BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MIDWEST GENERATION, LLC, WILL COUNTY GENERATING STATION,	)	
Petitioner,	)	
v.	)	**PCB No. 2006-060 (Permit Appeal – Air)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE

To: Dorothy Gunn, Clerk Robb Lyman, Assistant Counsel

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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board **PETITIONER'S REPLY IN SUPPORT OF A PERMIT STAY AND IN RESPONSE TO ILLINOIS EPA'S OPPOSITION TO PETITIONER'S REQUEST FOR A STAY** and **MOTION FOR LEAVE TO FILE REPLY INSTANTER**, copies of which are herewith served upon you.

Kathleen C. Bassi

Dated: December 2, 2005

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MIDWEST GENERATION, LLC, WILL COUNTY GENERATING STATION,	)	
Petitioner,	)	
v.	)	**PCB No. 2006-060**
	)	**(Permit Appeal – Air)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

MOTION FOR LEAVE TO FILE REPLY *INSTANTER*

Pursuant to 35 Ill. Adm. Code 101.500(e), MIDWEST GENERATION, LLC, WILL COUNTY GENERATING STATION ("Petitioner"), respectfully submits this Motion for Leave to File Reply *Instanter*. In support of this Motion, Petitioner states as follows:

1. Petitioner will be materially prejudiced unless it is allowed to file the attached Reply. First, in its Motion in Opposition to Petitioner's Request for Stay, Respondent Illinois Environmental Protection Agency ("the Agency") alleges that the Administrative Procedure Act's ("APA") automatic stay provision, Section 10-65(b), does not apply. In the attached Reply, Petitioner responds to the Agency's arguments and demonstrates why Section 10-65(b) of the APA does apply.

2. Second, in its Motion in Opposition, the Agency argues that Petitioner's asserted justifications for an entire stay of the Clean Air Act Permit Program (CAAPP) permit pursuant to the Board's discretionary stay authority fail to demonstrate "a clear and convincing need for a

broader stay." The Motion in Opposition reflects a significant change in the Agency's position concerning requests for permit stays, and Petitioner will be prejudiced unless it has an opportunity to respond to these new arguments.

WHEREFORE, for the reasons set forth above, Petitioner Midwest Generation, LLC, respectfully requests that the Board grant its Motion for Leave to File Reply *Instanter*.

Respectfully submitted,

MIDWEST GENERATION, LLC,
WILL COUNTY GENERATING
STATION

By: _____
One of Its Attorneys

Dated: December 2, 2005

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MIDWEST GENERATION, LLC, WILL COUNTY GENERATING STATION	)	
Petitioner,	)	
v.	)	**PCB No. 2006-60**
	)	**(Permit Appeal – Air)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

PETITIONER'S REPLY IN SUPPORT OF A PERMIT STAY AND IN RESPONSE TO THE AGENCY'S OPPOSITION TO PETITIONER'S REQUEST FOR A STAY

Petitioner, MIDWEST GENERATION, LLC, WILL COUNTY GENERATING STATION ("Petitioner," or "Midwest Generation"), by and through its attorneys, submits this reply in support of (1) its position that the Clean Air Act Permit Program ("CAAPP") permit on appeal in this proceeding is not in effect, pursuant to the Illinois Administrative Procedure Act (the "APA"), while this appeal is pending and until the Illinois Environmental Protection Agency (the "Agency") issues the permit after remand, and (2) its request, in the alternative, that the Illinois Pollution Control Board ("Board") grant Petitioner's request for a stay of the entire CAAPP permit pursuant to the Board's discretionary stay authority.[1] This reply also responds to the Agency's "Motion in Opposition to Petitioner's Request for Stay" (the "Opp.").[2] A motion for leave to file this reply is attached hereto and is filed herewith.

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[1] The Agency notes that Petitioner did not expressly make an alternative request to stay just the contested conditions. (Opp. at 2). That is correct. However, to the extent the Agency implies that the Board does not have authority to grant relief that is not expressly requested, that is inconsistent. The Board has the authority to grant appropriate relief including lesser relief than that requested by Petitioner.

[2] The Agency's filing is captioned a "motion," but the filing appears to be a response to Petitioner's positions and requests rather than a motion. For instance, the "motion" cites to the

INTRODUCTION

On November 2, 2005, Midwest Generation filed a Petition for Review (hereinafter "Petition") with the Board challenging certain permit conditions contained within the CAAPP permit issued by the Agency. As part of its Petition, Midwest Generation asserted that, until the Board rules on the contested conditions and the permit is issued by the Agency after remand with any changes required by the Board, the entire CAAPP permit is not in effect (is automatically stayed[3]) pursuant to Section 10-65(b) of the APA and the holding in *Borg-Warner Corp. v. Mauzy*, 427 N.E. 2d 415, 56 Ill. Dec. 335 (3d Dist. 1981). In the alternative, Petitioner requested that the Board, consistent with its grants of stay in response to stay requests in other CAAPP permit appeals, exercise its discretionary stay authority and stay the entire CAAPP permit. On November 18, 2005, the Agency filed a "Motion in Opposition" to Petitioner's conclusion that the entire CAAPP permit is stayed pursuant to Section 10-65(b) of the APA and to Petitioner's alternative request for a stay. The Agency incorrectly asserts that the APA's automatic stay provision, Section 10-65(b), does not apply, and that the Petitioner's asserted justifications for an entire stay of the CAAPP permit pursuant to the Board's discretionary stay authority fail to demonstrate "a clear and convincing need for a broader stay."

ARGUMENT

The CAAPP permit is and should be stayed in its entirety, for the reasons discussed below. First, pursuant to Section 10-65(b) of the APA, the entire CAAPP permit issued by the Agency does not become effective until after a ruling by the Board on the permit appeal and, in

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time for responses to be filed and, in its conclusion, seeks no relief except that the Board "deny the Petitioner's request for a stay of the effectiveness of the CAAPP permit in its entirety." (Opp. at 2, 20).

[3] For brevity, the effect of Section 10-65(b) of the APA is referred to herein as the "automatic stay."

the event of a remand, until the Agency has issued the permit consistent with the Board's order. In addition, to the extent necessary in light of the automatic stay under the APA, the Board should exercise its discretionary authority and enter an order staying the entire CAAPP permit because an ascertainable right warrants protection, irreparable injury will befall Petitioner in the absence of an entire stay, Petitioner has no adequate remedy at law, Petitioner is likely to succeed on the merits of its appeal, and the environment will not be harmed if the entire CAAPP permit is stayed.

I. THE EFFECTIVENESS OF THE ENTIRE CAAPP PERMIT ISSUED BY ILLINOIS EPA IS STAYED PURSUANT TO THE APA

As the Agency recognizes, the automatic stay provision of the APA governs administrative proceedings involving licensing and pursuant to *Borg-Warner*, under Section 10-65(b) of the APA, the effectiveness of a license is stayed until a final administrative decision is rendered by the Board.[4] (Opp. at 3-4). Indeed, the Agency concedes that the *Borg-Warner* decision is consistent with the involvement of and the separate roles of the Board and the Agency in permitting matters, that it is the "Board's decision . . . that ultimately determines when the permit becomes final," and the "CAAPP program itself does not reveal the General Assembly's intentions to change this administrative arrangement." (Opp. at 4). Nonetheless, the Agency asserts that the automatic stay provision of the APA, as applied by *Borg-Warner* to environmental permits, does not apply because the General Assembly somehow exempted CAAPP permit appeal proceedings in particular from the APA under 415 ILCS 39.5(7)(i) without referring to either the APA or *Borg-Warner*, and that the APA's grandfathering clause, 5 ILCS 100/10-1-5(a), excludes the applicability of the APA from this proceeding even though the

[4] The APA also ensures that the Petitioner continues to abide by the terms of the underlying state operating permits. 5 ILCS 100/10-65(b) and (Opp. 3-4).

CAAPP program, like the NPDES permitting program at issue in *Borg-Warner*, was not in effect prior to July 1, 1977. These assertions ignore controlling law, misinterpret the Illinois Environmental Protection Act (the "Act") and are incorrect.

A. The General Assembly Did Not Exempt the CAAPP from the Automatic Stay Provision of the APA.

The Agency's first argument is that, even though the General Assembly included no express exemption from the APA in Section 39.5 of the Act, the General Assembly nonetheless signaled its intention to make CAAPP permits effective immediately upon issuance by the Agency, in derogation of the APA's automatic stay of effectiveness, by including a "severability" provision in Section 39.5(7)(i) of the Act ("the severability clause") that addresses validity of permit provisions, not the effectiveness of a permit. (Opp. at 3-4). A close examination of the Agency's argument and the Act reveals that when the General Assembly desires to exempt sections of the Act from the APA, it does so expressly, through references to the APA, and it does not leave the divination of its intentions to inferences. Further, the Agency's argument misses the fundamental point that validity and effectiveness are two very different legal concepts.

The Agency misplaces its reliance on the severability clause. That provision addresses the validity of uncontested permit conditions. The issue before the Board, however, is not whether uncontested conditions remain valid notwithstanding challenges to other provisions, but whether the permit is in effect prior to the Board's ruling on appeal. The Agency errs by assuming, without support, that through a severability provision that does not even refer to permit effectiveness, let alone the APA, the General Assembly intended to change Illinois law so that the entire permit must remain in effect during the appeal. (Opp. at. 5-6, 18). The Agency's

strained interpretation of the severability clause is premised upon a misunderstanding of the applicability of the severability clause and the effect of a stay.

The first question before the Board is one of statutory construction. The cardinal rule of statutory construction is that the Board must ascertain and give effect to the intent of the legislature. *In re Marriage of King,* 208 Ill.2d 332, 340, 280 Ill. Dec. 695, 699 (Ill. 2003). "The legislature's intent can be determined by looking at the language of the statute and construing each section of the statute together as a whole." *People v. Patterson,* 308 Ill.App.3d 943, 947, 242 Ill. Dec. 518, 521 (2d Dist. 1999). Moreover, the language of the statute should be given its plain and ordinary meaning. *Marriage of King,* 208 Ill.2d at 340.

By construing Section 39.5(7)(i) of the Act along with each section of the Act together as a whole, it is apparent that Section 39.5(7)(i) is not intended to address when a permit is, or is not, in effect, the question addressed by *Borg-Warner* and the APA. Section 39.5(7)(i) of the Act provides that "[e]ach 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." First, as conceded by the Agency, the severability clause establishes CAAPP permit content and is, therefore, applicable to the Agency but not binding on the Board. (Opp. at 18). Second, the choice of the term "validity" is important and clearly demonstrates that the General Assembly was not addressing in this provision when permits are effective but, instead, was addressing potential problems of legal enforceability of the remainder of a permit when a portion of a permit is determined to be invalid (e.g., inconsistent with the governing law).

As the Agency concedes, Section 39.5(7)(i) was included in the Act so that uncontested conditions would "continue to survive notwithstanding a challenge to the permit's other terms."

(Opp. at 5). Survival of some permit terms when others are challenged has nothing to do with when a permit is effective under Illinois' administrative scheme. The plain and ordinary meaning of "validity" in legal settings is "[l]egal sufficiency, in contradistinction to mere regularity." Black's Law Dictionary 1548 (7th ed. 1999). Section 39.5(7)(i) of the Act is nothing more than a mechanism to ensure the legality of the remainder of a CAAPP permit when a condition is judged illegal or void. This concept is akin to typical severability provisions in contracts that provide that the invalidity of one contract term shall not impact the validity of the remainder of the contract. Such severability provisions do not affect the period during which a contract is in effect, only the terms that may be enforced while the contract is in effect. This view of Section 39.5(7)(i) is supported by the United States Environmental Protection Agency's ("USEPA") interpretation of the model severability clause upon which Section 39.5(7)(i) is based. On July 7, 1993, the USEPA in "Questions and Answers on the Requirements of Operating Permits Program Regulations" explained that "[t]he severability clause [(Section 39.5(7)(i) of the Act)] is a provision that allows the rest of the permit to be enforceable when a part of the permit is judged illegal or void."[5]

Undeterred by the plain language of Section 39.5(7)(i), the Agency attempts to read into the statutory language the key term the General Assembly chose not to include. According to the Agency, "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." (Opp. at 18, emphasis added). However, the General Assembly did not include the term "effectiveness" in Section 39.5(7)(i), as discussed above, and the Agency's assertion does not

[5] A copy of the relevant pages of the July 7, 1993 "Questions and Answers on the Requirements of Operating Permits Program Regulations" are attached hereto as Exhibit 1. The remainder of the document can be found at http://www.epa.gov/Region7/programs/artd/air/title5/t5indexbyauthor.htm.

make it so. Indeed, the Agency's effort to import the term "effectiveness" into Section 39.5(7)(i) merely shows that validity and effectiveness are two distinct terms. "Validity," as previously discussed connotes legality. The common and ordinary meaning of "effectiveness" has no such connotation. The applicable definition of the base word, "effect," is "the quality or state of being operational." Merriam Webster's Collegiate Dictionary 367 (10th ed. 1997). Therefore, "effectiveness" in the CAAPP permitting context means the time during which the obligations set forth in the permit are put into operation. To read "effectiveness" into the statutory language when the legislature chose to use "validity" results in an impermissible departure from the unambiguous statutory language. *Patterson,* 308 Ill.App.3d at 948 ("When the language of the statute is unambiguous, the [Board] may not depart from the language and read into the statute exceptions, limitations, or conditions.").

The Agency also misconstrues the effect a stay will have on the legality of the uncontested conditions. The Agency asserts that because

> a component of a CAAPP permit shall retain a "continued validity," ... uncontested conditions of a CAAPP permit must continue to survive notwithstanding a challenge to the permit's other terms. This language ["continued validity"] signifies an unambiguous intent to exempt some segment of the CAAPP permit from any kind of protective stay during the permit appeal process. (Opp. at 5-6).

The Agency seems to assume that a stay of the entire permit will somehow affect the "continued validity" or "survival" of the uncontested conditions. This is a flawed assumption. The automatic stay under the APA does not depend on or consider the merits of the CAAPP permit requirements, but rather merely suspends the time required for performance of the CAAPP permit requirements. A stay of the entire CAAPP permit, therefore, is not a challenge to any

portion of the CAAPP permit that will affect the "continued validity" or "survival" of the uncontested conditions.

Finally, if the General Assembly intended to exempt the CAAPP from the automatic stay provision of the APA, it would have expressly done so. One example of this exercise of legislative discretion is found in Section 31.1 of the Act, the very section the Agency cites in support of its proposition that the severability clause exempts the CAAPP from the APA. Section 31.1 of the Act states that "Sections 10-25 through 10-60 of the Illinois Administrative Procedure Act shall not apply to any administrative citation issued under subsection (b) of this Section." The General Assembly, therefore, knows how to explicitly exempt provisions of the APA from the Act. In the present case it chose not to; there is no explicit exclusion of the APA in Section 39.5(7)(i) of the Act. Since the language of Section 39.5(7)(i) is plain and unambiguous, the Board can not expand its meaning to include an exemption from the automatic stay provision of the APA. To do so would be an improper departure from the statutory language.

B. <u>The APA's Grandfathering Clause Does Not Apply To the CAAPP.</u>

The Agency's second argument is that, pursuant to 5 ILCS 100/1-5(a) ("the APA's grandfathering clause"), the APA does not apply to this proceeding because the Board had issued some procedural rules prior to July 1, 1977. More specifically, the Agency suggests that the Board's procedural rules adopted on October 8, 1970, in the R70-4 rulemaking ("general procedural rules") preclude APA applicability to CAAPP permit appeals because the general procedural rules were adopted before July 1, 1977. (Opp. at 6-7). That argument, however, is at odds with the appellate court's ruling in *Borg-Warner* and the General Assembly's intended reach of the APA's grandfathering clause.

The court in *Borg-Warner* upheld the APA's automatic stay provision in the context of a renewal of a National Pollutant Discharge Elimination System ("NPDES") permit sought from the Agency. *Borg-Warner*, 427 N.E. 2d 415, 421, 56 Ill. Dec. 335, 341 (3d Dist. 1981). The court ruled that the APA's grandfathering clause did not apply because there were no existing procedures for NPDES licensing prior to July 1, 1977, the pertinent date for exceptions to the applicability of the APA. *Id.* at 418. The NPDES rules at issue were written in a way that conditioned their effectiveness upon a future event. The Agency argues that this fact makes *Borg-Warner* "inapposite here." (Opp. at 7 n.2). The Agency misconstrues the significance of the *Borg-Warner* decision. The APA applied in *Borg-Warner* because there were no NPDES permitting procedures in effect as of July 1, 1977. There were not CAAPP permitting procedures in effect before July 1, 1977, either. The Agency apparently believes that *Borg-Warner* was incorrectly decided but that is a question the Agency will have to take up with the appellate court. Here, of course, that decision is controlling. Under *Borg-Warner*, the APA applies in this permit appeal proceeding.

Consistently, the Board has cited and followed *Borg-Warner*, issuing opinions recognizing the applicability of the automatic stay provision in the permitting context despite the fact that the general procedural rules were promulgated prior to July 1, 1977. *See* e.g., *Arco Products Company v. Illinois Environmental Protection Agency*, PCB 89-5 (February 2, 1989); *Village of Sauget v. Illinois Environmental Protection Agency*, PCB 86-57, *Monsanto Company v. Illinois Environmental Protection Agency*, PCB 86-62 (Consolidated), (July 31, 1986); *Electric Energy v. Illinois Environmental Protection Agency*, PCB 85-14 (February 7, 1985). The Agency has offered no contrary decision of this Board or any court. The Board should therefore continue to follow *Borg-Warner* and determine that the APA's grandfathering clause is

inapplicable because there were no existing procedures for CAAPP permitting as of July 1, 1977. To hold otherwise would be contrary to *Borg-Warner* and the Board's own precedent.

Furthermore, if the Agency's argument is correct, there would have been no need for the General Assembly to have expressly excluded the applicability of the contested case provisions of the APA from Section 31.1 of the Act. The Agency argues that "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." (Opp. at 6-7). In other words, the Agency argues that the contested case provisions of the APA do not apply in any contested case brought under the Act because the general procedural rules "point of origin" is before July 1, 1977. The legislature was certainly aware of the "point of origin" of the general procedural rules and the APA's grandfathering clause when it drafted the explicit exclusion of the APA from Section 31.1 of the Act. If the legislature intended for the APA's grandfathering clause to exclude the contested case provisions of the APA from the Act, there would have been no need for the legislature to have expressly excluded the contested case provisions of the APA from Section 31.1 of the Act. The legislature, therefore, did not intend for the APA's grandfathering clause to limit the applicability of the APA to the Act because the "point of origin" of the general procedural rules is before July 1, 1977. Carried to its logical conclusion, the Agency's argument would exempt virtually every Board proceeding from the APA and, in fact, would exempt the proceeding of any administrative body that existed before July 1, 1977, that had procedural rules in effect before that date.

II. THE BOARD SHOULD EXCERSISE ITS DISCRETIONARY AUTHORITY AND STAY THE ENTIRE CAAPP PERMIT ISSUED BY THE ILLINOIS EPA.

In situations like this, where Section 10-65(b) of the APA applies, the entry of a stay order is unnecessary as the stay provided by the APA is automatic. *See e.g., Arco Products*

Company v. Illinois Environmental Protection Agency, PCB 89-5 (February 2, 1989); *Village of Sauget v. Illinois Environmental Protection Agency*, PCB 86-57, *Monsanto Company v. Illinois Environmental Protection Agency*, PCB 86-62 (Consolidated), (July 31, 1986); *Electric Energy v. Illinois Environmental Protection Agency*, PCB 85-14 (February 7, 1985). Nonetheless, and without waiving its position that such a request is unnecessary in light of the APA, Midwest Generation requests, in the alternative, that the Board exercise its discretionary authority pursuant to 35 Ill.Adm.Code § 105.304(b) and enter an order staying the entire CAAPP permit.

The Board frequently grants requested stays of entire permits, often referring to various factors considered under common law. The Board considers several factors including (1) existence of an ascertainable right that needs protection, (2) irreparable injury in the absence of a stay, (3) the lack of an adequate remedy at law, (4) the probability of success on the merits, and (5) the likelihood of environmental harm if a stay is granted. *See Bridgestone/Firestone Off-road Tire Company v. Illinois Environmental Protection Agency*, PCB 02-31 (November 1, 2001). While the Board may look to these five factors in determining whether or not to grant a stay, it is not confined exclusively to these factors nor must each one be satisfied. *Id.*

The Board's recent practice in other CAAPP permit appeals, which practice has not been opposed by the Agency, has been to grant stays of the entire CAAPP permit when requested, even when the entire permit was not contested. *See Lone Star Industries, Inc. v. IEPA*, PCB 03-94 (January 9, 2003); *Nielsen & Brainbridge, L.L.C. v. IEPA*, PCB 03-98 (February 6, 2003); *Saint-Gobain Containers, Inc. v. IEPA*, PCB 04-47 (November 6, 2003); *Champion Laboratories, Inc. v. IEPA*, PCB 04-65 (January 8, 2004); *Midwest Generation, LLC – Collins Generating Station v. IEPA*, PCB 04-108 (January 22, 2004); *Ethyl Petroleum Additives, Inc., v. IEPA*, PCB 04-113 (February 5, 2004); *Board of Trustees of Eastern Illinois University v. IEPA*,

PCB 04-110 (February 5, 2004). Notwithstanding the Board's recent practice in the above-referenced appeals and the Agency's position in those appeals, the Agency now asserts that it "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." (Opp. at 8). The catalyst for the Agency's sudden change of position appears to be a phone call from USEPA. (Opp. at 16). Although the Agency argues that its "weighty concerns" are based on state law, it is clear that it was not until the USEPA called the Agency that the Agency had the epiphany that an entire stay of a CAAPP permit is improper. (Opp. at 16).

The Agency suggests that the reasons for an entire stay put forward by Petitioner justify a stay of the contested conditions,[6] but that certain reasons do not justify a stay of the entire CAAPP permit. (Opp. at 8). To this end, the Agency challenges the first two of the five factors the Board often looks to and the two additional reasons Petitioner put forth in its Petition -- a stay of the entire CAAPP permit is necessary to avoid administrative confusion and appropriate because IEPA failed to provide a statement of basis. Since the Agency is only challenging a limited number of the reasons Petitioner set forth in its Petition for a stay of the entire CAAPP permit, the Agency waives any objection to those reasons that it did not challenge and the Board may grant a stay of the entire CAAPP permit based on the unchallenged reasons set forth in the Petition. *Bridgestone/Firestone* at page 3.

A. An Ascertainable Right Exists That Needs Protection and Absent a Stay of the Entire CAAPP Permit, Petitioner Will Incur Irreparable Injury.

The Agency's first argument is that because Petitioner is not challenging the entire CAAPP permit, an ascertainable right does not exist as to the uncontested conditions that needs

[6] One of the conditions the Petitioner contests is the effective date. Therefore, a stay of the contested conditions will result in a stay of the effective date, thus staying the effectiveness of the entire CAAPP permit.

protection, and compliance with the uncontested conditions during the appeal process will not result in irreparable harm. (Opp. at 10-11). The Agency seems to assume that the contested conditions that pertain to such things as emissions testing, reporting, recordkeeping, and monitoring are not interwoven in purpose or scheme with the remainder of the CAAPP permit. This assumption is flawed. A close examination of the CAAPP permit reveals that a stay of just the contested conditions would create confusion and leave at least some of the uncontested conditions virtually meaningless. Further, such a limited stay would require Petitioner to comply with provisions that are incorrect applications of legal requirements. For example, Conditions 7.1.3(b)(iii), 7.1.3(c)(iii), 7.1.7(a)(iv), 7.1.10-2(a)(i)(D), 7.1.12(f), which were not contested, are linked to contested conditions. Therefore, if the Board were to only stay the contested conditions, these uncontested conditions would become meaningless.

Petitioner's right of appeal should not be cut short or even rendered moot by a limited stay that would result in Petitioner having to comply with certain conditions before a legal ruling that will or may affect the meaning of those conditions. Furthermore, as admitted by the Agency, Petitioner should not be required to expend exorbitant costs in complying with conditions whose meaning will be affected by the appeal process. (Opp. at 9). Since the contested conditions are beyond the scope of the Agency's statutory permit authority and are interwoven with the remainder of the CAAPP permit, a stay of the entire permit is necessary to protect an ascertainable right and avoid irreparable injury.

B. The Absence of a Stay of the Entire CAAPP Permit Would Cause Administrative Confusion.

The Agency's second argument is that, even though the permit appeal process is part of the administrative continuum, no administrative confusion will result if a partial stay is granted because the state operating permits become a "nullity" upon the issuance/effectiveness of the

CAAPP permit. (Opp. at 11). The Agency's interpretation of the Act contravenes a basic canon of statutory construction because it results in a superfluous interpretation of statutory language -- if effectiveness and issuance are synonymous as the Agency alleges, Section 39.5(4)(b) or (g) of the Act becomes superfluous. *Kraft Inc. v. Edgar*, 561 N.E.2d 656, 661 (Ill. 1990) *Stern v. Norwest Mortgage Inc.*, 672 N.E.2d 296, 299 (Ill. App. Ct. 1996); *Roscoe Taylor v. Illinois*, No. 93-CC-0083, 1995 WL 1051631, at *3 (Ill. Ct. Cl. 1995).

The Agency takes issue with Petitioner's reliance upon both Sections 39.5(4)(b) and 9.1(f) of the Act for the continuation of the state operating permit during the pendency of the appeal. (Opp. at 11). However, in ascertaining the meaning of a statute, the statute should be read as a whole with all relevant parts considered. *Patterson,* 308 Ill.App.3d at 947, 242 Ill. Dec. at 521. Petitioner's reliance on both sections is necessary and, therefore, appropriate in order to give effect to the language in the statute. Section 39.5(4) of the Act addresses the transition from the state operating permit program to the CAAPP. A source's state operating permit is to remain in full force and effect until issuance of the CAAPP permit. See Section 39.5(4)(b) of the Act. Once the CAAPP permit has been issued, at least this portion of the transition from the state operating permit program to the CAAPP has occurred. However, Section 39.5(4)(g) says that the "CAAPP permit shall upon becoming effective supersede the State operating permit." (Emphasis added.) Under Illinois law, as discussed above, the CAAPP permit is not effective if it has been appealed. If the Agency is correct in its argument, there is no permit in effect under which the source can operate if a stay is issued by the Board. The General Assembly could not have reasonably intended for a source to operate without a permit.

Section 9.1(f) of the Act supports the distinction between Sections 39.5(4)(b) and 39.5(4)(g) of the Act in the context of appeals of CAAPP permits, and confirms that the state

operating permits remain in effect until "final administrative action" is taken on the CAAP permit. Section 9.1(f) of the Act provides that "[i]f a complete application for a permit renewal is submitted to the Agency at least 90 days prior to expiration of the permit, all of the terms and conditions of the permit shall remain in effect until final administrative action has been taken on the application." The Agency argues that this section applies only to New Source Review construction permits because the context of Section 9.1 is the Clean Air Act. In actuality, Section 9.1(f) of the Act is not limited to permits issued because of Clean Air Act requirements, or even if it is, it would apply in the case of CAAPP permits because they are required by Title V of the Clean Air Act. First, New Source Review permits are not renewed. They are preconstruction permits that are followed by an operating permit. Therefore, Section 9.1(f) does not apply to New Source Review at all, let alone only to New Source Review. Second, permits issued because of Clean Air Act requirements generally require public notice, and the applications must be submitted at least 180 days prior to expiration of the previous permit. See Section 39(a) of the Act. Therefore, it is not limited only to permits required by the Clean Air Act. A state operating permit, pursuant to Section 9.1(f) of the Act, continues in effect after its expiration if the application for renewal is timely. In this case, the application for renewal was the application for the CAAPP permit. See Section 39.5(4)(a) of the Act. In order for Sections 39.5(4)(a), (b), and (g) of the Act to make sense in the context of the entire Act, which has not been superseded by the CAAPP as discussed above, the state operating permit continues in effect during the pendency of the appeal of the CAAPP permit thus creating administrative confusion if a stay of the entire permit is not granted.[7]

[7] Note that Section 39.5(5)(o) applies in appeals of renewal CAAPP permits.

C. The Absence of a Statement of Basis Warrants a Stay of the Entire CAAPP Permit.

The Agency's third argument is that the lack of a statement of basis does not support the need for a stay of the entire CAAPP permit because it does not render the entire permit defective. (Opp. at 14). The current issue before the Board, however, is not whether the lack of a statement of basis renders the permit defective, but whether the lack of a statement of basis justifies a stay of the entire CAAPP permit. Petitioner, therefore, will not address the merits of why a statement of basis renders the entire permit defective in this reply, but will set forth why the lack of a statement of basis is a reason to stay the entire permit.

Section 39.5(8)(b) requires the Agency to explain the Agency's rationale for the terms and conditions of the CAAPP permit. A statement of basis is, therefore, necessary for the permittee to fully understand the rationale behind each permit condition and ultimately affects whether the permittee finds a condition to be objectionable. Since the Agency did not issue a statement of basis, denying the permittee notice of the Agency's decision-making rationale and the opportunity to comment thereon, Petitioner effectively objects to each and every CAAPP permit condition. The Agency concedes that the reasons put forward by Petitioner in its Petition justify a stay of the contested conditions. Accordingly, the Agency's failure to provide a statement of basis justifies a stay of the entire CAAPP permit.

III. THE STATUTORY OBJECTIVES OF THE CAAPP AND THE COMMON ATTRIBUTES OF PERMIT APPEALS DO NOT WARRANT THE DENIAL OF A STAY OF THE ENTIRE CAAPP PERMIT.

The Agency argues, without providing any support for its argument, that the Board should not issue a stay of the entire CAAPP permit because it could lessen the opportunities for citizen enforcement against Petitioner and the "cumulative effect" of stays sought by other coal-fired CAAPP permittees would "effectively shield" the entire utility sector from potential

enforcement. (Opp. at 19) This argument is completely specious. The Act allows "any person" to file a complaint with the Board against any person violating the "Act, any rule or regulation adopted under the Act, any permit, or any term or condition of a permit." *See* Section 31(d)(i) of the Act. Therefore, a stay in this case or any of the other coal-fired CAAPP permit appeals will not limit a citizen's ability to bring an enforcement action.

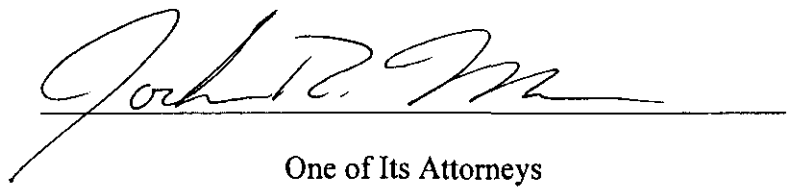
The Agency also argues that Petitioner is not entitled to a stay of the entire CAAPP permit because this appeal along with the other coal-fired CAAPP permit appeals are "protective appeals." Petitioner takes exception to the accusation that this appeal is protective. Petitioner was active in the opportunities for public participation and issued written comments in response to all of the iterations of the draft CAAPP permit. Petitioner filed this appeal because the Agency failed to address serious issues raised by Petitioner during public participation, resulting in a CAAPP permit that exceeds the Agency's statutory authority. Petitioner and the Agency anticipate that some of these issues will likely go to hearing.[8]

[8] The Agency in its Motion For Extension of Time to File Record concedes that some of this issues will likely go to hearing.

CONCLUSION

For the reasons set forth above, Petitioner contends that the CAAPP permit on appeal in this proceeding is not in effect, pursuant to the APA, while this appeal is pending and until the Agency issues the permit after remand, and requests, in the alternative, that the Board grant Petitioner's request for a stay of the entire CAAPP permit pursuant to the Board's discretionary stay authority.

Respectfully submitted,
MIDWEST GENERATION, LLC,
WILL COUNTY GENERATING STATION

by: 

One of Its Attorneys

Dated: December 2, 2005

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EXHIBIT 1

QUESTIONS AND ANSWERS ON THE REQUIREMENTS OF OPERATING PERMITS PROGRAM REGULATIONS

Prepared By:

The U. S. Environmental Protection Agency

July 7, 1993

INTRODUCTION

This document summarizes questions and answers (Q's & A's) on requirements and implementation of the Environmental Protection Agency's (EPA) final operating permits program regulations. The operating permits regulations were published on July 21, 1992, in Part 70 of Chapter I of Title 40 of the Code of Federal Regulations (57 FR 32250). These rules are mandated by Title V of the Clean Air Act (Act) as amended in 1990.

The contents of this document reflect a wide range of questions that have been asked of EPA concerning implementation of the operating permits program. In part, the document reflects audience questions and EPA's responses at workshops and conferences sponsored by EPA and by other groups at which EPA personnel participated as speakers. Workshop attendees included personnel from EPA Regional Offices, State and local permitting agencies, industry representatives, and other individuals from the interested public, including environmental groups.

Questions and answers are organized in chapters primarily according to the sections of the Part 70 regulations with additional topics covered in latter chapters.

This document is available in a WordPerfect 5.1 file on EPA's electronic bulletin boards and will be periodically updated by addition of more questions and answers. Each succeeding set of additions to this document will be indicated so the user can distinguish new material. As new material is added, it will be designated in WordPerfect "redline" font. "Redline" font appears differently (e.g., shading or dotted underline) according to the printer being used. Example:

(WordPerfect redline)

As each new addition of Q's & A's is made, the "redline" font will be removed from the previous addition so that only the latest material added will appear in "redline" font. Document updates will be recorded as they are made.

This document responds to many requests for information concerning implementation of Part 70. The contents are based on the Part 70 requirements and the requirements of Title V. Answers to questions are intended solely as guidance representing the Agency's current position on Part 70 implementation. The information contained herein is neither rulemaking nor final Agency action and cannot be relied upon to create any rights enforceable by any party. In addition, due to litigation underway, the Agency's position on aspects of the program discussed in this document may change. If so, answers will be

revised accordingly. As with periodic updates to this document, any change will be denoted with the Wordperfect "redline" font to distinguish any revised answer from a previous version.

RECORD OF DOCUMENT UPDATES

Original document: July 7, 1993

First Update: _____

TABLE OF CONTENTS

6.0 PERMIT CONTENT

6.1 General Permit Content

1. Must the SIP-approved emissions rate be included in the permit, or is a Control Technology Guideline reasonably available control technology limit sufficient?

The SIP-approved emissions rate is the applicable requirement and must be included in the permit.

2. What is a severability clause?

The severability clause is a provision that allows the rest of the permit to be enforceable when a part of the permit is judged illegal or void.

6.2 Equivalency Determination

6.3 Federal Enforceability

1. What are the limits on the additional requirements that a permitting authority can impose on a source in the non-federally-enforceable portion of the permit?

A permitting authority is free to add any "State-only" requirements to the extent allowed by State or local law. However, the permitting authority is also responsible for enforcing the federally-enforceably portion of the permit and EPA will exercise its enforcement oversight with regard to those terms and conditions.

2. If a facility takes a tighter limit to create emission credits, how is the new limit made federally enforceable?

The new limit is made federally enforceable by placing it in the federally-enforceable part of the Title V permit, along with appropriate compliance terms (e.g., monitoring, reporting, and recordkeeping).

3. What is the mechanism to change or reverse "State-only" conditions that became federally enforceable back to "State-only" status?

The mechanism for changing the designation from federally enforceable to "State-only" is the minor permit modification process. These changes, if "State-only," should not involve applicable requirements and could be removed from the federally-enforceable portion of the permit as long as none of the restrictions on minor permit modifications in section 70.7(e)(2)(i)(A) are violated. If any of the restrictions in

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of December 2005, I did serve, by electronic filing, by electronic mail, and by U.S. Mail postage prepaid, a true and correct copy of the attached **PETITIONER'S REPLY IN SUPPORT OF A PERMIT STAY AND IN RESPONSE TO THE AGENCY'S OPPOSITION TO PETITIONER'S REQUEST FOR A STAY** and **MOTION FOR LEAVE TO FILE REPLY *INSTANTER***, upon the following persons:

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