BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

KINCAID GENERATION, L.L.C.,	)	
	)	
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 **Kincaid Generation, L.L.C.** 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 3, 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
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Fax: 312-258-5600

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APPEARANCE

I hereby file my appearance in this proceeding, on behalf of Kincaid Generation, L.L.C.

Sheldon A. Zabel

Dated: November 3, 2005

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APPEARANCE

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Stephen J. Bonebrake

Dated: November 3, 2005

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APPEARANCE

I hereby file my appearance in this proceeding, on behalf of Kincaid Generation, L.L.C.

Joshua R. More

Dated: November 3, 2005

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APPEARANCE

I hereby file my appearance in this proceeding, on behalf of Kincaid Generation, L.L.C.

Kavita Patel
Kavita M. Patel

Dated: November 3, 2005

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CERTIFICATE OF SERVICE

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

by hand 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 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 3, 2005

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APPEAL OF CAAPP PERMIT

NOW COMES Petitioner, KINCAID GENERATION, L.L.C., ("Petitioner," "Kincaid," or "Kincaid Generation"), 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") 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. Kincaid Generation, Agency I.D. No. 021814AAB, is an electric generating station owned by Kincaid Generation, L.L.C., and operated by Kincaid Generation, L.L.C. The Kincaid electric generating units ("EGUs") were built in 1967 and 1968. The Kincaid Generating Station is located four miles west of Kincaid, Illinois, on Route 104 in Christian County. Christian County is an attainment area for all pollutants. Kincaid is a baseload load plant and can generate approximately 1248 megawatts. Kincaid Generation employs 146 people at the Kincaid Generating Station.

3. Kincaid Generation operates two coal-fired boilers at Kincaid that have the capability to fire at various modes that include the combination of coal and natural gas as their principal fuels. In addition, the boilers fire natural gas as auxiliary fuel during startup and for flame stabilization. Certain alternative fuels, such as used oils generated on-site, may be utilized as well. Kincaid also operates associated coal handling, coal processing, and ash handling activities. In addition to the boilers, Kincaid operates a natural gas-fired auxiliary boiler used to heat the plant. This boiler is not used to directly generate electricity. Finally, there is a 500-gallon gasoline tank located at Kincaid, to provide fuel for station vehicles.

4. Kincaid is a major source subject to Title V. The EGUs at Kincaid are subject to both of Illinois' NOx reduction programs: the "0.25 averaging" program at 35 Ill.Adm.Code 217.Subparts V and the "NOx trading program" or "NOx SIP call" at 35 Ill.Adm.Code 217.Subpart W. Kincaid is subject to the federal Acid Rain Program at Title IV of the Clean Air Act and was issued a Phase II Acid Rain Permit on March 18, 2005.

5. Emissions of nitrogen oxides ("NOx") from the EGUs are controlled by over-fire air (OFA) and selective catalytic reduction equipment (SCR). Emissions of sulfur dioxide ("SO_2") from the EGUs are controlled by limiting the sulfur content of the fuel used for the boilers. PM emissions from the boilers are controlled by an electrostatic precipitator ("ESP"). Fugitive PM emissions from various other coal and ash handling activities are controlled through enclosures, covers, moisture content, dust collection devices, and baghouses, as necessary and appropriate. Emissions of carbon monoxide ("CO") are limited through good combustion practices in the boilers. Emissions of volatile organic compounds ("VOC") from the gasoline storage tank are controlled by the use of a submerged loading pipe.

6. The Agency received the original CAAPP permit application for the Kincaid Station on September 7, 1995, and assigned Application No. 95090078. Petitioner updated this application on February 4, 2003. 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 amounting to $1.6 million, as set forth at Section 39.5(18) of the Act, since submitting the application for a CAAPP permit for the Kincaid Generating Station in 1995. Kincaid's state operating permits have 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.

7. The Agency issued a final draft permit for public review on June 5, 2003. Kincaid Generation filed written comments with the Agency regarding the Kincaid draft permit on September 26, 2003.[1] The Agency issued a proposed permit for the Kincaid Station on October 6, 2003. Subsequently, in December 2004, the Agency issued a draft revised proposed

[1] Kincaid Generation 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, then, Kincaid Generation is not attaching such documents to this Petition.

permit for Petitioner's and other interested persons' comments. Kincaid Generation again commented, on January 14, 2005. 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, which was a draft of its response to comments, and invited comment on that document as well. Kincaid Generation submitted comments on this version of the proposed 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 Kincaid Generation 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.

8. The final permit was, indeed, 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. It is for these reasons that Petitioner hereby appeals the permit. This permit appeal is timely submitted within 35 days following issuance of the permit. Petitioner requests that the Board review the permit, remand it to the Agency, and order the Agency to correct and reissue the permit, without further public proceeding, as appropriate.

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

II. EFFECTIVENESS OF PERMIT

9. 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 Kincaid Generation 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(b). 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 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.

10. The Act provides at Sections 39.5(4)(b) and 9.1(f) that the state operating permits continue 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 this appeal and the Agency has reissued the permit. Therefore, Kincaid Generation currently has the necessary permits to operate the station.

11. In the alternative, to avoid any question as to the effectiveness of the permit under the APA, Kincaid Generation 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 Kincaid Generation'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 burdensome and costly. To comply with conditions that are inappropriate, as Kincaid Generation alleges below, would cause irreparable harm to Kincaid Generation, including the imposition of these unnecessary costs and the adverse effect on Kincaid Generation's right to adequate review on appeal. Kincaid Generation has no adequate remedy at law other than this appeal to the Board. Kincaid Generation 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. Moreover, the Board has stayed the entirety of all the CAAPP permits that have been appealed. *See Bridgestone/Firestone Off Road Tire Company v. IEPA*, PCB 02-31 (November 1, 2001); *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); *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); *Ethyl Petroleum Additives, Inc., v. IEPA*, PCB 04-113 (February 5, 2004); *Oasis Industries, Inc. v. IEPA*, PCB 04-116 (May 6, 2004). The Board should continue to follow this precedent.

12. Finally, a large number of conditions, linked throughout the permit, 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 permit 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, Kincaid Generation requests that the Board stay the entire permit for these reasons.

13. 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, consistent with its grants of stay in other CAAPP permit appeals and because of the pervasiveness of the conditions appealed throughout the permit, to protect Kincaid Generation's right to appeal and in the interests of administrative efficiency, Kincaid Generation requests that the Board stay the entire permit pursuant to its discretionary authority at 35 Ill.Adm.Code § 105.304(b). 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 Kincaid Generation 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. As explained above, the

entire permit should be stayed and, thus, Kincaid Generation does not repeat this discussion below in addressing the challenged conditions.

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

14. As a preliminary matter, the CAAPP permits issued to the Kincaid Generating 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 elements of uniqueness that are true at the stations. As a result, the appeals of these permits filed with the Board will be equally as repetitious with elements of uniqueness reflecting the stations. 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 per unit type, identifying the permit conditions giving rise to the appeal and the conditions related to them that would be affected. Petitioner appeals all conditions related to the conditions giving rise to the appeal, however, whether such related conditions are expressly identified or not below.

15. 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, Kincaid Generation, as will be evidenced by the administrative record, has actively participated to the extent allowed by the Agency in the development of this permit. In some instances, also as discussed in further detail below, the Agency did not provide Kincaid Generation with a viable opportunity to comment, leaving Kincaid Generation with appeal as its only alternative as a means of rectifying inappropriate conditions. These issues are properly before the Board in this proceeding.

16. 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[3] 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.

17. 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 1026-27. (Quotation marks and citations in original omitted.) Thus, where the permitting authority, here the Agency, becomes excessive in its gapfilling, it is imposing new substantive requirements contrary to Title V.

18. The Agency, here, has engaged in appropriate 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 exceeded its authority to gapfill 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 impose new substantive requirements. Where Petitioner identifies inappropriate gapfilling as the basis for its objection,

[3] Note that testing may be a type of monitoring. *See* Section 39.5(7)(d)(ii) of the Act.

Petitioner requests that the Board assume this preceding discussion of gapfilling is part of that discussion of the specific term or condition.

19. In a number of instances 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(l) of the Act. 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.

20. 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 requirement that serves as the basis for the contested condition in the permit. Only applicable requirements may be included in the permit,[4] 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 authority 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.

21. Moreover, the Agency's assertion in the Responsiveness Summary that its general statutory authority serves as its authority to include conditions necessary to "accomplish the

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

purposes of the Act" misstates what is actually in the Act. Responsiveness Summary, p. 15; *see* Section 39.5(7)(n). Section 39.5(7)(a) says that the permit is to contain conditions necessary to "assure compliance with all applicable requirements." (Emphasis added.) For the Agency to assume broader authority than that granted by the Act is unlawful and arbitrary and capricious.

22. 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(n) of the Act. The Agency's after-the-fact short project summary produced at public notice, the permit, and the Responsiveness Summary are not sufficient and cannot be considered a statement of basis. Moreover, the project summary and Responsiveness Summary do not speak to Kincaid. When the permittee and the public are questioning the rationale in comments, it is evident that the Agency's view of a statement of basis is not sufficient. Since the Responsiveness Summary is prepared after the fact and is not provided during permit development, it cannot serve as the statement of basis. The lack of a viable statement of basis denies the permittee notice of the Agency's decision-making rationale and the opportunity to comment thereon and makes the entire permit defective. This alone is a basis for appeal and remand of the permit and for a stay of the entire permit.

A. Issuance and Effective Dates
(Cover Page)

23. The Agency issued the CAAPP permit that is the subject of this appeal to Kincaid Generation on September 29, 2005, at 7:18 p.m. The Agency notified Kincaid Generation that the permits had been issued through emails sent to a Kincaid Generation employee. The email indicated that the permits were available on USEPA's website, where Illinois' permits are housed. However, that was not the case. Kincaid Generation could not locate the permits on the website that evening.

24. The issuance date of the permit becomes important because that is also the date that commences the computation of time for filing an appeal of the permit and for submitting certain documents, according to permit language, to the Agency. USEPA's website identifies that date as September 29, 2005. If that date is also the effective date, many additional deadlines would be triggered, including the expiration date as well as the date by which certain other documents must be submitted to the Agency. More critical, however, is the fact that once the permit becomes effective, Kincaid Generation is obliged to comply with it, regardless of whether it has any recordkeeping systems in place, any additional control equipment that might be necessary, new compliance requirements, 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, and it has changed considerably. Therefore, it is unreasonable and unprecedented to expect Kincaid Generation to have anticipated the final permit to the degree necessary for it to have been in compliance on September 29, 2005.

25. Moreover, publication of the permit on a website is not "official" notification in Illinois. Kincaid 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, at the earliest, until the permit is officially delivered to the company, it should not be deemed effective. Kincaid's CAAPP permit was officially delivered through the U.S. Postal Service on October 3, 2005.

26. 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 the smallest violation of the permit. If the issuance date is the effective date, this has the potential for tremendous consequences to the permittee and is extremely inequitable.

27. If the effective date of the permit is September 29, 2005, this also would create an obligation to perform quarterly monitoring and to submit quarterly reports (*c.f.* Condition 7.1.10-2(a)), for the third quarter of 2005, consisting of less than 30 hours of operation. The requirement to perform quarterly monitoring, recordkeeping, and reporting for a quarter that consists of less than 30 hours of operation, assuming the permittee would even have compliance systems in place so quickly after issuance of the permit, is overly burdensome and would not benefit the environment in any manner. Therefore, the requirement is arbitrary and capricious.

28. 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 the time for the source to appeal the permit has expired, so that an appeal can stay the permit until the Board can rule.

29. Consistent with the APA, the effective date of the permit, contested herein, is stayed, and Kincaid Generation requests that the Board order the Agency to establish an effective date some period of time after the permittee has received the permit following remand and reissuance of the permit, to allow the permittee sufficient time to implement the systems necessary to comply with all requirements in this very complex permit.

B. Overall Source Conditions
(Section 5)

(i) Recordkeeping of and Reporting HAP Emissions

30. The CAAPP permit issued to Kincaid Generation 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 a 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."

31. 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 Kincaid Generation. 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 incorrectly states in the Responsiveness Summary 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 authority to gather data pursuant to Section 4(b) and its authority to gapfill to assure compliance with the permit 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.

32. 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, state 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 Kincaid Generation 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.

33. 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 Kincaid Generation requests that the Board order the Agency to amend the permit accordingly.

(ii) Retention and Availability of Records

34. 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 Kincaid Generation 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), Kincaid Generation 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, Kincaid Generation should not be required to again provide the data absent its loss for some unforeseen reason, and certainly should not to have to print out the information. Further, Kincaid Generation is troubled by the qualifier

generally that the Agency included in its statement. It implies that the Agency may not always choose reasonable times, nature, and scope of these requests.

35. Consistent with the APA, Conditions 5.6.2(b) and (c), contested herein, are stayed, and Kincaid Generation 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

36. Kincaid Generation is unsure as to what the Agency expects with respect to Condition 5.6.2(d). *See* Condition 5.6.2(d). Kincaid Generation first thought that the Agency was requiring 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 rereading Condition 5.6.2(d), Kincaid Generation believes that through this condition, the Agency is requiring Kincaid Generation to submit blank copies of its records, apparently so that the Agency can check them for form and type of content. If true, the condition is unacceptable, as the Agency does not have the authority to oversee how Kincaid Generation conducts its internal methods of compliance. There is no basis in law for such a requirement and it must be deleted.

37. Each company has the 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. While the Agency has the authority to require that certain information be reported, it has no authority – and cites to no authority (because there is none) – to impose this condition.

38. Nor does the Agency provide a purpose for this condition – which is an 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 guess the Agency's purpose for this condition. However, if the Agency finds that submitted records are inadequate, the Agency has remedies to address that situation.

39. Additionally, this permit condition requires Kincaid to submit these documents before the 35 days to appeal has run, which violates Kincaid Generation's due process rights to appeal the condition, as granted by the Act at Section 40.2. The Agency's requirement at Condition 5.6.2(d) that Kincaid Generation submit blank forms within 30 days of issuance of the permit significantly undermines Kincaid Generation's right to appeal – and the effectiveness of that right. Although the condition is stayed, because the appeal may not be filed until 35 days after issuance, a third party might try to argue that Kincaid Generation is not in compliance with the new permit from the time the report was due until the appeal was filed. While this is not correct because the stay is effective as of the date of issuance, it is improper to even create this uncertainty. This denies Kincaid Generation due process and thus is unconstitutional, unlawful, and arbitrary and capricious.

40. Consistent with the APA, Condition 5.6.2(d), contested herein, is stayed, and Kincaid Generation requests that the Board order the Agency to delete it from the permit. In the alternative, Kincaid Generation requests that the Board interpret this condition to bar enforcement against Kincaid if the Agency fails to communicate any inadequacies it finds in the blank recordkeeping forms submitted to it, so long as those records were completed, as part of the permit shield.

C. NOx SIP Call
(Section 6.1)

41. 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 Kincaid Generation 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, Kincaid Generation suggests that the condition merely refer to the first ozone season during which the permit is effective.

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

D. Boilers
(Section 7.1)

(i) Opacity as a Surrogate for PM

43. Historically, power plants and other types of industry have demonstrated compliance with emissions limitations for 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 indicating 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 Kincaid's 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.

44. The provisions requiring the use of opacity as a surrogate for PM are found in Conditions 7.1.9(c)(ii), linked to Condition 7.1.4(b), which contains the emissions limitation for PM; 7.1.9(c)(iii)(B), also linked to Conditions 7.1.4(b) and 7.1.9(c)(ii); 7.1.10-1(a)(i) and (ii), linked to Condition 7.1.10-3(a); 7.1.10-2(a)(i)(E), linked to Conditions 7.1.9(c)(iii)(B) and 7.1.9(c)(ii); 7.1.10-2(d)(v) generally; 7.1.10-2(d)(v)(C), requiring an explanation of the presumed number and magnitude of opacity and PM exceedances and speculation as to the causes of the exceedances; 7.1.10-2(d)(v)(D), requiring a description of actions taken to reduce opacity and PM exceedances and anticipated effect on future exceedances; 7.1.10-3(a)(ii), requiring follow-up reporting within 15 days after an incident during which there may have been a PM exceedance based upon this upper bound of opacity; and 7.1.12(b), relying on continuous opacity monitoring pursuant to Condition 7.1.8(a), PM testing to determine the upper bound of opacity,

and the recordkeeping conditions described above to demonstrate compliance with the PM emissions limitation.

45. Providing a reliable, exact PM concentration level outside of stack testing is not possible. It is impossible to continuously test a stack to determine a continuous level of PM emissions, and it would be unreasonable for the Agency to expect such. Pursuant to some of the consent decrees settling a number of USEPA's enforcement actions against coal-fired power generators, some companies are testing continuous PM monitoring devices. None of these companies, according to their consent decrees, is required to rely on these PM continuous emissions monitoring systems ("CEMS") to determine their current PM emissions levels. The PM CEMS are not at a point of refinement where they can even be considered credible evidence of PM emissions levels. 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. Moreover, PM CEMS have not been proven to equate to Method 5.

46. Historically, opacity has not 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.[5] Kincaid Generation agrees with the Agency that increasing opacity may indicate that PM emissions are increasing, but 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. Kincaid Generation's current operating permits require triennial PM stack testing, to be performed within 120 days prior to expiration of the permit,

[5] "[S]etting a specific level of opacity that is deemed to be equivalent to the applicable PM emission limit . . . is not possible on a variety of levels. . . . It would also be inevitable that such an action would be flawed as the operation of a boiler may change over time and the coal supply will also change, affecting the nature and quantity of the ash loading to the ESP. These type of changes cannot be prohibited, as they are inherent in the routine operation of coal-fired power plants. However, such changes could invalidate any pre-established opacity value." Responsiveness Summary, p. 44.

which has an expiration date three years following issuance. This requirement comprises periodic monitoring. 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 method for PM emissions limitations in the NSPS is only through stack testing, not through opacity as a surrogate for PM.

47. 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 estimates of PM levels or guesses as to whether there is 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 an opacity/PM surrogate level of 15% were exceeded, this must be reported despite the fact that all fields in the ESP were on and operating, that stack testing indicates the PM emissions level at the 95th percentile confidence interval is 0.04 lb/mmBtu/hr, and that the likelihood there was an exceedance of the PM emissions limitation of 0.1 lb/mmBtu/hr is extremely low. The purpose of such reporting is unclear. It does not assure compliance with the PM limit. Moreover, this reporting requirement is a new substantive requirement, according to *Appalachian Power*, and is not allowed under Title V. As such, these conditions exceed the Agency's gapfilling authority and are unlawful and arbitrary and capricious.

48. Contrary to the Agency's assertion in the Responsiveness Summary, opacity does not provide a "robust means to distinguish compliance operation of a coal-fired boiler and its ESP from impaired operation" (Responsiveness Summary, p. 43). Relying upon opacity as a

surrogate for PM emissions levels, in fact, penalizes the best-operating units. Units that stack test with 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%, this condition in the permit would require the permittee to submit a report for every operating hour for the quarter, over 2,180 reports for the third quarter of 2005, stating that the unit may have exceeded the PM limit. This condition will result in burdensome reporting that serves no purpose. As such, it exceeds the Agency's authority to gapfill, is unlawful, and is arbitrary and capricious.

49. Further, this condition effectively creates a false low opacity limitation. In order to avoid the implication that there may have been an exceedance of the PM limit, the opacity limit becomes that 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 requirement 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 Title V of the Clean Air Act. It also violates the provisions of Title VII of the Act. *See Appalachian Power.*

50. These conditions could invite some sources to perform stack testing under atypical operating conditions, *i.e.*, to "detune" the units, in order to push the bounds of compliance with the PM limit. That is, to identify more realistic operating conditions that would result in emissions closer to the PM limit,[6] a source might perform stack tests with some

[6] Kincaid Generation's policy is that the boilers be operated in a compliant manner. During stack tests, Kincaid Generation 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 Kincaid's last stack tests were at 0.008 lb/mmBtu (Unit 1) and 0.006 lb/mmBtu (Unit 2), well in compliance with the PM limitation.

elements of the ESP turned off. Testing in a manner that generates results close to the PM limit may result in opacity that exceeds the opacity limit. This is counter-intuitive and not in keeping with good air pollution control practices. Moreover, arguably, sources could operate at these detuned levels and still be in compliance but emit more pollutants than they typically do now. These hypothetical situations illustrate the flaw with this condition.

51. Periodic stack testing according to the schedule contained in Condition 7.1.7(a)(iii) and good operational practices fill the gap. Periodic stack testing according to the schedule in Condition 7.1.7(a)(iii) 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 stack testing" is the Agency's own phrase in Condition 7.1.7(a)(iii) and is consistent with the findings of *Appalachian Power*.

52. Conditions 7.1.10-2(d)(v)(C) and (D) in particular are repetitious of Condition 7.1.10-2(d)(iv). Both require descriptions of the same incident and prognostications as to how the incidents can be prevented in the future. One such requirement, Condition 7.1.10-2(d)(iv), is sufficient to address the Agency's concern, although Kincaid Generation also objects to Condition 7.1.10.2(d)(iv) to the extent that it requires reporting related to the opacity surrogate.

53. As with Condition 5.6.2(d) discussed above, Condition 7.1.9(c)(ii) denies Kincaid Generation due process. Condition 7.1.9(c)(ii) requires 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).

Like Condition 5.6.2(d), Condition 7.1.9(c)(ii) denies Kincaid Generation due process for the same reasons. Kincaid Generation was not granted the opportunity to appeal the condition

before it was required to submit information that Kincaid Generation believes is not useful or reliable.

54. Finally, Condition 7.1.10-2(d)(vi) requires Kincaid Generation 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," they do not require definition. This requirement does not appear anywhere else in the permit, which supports there being no need for these definitions in this condition. This requirement has no basis and should be deleted from the permit.

55. Consistent with the APA, Conditions 7.1.9(c)(ii), 7.1.9(c)(iii)(B), 7.1.10-1(a), 7.1.10-2(a)(i)(E), 7.1.10-2(d)(iv), 7.1.10-2(d)(v), 7.1.20-2(d)(vi), 7.1.10-3(a)(ii), and 7.1.12(b), contested herein, and any other related conditions that the Board finds appropriate are stayed, and Kincaid Generation requests that the Board order the Agency to delete these conditions.

(ii) Reporting the Magnitude of PM Emissions

56. Somewhat consistent with its direction for PM, the Agency also requires Kincaid Generation to determine and report the magnitude of PM emissions during startup and operation during malfunction and breakdown. *See* Conditions 7.1.9(g)(i), 7.1.9(g)(ii)(C)(V), 7.1.9(h)(ii)(D)(III), and 7.1.10-2(d)(iv)(A)(III). Compliance with these conditions is not possible and, therefore, these conditions are arbitrary and capricious. Kincaid Generation does not have a means for measuring the magnitude of PM emissions at any time other than during stack testing – not even using the opacity surrogate. There is no certified, credible, or reliable alternative to stack testing to quantify PM emissions.

57. Additionally, Condition 7.1.10-2(d)(iv)(A)(V) requires Kincaid Generation 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." Kincaid Generation believes this means that it must provide any additional information it might have that indicates an exceedance of the PM emissions limit. Like the above statements regarding opacity, this condition is an inappropriate and inaccurate basis for determining whether there are exceedances of the PM limit and the magnitude of any such exceedance. As discussed above, stack testing is the only reliable method of testing for PM emissions exceedances, and stack testing is not done continuously.

58. Consistent with the APA, Conditions 7.1.9(g)(i), 7.1.9(g)(ii)(C)(V), 7.1.9(h)(ii)(D)(III), and7.1.10-2(d)(iv), specifically 7.1.10-2(d)(iv)(A)(III) and (5), contested herein, are stayed, and Kincaid Generation requests that the Board order the Agency to delete these conditions from the permit.

(iii) PM Testing

59. Kincaid Generation interprets the language in Condition 7.1.7(a)(i) to mean that stack testing that occurs after December 31, 2003, and before September 29, 2006, satisfies the initial testing requirement included in the permit. However, the language is not clear and should be rewritten.

60. The Agency has included a requirement in the permit at Condition 7.1.7(b)(iii) that Kincaid Generation perform testing for PM10 condensibles. 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 below. Second, even if the condition were appropriately included in the permit, the language of Condition 7.1.7(b)*[7] is not clear as to the timing of the required testing, largely because of the lack of clarity of Condition 7.1.7(a)(i).

[7] The asterisk is in the permit.

61. Regarding the requirement in Condition 7.1.7(b)(iii) for Method 202 testing, the Agency has exceeded its authority because there is no regulatory requirement that applies PM10 limitations to the Kincaid Generating Station. For this reason, the requirement should be removed from the permit. At the least, the requirement should be set aside in a state-only portion of the CAAPP permit, although Kincaid Generation believes its inclusion in any permit would be inappropriate. In the Responsiveness Summary at page 18, the Agency stated, "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). While the Agency has authority to gather information, this authority does not extend under Title V to requiring a facility to test for PM10 condensibles, because that testing is not an "applicable requirement" under Title V. As discussed above, an "applicable requirement" is one that applies to the permittee pursuant to a federal regulation or a SIP. That Method 202 is one of USEPA's reference methods does not make it an "applicable requirement" pursuant to Title V, as the Agency suggests in the Responsiveness Summary.

62. Also regarding Condition 7.1.7(b)(iii), the structure of the Board's PM regulations establish the applicable requirements for the Kincaid Generating Station. The Kincaid Generating Station is subject to 35 Ill.Adm.Code 212.Subpart E, Particulate Matter Emissions from Fuel Combustion Emission Units. It is not and never has been located in a PM10

nonattainment area.[8] The Board's PM regulations are structured such that particular PM10 requirements apply to identified sources located in the PM10 nonattainment areas.[9] No such requirements apply now or have ever applied to the Kincaid Generating Station.

63. The measurement method for PM, found at 35 Ill.Adm.Code § 212.110, references only Method 5 or derivatives of Method 5. This section of the Board's rules applies to the Kincaid Generating 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. The Kincaid Generating Station is not subject to PM10 limitations and thus is not subject to § 212.108, regardless of 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. While this is a true statement for tests of PM10 condensibles under § 212.108, it has no bearing on facilities subject only to PM testing under § 212.110. Therefore, there is no basis for the Agency to include a requirement for Method 202 testing in the CAAPP permit, which is limited to including only applicable requirements and such monitoring, recordkeeping, and reporting that are necessary to assure compliance.

64. In fact, 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

[8] In fact, there are no more 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.

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

> 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[10] 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." Responsiveness Summary, p. 18. Under the Board's rules, it is limited to testing for PM, and so its "regulatory applicability" is limited.

65. While the Agency has a duty under Section 4(b) to gather data, it must be done in compliance with Section 4(b). Section 4(b), however, does not create or authorize the creation of permit conditions. Only the Board's rules serve as the basis for permit conditions. Requiring such testing in the CAAPP permit is not appropriate, and as such, it is unlawful and exceeds the Agency's authority.

66. The requirement for Method 202 testing must be deleted from the permit. Consistent with the APA, Condition 7.1.7(b)* and the inclusion of Method 202 in Condition 7.1.7(b)(iii), contested herein, are stayed, and Kincaid Generation requests that the Board order the Agency to delete the requirement for Method 202 testing from the permit.

(iv) Measuring CO Concentrations

67. The CAAPP permit issued to the Kincaid Generating Station requires Kincaid Generation to conduct, as a work practice, quarterly "combustion evaluations" that consist of "diagnostic measurements of the concentration of CO in the flue gas." *See* Condition 7.1.6(a).

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

See also Conditions 7.1.9(a)(vi) (related recordkeeping requirement), 7.1.10-1(a)(iv) (related reporting requirement), and 7.1.12(d) (related compliance procedure requirement). These provisions are not necessary to assure compliance with the underlying standard, are not required by the Board's regulations, and, therefore, exceed 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 optimize boiler efficiency, which serves to minimize CO emissions. At Kincaid and elsewhere, compliance with the CO limitation has been accomplished through combustion maximization optimization techniques. This approach is sufficient and should not be changed. Ambient air quality is not threatened, and stack testing has demonstrated that emissions of CO at the Kincaid Generating Station, at 101 ppm at Unit 1 and 62 ppm at Unit 2 during diagnostic stack testing, are significantly below the standard of 200 ppm.

68. In the case of CO, requiring the stations to purchase and install equipment to monitor and record emissions of a pollutant that stack testing demonstrates they comply with and for which the ambient air quality is in compliance by a large margin is costly and burdensome and, therefore, arbitrary and capricious. In order to comply with the "work practice"[11] of performing "diagnostic testing" that yields a concentration of CO, Kincaid Generation would be required to purchase and install or operate some sort of monitoring device with no environmental purpose served.

69. 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. It is Kincaid Generations'

[11] Kincaid Generation questions how the requirement that the Agency has included in Condition 7.1.6(a) is classified as a "work practice." To derive a concentration of CO emissions, Kincaid Generation will have to engage in monitoring or testing – the work practice of combustion optimization that has been the standard historically.

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

70. In addition, Conditions 7.1.9(g)(i), 7.1.9(g)(ii)(C)(V), and 7.1.9(h)(ii)(D)(III)[12] require Kincaid Generation to provide estimates of the magnitude of CO emitted during startup and operation during malfunction and breakdown. The monitoring device that Kincaid Generation would have to use for the quarterly diagnostic evaluations required by Condition 7.1.6(a) is a portable CO monitor, which it is believed do not give continuous readout recordings. Rather, they must be manually read. What the Agency is effectively requiring through the recordkeeping provisions of Conditions 7.1.9(g)(i), 7.1.9(g)(ii)(C)(5), and 7.1.9(h)(ii)(D)(3) is that someone continually read the portable CO monitor during startup, which could take as long as 36 hours, and during malfunctions and breakdowns, which are by their nature unpredictable. In the first case (startup), the requirement is unreasonable and burdensome and could be dangerous in some weather conditions. Malfunctions and breakdowns would have the same problems that would occur during startup, and the unpredictability of malfunctions and breakdowns may make it impossible for Kincaid Generation to comply with the condition.

71. 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

[12] Related conditions are 7.1.10-1(a)(iv) (reporting) and 7.1.12(d) (compliance procedures).

as to how to perform the diagnostic measurements. Kincaid Generation 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 Condition 7.1.6(a). 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 Kincaid's permit.

72. Consistent with the APA, Conditions 7.1.6(a), 7.1.9(a)(vi), 7.1.9(g)(i), 7.1.9(g)(ii)(C), 7.1.9(h)(ii)(D), 7.1.10-1(a)(iv), and 7.1.12(d), contested herein, and any other related conditions that the Board finds appropriate are stayed, and Kincaid Generation requests that the Board order the Agency to delete these requirements from the permit. Kincaid Generation also requests that the Board order the Agency to amend Condition 7.1.6(a) to reflect a requirement for work practices optimizing boiler operation, to delete the 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) Applicability of 35 Ill.Adm.Code 217.Subpart V

73. The Agency has included the word *each* in Condition 7.1.4(f): "The affected boilers are each subject to the following requirements. . . ." (Emphasis added.) Because of the structure and purpose of 35 Ill.Adm.Code 217.Subpart V, which is the requirement that the NOx emissions rate from certain coal-fired power plants during the ozone season average no more than 0.25 lb/mmBtu across the state, Kincaid Generation submits that the use of the word *each* in this sentence is misplaced and confusing, given the option available to the Kincaid Generating Station to average emissions among affected units in infinite combinations.

74. Consistent with the APA, Conditions 7.1.4(f) and 7.1.4(f)(i)(A) are stayed, and Kincaid Generation requests that the Board order the Agency to delete the word *each* from the sentence quoted above in Condition 7.1.4(f) and to insert the word *each* in Condition 7.1.4(f)(i)(A) if the Board agrees that its inclusion is necessary at all, as follows: "The emissions of NOx from ~~an~~ each affected boiler. . . ."

(vi) 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 emissions limitation during startup. 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 Condition 7.1.9(g), do 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.

76. Kincaid Generation is already required to provide information regarding when startups occur and how long they last by Condition 7.1.9(g)(ii)(A). Condition 7.1.9(g)(ii)(B) requires some additional information relative to startup. Emissions of SO_2, NOx, and opacity during startup are continuously monitored by the CEMS/COMS. Midwest Generation 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 Condition 7.1.9(g)(ii)(C) after a

six-hour period 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 were it to be required even after the 26 hours typical for startup.

77. Consistent with the APA, Condition 7.1.9(g)(ii)(C), contested herein, is stayed, and Kincaid Generation requests that the Board order the Agency to delete the condition, consistent with the startup provisions of 35 Ill.Adm.Code § 201.149 and the inapplicability of § 201.263.

(vii) Malfunction and Breakdown Provisions

78. 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 Kincaid Generation. This grant of authority serves as an affirmative defense in an enforcement action. *Generally see* Condition 7.1.3(c).

79. With this grant of authority, Condition 7.1.10-3(a)(i) requires Kincaid Generation to notify the Agency "immediately" if it operates during malfunction and breakdown and there could be PM exceedances. As pointed out above, there is currently no proven or certified methodology for measuring PM emissions other than through stack testing. Therefore, Kincaid Generation must notify the Agency if it suspects that there have been PM exceedances. The Agency has provided no regulatory basis for this reporting and no guidance on how to make this judgment call. Reference to reliance on opacity as an indicator of PM emissions should also be

deleted. The condition as written exceeds the scope of the Agency's authority to gapfill and so is unlawful, arbitrary and capricious.

80. Also in the final version Condition 7.1.10-3(a)(i), the Agency has deleted the word *consecutive* as a trigger for reporting opacity and potential PM exceedances during an "incident." Its deletion completely changes the scope and applicability of the condition. *Please see* Kincaid Generation's comments on each version of the permit in the Agency Record. As the series of comments demonstrates, it was not until the draft revised proposed permit issued in July 2005 that the Agency had deleted the concept of consecutive six-minute averages of opacity from this condition. Moreover, the methodology for using consecutive six-minute averages has been common practice in the underlying permit.

81. The Agency has provided no explanation for this change. As the actual opacity exceedance could alone comprise an "incident," Kincaid Generation believes that it is more appropriate to retain the word *consecutive* in the condition. Random, intermittent exceedances of the opacity limitation 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." In the alternative, Kincaid Generation suggests that the Agency add a two-hour timeframe during which these six or more 6-minute opacity averaging periods could occur to be consistent with the next condition, 7.1.10-3(a)(ii). Likewise, a timeframe is not included in Condition 7.1.10-3(a)(ii), which appears to refer to the same "incident" that is addressed by Condition 7.1.10-3(a)(*i*). Kincaid Generation suggests that the Agency qualify the length of time during which the opacity standard may have been exceeded for two or more hours to 24 hours.

82. Consistent with the APA, Condition 7.1.10-3(a)(i), contested herein, is stayed, and Kincaid Generation requests that the Board order the Agency to delete it from the permit as it relates to PM. Consistent with the APA, Condition 7.1.10-3(a)(ii), contested herein, is stayed and Kincaid Generation requests that the Board order the Agency to remove the reference to PM emissions and to insert a timeframe to span the six-minute opacity averaging periods to make them consecutive or, in the alternative, to require that they occur within a two-hour block.

(viii) Alternative Fuels Requirements

83. The Agency has included at Conditions 7.1.5(a)(ii)-(iv) requirements that apply when Kincaid uses a fuel other than coal as its principal fuel. Condition 7.1.5(a)(ii) identifies what constitutes using an alternative fuel as the principal fuel and establishes emissions limitations. Condition 7.1.5(a)(iii) also describes the conditions under which Kincaid would be considered to be using an alternative fuel as its principal fuel. Condition 7.1.5(a)(iv) requires notification to the Agency prior to Kincaid's use of an alternative fuel as its principal fuel.

84. Inclusions of these types of requirements in Condition 7.1.5, the condition addressing non-applicability of requirements, is organizationally misaligned under the permit structure adopted by the Agency. These provisions should be included in the proper sections of the permit, such as 7.1.4 for emissions limitations and 7.1.10 for notifications. In the alternative, they should be in Condition 7.1.11(c), operational flexibility, where the Agency already has a provision addressing alternative fuels. As the Agency has adopted a structure for the CAAPP permits that is fairly consistent not only among units in a single permit but also among permits,[13] it would be useful for the Agency to include specific recordkeeping requirements in the same sections.

[13] That is, Condition 7.*x*.9 for all types of emissions units in this permit, from boilers to tanks, addresses recordkeeping. Likewise, condition 7.*x*.9 addresses recordkeeping in all of the CAAPP permits for EGUs.

85. Additionally, at Condition 7.1.11(c)(ii), the Agency's placement of the examples of alternative fuels defines them as hazardous wastes. The intent and purpose of the condition is to ensure that these alternative fuels are not classified as hazardous wastes. The last phrase of the condition, beginning with "such as petroleum coke, tire derived fuel. . . ," should be placed immediately after "Alternative fuels" with punctuation and other adjustments to the language as necessary, to clarify that the examples listed are not hazardous wastes.

86. For these reasons, Conditions 7.1.5(a)(ii), 7.1.5(a)(iii), 7.1.5(a)(iv), and 7.1.11(c)(ii) are stayed pursuant to the APA, and Kincaid Generation requests that the Board order the Agency to place Conditions 7.1.5(a)(ii)-(iv) in more appropriate sections of the permit and to clarify Condition 7.1.11(c)(ii).

(ix) Stack Testing Requirements

87. Condition 7.1.7(e) identifies 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, Kincaid Generation 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 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 or parametric compliance data would be inappropriate.

88. Consistent with the APA, Condition 7.1.7(e), contested herein, is stayed, and Kincaid Generation requests that the Board order the Agency to delete it from the permit.

(x) Monitoring and Reporting Pursuant to NSPS

89. It appears from various conditions in the permit that the Agency believes that Kincaid is subject to NSPS monitoring and reporting requirements pursuant to the Acid Rain Program. Kincaid Generation's review of the Acid Rain requirements does not show how NSPS applies to Kincaid. The Acid Rain Program requires monitoring and reporting pursuant to 40 CFR Part 75. Specifically, 40 CFR § 75.21(b) states that continuous opacity monitoring shall be conducted according to procedures set forth in state regulations where they exist. Recordkeeping is addressed at § 75.57(f) and reporting at § 75.65. None of this references Part 60, NSPS.

90. Arguably, it is odd that a permittee would appeal a condition in a permit that states that regulatory provisions are not applicable. However, consistent with Kincaid Generation's analysis of the Acid Rain requirements, the permit, and the Board's regulations, it must also appeal Condition 7.1.5(b), which exempts Kincaid from the requirements of 35 Ill.Adm.Code 201.Subpart L based upon the applicability of NSPS. NSPS does not apply to the Kincaid Generating Station through the Acid Rain Program, and so this condition is inappropriate.

91. Conditions 7.1.10-2(b)(i), 7.1.10-2(c)(i) and 7.1.10-2(d)(i) require Kincaid Generation to submit summary information on the performance of the SO_2, NOx, and opacity continuous monitoring systems, respectively, including the information specified at 40 CFR § 60.7(d). Condition 7.1.10-2(d)(iii) Note refers, also, to NSPS §§ 60.7(c) and (d). The information required at § 60.7(d) is inconsistent with the information required by 40 CFR Part 75, which are the federal reporting requirements applicable to Kincaid Generation's boilers. Section 60.7(d) is not an "applicable requirement," as the boilers are not subject to the NSPS. For Kincaid Generation to comply with these conditions would entail reprogramming or

purchasing and deploying additional software for the computerized CEMS, effectively resulting in the imposition of additional substantive requirements through the CAAPP permit exceeding the allowance for gapfilling. Moreover, contrary to Condition 7.1.10-2(d)(iii), Kincaid Generation does not find a regulatory link between the NSPS provisions of 40 CFR 60.7(c) and (d) and the Acid Rain Program.

92. Consistent with the APA, Conditions 7.1.5(b), 7.1.10-2(b)(i), 7.1.10-2(c)(i), 7.1.10-2(d)(i) and 7.1.10-2(d)(iii) Note, contested herein, are stayed, and Kincaid Generation requests that the Board order the Agency to delete reference to 40 CFR 60.7(d).

(xi) Opacity Compliance Pursuant to § 212.123(b)

93. The Board's regulations at 35 Ill.Adm.Code § 212.123(b) provide that a source may exceed the 30% opacity limitation of § 212.123(a) for an aggregate of eight minutes in a 60-minute period but no more than three times in a 24-hour period. Additionally, no other unit at the source located within a 1,000-foot radius from the unit whose emissions exceed 30% may emit at such an opacity during the same 60-minute period. Because the opacity limit at § 212.123(a) is expressed as six-minute averages pursuant to Method 9 (*see* Condition 7.1.12(a)(i)), a source demonstrating compliance with § 212.123(b) must reprogram its COMS to record or report opacity over a different timeframe than would be required by demonstrating compliance with § 212.123(a) alone. The Agency attempts to reflect these provisions at Condition 7.1.12(a), providing for compliance with § 212.123(a) at Condition 7.1.12(a)(i) and separately addressing § 212.123(b) at Condition 7.1.12(a)(ii). Additionally, the Agency requires Kincaid Generation to provide it with 15 days' notice prior to changing its procedures to accommodate § 212.123(b) at Condition 7.1.12(a)(ii)(E). These conditions raise several issues.

94. Condition 7.1.12(a)(ii) assumes that accommodating the "different" compliance requirements of § 212.123(b), as compared to § 212.123(a), is a change in operating practices. Whether it is or is not a change in operating practices is immaterial under the rule. Moreover, as with Kincaid Generation's objection to Condition 5.6.2(d), Condition 7.1.12(a)(ii)(E) is an attempt by the Agency to insert itself into the operational practices of a source beyond the scope of its authority to do so. The Agency states that the purpose of the 15 days' prior notice is so that the Agency can review the source's recordkeeping and data handling procedures, presumably to assure that they will comply with the requirements implied by § 212.123(b). As with Condition 5.6.2(d), the risk lies with the permittee. If, during an inspection or a review of a quarterly report, the Agency finds that Kincaid Generation has not complied with § 212.123(b)'s implied data collection requirements, then the Agency is authorized by the Act to take certain actions. Kincaid Generation takes the responsibility for the data capture and recordkeeping necessary for compliance with § 212.123(b).

95. Moreover, while Condition 7.1.12(a)(ii)(E) says that the Agency will review Kincaid's recordkeeping and data handling practices, it says nothing about approving them or what the Agency plans to do with the review. The Agency has not explained a purpose of the requirement in a statement-of-basis document or in its Responsiveness Summary or shown how this open-ended condition assures compliance with the applicable requirement. Because the Kincaid Generating Station is required to operate a COMS, all of the opacity readings captured by the COMS are recorded and available to the Agency, allowing the Agency the opportunity to determine whether Kincaid has complied with § 212.123(b). The 15 days' prior notice will not improve the Agency's ability to determine Kincaid's compliance.

96. Conditions 7.1.10-3(a)(i) and (ii) do not accommodate the applicability of § 212.123(b). The Board's regulations do not limit when § 212.123(b) may apply beyond eight minutes per 60 minutes three times per 24 hours. Therefore, any limitation on opacity must consider or accommodate the applicability of § 212.123(b) and not assume or imply that the only applicable opacity limitation is 30%.

97. Finally, inclusion of recordkeeping and notification requirements relating to § 212.123(b) in the compliance section of the permit is organizationally misaligned under the permit structure adopted by the Agency. These provisions, to the extent that they are appropriate in the first place, should be included in sections such as 7.1.9 for recordkeeping and 7.1.10 for reporting. As the Agency has adopted a structure for the CAAPP permits that is fairly consistent not only among units in a single permit but also among permits, it would be useful for the Agency to include specific recordkeeping requirements in the same sections.

98. Consistent with the APA, Condition 7.1.12(a)(ii), contested herein, is stayed, and Kincaid Generation requests that the Board order the Agency to delete the condition from the permit. Additionally, consistent with the APA, Conditions 7.1.10-3(a)(i) and (ii), contested herein, are stayed, and, if the Board does not order the Agency to delete these conditions from the permit pursuant to other requests raised in this appeal, Kincaid Generation requests that the Board order the Agency to amend these conditions to reflect the applicability of § 212.123(b).

E. Coal Handling Equipment, Coal Processing Equipment, and Fly Ash Equipment
(Sections 7.2, 7.3, and 7.4)

(i) Fly Ash Handling v. Fly Ash Processing Operation

99. 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 7.4.5 that the NSPS for Nonmetallic Mineral Processing Plants does not apply "because there is no

equipment used to crush or grind ash." This underscores Kincaid Generation's point that the fly ash handling system is not a process.

100. Because the fly ash operations at the Kincaid Station are not a process, they are not subject to the process weight rate rule at § 212.321(a), which accordingly is not an applicable requirement under Title V. As such, Condition 7.4.4(c) and all other references to the process rate weight rule or § 212.321(a), including in Section 10 of the permit, should be deleted.

101. Since the fly ash operation is not a process, reference to it as a process is inappropriate. The word *process* and its derivatives in Section 7.4 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 applicability of § 212.321(a).

102. Consistent with the APA, the Conditions 7.4.3, 7.4.4, 7.4.6, 7.4.7, 7.4.8, 7.4.9, 7.4.10, and 7.4.11, all of which are contested herein, are stayed, and Kincaid Generation requests that the Board order the Agency to delete the Conditions 7.4.4(c), 7.4.9(b)(ii), and all other references to the process weight rate rule, including in Section 10, and add Condition 7.4.5(b) identifying § 212.321(a) as a requirement that is not applicable to Kincaid.

(ii) Fugitive Emissions Limitations and Testing

103. The Agency has applied the opacity limitations of § 212.123 to sources of fugitive emissions at the Kincaid Generating Station through Conditions 7.2.4(b), 7.3.4(b), and 7.4.4(b), all referring back to Condition 5.2.2(b). 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.

104. 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. Condition 5.2.3 echoes these requirements, and Condition 5.2.4 requires the fugitive emissions plan.

105. 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.

106. As § 212.107 specifically excludes the applicability of Method 9 to fugitive emissions, the requirements of Condition 7.2.7(a), 7.3.7(a), and 7.4.7(a) are inappropriate and do not reflect applicable requirements. Therefore, they, along with Conditions 7.2.4(b), 7.3.4(b), and 7.4.4(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 Condition 7.2.12(a), 7.3.12(a), and 7.4.12(a) rely on Method 9 for demonstrations of compliance, it, too, is unlawful.

107. The Agency also requires stack tests of the baghouses at Conditions 7.2.7(b), 7.3.7(b), and 7.4.7(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. Kincaid Generation cannot comply with Method 1. At Kincaid, 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.

108. For these reasons, consistent with the APA, Conditions 7.2.4(b), 7.2.7(a), 7.2.12(a), 7.3.4(b), 7.3.7(a), 7.3.12(a), 7.4.3(b), 7.4.7(a), and 7.4.12(a), all contested herein, are stayed, and Kincaid Generation requests that the Board order the Agency to delete these conditions to the extent that they require compliance with § 212.123 and Method 9 or stack testing and, thereby, compliance with Methods 1 and 5.

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

109. The final permit provides at Condition 7.4.7(a)(ii) that Kincaid Generation conduct the opacity testing required at Condition 7.4.7(a)(i) 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%.

110. The Agency provided no explanation for (1) treating fly ash handling differently from coal handling in this regard (*see* Condition 7.2.7(a)(ii)[14]) or (2) reducing the threshold from 10% to 5%. Because the Agency failed to provide an explanation for this change, Kincaid Generation did not have the opportunity to comment on the change and does not understand the Agency's rationale. Thus, the inclusion of this change in the threshold for discontinuing the opacity test is arbitrary and capricious. Condition 7.4.7(a)(ii) is inextricably entwined with 7.4.7(a), and so Kincaid Generation appeals this underlying condition as well.

111. The final permit provides at Condition 7.4.7(a)(ii) that Kincaid Generation conduct the opacity testing required at Condition 7.4.7(a)(i) for a period of at least 30 minutes "unless the average opacities for the first 12 minutes of observation (two 6-minute averages) are both less than 5.0 percent." The original draft and proposed permits (June 2003 and October

[14] "The duration of opacity observations for each test shall be at least 30 minutes (five 6-minute averages) unless the average opacities for the first 12 minutes of observations (two 6-minute averages) are both less than 10.0 percent." (Emphasis added.)

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%.

112. For these reasons, Condition 7.4.7(a), which is again contested herein, is stayed, and Kincaid Generation requests that the Board order the Agency to amend Condition 7.4.7(a)(ii) to reflect the 10% threshold, rather than the 5% threshold, for discontinuation of the opacity test, although Kincaid Generation specifically does not concede that Method 9 measurements are appropriate in the first place.

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

113. Conditions 7.2.8(a), 7.3.8(a), and 7.4.8(a) contain inspection requirements for the coal handling, coal processing, and fly ash handling operations, respectively. In each case, the condition requires that "[t]hese inspections shall be performed with personnel not directly involved in the day-to[-]day operation of the affected operations. . . ." The Agency provided no basis for this requirement other than a discussion, after the permit was issued, in the Responsiveness Summary at page 19. 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. 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.[15]

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

115. The Agency has included in Conditions 7.2.8(b) and 7.3.8(b) that inspections of coal handling and coal processing operations be conducted every 15 months while the process is not operating. Condition 7.4.8(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 processes are intricately linked to the operation of the boilers. In any given area of the plant, 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. It is Kincaid Generation's best interest to run its operations as efficiently and safely as possible. While the Agency certainly has gapfilling authority, the gapfilling authority is limited to what is necessary to ensure compliance with permit conditions. *See Appalachian Power*. It is not clear at all how these frequencies of inspections accomplish that end.

116. 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.

[15] The Agency's requirements in this condition also underscore Kincaid Generation's appeal of the conditions applying an opacity limitation to fugitive sources, above at Section III.E.(ii).

117. 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, inspections should be linked to boiler outages. Moreover, these operations are inspected on monthly or weekly bases pursuant to Conditions 7.2.8(a), 7.3.8(a), and 7.4.8(a), and so any maintenance issues will be identified.

118. Conditions 7.2.8(b), 7.3.8(b), and 7.4.8(b) require detailed inspections of the coal handling, coal processing, and fly ash handling operations 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.

119. Condition 7.2.8(a) requires inspections of the coal handling operations on a monthly basis and provides "that all affected operations that are in routine service shall be inspected at least once during each calendar month." Until the July 2005 draft revised proposed permit, the language in this clause was "that all affected operations shall be inspected at least once during each calendar quarter."[16] The Agency has provided no explanation as to why the frequency of inspections has been increased. Also, since the first sentence of the condition already states that these operations are to be inspected on a monthly basis, the last clause of the condition is superfluous.

120. For these reasons, Conditions 7.2.8(a), 7.3.8(a), and 7.4.8(a), which are contested herein, are stayed consistent with the APA, and Kincaid Generation requests that the Board order the Agency to delete those provisions of these conditions that dictate who should perform

[16] That is, not all aspects of the coal handling operations are required to be inspected during operation on a monthly basis.

inspections of these operations, to delete the requirement contained in these conditions that Kincaid Generation inspect before and after maintenance and repair activities. Additionally, Conditions 7.2.8(b), 7.3.8(b), and 7.4.8(b) and any related conditions, are contested herein, are stayed pursuant to the APA, and Kincaid Generation requests that the Board order the Agency to alter the frequency of the inspections to correspond to boiler outages.

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

121. Condition 7.2.9(a)(i)(C) requires Kincaid Generation to submit a list identifying coal conveying equipment considered an "affected facility" for purposes of NSPS. Such a list was included in the application, and that should suffice. Moreover, the equipment in question is subject to the NSPS identified in Condition 7.2.3(a)(ii), and so has already been identified in the permit itself. A second list is not necessary to ensure compliance with emissions limitations. The equipment has been permitted historically. Moreover, the condition requires submission of this list pursuant to Condition 5.6.2(d), which is addressed earlier in this Petition. Condition 7.2.9(a)(i)(C) should be deleted from the permit.

122. Likewise, the demonstrations confirming that the established control measures assure compliance with emissions limitations, required at Conditions 7.2.9(b)(ii), 7.3.9(b)(ii) and 7.4.9(b)(ii), have already been provided to the Agency in the construction and CAAPP permit applications. These conditions, therefore, are unnecessary, and resubmitting the demonstrations pursuant to Conditions 7.2.9(b)(iii), 7.3.9(b)(iii), and 7.4.9(b)(iii) serves no compliance purpose. Also, Conditions 7.2.9(b)(iii), 7.3.9(b)(iii), and 7.4.9(b)(iii) rely upon Condition 5.6.2(d), contested herein. Conditions 7.2.9(b)(ii), 7.2.9(b)(iii), 7.3.9(b)(ii), 7.3.9(b)(iii), 7.4.9(b)(ii), and 7.4.9(b)(iii) should be deleted from the permit.

123. Moreover, Conditions 7.2.9(b)(iii), 7.3.9(b)(iii), and 7.4.9(b)(iii) include reporting requirements within the recordkeeping requirements, contrary to the overall structure of the permit. Kincaid Generation has already objected to the inclusion of these conditions for other reasons. In any event, they should not appear in Condition 7.*x*.9.

124. Conditions 7.2.9(d)(ii)(B), 7.3.9(c)(ii)(B), and 7.4.9(ii)(B) are redundant of 7.2.9(d)(ii)(E), 7.3.9(c)(ii)(E), and 7.4.9(c)(ii)(E), respectively. Such redundancy is not necessary. Conditions 7.2.9(d)(ii)(B), 7.3.9(c)(ii)(B), and 7.4.9(c)(ii)(B) should be deleted from the permit.

125. Conditions 7.2.9(e)(ii), 7.2.9(e)(vii), 7.3.9(d)(ii), 7.3.9(d)(vii), 7.4.9(d)(ii), and 7.4.9(d)(vii) require Kincaid Generation to provide the magnitude of PM emissions during an incident where the coal handling operation continues without the use of control measures. Kincaid Generation has established that it has no means to measure exact PM emissions from any process on a continuing basis. The Agency understands this. Therefore, it is not appropriate for the Agency to require reporting of the magnitude of PM emissions.

126. The Agency uses the word *process* in Condition 7.2.9(f)(ii) rather than *operation*.[17] While this may seem a minor point, it is a point with a distinction. The word *process*, as the Board can see in Section 7.4 of the permit relative to the fly ash handling operation, could implicate the applicability of the process weight rate rule. To avoid anyone's confusing coal handling as an operation subject to the process weight rate rule, Kincaid Generation requests that the Board order the Agency to substitute *operation* or some other synonym for *process* in this context.

[17] "Records for each incident when operation of an affected process continued during malfunction or breakdown. . . ." (Emphasis added.)

127. The Agency provided no rationale or authority for including of Condition 7.4.9(c)(i)(B), observations of accumulations of fly ash in the vicinity of the operation. The Agency did address this condition after the fact in the Responsiveness Summary, but did not provide an acceptable rationale for the provision. The Agency says, with respect to the accumulation of fines, as follows:

> 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.

Responsiveness Summary, p. 19. 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.

128. 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 is not 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. Likewise, the Agency cannot supplement the fugitive dust plan, the control plan, through the permit. It is a priority of Kincaid to maintain its facility clear of fines for safety and environmental requirements.

129. Given that the fly ash system results in few emissions, rarely breaks down, and is a closed system, there is no apparent justification for the trigger for additional recordkeeping when operating during malfunction/breakdown being only one hour in Condition 7.4.9(e)(ii)(E) compared to the two hours allowed for coal handling (Condition 7.2.9(f)(ii)(E)) and coal processing (Condition 7.3.9(e)(ii)(E)). The Agency has provided no rationale for this difference. Moreover, in earlier versions of the permit, this time trigger was two hours. *See* the June 2003 draft permit and the October 2003 proposed permit.

130. For these reasons, Conditions 7.2.9(a)(i)(C), 7.2.9(b)(ii), 7.2.9(b)(iii), 7.2.9(e)(ii), 7.2.9(e)(vii), 7.2.9(f)(ii), 7.3.9(b)(ii), 7.3.9(b)(iii), 7.3.9(c)(ii)(B), 7.3.9(c)(ii)(E), 7.3.9(d)(ii), 7.3.9(d)(vii), 7.4.9(b)(ii), 7.4.9(b)(iii), 7.4.9(c)(i)(B), 7.4.9(c)(ii)(B), 7.4.9(c)(ii)(E), 7.4.9(d)(ii), and 7.4.9(e)(ii)(E), all contested herein, are stayed consistent with the APA, and Kincaid Generation requests that the Board order the Agency to delete Conditions 7.2.9(a)(i)(C), 7.2.9(b)(ii), 7.2.9(b)(iii), 7.2.9(d)(ii)(B), 7.3.9(b)(ii), 7.3.9(b)(iii), 7.3.9(d)(ii)(B), 7.4.9(b)(ii), 7.4.9(b)(iii), 7.4.9(c)(i)(B), 7.4.9(c)(i)(B) and 7.4.9(d)(ii); add the concept of estimating the magnitude of PM emissions to Condition 7.2.9(e)(ii), 7.3.9(d)(ii), 7.3.9(e)(ii), 7.4.9(d)(ii), and 7.4.9(d)(vii); substitute the word *operation* for the word *process* in Condition 7.2.9(f)(ii); and change one hour to two hours in Condition 7.4.9(e)(ii)(E).

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

131. Conditions 7.2.10(a)(ii), 7.3.10(a)(ii), and 7.4.10(a)(ii) require notification to the Agency for operation of support operations that were not in compliance with the applicable work practices of Conditions 7.2.6(a), 7.3.6(a), and 7.4.6(a), respectively, for more than 12 hours or four hours with respect to ash handling regardless of whether there were excess emissions. Conditions 7.2.6(a), 7.3.6(a), and 7.4.6(a) identify the measures that Kincaid Generation employs to control fugitive emissions at the Kincaid Generating Station. Implementation of these measures is set forth in the fugitive dust plan required by Condition 5.2.4 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 7.2.10(a)(ii), 7.3.10(a)(ii), and 7.4.10(a)(ii) should be with excess emissions and not with whether control measures are implemented within the past 12 or four hours, as the fugitive dust plan does not require implementation of those control measures continuously. There are frequently 12- or four-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 or four hours. Kincaid Generation notes also that the Agency has provided no explanation as to why ash handling in Condition 7.4.10(a)(ii) has only a four-hour window while coal handling and processing have a 12-hour window.

132. Conditions 7.2.10(b)(i)(A), 7.3.10(b)(i)(A), and 7.4.10(b)(i)(A) require 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. These conditions are beyond the Agency's authority to require such reporting.

133. Additionally, in these same conditions (*i.e.*, 7.2.10(b)(i)(A), 7.3.10(b)(i)(A), and 7.4.10(b)(i)(A))), the Agency requires reporting if opacity exceeded the limit for "five or more 60[-]minute averaging periods" ("four or more" for ash handling). The next sentence in the condition says, "Otherwise, . . . for no more than five 6-minute averaging periods. . . ." The ash handling provision says "no more than three" (Condition 7.4.10(b)(i)(A)). The language in Condition 7.4.10(b)(i)(A) is internally consistent; however, the language in Conditions 7.2.10(b)(i)(A) and 7.3.10(b)(i)(A) is not. It is difficult to tell from these two conditions whether five six-minute averaging periods of excess opacity readings do or do not require reporting. In earlier versions of the permit, five six-minute averaging periods did not trigger reporting. In fact, the August 2005 proposed versions of the permit is the first time that five six-minute averages triggered reporting. The conditions should be amended to clarify that excess opacity reporting in Conditions 7.2.10(b)(i)(A) and 7.3.10(b)(i)(A) is triggered after five six-minute averaging periods and, as discussed below, that these averaging periods should be consecutive or occur within some reasonable outside timeframe and not just randomly.

134. As is the case with other permit conditions for the fly ash handling operations, the reporting requirements during malfunction/breakdown at Condition 7.4.10(b)(i)(A) for this support operation are different from those for the coal handling and coal processing operations. Kincaid Generation must notify the Agency immediately for each incident in which opacity of the fly ash operations exceeds the limitation for four or more six-minute averaging periods, while for coal handling and coal processing, such notification is required apparently (*see* discussion above) only after five six-minute averaging periods. *See* Conditions 7.2.10(b)(i)(A) and 7.3.10(b)(i)(A). The Agency has provided no basis for these differences or for why it changed the immediate reporting requirement for ash handling from five six-minute averaging periods, as

in the October 2003 proposed permit, to the four six-minute averaging periods. Additionally, the Agency has deleted the time frame during which these opacity exceedances occur in this provision[18] in all three sections – 7.2.10(b)(i)(A), 7.3.10(b)(i)(A), and 7.4.10(b)(i)(A). *Cf.*, the October 2003 proposed permit. The lack of a timeframe for these operations has the same problems as discussed above regarding the boilers. The trigger for reporting excess opacity for all three of these operations should be the same timeframe. The Agency has provided no justification for these differences. Also, given the complexities of the permitting requirements generally, these different reporting timeframes make compliance more challenging. No environmental purpose is served by having them different.

135. The Agency requires at Conditions 7.2.10(b)(ii)(C), 7.3.10(b)(ii)(C), and 7.4.10(b)(ii)(C) that Kincaid Generation aggregate the duration of all incidents during the preceding calendar quarter when the operations continued during malfunction/breakdown with excess emissions. Kincaid Generation is already required at Conditions 7.2.10(b)(ii)(A), 7.3.10(b)(ii)(A), and 7.4.10(b)(ii)(A) to provide the duration of each incident. It is unclear why the Agency needs this additional data. The Agency has not identified any applicable requirement for this provision other than the general reporting provisions of Section 39.5 of the Act, and it is not appropriate gapfilling. For these reasons, these conditions should be deleted.

136. Conditions 7.2.10(b)(ii)(D), 7.3.10(b)(ii)(D), and 7.4.10(b)(ii)(D) require reporting that there were no incidents of malfunction/breakdown, and so no excess emissions, in the quarterly report. The provisions in Section 7.1.10-2[19] require reporting only if there are excess emissions, and Condition 7.1.10-3, which addresses malfunction/breakdown specifically,

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[18] That is, that the averaging periods are consecutive or occur within some timeframe, such as two hours.

[19] Conditions 7.1.10-2(b)(iii), (c)(iii), (d)(iii), and (d)(iv).

requires only notification and only of excess emissions. Reporting requirements for the support operations during malfunction/breakdown should be limited to reporting excess emissions and should not be required if there are no excess emissions.

137. For these reasons, Conditions 7.2.10(a)(ii), 7.2.10(b)(i)(A), 7.2.10(b)(ii)(C), 7.2.10(b)(ii)(D), 7.3.10(a)(ii), 7.3.10(b)(i)(A), 7.3.10(b)(ii)(C), 7.3.10(b)(ii)(D), 7.4.10(a)(ii), 7.4.10(b)(i)(A), 7.4.10(b)(ii)(C), and 7.4.10(b)(ii)(D), all contested herein, are stayed pursuant to the APA, and Kincaid Generation requests that the Board order the Agency to qualify that Conditions 7.2.10(a)(ii), 7.3.10(a)(ii), and 7.4.10(a)(ii) are limited to notification when there are excess emissions rather than when control measures have not been applied for a 12-hour period or four-hour period in the case of ash handling; to add a timeframe for opacity exceedances occurring during operation during malfunction/breakdown for immediate reporting to the Agency in Conditions 7.2.10(b)(i)(A), 7.3.10(b)(i)(A), and 7.4.10(b)(i)(A); to change the number of six-minute averaging periods to six and to delete the requirement for reporting suppositions of excess opacity in Conditions 7.2.10(b)(i)(A), 7.3.10(b)(i)(A), and 7.4.10(b)(i)(A); to delete Conditions 7.2.10(b)(ii)(C), 7.3.10(b)(ii)(C), 7.4.10(b)(ii)(C).

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

138. The permit includes requirements that Kincaid Generation 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(a)(ii), 7.3.9(a)(ii), 7.4.9(a)(ii), 7.5.9(a)(ii) and 7.6.9C require logs for each control device or for the permitted equipment without regard to excess emissions or malfunction/breakdown. Conditions 7.1.9(h)(i), 7.2.9(f)(i), 7.3.9(e)(i), and 7.4.9(e)(i) require logs for components of operations related to excess

emissions during malfunction/breakdown. Conditions 7.2.9(d)(i)(C), 7.3.9(c)(i)(C), and 7.4.9(c)(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)(ii)(B)-(E), 7.3.9(c)(ii)(B)-(E), and 7.4.9(c)(ii)(B)-(E) go even further to require Kincaid Generation 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.

139. 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.

140. Conditions 7.2.9(d)(i)(D), 7.3.9(c)(i)(D) and 7.4.9(c)(i)(D) require "[a] summary of the observed implementation or status of actual control measures, as compared to the established control measures." These conditions are ambiguous, without clear meaning, and should be deleted from the permit.

141. 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.

142. For these reasons, Conditions 7.1.9(b)(i), 7.2.9(a)(ii), 7.2.9(d)(i)(C), 7.2.9(d)(i)(D), 7.2.9(d)(ii)(B)-(E), 7.3.9(a)(ii), 7.3.9(c)(i)(C), 7.3.9(c)(i)(D), 7.3.9(c)(ii)(B)-(E), 7.4.9(a)(ii), 7.4.9(c)(i)(C), 7.4.9(c)(i)(D), 7.4.9(c)(ii)(B)-(E), 7.6.9(a)(ii), and 7.7.9(a)(ii), all contested herein, are stayed consistent with the APA, and Kincaid Generation requests that the Board order the Agency to delete these conditions.

G. Testing Protocol Requirements
(Sections 7.1, 7.2, 7.3, 7.4)

143. The permit contains testing protocol requirements in Section 7.1, 7.2, 7.3, and 7.4 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. Duplicate requirements potentially expose Kincaid to allegations of violations based upon multiple conditions, when those conditions are mere redundancies. It is arbitrary and capricious and such conditions in Section 7 should be deleted from the permit.

144. More specifically, Conditions 7.1.7(c)(1), 7.2.7(b)(iii), 7.3.7(b)(iii), and 7.4.7(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. Condition 7.1.7(c), on the other hand, properly references Condition 8.6.3 and requires additional information in the test report without repeating Condition 8.6.3. However, Conditions 7.2.7(b)(v), 7.3.7(b)(v), and 7.4.7(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.

145. For these reasons, Conditions 7.1.7(c)(1), 7.2.7(b)(iii), 7.2.7(b)(v), 7.3.7(b)(iii), 7.2.7(b)(v), 7.4.7(b)(iii), and 7.4.7(b)(v), contested herein, are stayed pursuant to the APA, and Kincaid Generation 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.

H. Standard Permit Conditions
(Section 9)

146. Kincaid Generation 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 Kincaid Generation'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 Kincaid Generation's health and safety rules. Kincaid Generation believes that this condition needs to make it clear that Kincaid Generation's CBI and health and safety requirements are limitations on surveillance.

147. For these reasons, Condition 9.3, contested herein, is stayed pursuant to the APA, and Kincaid Generation 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 Kincaid Generation 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 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. Kincaid Generation's state operating permit 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,

KINCAID GENERATION, L.L.C.,
KINCAID GENERATING STATION

by: _____
One of Its Attorneys

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