)(ii) or properly justify or revise it.

(iii) Inspection Requirements for Coal Handling, Coal Processing, and Fly Ash Handling and Limestone Operations

96. Conditions 7.3.8(a), 7.4.8(a), 7.5.8(a) and 7.6.8(a) contain inspection requirements for the coal handling, coal processing, and fly ash handling operations, respectively. In each case, except 7.6.8(a) the condition requires that "[t]hese inspections shall be performed with personnel not directly involved in the day-to [sic] day operation of the affected operations. . . ." [7.6.8(a) has a hyphen between "to" and "day"]. The Agency provides no basis for this requirement. The Agency's rationale is that the personnel performing the inspection should be "'fresh'" and "'independent'" of the daily operation, but the Agency does not tell us why being "fresh" and "independent" are "appropriate" qualifications for such an inspector; or even what those terms mean. The Agency rationalizes that Method 22, *i.e.*, observation for visible emissions, applies, and so the inspector need have no particular skill set. The opacity requirement for these operations is not 0% or no visible emissions, at the point of operation, but rather at the property line. Therefore, exactly what the observer is supposed to look at is not at all clear.

97. There is no basis in law or practicality for the provision. To identify in a CAAPP permit condition who can perform an inspection is overstepping the Agency's authority and clearly exceeds any gapfilling authority that may somehow apply to these observations of fugitive dust. The requirement must be stricken from the permit.

98. The Agency has included in Conditions 7.3.8(b), 7.4.8(b) and 7.6.8(b) that inspections of coal handling, coal processing and limestone operations be conducted every 15 months while the process is not operating. Condition 7.5.8(b) contains a corresponding requirement for fly ash handling, but on a nine-month frequency. The Agency has not made it

clear in a statement of basis or even the Responsiveness Summary why these particular frequencies for inspections are appropriate. Essentially, the Agency is creating an outage schedule, as these operations are intricately linked to the operation of the boilers. In any given area of the Station, Station personnel are constantly alert to any "abnormal" operations during the course of the day. Although these are not formal inspections, they are informal inspections and action is taken to address any abnormalities observed as quickly as possible. SIPC's best interest is to run its operations as efficiently and safely as possible. While the Agency may have gapfilling authority, the gapfilling authority is limited to what is necessary to ensure compliance with permit conditions. *See Appalachian Power*. Lacking any statement of basis or adequate response, how these frequencies of inspections accomplish that end is unknown. Rather, it appears that these conditions are administrative compliance traps for work that is done as part of the normal activities at the Station.

99. Moreover, the Agency does not provide a rationale as to why the frequency of fly ash handling inspections should be greater (more frequent) than for the other operations.

100. As these operations must be inspected when they are not operating, and as they would not operate during an outage of the boiler, it is not necessary for the Agency to dictate the frequency of the operations. Rather, it is logical that these inspections should be linked to boiler outages. Furthermore, these operations are inspected on monthly or weekly bases pursuant to the permit and so any maintenance issues will be identified long before the 15 or nine-month inspections.

101. Conditions 7.3.8(b), 7.4.8(b), 7.5.8(b) and 7.6.8(b) require detailed inspections both before and after maintenance has been performed. The Agency has not provided a rationale for this requirement and has not cited an applicable requirement for these conditions. This level

of detail in a CAAPP permit is unnecessary and inappropriate and exceeds the Agency's authority to gapfill. These requirements should be deleted from the permit.

102. Conditions 7.4.8(a) and 7.5.8(a) requires that these operations be inspected on a weekly basis while the operations are in use. The corresponding requirement for coal handling is monthly, 7.3.8(b), and bi-weekly for limestone operations, 7.6.8(a). Furthermore, each unit subject to 7.3.8(a) must be inspected monthly and each subject to 7.6.8(a) bi-monthly. The Agency has provided no justification for the weekly frequency for inspecting ash handling and coal processing operations. In fact, these operations are "clean" and have never presented a serious emission problem. It does not deserve or require the intense level of attention that it has received in the permit. In addition, the differing, inconsistent and confusing inspection requirements put an unnecessary and unreasonable burden on SIPC's limited staff and create a needless risk of non-compliance. The provisions are unnecessary, arbitrary and capricious.

103. For these reasons, Conditions 7.3.8(a) and (b), 7.4.8(a) and (b), 7.5.8(a) and (b), and 7.6.8(a) and (b), which are contested herein, are stayed consistent with the APA, and SIPC requests that the Board order the Agency to delete or revise those provisions, with an adequate explanation of the basis for any revised provisions, so as to correct the infirmities noted here.

(iv) Recordkeeping Requirements for Coal Handling, Coal Processing, and Fly Ash Handling and Limestone Operations

104. Conditions 7.3.9(b)(iii), 7.4.9(b)(iii), and 7.5.9(b)(iii) and 7.6.9(b)(iii) include reporting requirements within the recordkeeping requirements, contrary to the overall structure of the permit. SIPC has already objected to the inclusion of these conditions for other reasons. However, in any event, they should not appear in these provisions.

105. Condition 7.3.9(e)(ii), 7.4.9(d)(ii), 7.5.9(e)(ii) and 7.6.9(e)(ii) require SIPC to provide the magnitude of PM emissions during incidents where these operations continue

without the use of control measures. SIPC has established that it has no means to quantify PM emissions from any operation on a continuing basis. Because the condition is impossible to comply with, it is arbitrary and capricious.

106. The Agency provided no rationale and still provides no authority for its inclusion of Condition 7.5.9(d)(i)(B), observations of accumulations of fly ash in the vicinity of the operation. The Agency addressed this condition, after the fact, in the Responsiveness Summary, but did not provide an acceptable rationale as to why the provision is even there. The Agency stated:

> Likewise, the identification of accumulations of fines in the vicinity of a process does not require technical training. It merely requires that an individual be able to identify accumulations of coal dust or other material. This is also an action that could be performed by a member of the general public. Moreover, this is a *reasonable requirement for the plants for which it is being applied,* which are required to implement operating programs to minimize emissions of fugitive dust. At such plants, accumulations of fines can potentially contribute to emissions of fugitive dust, as they could become airborne in the wind.

The heart of the matter lies in the next-to-last sentence: "plants . . . which are required to *implement operation programs to minimize emissions of fugitive dust.*" This is accomplished through fugitive dust plans, required at 35 Ill.Adm.Code § 212.309 and Condition 5.2.4. The elements of fugitive dust plans are set forth at § 212.310 and do not include observations of accumulations of fines. In fact, nothing in the Board's rules addresses observing the accumulation of fines.

107. Observing accumulations of fines is not an applicable requirement; therefore, its inclusion in the permit violates Title V and *Appalachian Power* by imposing a new substantive requirement upon the permittee through the Title V permit. Additionally, observing accumulations of fines cannot reasonably be included under gapfilling, as it is not necessary to

assure compliance with the permit. The assurance of compliance with the fugitive dust requirements rests within the adequacy of the fugitive dust plan, which must be submitted to the Agency for its review, pursuant to § 212.309(a), and periodically updated, pursuant to § 212.312. If the permittee does not comply with its fugitive dust plan or the Agency finds that the fugitive dust plan is not adequate, there are procedures and remedies available to the Agency to address the issue. However, those remedies and procedures do not fall within the scope of gapfilling to the extent that the Agency can require by permit what must be included in the fugitive dust plan. Likewise, the Agency cannot supplement the fugitive dust plan through the permit.

108. The requirement that SIPC observe accumulations of fly ash dust in Condition 7.5.9(d)(i)(B) should be deleted from the permit.

109. Given that these operations result in few emissions, rarely break down, and are largely enclosed, there is no apparent justification for the trigger for additional recordkeeping when operating during malfunction/breakdown being only one hour in Conditions 7.4.9(d)(ii), 7.3.9(e)(ii), 7.5.9(e)(ii) and 7.6.9(e)(ii). The Agency has provided no rationale for this difference and it simply results in unnecessary and largely pointless burden on SIPC's limited staff resources.

110. For these reasons, the Conditions contested herein are stayed consistent with the APA, and SIPC requests that the Board order the Agency to delete or correct these provisions.

(v) Reporting Requirements for Coal Handling, Coal Processing, Fly Ash Handling and Limestone Operations

111. Conditions 7.3.10(a)(ii), 7.4.10(a)(ii), and 7.5.10(a)(ii) and 7.6.10(a)(ii) require notification to the Agency for operations not in compliance with the referenced applicable work practices for more than 12 hours regardless of whether there were excess emissions. Conditions 7.3.6(a), 7.4.6(a), 7.5.6(a) and 7.6.6(a) identify the measures that SIPC employs to control

fugitive emissions at the Station. Implementation of these measures is set forth in the fugitive dust plan required by Condition 5.2.2 and §212.309 but not addressed in Conditions 7.2.6, 7.3.6, or 7.4.6. The Agency's concern here in Conditions 7.3.10(a)(ii), 7.4.10(a)(ii), 7.5.10(a)(ii) and 7.6.10(a)(ii) should be with excess emissions and not with whether control measures are implemented within the past 12 hours as the fugitive dust plan does not require implementation of those control measures continuously. Therefore, there are frequently 12 hour periods when the control measures are not applied because it is not necessary that they be applied or it is dangerous to apply them. These conditions should be amended to reflect notification of excess emissions and not of failure to apply work practice control measures within the past 12 hours. Further, the requirements set forth in Conditions 7.3.6(a), 7.4.6(a), 7.5.6(a) and 7.6.6(a) are unnecessary as the plan specifies the necessary work practices and is reviewed by the Agency making these conditions unnecessary and potentially redundant or inconsistent.

112. For these reasons, Conditions 7.3.6(a), 7.4.6(a), 7.5.6(a), 7.6.6(a), 7.3.10(a)(ii), 7.4.10(a)(ii), 7.5.10(a)(ii) and 7.6.10(a)(ii), all contested herein, are stayed pursuant to APA, and SIPC requests that the Board order the Agency to revise those Conditions to correct the infirmities noted herein.

(vi) Fugitive Emissions Limitations and Testing

113. The Agency has applied the opacity limitations of § 212.123 to sources of fugitive emissions at the Station through Conditions 7.3.4(b), 7.4.4(b), 7.5.4(b) and 7.6.4(b), all referring back to Condition 5.2.2(b). SIPC believes that applying the opacity limitations of § 212.123 to sources of fugitive emissions is improper and contrary to the Board's regulatory structure covering PM emissions. In its response to comments to this effect, the Agency claims that

> [n]othing in the State's air pollution control regulations states that the opacity limitation does not apply to fugitive emission units.

> The regulations at issue broadly apply to 'emission units.' Moreover, while not applicable to these power plants, elsewhere in the State's air pollution control regulations, opacity limitations are specifically set for fugitive particulate matter emissions at marine terminals, roadways, parking lots and storage piles.

Responsiveness Summary, p. 41.

114. That the Agency had to specifically establish fugitive emissions limitations for such sources is a strong indication that the regulatory structure did not apply the opacity limitations of § 212.123 to fugitive sources. Fugitive emissions are distinctly different in nature from point source emissions, in that point source emissions are emitted through a stack, while fugitive emissions are not emitted through some discrete point. Therefore, fugitive emissions are addressed separately in the Board's rule at 35 Ill.Adm.Code 212.Subpart K. These rules call for fugitive emissions plans and specifically identify the types of sources that are to be covered by these plans. Other Conditions in the permit echo these requirements.

115. The limitations for fugitive emissions are set forth at § 212.301. It is a no-visible-emissions standard, as viewed at the property line of the source. The measurement methods for opacity are set forth at § 212.109, which requires application of Method 9 as applied to § 212.123. It includes specific provisions for reading the opacity of roadways and parking areas. However, § 212.107, the measurement method for visible emissions, says, "This Subpart shall not apply to Section 212.301 of this Part." Therefore, with the exception of roadways and parking lots, the Agency is precluded from applying Method 9 monitoring to fugitive emissions, leaving no manner for monitoring opacity from fugitive sources other than the method set forth in § 212.301. This reinforces the discussion above regarding the structure of Part 212 and that § 212.123 does not apply to sources of fugitive emissions other than where specific exceptions to that general nonapplicability are set forth in the regulations.

116. As § 212.107 specifically excludes the applicability of Method 9 to fugitive emissions, the requirements of Condition 7.3.7(a), 7.4.7(a), 7.5.7(a), and 7.6.7(a) are clearly inappropriate and do not reflect applicable requirements. Therefore, they, along with Conditions 7.3.4(b), 7.4.4(b), and 7.5.4(b) and 7.6.7(b) must be deleted from the permit. Except for roadways and parking lots, § 212.123 is not an applicable requirement for fugitive emissions sources and the Agency's inclusion of conditions for fugitive sources based upon § 212.123 and Method 9 is unlawful. To the extent that part of Condition 7.3.12(a), 7.4.12(a), 7.5.12(a), and 7.6.12 rely on Method 9 for demonstrations of compliance, these, too, are unlawful.

117. The Agency also requires stack tests of the baghouses at Conditions 7.4.7(b), 7.5.7(b), and 7.6.7(b). PM stack testing would be conducted in accordance with Test Method 5. However, a part of complying with Method 5 is complying with Method 1, which establishes the physical parameters necessary to test. SIPC cannot comply with Method 1. The stacks and vents for sources such as small baghouses and wetting systems are narrow and not structurally built to accommodate testing ports and platforms for stack testing. The PM emissions for these types of emissions units are very small. The inspections, monitoring, and recordkeeping requirements are sufficient to assure compliance. These conditions should be deleted from the permit.

118. For these reasons, consistent with the APA, the condition contested herein are stayed, and SIPC requests that the Board order the Agency to delete these conditions or revise as necessary.

Turbines
(Section 7.7)

(i) General

119. Condition 7.7.6(b)(i) has subparts (ii) and (iv) but no subpart (iii). The permit contains two Conditions 7.7.8-1. Condition 7.7.1 refers to the turbines as "process emission units;" they are fuel combustion units. These designation and numbering inconsistencies cause the permit to be unclear and ambiguous, making it uncertain as to what applies.

120. For these reasons, the conditions contested herein are stayed pursuant to the APA, and SIPC requests that the Board order the Agency to delete or properly correct them.

(ii) Observations During Operation

121. The Agency has specified in Condition 7.7.6(g)(i) which SIPC personnel may perform the task identified in the condition: ". . . shall be formally observed by operating personnel for the turbine or a member of the permittee's environmental staff . . ." The Agency already requires that persons who perform certain tests, such as a Method 9 reading of opacity, be certified to do so. The requirement that the personnel performing an opacity observation, as in Condition 7.7.6(g)(i), be certified to do so is implicit in the requirement that the opacity reading be "formal," implying that it should be performed pursuant to Method 9. The Agency has no basis for spelling out which of SIPC's personnel may perform required activities. If SIPC chooses, the persons performing this observation may not be its own turbine operator or members of its environmental staff, of even its own employees, yet the observations would be valid.

122. There is no applicable requirement that specifies that the turbine operator or the environmental staff must be the personnel who observe opacity and operation of the turbines.

Specifically identifying which personnel may perform these activities is not within the scope of gapfilling, as it is not necessary to ensure compliance with the permit. Therefore, this requirement is arbitrary and capricious and should be stricken from the permit.

123. For these reasons, Condition 7.7.6(g)(i), contested herein, is stayed pursuant to the APA and SIPC requests that the Board order the Agency to delete the phrase "by operating personnel for the turbine or a member of permittee's environmental staff" from this condition.

(iii) Reporting Requirements

124. Condition 7.7.10(a)(i)(A) requires an immediate report to the Agency of an "incident," if the opacity from a turbine exceeds the standard, "or may have exceeded the standard," for 3 of more 6 minute averaging periods. The provisions does not specify over what time period – an hour, a day, a year – these 3 exceedances may occur making the provision unclear and ambiguous. The draft provision included the term "consecutive" so that it was clear when the provision applied; it is now unclear and, therefore, ambiguous and arbitrary and capricious.

125. Condition 7.7.10(a)(i)(A) mandates reporting, "the permittee shall promptly notify." Because of the uncertain definition of the term "incident," the uncertain time period over which the exceedances to constitute a reportable event apparently can occur and the possibility that such exceedances may have different, and unrelated causes, at the very least the Agency should retain its discretion to determine whether a series of exceedances or possible ("may") exceedances comes within the intended ambit of this provision.

126. Condition 7.7.10(a)(i)(B) requires reporting these incidents within 15 days. "Incident," however, is not clearly defined so it is unclear when the 15-day clock may be running. Further, to determine whether there "may have been" an opacity exceedance, or even if

there was one because the turbines do not have continuous opacity monitors, is not an easily accomplished matter and, therefore, requiring reporting on such a time scale is potentially impossible, and certainly unnecessary.

127. For these reasons, the conditions contested herein are stayed pursuant to the APA, and SIPC requests that the Board order the Agency to properly revise these conditions.

(iv) Observations of Excess Opacity

128. Condition 7.7.10.(a)(i)(A) requires reporting when the opacity limitation may have been exceeded. That a limitation may have been exceeded does not rise to the level of an actual exceedance. SIPC believes it is beyond the scope of the Agency's authority to require reporting of suppositions of exceedances.

129. Also in Condition 7.7.10(a)(i)(A), the Agency has deleted the word *consecutive* as a trigger for reporting opacity and potential PM exceedances during an "incident" in the final version of the permit. Versions prior to the July 2005 version included that word. Its deletion completely changes the scope and applicability of the condition. It was not until the draft revised proposed permit issued in July 2005 that the Agency had deleted the concept of consecutive 6-minute averages of opacity from this condition. In the December 2004 version of the permit, the word *consecutive* had been replaced with *in a row*, but the concept is the same.

130. For these reasons, Condition 7.7.10(a)(i)(A), contested herein, is stayed, and SIPC requests that the Board order the Agency to delete the concept of requiring SIPC to report mere suppositions and to add a timeframe during which excess opacity was observed before reporting is triggered.

(v) Fuel SO_2 Data

131. The basis for determining compliance with the SO_2 limitation provided in Condition 7.7.12(b) is USEPA's default emissions factors, which are to be used only when better data is not available. The condition should allow SIPC to rely on such better data, including characteristics of the fuel determined through sampling and analysis, as sampling and analysis will provide better data for determining SO_2 emissions.

132. For these reasons, Condition 7.7.12(b), contested herein, is stayed pursuant to the APA, and SIPC requests that the Board order the Agency to amend the condition to provide for the necessary flexibility for SIPC to rely on better data than default emissions factors.

Maintenance and Repair Logs
(Sections 7.1, 7.2, 7.3, 7.4 7.5, 7.6 7.7)

133. The permit includes requirements that SIPC maintain maintenance and repair logs for each of the permitted operations. However, the requirements associated with these logs differ among the various operations, which adds to the complexity of the permit unnecessarily. Specifically, Conditions 7.1.9(b)(i), 7.2.9(b)(i), 7.4.9(a)(iii), 7.5.9(a)(ii), 7.6.9(a)(ii), and 7.7.9(a)(ii) require logs for each control device or for the permitted equipment without regard to excess emissions or malfunction/breakdown. Conditions 7.1.9(g)(i), 7.2.9(g)(i), 7.4.9(e), 7.5.9(e) and 7.6.9(e) require logs for components of operations related to excess emissions during malfunction/breakdown. Conditions 7.3.9(d)(i)(C), 7.4.9(c)(i)(C), 7.5.9(d)(i)(C) and 7.6.9(d)(i)(C) require descriptions of recommended repairs and maintenance, a review of previously recommended repair and maintenance, apparently addressing the status of the completion of such repair or maintenance. Conditions 7.2.9(d)(i), 7.3.9(d)(i), 7.4.9(c)(ii), 7.5.9(d)(ii) and 7.6.9(d)(i) go even further to require SIPC to record the observed condition of

the equipment and a summary of the maintenance and repair that has been or will be performed on that equipment, a description of the maintenance or repair that resulted from the inspection, and a summary of the inspector's opinion of the ability of the equipment to effectively and reliably control emissions.

134. Each section of the permit should be consistent on the recordkeeping requirements for maintenance and repair of emission units and their respective pollution control equipment. Consistency should be maintained across the permit for maintenance and repair logs whereby records are required only if any emission unit, operation, process or air pollution control equipment has a malfunction and breakdown with excess emissions.

135. Conditions 7.3.9(d)(i)(D), 7.4.9(c)(i)(D), 7.5.9(d)(i)(D), and 7.6.9(d)(i)(D) require "[a] summary of the observed implementation or status of actual control measures, as compared to the established control measures." SIPC does not understand what this means. These conditions are ambiguous, without clear meaning, and should be deleted from the permit.

136. These requirements exceed the limitations on the Agency's authority to gapfill. The purposes of maintaining equipment are multifold, including optimization of operation as well as for environmental purposes. The scope of the Agency's concern is compliance with environmental limitations and that is the scope that should apply to recordkeeping. The maintenance logs required in this permit should be consistently limited to logs of repairs correcting mechanical problems that caused excess emissions.

137. For these reasons, the Conditions contested herein are stayed consistent with the APA, and SIPC requests that the Board order the Agency to delete these conditions.

Testing Protocol Requirements
(Sections 7.1, 7.2, 7.3, 7.4, 7.5, 7.6)

138. The permit contains testing protocol requirements in Sections 7.1, 7.2, 7.3, 7.4, 7.5 and 7.6 that unnecessarily repeat the requirements set forth at Condition 8.6.2. Condition 8.6.2, a General Permit Condition, provides that specific conditions within Section 7 may supersede the provisions of Condition 8.6.2. Where the conditions in Section 7 do not supersede Condition 8.6.2 but merely repeat it, those conditions in Section 7 should be deleted. Included as they are, they potentially expose the permittee to allegations of violations based upon multiple conditions, when those conditions are mere redundancies. This is inequitable. It is arbitrary and capricious and such conditions in Section 7 should be deleted from the permit.

139. More specifically, Conditions 7.1.7(c)(1), 7.2.7(c)(i), 7.5.7(b)(iii), and 7.6.7(b)(iii) repeat the requirement that test plans be submitted to the Agency at least 60 days prior to testing. This 60-day submittal requirement is part of Condition 8.6.2 as well. Conditions 7.1.7(e), 7.2.7(e), 7.3.7(a)(v), 7.4.7(b)(v), 7.5.7(b)(v) and 7.6.7(b)(v) require information in the test report that is the same as the information required by Condition 8.6.3. To the extent that the information required by the conditions in Section 7 repeat the requirements of Condition 8.6.3, they should be deleted.

140. For these reasons, the Conditions contested herein, are stayed pursuant to the APA, and SIPC requests that the Board order the Agency to delete Conditions 7.1.7(c)(1), 7.2.7(b)(iii), 7.3.7(b)(iii), and 7.4.7(b)(iii) and to amend Conditions 7.2.7(b)(v), 7.3.7(b)(v), and 7.4.7(b)(v) such that they do not repeat the requirements of Condition 8.6.3.

Standard Permit Conditions
(Section 9)

141. SIPC is concerned with the scope of the term "authorized representative" in Condition 9.3, regarding Agency surveillance. At times, the Agency or USEPA may employ contractors who would be their authorized representatives to perform tasks that could require them to enter onto SIPC's property. Such representatives, whether they are the Agency's or USEPA's employees or contractors, must be subject to the limitations imposed by applicable Confidential Business Information ("CBI") claims and by SIPC's health and safety rules. SIPC believes that this condition needs to make it clear that SIPC's CBI and health and safety requirements are limitations on surveillance.

142. For these reasons, Condition 9.3, contested herein, is stayed pursuant to the APA, and SIPC requests that the Board order the Agency to clarify the limitations on surveillance in the condition as set forth above.

WHEREFORE, for the reasons set forth herein, Petitioner requests a hearing before the Board to contest the decisions contained in the CAAPP permit issued to Petitioner on September 29, 2005. The permit contested herein is not effective pursuant to Section 10-65 of the Administrative Procedures Act (5 ILCS 100/10-65). In the alternative, to avoid the potential confusion and uncertainty described earlier, and to expedite the review process, Petitioner requests that the Board exercise its discretionary authority to stay the entire permit. SIPC's state operating permits issued for the Station will continue in full force and effect, and the environment will not be harmed by this stay. Further, Petitioner requests that the Board remand the permit to the Agency and order it to appropriately revise conditions contested herein and any other provision the validity or applicability of which will be affected by the deletion or change in the provisions challenged herein and to reissue the CAAPP permit.

Respectfully submitted,
SOUTHERN ILLINOIS POWER COOPERATIVE

By: _____
One of Its Attorneys

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Sheldon A. Zabel
Kathleen C. Bassi
Stephen A. Bonebrake
Joshua R. More
Kavita M. Patel
SCHIFF HARDIN, LLP
6600 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606
Phone: 312-258-5500
Fax: 312-258-5600