BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

DYNEGY MIDWEST GENERATION, INC. (HENNEPIN POWER STATION),	)	
Petitioner,	)	
v.	)	PCB No. 2006-072 (CAAPP Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE

To: Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

Bradley P. Halloran
Hearing Officer
James R. Thompson Center,
Suite 11-500
100 West Randolph Street
Chicago, Illinois 60601

Sheldon A. Zabel
Kathleen C. Bassi
Stephen J. Bonebrake
Joshua R. More
Kavita M. Patel
Schiff Hardin, LLP
6600 Sears Tower
233 South Wacker Drive
Chicago, Illinois 60606

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board the **APPEARANCES, MOTION IN OPPOSITION TO PETITIONER'S REQUEST FOR STAY and AFFIDAVIT** of the Respondent, Illinois Environmental Protection Agency, a copy of which is herewith served upon the assigned Hearing Officer and the attorneys for the Petitioner.

Respectfully submitted by,

Robb H. Layman
Assistant Counsel

Dated: November 18, 2005
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 524-9137

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
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Petitioner,	)	
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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

APPEARANCE

NOW COMES Robb H. Layman and enters his appearance on behalf of the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, as one of its attorneys in the above-captioned matter.

Respectfully submitted by,

Robb H. Layman

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Respondent.	)	

APPEARANCE

NOW COMES Sally Carter and enters her appearance on behalf of the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, as one of its attorneys in the above-captioned matter.

Respectfully submitted by,

Sally Carter

Sally Carter
Assistant Counsel

Dated: November 18, 2005
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 782-5544

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

DYNEGY MIDWEST GENERATION, INC. (HENNEPIN POWER STATION),	)	
Petitioner,	)	
v.	)	PCB No. 2006-072 (CAAPP Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

MOTION IN OPPOSITION TO
PETITIONER'S REQUEST FOR STAY

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by and through its attorneys, and moves the Illinois Pollution Control Board ("Board") to deny the Petitioner's, DYNEGY MIDWEST GENERATION, INC., (hereinafter "Dynegy Midwest Generation" or "Petitioner"), request for a stay of the effectiveness of the Clean Air Act Permit Program ("CAAPP") permit issued in the above-captioned matter.

INTRODUCTION

Acting in accordance with its authority under the CAAPP provisions of the Illinois Environmental Protection Act (hereinafter "Act"), *415 ILCS 5/39.5(2004)*, the Illinois EPA issued a CAAPP permit to Dynegy Midwest Generation on September 29, 2005. The permit authorized the operation of an electrical power generation facility known as the Hennepin Power Station. The facility is located at R.R.#1, Box 200AA, in Hennepin, Illinois.

On November 3, 2005, attorneys for the Petitioner filed this appeal (hereinafter "Petition") with the Board challenging certain permit conditions contained within the CAAPP permit issued by the Illinois EPA. The Illinois EPA received an electronic version of the appeal on the same date. Formal notice of the appeal was served upon the Illinois EPA on November 7, 2005.

As part of its Petition, Dynegy Midwest Generation seeks a stay of the effectiveness of the entire CAAPP permit, citing two principal grounds for its requested relief. First, Petitioner alleges that the CAAPP permit is subject to the automatic stay provision of the Illinois Administrative Procedure Act ("APA"), *5 ILCS 100/10-65(b)(2004)*. As an alternative basis for a blanket stay of the CAAPP permit, Petitioner alleges facts intended to support the Board's use of its discretionary stay authority.

In accordance with the Board's procedural requirements, the Illinois EPA may file a response to any motion within 14 days after service of the motion. *See, 35 Ill. Adm. Code 101.500(d).*

ARGUMENT

The Illinois EPA urges the Board to deny Petitioner's request for a stay of the effectiveness of the entire CAAPP permit. For reasons that are explained in detail below, Petitioner cannot avail itself of the protections afforded by the APA's automatic stay provision as a matter of law. Further, Petitioner has failed to demonstrate sufficient justification for the Board to grant a blanket stay of the CAAPP permit under its discretionary stay authority. Given the absence of an alternative request by Petitioner seeking either a stay of contested CAAPP permit conditions or any other relief deemed just and appropriate, the Board should decline to grant any stay relief whatsoever.

I. The CAAPP permit issued by the Illinois EPA should not be stayed in its entirety by reason of the APA's automatic stay provision.

The first argument raised by Petitioner maintains that the CAAPP permit in this proceeding is subject to the automatic stay provision of the APA. *See, Petition at pages 5-6.* The automatic stay provision under the APA governs administrative proceedings involving licensing, including a "new license with reference to any activity of a continuing nature." *See, 5 ILCS 100/10-65(b).* The CAAPP permit at issue in this proceeding governs emissions-related activities at an existing, major stationary source in Illinois. Accordingly, the Illinois EPA does not dispute that the CAAPP permit is synonymous with a license that is of a continuing nature. *See also, 5 ILCS 100/1-35 (2004)*(defining "license" as the "whole or part of any agency permit... required by law").

In its argument, Petitioner postulates that the APA automatically stays the effectiveness of the CAAPP permit until after the Board has rendered a final adjudication on the merits of this appeal. Citing to a Third District Appellate Court ruling from over two decades ago, Petitioner reasons that the APA's stay provision continues to apply throughout the duration of the pending appeal because it is the Board, not the Illinois EPA, that makes the "final agency decision" on the permit. *See, Borg-Warner Corporation v. Mauzy,* 427 N.E.2d 415, 56 Ill. Dec. 335 (3rd Dist. 1981). The stay provision would also apparently ensure that the Petitioner continues to abide by the terms of "the existing license [which] shall continue in full force and effect." *See, 5 ILCS 100/1-65(b)(2004).* In this case, that "existing license" is the underlying State operating

permits[1] that have been separately governing the facility's operations since the Illinois EPA's original receipt of the permit application. *See, 415 ILCS 5/39.5(4)(b)(2004).*

The *Borg-Warner* decision upheld the APA's automatic stay provision in the context of a renewal for a National Pollutant Discharge Elimination System ("NPDES") permit sought before the Illinois EPA. Notably, the court observed:

> "A final decision, in the sense of a final and binding decision coming out of the administrative process before the administrative agencies with decision making power, will not be forthcoming in the instant case until the PCB rules on the permit application."

Borg-Warner, 56 Ill. Dec. at 341. The Illinois EPA concedes that the *Borg-Warner* decision may still reflect good law and that it probably warrants, in the appropriate case, application of the doctrine of *stare decisis* by Illinois courts. Moreover, the Illinois EPA observes that the ruling is apparently in perfect harmony with other subsequent decisions by Illinois courts that addressed the respective roles of the Illinois EPA and the Board in permitting matters under the Act. In this regard, the Illinois EPA is fully cognizant of the "administrative continuum" that exists with respect to the Board in most permitting matters, and the CAAPP program itself does not reveal the General Assembly's intentions to change this administrative arrangement. *See, Illinois EPA v. Illinois Pollution Control Board,* 486 NE2d 293, 294 (3rd Dist. 1985), *affirmed, Illinois EPA v. Illinois Pollution Control Board,* 503 NE2d 343, 345 (Ill. 1986); *ESG Watts, Inc., v. Illinois Pollution Control Board,* 676 N.E.2d 299, 304 (3rd Dist. 1997). Thus, it is the Board's decision in reviewing whether a CAAPP permit should issue that ultimately determines when the permit becomes final.

[1] In limited situations, it is possible that a facility's operation during the pending review of the CAAPP permit application was also authorized in a State construction permit.

While the *Borg-Warner* opinion may offer some interesting reading, it does not provide a proper precedent in this case. This conclusion can be arrived because the APA simply does not apply to these CAAPP permit appeal proceedings. For one reason, the APA's various provisions should not apply where the General Assembly has effectively exempted them from a particular statutory scheme. One example of this exercise of legislative discretion is found with administrative citations, which under Section 31.1 of the Act are not subject to the contested case provisions of the APA. *See, 415 ILCS 5/31.1(e)(2004).* In the case of the Act's CAAPP provisions, a similar basis for exemption is provided by the permit severability requirements that govern the Illinois EPA's issuance of CAAPP permits.

Section 39.5(7) of the Illinois CAAPP sets forth requirements governing the permit content for every CAAPP permit issued by the Illinois EPA. *See generally, 415 ILCS 5/39.5(7)(2004).* Section 39.5(7)(i) of the Act provides that:

> "Each CAAPP permit issued under subsection 10 of this Section shall include a severability clause to ensure the continued validity of the various permit requirements in the event of a challenge to any portions of the permit."

415 ILCS 5/39.5(7)(i)(2004). This provision represents something more than the trivial or inconsequential dictates to an agency in its administration of a permit program. Rather, it clearly contemplates a legal effect upon a permitting action that extends beyond the scope of the permit's terms. In other words, the General Assembly was not simply speaking to the Illinois EPA but, rather, to a larger audience. By observing that a component of a CAAPP permit shall retain a "continued validity," lawmakers clearly proscribed that the uncontested conditions of a CAAPP permit must continue to survive notwithstanding a challenge to the permit's other terms. This language signifies an

unambiguous intent to exempt some segment of the CAAPP permit from any kind of protective stay during the permit appeal process. For this reason, the automatic stay provision of the APA cannot be said to govern CAAPP permits issued pursuant to the Act.

The Board should also reject the Petitioner's automatic stay argument on entirely separate grounds. Petitioner suggests that the APA's automatic stay provision applies by virtue of the licensing that is being obtained through the CAAPP permitting process. However, the APA contains a grandfathering clause that specifically exempts an administrative agency that previously possessed "existing procedures on July 1, 1977" for contested case or licensing matters. *See, 5 ILCS 100/1-5(a)(2004).* Where such provisions were in existence prior to the July 1, 1977, date, those existing provisions continue to apply. *Id.*

Procedural rules have been in place with the Board since shortly after its formal creation. Because the permitting scheme established by the Act contemplated appeals to the Board, procedural rules were created in those early years to guide the Board in its deliberations. Similar to the current Board procedures for permitting disputes, the earlier rules referenced the Board's enforcement procedures in providing specific requirements for the permit appeal process. They were then, as they are today, contested case requirements by virtue of their very nature.

The earliest version of the Board's procedural regulations was adopted on October 8, 1970 in the R70-4 rulemaking and was subsequently published by the Illinois Secretary of State's office as "Procedural Rules." Those rules included requirements for permit appeals, effective through February 14, 1974, and they required such proceedings

to be conducted according to the Board's Part III rules pertaining to enforcement. *See, Rule 502.* In contrast to the Regulatory and Nonadjudicative Hearings and Proceedings, the Enforcement Proceedings of Part III contained a plethora of contested case requirements, including provisions for the filing of a petition (i.e., Rule 304), authorization for hearing (i.e., Rule 306), motion practice (i.e., Rule 308), discovery (i.e., Rule 313), conduct of the hearing (Rule 318), presentation of evidence (i.e., Rule 321), examination of witnesses (i.e., Rules 324, 325 and 327) and final disposition (i.e., Rule 322). A later version of these rules, including amendments, was adopted by the Board on August 29, 1974.

The "Procedural Rules" that originally guided the Board in enforcement cases and permit appeals formed the basic framework for the current-day version of the Board's procedural regulations promulgated at 35 Ill. Adm. Code 101-130. Although the Board's procedural rules may have evolved and expanded over time, the core features of the adversarial process governing these cases have remained substantially the same, including those rules governing CAAPP permit appeals. Because the Board had such procedures in place prior to July 1, 1977, those procedures effectively secured the Board's exemption from the APA's contested case requirements. And so long as those underlying procedures historically satisfied the grandfathering clause, it should not matter that the Act's CAAPP program was enacted some twenty years later. After all, it is the procedures applicable to contested cases and their point of origin that is relevant to this analysis, not the advent of the permitting program itself.[2]

[2] Petitioner may counter that the *Borg-Warner* decision is at odds with this argument and that part of the appellate court's ruling held that the APA's grandfathering clause did not apply to the Board's rules for the NPDES permit program. The court's discussion on the issue of the grandfathering clause is inapposite here. The NPDES rules at issue were written in a way that conditioned their effectiveness upon a future event.

II. The CAAPP permit issued by the Illinois EPA should not be stayed in its entirety by reason of Petitioner's alleged justifications.

Separate and apart from its APA-related argument, Petitioner offers the Board an alternative basis for granting a blanket stay of the CAAPP permit. Specifically, Petitioner suggests that the Board stay the entire CAAPP permit as part of its discretionary stay authority. *See, Petition at pages 6-8.* While the reasons put forward by Petitioner might have sufficed to justify a stay of the CAAPP permit's contested conditions had one been sought, Petitioner fails to demonstrate a clear and convincing need for a broader stay. Even if the Petitioner could muster more persuasive arguments on this issue, the Illinois EPA questions whether such an all-encompassing remedy is appropriate under any circumstances. Notwithstanding the Board's recent practice in other CAAPP appeals, the Illinois EPA has come to regard blanket stays of CAAPP permits as incongruous with the aims of the Illinois CAAPP and needlessly over-protective in light of attributes common to these appeals.

Section 105.304(b) of Title 35 of the Board's procedural regulations provides that a petition for review of a CAAPP permit may include a request for stay. The Board has frequently granted stays in permit proceedings, often citing to the various factors considered by Illinois courts at common law. The factors that are usually examined by the Board include the existence of a clearly ascertainable right that warrants protection, irreparable injury in the absence of a stay, the lack of an adequate legal remedy and a

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When the event actually took place, the effectiveness of the rules occurred after the July 1, 1977, date established in the grandfathering clause. More importantly, in addressing an issue that was not central to the appeal, the appellate court appears to have erroneously placed too much emphasis on the substantive permitting procedures of the NPDES program, rather than those procedures applicable to the Board's contested case hearings. A proper construction of the APA demands that the focus be placed on the existing procedures "specifically for contested cases or licensing." *5 ILCS 100/1-5(a)(2004).*

probability of success on the merits of the controversy. *See, Bridgestone/Firestone Off-road Tire Company v. Illinois EPA*, PCB 02-31 at page 3 (November 1, 2001); *Community Landfill Company and City of Morris v. Illinois EPA*, PCB No. 01-48 and 01-49 (consolidated) at page 5 (October 19, 2000), citing *Junkunc v. S.J. Advanced Technology & Manufacturing*, 498 N.E.2d 1179 (1st Dist. 1986). However, the Board has noted that its consideration is not confined exclusively to those factors nor must each one of those factors be considered by the Board in every case. *See, Bridgestone/Firestone* at page 3.

The Board has commonly evaluated stay requests with an eye toward the nature of the injury that might befall an applicant from having to comply with permit conditions, such as the compelled expenditure of "significant resources," *Abitec Corporation v. Illinois EPA*, PCB No. 03-95 at page 1 (February 20, 2003), or the effectual loss of appeal rights prior to a final legal determination. *Bridgestone/Firestone* at page 3. The Board has also afforded special attention to the "likelihood of environmental harm" for any stay that may be granted. *See, Bridgestone/Firestone* at page 3; *Abitec Corporation* at 1; *Community Landfill Company and City of Morris v. Illinois EPA*, at page 4.

i. Consideration of traditional factors

Petitioner's Motion touches, albeit sketchily, on some of the relevant factors in this analysis. *See, Petition at pages 6-8.* The Illinois EPA generally accepts that Petitioner should not be required to expend exorbitant costs in complying with challenged monitoring, reporting or record-keeping requirements of the CAAPP permit until after it is provided its proverbial "day in court." Petitioner's right of appeal likewise should not be cut short or rendered moot because it was unable to obtain a legal ruling before being

required to comply with those terms of the permit that are deemed objectionable. The Illinois EPA recognizes these reasons as a legitimate basis for authorizing a stay of permit conditions contested on appeal. However, they are not at all instructive to Petitioner's claim that a stay of the entire CAAPP permit is needed.

Judging by a fair reading of the Petition, Petitioner has challenged a relatively small number of the conditions contained in the overall CAAPP permit, thus leaving the lion's share of the permit conditions unaffected by the appeal. Much of the gist of Petitioner's appeal pertains to "periodic monitoring," including a number of provisions dealing with emissions testing, reporting, record-keeping and monitoring of emissions that are purportedly beyond the scope of the Illinois EPA's statutory permit authority. If the vast majority of the permit's terms are uncontested, it cannot logically follow that the absence of a stay for those conditions will prevent the Petitioner from exercising a right of appeal. Similarly, it is difficult to discern why Petitioner's compliance with uncontested permit conditions would cause irreparable harm, especially if one can assume, as here, that the crux of CAAPP permitting requirements were carried over from previously-existing State operating permits.[3]

[3] The Illinois EPA does not dispute that the Clean Air Act's ("CAA") Title V program, which formed the framework for the Illinois CAAPP, requires only a marshalling of pre-existing "applicable requirements" into a single operating permit for a major source and that it does not generally authorize new substantive requirements. *See, Appalachian Power Company v. Illinois EPA*, 208 F.3d 1015, 1026-1027 (D.C. Circuit, 2000); *Ohio Public Interest Research Group v. Whitman*, 386 F.3d 792, 794 (6th Cir. 2004); *In re: Peabody Western Coal Company*, CAA Appeal No. 04-01, slip op. at 6 (EAB, February 18, 2005). Aside from the conditions lawfully imposed by the Illinois EPA for periodic monitoring and other miscellaneous matters, the remainder of the CAAPP permit should be comprised of the pre-existing requirements that were previously permitted. A casual comparison of the CAAPP permit and the Petition suggests that the present appeal only calls into question a relatively small fraction of permit conditions contained in the overall CAAPP permit.

ii. Other related factors

Petitioner argues that the absence of a blanket stay would cause "administrative confusion" because the uncontested conditions of the CAAPP permit would remain in effect while the challenged conditions would be governed by the "old state operating permits." *Petition at page 7.* The Illinois EPA takes exception to a key assumption in the Petitioner's argument. In the Illinois EPA's view, the vestiges of any former State operating permits for this CAAPP source dissipated upon the Illinois EPA's issuance of the CAAPP permit on September 29, 2005. This area of discussion may be a significant source of Petitioner's misunderstanding, thus explaining its confusion with the effects of a limited stay.

Section 39.5(4)(b) states that a CAAPP source must abide by the terms of its previous State operating permit, even though the permit may have expired, "until the source's CAAPP permit has been issued." *See, 415 ILCS 5/39.5(4)(b)(2004).*[4] A few subsections later, the statute provides that the CAAPP permit "shall upon becoming effective supercede the State operating permit." *See, 415 ILCS 5/39.5(4)(g)(2004).* Taken together, these provisions indicate that permit issuance and permit effectiveness for a CAAPP permit are synonymous and that any underlying State operating permit becomes a nullity upon the aforementioned occurrence. The General Assembly could not have reasonably intended for a source's obligation to end upon permit issuance, only to

[4] Petitioner also references Section 9.1(f) of the Act as a source of authority for its proposition that the State operating permit continues in effect until the CAAPP permit is issued. *See, Petition at page 5.* This assertion is erroneous. Section 9.1(f) applies only to New Source Review permits issued under the authority of the CAA, not CAAPP permits specifically governed by Section 39.5. Although the text of the subsection is silent with respect to this distinction, it should be construed with reference to its context and surrounding provisions, which are confined entirely to specified CAA programs. Alternatively, to the extent that the Act's CAAPP requirements are more specific to CAAPP permits, the provision found at Section 39.5(4)(b) would apply instead of the more general provision under Section 9.1(f).

have the CAAPP permit's superceding effect on the State operating permit delayed until permit effectiveness.

Petitioner apparently reads the above-referenced provisions as though they apply to the Board's final action in this appeal. *See, Petition at page 5.* However, this argument ignores other provisions of the Act that clearly depict the Illinois EPA as the permit-issuer. No clearer evidence of this intent can be found than the numerous provisions of Section 39.5(9) of the Act, which govern the United States Environmental Protection Agency's (hereinafter "USEPA") participation and role in reviewing the CAAPP permits. *See, 415 ILCS 5/39.5(9)(2004).*[5] Other provisions of the Act similarly establish that permit issuance denotes the action of the Illinois EPA, not the Board, in the context of CAAPP permitting.[6]

As previously mentioned, the Illinois EPA does not deny that the CAAPP permitting process is analogous to the type of "administrative continuum" recognized by Illinois courts in other permitting programs under the Act. In this respect, the Illinois EPA performs a role under the Illinois CAAPP that requires, in essence, a *de facto* issuance of a CAAPP permit. The Board's obligation in adjudicating whether the permit should issue, in contrast, is a *de jure*-like function that, while critical in terms of

[5] *See, 415 ILCS 5/39.5(9)(b)*(noting requirement that the Illinois EPA shall not "issue" the proposed permit if USEPA provides a written objection within the 45 day review period); *415 ILCS 5/39.5(9)(f)*(explaining that when the Illinois EPA is in receipt of a USEPA objection arising from a petition, the "Agency shall not issue the permit"); *415 ILCS 5/39.5(9)(g)*(observing requirements for whenever a USEPA objection is received by the Illinois EPA following its issuance of a permit after the expiration of the 45-day review period and prior to receipt of an objection arising from a petition). Notably, one such provision states that the "effectiveness of a permit or its requirements" is not stayed by virtue of the filing of a petition with USEPA. *See, 415 ILCS 5/39.5(9)(f).*

[6] The requirements in Section 39.5(10), entitled "Final Agency Action," recognize the standards for permit issuance by the Illinois EPA. *415 ILCS 5/39.5(10)(2004).* Similarly, the review provisions for Title V permits, codified at Section 40.2, focus on a permit denial or a grant of a permit with conditions as a basis for appeal to the Board. *See, 415 ILCS 5/40.2(a)(2004).* The latter provisions even go so far as to reference "final permit action" in relation to the Illinois EPA's permit decision. *Id.*

determining whether a permit issued by the Illinois EPA becomes final, should not color the meaning of other legal terms.[7] The issuance or effectiveness of a CAAPP permit is functionally distinct from the legalisms associated with when a CAAPP permit becomes final.

Even putting aside the legal semantics posed by this issue, the thrust of Petitioner's argument misses its mark. Any confusion stemming from the appeal phase of the Title V program should be fairly modest compared to the past. Prior to the enactment of the CAA Amendments of 1990, states issued permits under a patchwork of various programs. In Illinois and elsewhere, numerous permits for separate or discrete pollutant-emitting activities would often exist for an individual source of major emissions and they frequently did not address the applicability of all other CAA or state (i.e., State Implementation Program ("SIP")) requirements.[8] The Title V operating permit program ensured that all of a major source's applicable state and CAA-related requirements would be brought together into a single, comprehensive document. In doing so, the legislation sought to minimize the confusion brought about from the absence of a uniform federal permitting system.[9] By trying to breath life into the State operating permits beyond the date of the Illinois EPA's permit issuance, Petitioner's argument would actually prolong one of the very problems that the Title V permitting scheme was meant to remedy.

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[7] As a practical matter, Petitioner's requested relief belies the notion that former State operating permits continue to govern the facility's operations until the Board issues its final ruling in this cause. After all, it is the CAAPP permit issued by the Illinois EPA from which the Petitioner is seeking a stay.

[8] *See,* David P. Novello, *The New Clean Air Act Operating Permit Program: EPA's Final Rules,* 23 Environmental Law Reporter 10080, 10081-10082 (February 1993).

[9] *Id.*

Petitioner also mentions in passing that the Illinois EPA's failure to provide a sufficient statement of basis for the CAAPP permit is another reason for staying the entire permit. *Petition at page 7.* Because Petitioner treats this issue separately in its Petition, the Illinois EPA will not fully address the merits of the argument in this Motion. However, the Illinois EPA will briefly respond to the issue as it relates to the Petitioner's request for stay.

The statement of basis envisioned by the statute is an informational requirement that is meant to facilitate both the public and USEPA's understanding of the permit decision in the draft phase of permitting. *See, 415 ILCS 5/39.5(8)(b)(2004).* It is not a part of, nor does it otherwise affect, the content of the CAAPP permit and it does not bind or impose legal consequences in the same manner that a permit itself does. The Illinois EPA generally does not believe that any perceived inadequacies in the statement of basis can lawfully render the entire CAAPP permit defective.

In this instance, the Petitioner identified its grievances with respect to the CAAPP permit's conditions notwithstanding the alleged flaws in the underlying statement of basis. To the extent that something contained in a statement of basis is found objectionable, or is left out altogether, the Illinois EPA suggests that the mechanism for challenging it runs to the underlying permit condition, not the statement itself. The Petitioner should not be heard to complain of the inadequacies of the statement when the basis that gives rise to the appeal stems from a permit's conditions, not the deliberative thought-processes of the permitting agency. As such, the Illinois EPA does not construe a statement of basis as affecting the validity of the final CAAPP permit nor as a reason for voiding the Illinois EPA's final permit decision. If such challenges were recognized

by the Board, they could serve as a pretext for preventing the final issuance of a CAAPP permit and result in perpetual litigation over a largely ministerial agency function.

The Illinois EPA is ultimately prepared to argue that the statement of basis that was prepared in conjunction with the CAAPP permit was sufficiently adequate as to comply with the Act. Alternatively, the Illinois EPA is prepared to contend that the statement of basis requirement is predominantly procedural in nature, is confined to the preliminary stages of the permitting process and arguably lacks sufficiently intelligible standards as to serve as a basis for enforcement. In any event, the Board should deny the Petitioner's request for stay on any grounds relating to this issue. On the whole, the Petitioner's charge that the statement of basis affects the entire permit is unsupported by law and fails to demonstrate a probability of success on the merits of the controversy.

iii. Significance of prior Board rulings

The Board has granted numerous stays in past and pending CAAPP permit proceedings. For the most part, the extent of the relief granted has been a function of the relief sought by the petitioning party. In several cases, the Board has granted stays of the entire CAAPP permit, usually doing so without much substantive discussion.[10] Curiously, all excepting one of the prior cases involving blanket stays were brought by petitioning parties represented by the same law firm. In other CAAPP appeal cases, the Board granted stays for the contested permit conditions, again mirroring the relief sought

[10] *See, Lone Star Industries, Inc., v. Illinois EPA,* PCB No. 03-94, slip opinion at 2, (January 9, 2003); *Nielsen v. Bainbridge, L.L.C., v. Illinois EPA,* PCB No. 03-98, slip opinion at 1-2 (February 6, 2003); *Saint-Gobain Containers, Inc., v. Illinois EPA,* PCB No. 04-47, slip opinion at 1-2 (Novembe 6, 2003);*Champion Laboratories, Inc., v. Illinois EPA,* PCB No. 04-65, slip opinion at 1 (January 8, 2004);; *Midwest Generation, L.L.C., v. Illinois EPA,* PCB No. 04-108, slip opinion at 1 (January 22, 2004); *Ethyl Petroleum Additives, Inc., v. Illinois EPA,* slip opinion at 1 (February 5, 2004); *Board of Trustees of Eastern Illinois University v. Illinois EPA,* PCB No. 04-110, slip opinion at 1 (February 5, 2004).

by the petitioning party.[11] In a few cases, the Board does not appear to have granted any stay protection whatsoever, as the petitioning party apparently opted not to pursue such relief.[12]

In the majority of the afore-referenced cases, the Illinois EPA did not actively participate in the stay motions sought before the Board due to the perennially-occurring press of other matters.[13] In doing so, the Illinois EPA clearly waived any rights to voice objections to the stays sought and obtained in those cases. Even in the absence of a lack of resources, it is doubtful that the Illinois EPA would have articulated weighty concerns, as presently argued, with respect to the stay relief requested in earlier cases. However, following the Board's last occasion to act on a blanket stay request in a CAAPP permit appeal, Illinois EPA officials became aware of the potential implications posed by stays on the existing Title V program approval.[14] In the wake of this discovery, the Illinois EPA is now compelled to observe that the Board's earlier decisions affording blanket stays to CAAPP permits arguably fell short of exploring all of the relevant considerations

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[11] *See, Bridgestone/Firestone Off-road Tire Company v. Illinois EPA,* PCB 02-31 at page 3 (November 1, 2001); *PPG Industries, Inc., v. Illinois EPA,* PCB No. 03-82, slip opinion at 1-2 (February 6, 2003); *Abitec Corporation v. Illinois EPA,* PCB No. 03-95, slip opinion at 1-2 (February 20, 2003); *Noveon, Inc., v. Illinois EPA,* PCB No. 04-102, slip opinion at 1-2 (January 22, 2004); *Oasis Industries, Inc., v. Illinois EPA,* PCB No. 04-116, slip opinion at 1-2 (May 6, 2004).

[12] *See, XCTC Limited Partnership, v. Illinois EPA,* PCB No. 01-46, *consolidated with Georgia-Pacific Tissue, L.L.C., v. Illinois EPA,* PCB No. 01-51; *General Electric Company v. Illinois EPA,* PCB No. 04-115 (January 22, 2004).

[13] The Illinois EPA did file a joint motion in support of a stay request seeking protection for contested conditions of a CAAPP permit. *See, Abitec Corporation v. Illinois EPA,* PCB No. 03-95, slip opinion at 1-2 (February 20, 2003).

[14] Jim Ross, a former Unit Manager for the CAAPP Unit of the Division of Air Pollution Control's Permits Section, received an inquiry from a USEPA/Region V representative in March of 2004 pertaining to the broad nature of the stays obtained in CAAPP permit appeal proceedings before the Board. This initial inquiry led to further discussion between USEPA/Region V representatives and the Illinois EPA regarding the impact of such stays on the severability requirements for CAAPP permits set forth in 40 C.F.R. Part 70 and the Illinois CAAPP. (*See, Supporting Affidavit of Jim Ross attached to this Motion).*

necessary to the analysis. Accordingly, the Illinois EPA urges the Board to reflect upon additional factors that have not previously been addressed to date.[15]

iv. Statutory objectives of CAAPP and common attributes of permit appeals

As discussed earlier in this Motion, the Illinois CAAPP commands the Illinois EPA to incorporate conditions into a CAAPP permit that address requirements concerning the "severability" of permit conditions. *See, 415 ILCS 5/39.5(7)(i)(2004).* To this end, every CAAPP permit is required to contain a permit condition severing those conditions challenged in a subsequent permit appeal from the other permit conditions in the permit. The severability provision is prominently displayed in the Standard Permit Conditions of the Petitioner's CAAPP permit. *See, Standard Permit Condition 9.13.* It should also be noted that the language from the Act's CAAPP program mirrors the provision promulgated by USEPA in its regulations implementing Title V of the CAA. *See,* 40 C.F.R. §70.6(a)(5)(July 1, 2005 edition).

As is evident from the statutory language, the obvious legislative intent for this CAAPP provision is to "ensure the continued validity" of the ostensibly larger body of permitting requirements that are not being challenged on appeal. The use of the word "various" in describing those conditions that are severable is especially important when compared with the later reference in the same sentence to "any portions" of the permit that are contested. Because the commonly understood meaning of the adjective "various" is "of diverse kinds" or "unlike; different," this wording demonstrates a legislative intent to contrast one discernable group of permit conditions (i.e., uncontested

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[15] It is noted that the Board's prior rulings regarding blanket stays of CAAPP permits have been granted contingent upon the Board's final action in the appeal or "until the Board orders otherwise."

conditions) from the other another (i.e., contested conditions). *See, The American Heritage Dictionary, Second College Edition; see also, Webster's New World Dictionary, Third College Edition* (describing primary use of the term as "differing one from another; of several kinds"). Given the clear absence of ambiguity with this statutory text, no other reasonable meaning can be attributed to its language.

The Illinois EPA readily concedes that the permit content requirements of the CAA and the Illinois CAAPP are not directly binding on the Board. However, while the Illinois EPA's mandate under Section 39.5(7)(i) of the Act's CAAPP program does not, on its face, affect the Board, the provision could arguably be read as a limited restriction on the Board's discretionary stay authority in CAAPP appeals.[16] Implicit in the statutory language is an unmistakable expression aimed at preserving the validity and effectiveness of some segment of the CAAPP permit during the appeal process. This legislative goal cannot be achieved if blanket stays are the convention. Where the obvious intention of lawmakers could be thwarted, reviewing courts must construe a statute in a manner that effectuates its object and purpose. *See, F.D.I.C. v. Nihiser,* 799 F.Supp. 904 (C.D. Ill. 1992); *Castaneda v. Illinois Human Rights Commission,* 547 N.E.2d 437 (Ill. 1989). In this instance, the Board should recognize an inherent limitation of its stay authority by virtue of the Illinois CAAPP's severability provision. At the very least, the existence of the provision should give pause to the Board's recent approach in evaluating stays in CAAPP permit appeals.

[16] Any such restriction may not be absolute, as the Act's permit content requirement does not necessarily rule out the potential merits of a blanket stay where a permit is challenged in its entirety. As previously mentioned, the Illinois EPA disputes the merits of Petitioner's argument relating to a purported deficiency in the CAAPP permit's statement of basis.

It is noteworthy that one of the chief goals of the CAA's Title V program is to promote public participation, including the use of citizen suits to facilitate compliance through enforcement.[17] The severability requirement of the Part 70 regulations, which formed the regulatory basis for Section 39.5(7)(i) of the Illinois CAAPP, can be seen as an extension of this endeavor. Blanket stays of CAAPP permits could arguably lessen the opportunities for citizen enforcement in an area that is teeming with broad public interest. Moreover, the cumulative effect of stays sought by Petitioner and other coal-fired CAAPP permittees in other appeals would cast a wide net. Blanket stays of these recently-issued CAAPP permits would effectively shield an entire segment of Illinois' utilities sector from potential enforcement based on Title V permitting, which was meant to provide a more convenient, efficient mechanism for the public to seek CAA-related enforcement.

One last consideration in this analysis is the deliberate, if not time-consuming, pace of permit appeals in general. From past experience, the Illinois EPA has observed that many permit appeals are of a type that could more aptly be described as "protective appeals." These types of appeals are frequently filed because a particular permit condition affects an issue relating to on-going or future enforcement proceedings. Alternatively, these cases may entail some other kind of contingency necessitating additional permit review, a new permit application and/or obtaining a revised permit from the Illinois EPA. Only rarely does a permit appeal actually proceed to hearing.

Based on the Illinois EPA's estimation, nearly all of the CAAPP permit appeals filed with the Board to date could be aptly described as "protective appeals." While a

[17] *See,* David P. Novello, *The New Clean Air Act Operating Permit Program: EPA's Final Rules,* 23 Environmental Law Reporter 10080, 10081-10082 (February 1993).

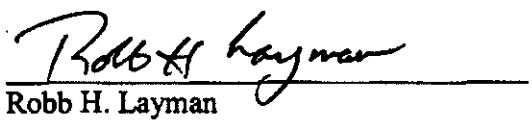
handful of cases have been voluntarily dismissed from the Board's docket, several of these cases are, and will remain, pending with the Board for months and/or years to come, in part, because there is no ability to resolve them independent of their related enforcement or permitting developments. As the Illinois EPA is often an obligatory participant in many of these types of cases, this argument is not meant to condemn the practice. Rather, the relevant point is that significant portions of a CAAPP permit stayed in its entirety will be delayed from taking effect, in spite of bearing no relationship to the appeal or its ultimate outcome. To allow this under circumstances where petitioning parties seldom appear to desire their "day in court" strikes the Illinois EPA as needlessly over-protective.

CONCLUSION

For the reasons explained above, the Illinois EPA moves the Board to deny the Petitioner's request for a stay of the effectiveness of the CAAPP permit in its entirety.

Respectfully submitted by,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,



Robb H. Layman
Assistant Counsel

Dated: November 18, 2005
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 524-9137

STATE OF ILLINOIS
COUNTY OF SANGAMON

AFFIDAVIT

I, Jim Ross, being first duly sworn, depose and state that the following statements set forth in this instrument are true and correct, except as to matters therein stated to on information and belief and, as to such matters, the undersigned certifies that he believes the same to be true:

1. I am currently employed by the Illinois Environmental Protection Agency ("Illinois EPA") as a Senior Public Service Administrator professional engineer. During the early part of 2004, I was the Manager of the Clean Air Act Permit Program ("CAAPP") Unit in the Division of Air Pollution Control's Permit Section, whose offices are located at 1021 North Grand Avenue East, Springfield, Illinois. I have been employed with the Illinois EPA since May 1988.

2. As part of my job responsibilities, I participated in frequent teleconference calls with representatives from the United States Environmental Protection Agency ("USEPA") at Region V in Chicago, Illinois, involving various pending CAAPP permit applications and issues pertaining to the administration of the CAAPP program. By virtue of my involvement in the CAAPP permit review process, I am familiar with communications between USEPA/Region V and the Illinois EPA in March of 2004 concerning an issue relating to stays obtained in CAAPP permit appeals before the Illinois Pollution Control Board. The issue was initially raised by a representative from USEPA/Region V, who expressed concern about the impact of such stays upon the severability requirements of 40 C.F.R. Part 70 and the Illinois CAAPP.

3. I have read the Motion prepared by the Illinois EPA's attorneys relating to

this matter and, further, find that the facts set forth in said responses and answers are true, responsive and complete to the best of my knowledge and belief.

Further ~~affiant~~ sayeth not.

Subscribed and Sworn
To Before Me this 15 Day of November 2005

Brenda Boehner

OFFICIAL SEAL
BRENDA BOEHNER
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 11-3-2009

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of November 2005, I did send, by electronic mail with prior approval, the following instruments entitled **APPEARANCES, MOTION IN OPPOSITION TO PETITIONER'S REQUEST FOR STAY and AFFIDAVIT** to:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

and a true and correct copy of the same foregoing instrument, by First Class Mail with postage thereon fully paid and deposited into the possession of the United States Postal Service, to:

Bradley P. Halloran
Hearing Officer
James R. Thompson Center
Suite 11-500
100 West Randolph Street
Chicago, Illinois 60601

Sheldon A. Zabel
Kathleen C. Bassi
Stephen J. Bonebrake
Joshua R. More
Kavita M. Patel
Schiff Hardin, LLP
6600 Sears Tower
233 South Wacker Drive
Chicago, Illinois 6060

Robb H. Layman
Assistant Counsel