BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MIDWEST GENERATION, LLC, WAUKEGAN GENERATING STATION	)	
Petitioner,	)	
v.	)	**PCB No. 06-_____**
	)	**(Permit Appeal – Air)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE

To: Dorothy Gunn, Clerk
Pollution Control Board
James R. Thompson Center
100 W. Randolph Street
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 61794-9276

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board **APPEAL OF CAAPP PERMIT** and **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.

_____/s/ **Kathleen C. Bassi**_____
Kathleen C. Bassi

Dated: March 13, 2006

SCHIFF HARDIN LLP
Sheldon A. Zabel
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Stephen J. Bonebrake
Joshua R. More
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APPEARANCE

I hereby file my appearance in this proceeding, on behalf of Midwest Generation, LLC, Waukegan Generating Station.

_____/s/ **Kathleen C. Bassi**_____
Kathleen C. Bassi

Dated: March 13, 2006

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_____/s/ **Sheldon A. Zabel**_____
Sheldon A. Zabel

Dated: March 13, 2006

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_____/s/ **Stephen J. Bonebrake**_____
Stephen J. Bonebrake

Dated: March 13, 2006

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APPEARANCE

I hereby file my appearance in this proceeding, on behalf of Midwest Generation, LLC, Waukegan Generating Station.

_____/s/ **Joshua R. More**_____
Joshua R. More

Dated: March 13, 2006

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APPEARANCE

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_____/s/ **Kavita M. Patel**_____
Kavita M. Patel

Dated: March 13, 2006

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APPEAL OF CAAPP PERMIT

NOW COMES Petitioner, MIDWEST GENERATION, LLC, WAUKEGAN GENERATING STATION ("Petitioner," "Waukegan," or "Midwest 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 February 7, 2006, 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. The Waukegan Generating Station (the "Station"), Agency I.D. No. 09710AAC, is an electric generating station owned by Midwest Generation, LLC, and operated by Midwest Generation, LLC – Waukegan Generating Station. The Waukegan electrical generating units ("EGUs") went online between 1952 and 1962. The Waukegan Generating Station is located at 401 East Greenwood Avenue, Waukegan, Illinois 60087-5197, within the Chicago ozone and PM2.5[1] nonattainment areas. Waukegan is an intermediate load plant and can generate approximately 781 net megawatts. Midwest Generation employs approximately 189 people at the Waukegan Generating Station.

3. Midwest Generation operates three coal-fired boilers at Waukegan with the capability to fire at various modes that include the combination of coal, natural gas, and/or fuel oil as their principal fuels. In addition, the boilers fire natural gas or fuel oil as auxiliary fuel during startup and for flame stabilization. Certain alternative fuels, such as used oils generated on-site, may be utilized as well. Waukegan also operates associated coal handling, coal processing, and ash handling activities. In addition to the boilers, Waukegan operates four oil-fired turbines, used during peak demand periods.

4. Waukegan is a major source subject to Title V. Waukegan is subject to the Emissions Reduction Market System (ERMS) but has limited its emissions of volatile organic compounds ("VOC") to less than 15 tons per ozone season and so is not required to hold and surrender allotment trading units (ATUs). The EGUs at Waukegan are subject to both of

[1] Particulate matter less than 2.5 microns in aerodynamic diameter.

Illinois' Nitrogen Oxide ("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. Waukegan 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 NOx from the EGU are controlled by low NOx burners and overfire air. Emissions of sulfur dioxide ("SO_2") from the EGUs are controlled by limiting the sulfur content of the fuel used for the boilers. Likewise, Waukegan monitors and limits the sulfur content of the fuel oil used at the Station in the boilers and turbines. Particulate matter ("PM") emissions from each boiler are controlled by an electrostatic precipitator ("ESP"). Fugitive PM emissions from various other coal and ash handling activities are controlled through baghouses, enclosures, covers, dust suppressants, and water sprays, as necessary and appropriate. Emissions of carbon monoxide ("CO") are limited through good combustion practices in the boilers.

6. The Agency received the original CAAPP permit application for the Waukegan Station on September 7, 1995, and assigned Application No. 95090047. Petitioner substantially updated this application June 20, 2003, and April 27, 2005. The CAAPP permit application was timely submitted and updated, and Petitioner requested and was granted an application shield, pursuant to Section 39.5(5)(h). Petitioner has paid fees as set forth at Section 39.5(18) of the Act since submitting the application for a CAAPP permit for the Waukegan Generating Station, totaling $1.6 million since 1995. Waukegan'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 4, 2003. The Agency subsequently held a hearing on the draft permit on August 19, 2003, in Waukegan, which representatives of Midwest Generation attended and presented testimony. Midwest Generation filed written comments with the Agency regarding the Waukegan draft permit on September 26, 2003.[2] The Agency issued a proposed permit for the Waukegan Station on October 10, 2003. Although this permit was not technically open for public comment, as it had been sent to USEPA for its comment as required by Title V of the Clean Air Act, Midwest Generation, nevertheless, submitted comments on November 20, 2003. Subsequently, in December 2004, the Agency issued a draft revised proposed permit for Petitioner's and other interested persons' comments. Midwest Generation again commented. The Agency issued a second draft revised proposed permit in July 2005 and allowed the Petitioner and other interested persons 10 days to comment. At the same time, the Agency released its preliminary Responsiveness Summary, which was a draft of its response to comments, and invited comment on that document as well. Midwest Generation submitted comments on this version of the permits proposed for all six of its generating stations together 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 this version of the permit from the Petitioner or other interested persons, and Midwest Generation did not submit further comments on the August 15, 2005, version, based

[2] Midwest 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, Midwest Generation is not attaching such documents to this Petition.

upon the understanding that the Agency had every intention to issue the permit at the end of USEPA's review period.

8. On September 28, 2005, within the 45-day review period provided for review of a proposed CAAPP permit by USEPA, the USEPA objected to the proposed permit for the Waukegan Generating Station. In response to USEPA's objections to the proposed CAAPP permit for the Waukegan Generating Station, the Agency elected to make a change to this CAAPP permit. Around December 1, 2005, the Agency then provided an additional opportunity for Midwest Generation, members of the public, and other parties to submit comments on a draft of a proposed CAAPP permit with this change, which the Agency planned to resubmit to USEPA for its review. In preparation for this comment period, the Agency also prepared a new version of the Responsiveness Summary, dated December 1, 2005, which was specific to the Agency's planned action on the CAAPP application for the Waukegan Generating Station.

9. On December 14, 2005, Midwest Generation commented on the changes made to the revised proposed permit.

10. The final permit was issued on February 7, 2006.[3] On the same day the Agency issued a new version of the Responsiveness Summary to address these additional comments, as well as its response to USEPA objections. Although some of Petitioner's comments have been addressed in the various iterations of the permit and Responsiveness Summary, the permit still contains terms and conditions that are not acceptable to Petitioner. For these reasons, 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

[3] *See* USEPA/Region 5's Permits website at < http://www.epa.gov/region5/air/permits/ilonline.html> → "CAAPP permit Records" → "Midwest Generation EME, LLC" for the source located at 401 East Greenwood, Waukegan, Illinois, for the complete "trail" of the milestone action dates for this permit.

it to the Agency, and order the Agency to correct and reissue the permit, without further public proceeding, as appropriate.

II. EFFECTIVENESS OF PERMIT

11. Petitioner notes that, consistent with the Board's decisions on February 16, 2006, in other recent appeals of CAAPP permits regarding the effectiveness of appealed permits under Section 10-65(b) of the Illinois Administrative Procedure Act ("APA"), 5 ILCS 100/10-65, and the holding in *Borg-Warner Corp. v. Mauzy*, 427 N.E. 2d 415 (Ill.App.Ct. 3d Dist. 1981) ("*Borg-Warner*"), the CAAPP permit issued by the Agency to Midwest Generation for the Waukegan Generating Station does not become effective until after a ruling by the Board on the permit appeal and, in the event of a remand, until the Agency has issued the permit consistent with the Board's order. *See* Order of the Illinois Pollution Control Board Finding that the APA's Automatic Stay Applies to this Case (Order), Midwest Generation, LLC, Crawford Generating Station v. IEPA, PCB 2006-056, at p. 7 (February 16, 2006) (the Board held that "as did the Borg-Warner court in the NPDES permit context, the Board finds that the APA's automatic stay applies to this CAAPP permit. Section 10-65(b) of the APA effectively issues a stay of the CAAPP permit by operation of law."); Order, Midwest Generation, LLC, Fisk Generating Station v. IEPA, PCB 2006-057 (February 16, 2006); Order, Midwest Generation, LLC, Joliet Generating Station v. IEPA, PCB 2006-058 (February 16, 2006); Order, Midwest Generation, LLC, Powerton Generating Station v. IEPA, PCB 2006-059 (February 16, 2006); Order, Midwest Generation, LLC, Will County Generating Station v. IEPA, PCB 2006-060 (February 16, 2006); *see also* PCB 2006-063-64, PCB 2006-066-75.

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

12. As a preliminary matter, the CAAPP permits issued to the Waukegan Generating Station and 21 of the other coal-fired power plants in the state 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. For example, not all stations have the same types of emissions units. Some units in the state are subject to New Source Performance Standards ("NSPS"), perhaps New Source Review ("NSR") or Prevention of Significant Deterioration ("PSD"), or other state or federal programs, while others are not. Applicable requirements may differ because of geographic location. 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 should the Board grant Petitioner's appeal. Petitioner appeals all conditions related to the conditions giving rise to the appeal, however, whether such related conditions are expressly identified or not below.

13. 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 of the Act (the applicant may appeal while others need to have participated in the public process). However, Midwest 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. These issues are properly before the Board in this proceeding.

14. 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. The language at Section 39.5(7)(d)(ii) 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[4] than is required in the underlying applicable requirement unless the applicable requirement contained no periodic testing or monitoring, specified no frequency for testing or monitoring, or required only a one-time test. *Appalachian Power* at 1028.

15. 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 over-enthusiastic in its gapfilling, it is imposing new substantive requirements contrary to Title V.

16. The Agency, indeed, has engaged in gapfilling, as some of the Board's underlying regulations do not provide specifically for periodic monitoring. *C.f.*, 35 Ill.Adm.Code 212.Subpart E. However, the Agency has also engaged in over-enthusiastic gapfilling in some instances, as discussed in detail below. These actions are arbitrary and capricious and are an unlawful assumption of regulatory authority not granted by Section 39.5 of the Act. Moreover, contrary to *Appalachian Power*, they, by their nature, unlawfully

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

constitute the imposition of new substantive requirements. Where Petitioner identifies inappropriate gapfilling as the basis for its objection to a term or condition of the permit, Petitioner requests that the Board assume this preceding discussion of gapfilling as part of that discussion of the specific term or condition.

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

18. 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 in certain instances. Only applicable requirements may be included in the permit,[5] 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

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

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.

19. 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 purposes of the Act" misstates what is actually in the Act. Responsiveness Summary, p. 15; s*ee* 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." For the Agency to assume broader authority than that granted by the Act is unlawful and arbitrary and capricious.

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

and is, in and of itself, a basis for appeal and remand of the permit and stay of the entire permit.

A. Issuance and Effective Dates
(Cover Page)

21. The Agency issued the CAAPP permit that is the subject of this appeal to Midwest Generation/Waukegan Generating Station on February 7, 2006.

22. 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 the language in the permit, to the Agency. USEPA's website identifies that date as February 7, 2006. 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, Midwest 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 to expect Midwest Generation to have anticipated the final permit to the degree necessary for it to have been in compliance by February 7, 2006.

23. Neither the Act nor the regulations specify when permits should become effective. Prior to the advent of Title V, however, sources have not been subject to such numerous and detailed permit conditions and exposed to enforcement from so many sides. Under Title V, not only the Agency through the Attorney General, but also USEPA and the

general public can bring enforcement suits for violation of the least matter in the permit. If the issuance date is the effective date, then this has the potential for tremendous consequences to the permittee and is extremely inequitable.

24. 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, alternatively, at least until the time for the source to appeal the permit has expired. An appeal, if filed, will stay the permit until the Board can rule.

25. Midwest 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. This will 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

26. The CAAPP permit issued to the Waukegan Generating Station requires Midwest 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."

27. In fact, there is no applicable requirement that allows the Agency to require this recordkeeping and reporting. There are no regulations that limit emissions of HAPs from the

Waukegan Generating Station. While USEPA has recently promulgated the Clean Air Mercury Rule ("CAMR") (70 Fed.Reg. 28605 (May 18, 2005)), Illinois has not yet developed its corresponding regulations to the Board. The Agency correctly discussed this issue relative specifically to mercury in the Responsiveness Summary by pointing out that it cannot add substantive requirements through a CAAPP permit or through its oblique reference to the CAMR. *See* Responsiveness Summary in the Administrative Record, p. 21. However, the Agency was incorrect in its discussion in the Responsiveness Summary by stating that it can rely upon Section 4(b), the authority for the Agency to gather information, as a basis for requiring recordkeeping and reporting of mercury emissions through the CAAPP permit. The Agency has confused its 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.

28. Further, the Agency's own regulations, which are part of the approved program under Title V, 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 Midwest 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.

29. Midwest Generation requests that the Board order the Agency to amend the permit by deleting Conditions 5.6.1(a) and (b) and by amending Condition 5.7.2 as it relates to reporting emissions of HAPs in the Annual Emission Report.

(ii) Retention and Availability of Records

30. 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 Midwest 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), Midwest 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, Midwest 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, Midwest 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.

31. Midwest Generation requests that the Board order the Agency to amend Conditions 5.6.2(b) and (c) in a manner to correct the deficiencies outlined above.

(iii) Submission of Blank Record Forms to the Agency

32. Midwest Generation may be confused as to what the Agency expects with respect to Condition 5.6.2(d). *See* Condition 5.6.2(d). Midwest Generation's first interpretation of this condition was 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, and 7.5.9. However, upon rereading Condition 5.6.2(d), Midwest Generation has come to believe that through this condition, the Agency is requiring Midwest Generation to submit blank copies of its records, apparently so that the Agency can check them for form and type of content. If this latter is the correct interpretation of this condition, the condition is unacceptable, as the Agency does not have the authority to oversee how Midwest Generation conducts its internal methods of compliance. There is no basis in law for such a requirement and it must be deleted.

33. Each company has the right and responsibility to develop and implement internal recordkeeping systems. Even the most unsophisticated company has the right to

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

34. Nor does the Agency provide a purpose for this condition – which serves as an excellent example of why a detailed statement-of-basis document should accompany the CAAPP permits, including the drafts, as required by Title V. One can assume that the Agency's purpose for this condition is to review records that permittees plan to keep in support of the various recordkeeping requirements in the permit in order to assure that they are adequate. However, there is no regulatory or statutory basis for the Agency to do this, and it has cited none. Moreover, if the Agency's purpose for requiring this submission is to determine the adequacy of recordkeeping, then without inherent knowledge of all the details of any given operation, it will be difficult for the Agency to determine the adequacy of recordkeeping for the facility through an off-site review. If the Agency finds records that are submitted during the prescribed reporting periods inadequate, the Agency has a remedy available to it through the law. It can enforce against the company. That is the risk that the company bears.

35. Further, if the company is concerned with the adequacy of its planned recordkeeping, it can ask the Agency to provide it some counsel. Providing such counsel or assistance is a statutory function of the Agency. Even then, however, the Agency will qualify its assistance in order to attempt to avoid reliance on the part of the permittee should there be an enforcement action brought. An interpretation of this condition could be that by providing

blank recordkeeping forms to the Agency, absent a communication from the Agency that they are inadequate, enforcement against the permittee for inadequate recordkeeping is barred, so long as the forms are filled out, because they are covered by the permit shield.

36. Additionally, the Agency has violated Midwest Generation's due process rights under the Constitution by requiring submission of these documents before Midwest Generation had the opportunity to exercise its right to appeal the condition, as granted by the Act at Section 40.2. The Act allows permittees 35 days in which to appeal conditions of the permit to which it objects. The Agency's requirement at Condition 5.6.2(d) that Midwest Generation submit blank forms within 30 days of issuance of the permit significantly undermines Midwest Generation's right to appeal – and the effectiveness of that right – or forces Midwest Generation to violate the terms and conditions of the permit to fully preserve its rights. Although the condition is stayed, because the appeal may not be filed until 35 days after issuance, there could at least be a question as to whether Midwest Generation was in violation from the time the report was due until the appeal was filed. Midwest Generation submits that the stay relates back to the date of issuance, but it is improper to even create this uncertainty. This denies Midwest Generation due process and so is unconstitutional, unlawful, and arbitrary and capricious.

37. Midwest Generation requests that the Board order the Agency to delete Condition 5.6.2(d) from the permit. In the alternative, Midwest Generation requests that the Board interpret this condition such that if the Agency fails to communicate any inadequacies it finds in blank recordkeeping forms submitted to it, enforcement against Midwest Generation for inadequate records is barred, so long as those records were completed, as a part of the permit shield.

C. NOx SIP Call
(Section 6.1)

38. 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 Midwest 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, Midwest Generation suggests that the condition merely refer to the first full ozone season during which the permit is effective.

39. Midwest Generation requests that the Board order the Agency to amend the language of Condition 6.1.4(a) to avoid retroactive compliance with past requirements.

D. Boilers
(Section 7.1)

(i) Opacity as a Surrogate for PM

40. 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 December 2005 proposed permit, the Agency required Petitioner to identify the opacity measured at the 95th percentile confidence interval of the measurement of compliant PM emissions during the last and other historical stack tests as the upper bound opacity level that triggers reporting of whether there may have been an exceedance of the PM limit without regard for the realistic potential for a PM exceedance. These reporting requirements are quite onerous, particularly for the units that tested at the lowest levels of PM and opacity. The inclusion of these conditions exceeds the scope of the Agency's authority to gapfill and so are arbitrary and capricious and must be stricken from the permit.

41. The provisions requiring the use of opacity as effectively 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) and 7.1.4(b); 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.

42. No one can provide a reliable, exact PM concentration level anywhere in the United States today outside of stack testing. Obviously, it is impossible to continuously test a stack to determine a continuous level of PM emissions, and it would be unreasonable for the Agency or anyone else 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, including one in Illinois, are testing continuous PM monitoring devices.[6] 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.[7] The PM CEMS are not yet at a point of refinement where they can even be considered credible evidence of PM emissions levels; at least, we are not aware of any case in which government or citizens suing under Section 304 of the Clean Air Act have relied upon PM CEMS as the

[6] *C.f.* ¶ 89 of the consent decree entered in *U.S. v. Illinois Power Company*, Civ. Action No. 99-833-MJR (S.D.Ill.), found in the Agency's administrative record of Dynegy Midwest Generation's ("Dynegy") appeals of its permits, filed on or about the same day as this appeal. *See* Administrative Record.

[7] The Agency's requirement that Dynegy rely on uncertified PM CEMS is included in Dynegy's appeals.

basis of a case for PM violations. As a result, sources must rely upon the continuity or consistency of conditions that occurred during a successful stack test to provide reliable indications of PM emissions levels.

43. Historically, opacity has never been used as a reliable, quantitative surrogate for PM emissions levels. The Agency itself acknowledged that opacity is not a reliable indicator of PM concentrations. *See* Responsiveness Summary, pp. 15-16, 43-45.[8] Midwest 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. Midwest Generation's current operating permits require triennial PM stack testing, to be performed within 120 days prior to expiration of the permit, 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.

44. Despite the Agency's implications to the contrary in the Responsiveness Summary (*see* Responsiveness Summary, pp. 43-45), the permit does make opacity a surrogate for PM compliance. When the Agency requires even estimates of PM levels or guesses as to whether there is an exceedance of PM based upon opacity, opacity has been quantitatively tied to PM compliance. Further, the opacity level triggers reporting that the opacity/PM surrogate

[8] "[Setting] 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. 45.

level has been exceeded and so there may have been an exceedance of the PM level regardless of any evidence to the contrary. For example, if the opacity/PM surrogate level of, say, 15% is exceeded, this must be reported despite the fact that all fields in the electrostatic precipitator were on and operating, stack testing indicated that the PM emissions level at the 95th percentile confidence interval is 0.04 lb/mmBtu/hr, and the likelihood that there was an exceedance of the PM emissions limitation of 0.1 lb/mmBtu/hr is extremely low. The purpose of such reporting eludes Petitioner. It does not assure compliance with the PM limit and so inclusion of these conditions exceeds the Agency's gapfilling authority and is, thus, unlawful and arbitrary and capricious. Moreover, this unnecessary reporting requirement is a new substantive requirement, according to *Appalachian Power*, not allowed under Title V.

45. Contrary to the Agency's assertion in the Responsiveness Summary that opacity provides a "robust means to distinguish compliance operation of a coal-fired boiler and its ESP from impaired operation" (Responsiveness Summary, p. 45), the robustness is actually perverse. Relying upon opacity as a surrogate for PM emissions levels has the perverse result of penalizing the best-operating units. That is, the units for which the stack testing resulted in very low opacity and very low PM emissions levels are the units for which this additional reporting will be most frequently triggered. For example, stack testing at one of Midwest Generation's units measured 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 Midwest Generation 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. Clearly, this condition will result in overly burdensome reporting that serves no purpose. As such, it exceeds the Agency's authority to gapfill, is unlawful, and is arbitrary and capricious.

46. 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*.

47. These conditions invite sources to perform stack testing under operating conditions that are less than normal, *i.e.*, to "detune" the units, to push the bounds of compliance with the PM limit in order to avoid the unnecessary recordkeeping and reporting the conditions require, particularly for the typically best operating units. That is, to identify more realistically the operating conditions that would result in emissions closer to the PM limit,[9] Midwest Generation would have to perform stack tests with some elements of the ESP turned off, even though they would not be turned off during normal operation. Testing in a manner that generates results close to the PM limit may result in opacity that exceeds the opacity limit. Nevertheless, in order to avoid the unnecessary and clearly arbitrary and capricious recordkeeping and reporting requirements included in these conditions, such stack testing is called for, despite the fact that the results of such tests will not reflect normal operation of the boilers. This is counter-intuitive, and it took Midwest Generation quite some time to grasp that this is, at least indirectly, what these conditions call for. It is so counter-

[9] Midwest Generation's policy is that the boiler be operated in a compliant manner. During stack tests, Midwest Generation has consistently operated the boiler 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 Waukegan's last stack test was at 0.02 lb/mmBtu for Unit 6, 0.017 lb/mmBtu for Unit 7 and 0.05 lb/mmBtu for Unit 8, well in compliance with the PM limitation.

intuitive as to be the antithesis of good air pollution control practices, yet this is what the Agency is essentially demanding with these conditions. Moreover, arguably, sources could operate at these detuned levels and still be in compliance with their permits and the underlying regulations but emit more pollutants into the atmosphere than they typically do now. This result illustrates the perversity of the condition.

48. Periodic stack testing 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*.

49. 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 Midwest Generation also objects to Condition 7.1.10-2(d)(iv) to the extent that it requires reporting related to the opacity surrogate.

50. As with Condition 5.6.2(d) discussed above, Condition 7.1.9(c)(ii) denies Midwest 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).

Obviously, if Condition 5.6.2(d) denies Midwest Generation due process, Condition 7.1.9(c)(ii) does as well for the same reasons. Midwest Generation was not granted the opportunity to

appeal the condition before it was required to submit to the Agency information that Midwest Generation believes is not useful or reliable. Midwest Generation is particularly loathe to provide the Agency with this information because it believes that the information will be misconstrued and misused.

51. Finally, Condition 7.1.10-2(d)(vi) requires Midwest 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," it eludes Midwest Generation as to why, then, they require definition. Moreover, this requirement does not appear anywhere else in the permit. If "common technical terms" do not require definition in other contexts in this permit, then surely they do not require definition in this context. This requirement should be deleted from the permit.

52. Midwest Generation requests that the Board order the Agency to delete these conditions 7.1.9(c)(ii), 7.1.9(c)(iii)(B), 7.1.10-1(a)(i) and (ii), 7.1.10-2(a)(i)(E), 7.1.10-2(d)(iv), 7.10-2(d)(v), 7.1.10-2(d)(v)(A), 7.1.10-2(d)(v)(B), 7.1.10-2(d)(v)(C), 7.1.10-2(d)(v)(D), 7.1.10-2(d)(vi), 7.1.10-3(a)(ii), and 7.1.12(b)..

(ii) Reporting the Magnitude of PM Emissions

53. Somewhat consistent with its direction for PM, or, charitably, arguably so, the Agency also requires Midwest 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)(5), 7.1.9(h)(ii)(D)(3), and 7.1.10-2(d)(iv)(A)(3). Compliance with these conditions is an impossibility and, therefore, the inclusion of these conditions in the permit is arbitrary and capricious. Midwest 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 not a certified, credible, reliable alternative to stack testing to measure PM emissions.

54. Additionally, Condition 7.1.10-2(d)(iv)(A)(5) requires Midwest 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." Midwest Generation believes that this means that it must provide information relative to any other means, besides opacity – which, as discussed in detail above, Midwest Generation believes is an inappropriate and inaccurate basis for determining whether there are exceedances of the PM limit, let alone the magnitude of any such exceedance – that Midwest Generation relied upon to determine there was an exceedance of the PM limit. Besides stack testing, there are none.

55. Midwest Generation requests that the Board order the Agency to delete Conditions 7.1.9(g)(i), 7.1.9(g)(ii)(C)(5), 7.1.9(h)(ii)(D)(3), and 7.1.10-2(d)(iv), specifically 7.1.10-2(d)(iv)(A)(3) and (5) from the permit.

(iii) PM Testing

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

57. The Agency has included a requirement in the permit at Condition 7.1.7(b)(iii) that Midwest 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 in detail below. Second, even if the condition were appropriately included in the permit, which Midwest Generation does not by any means

concede, the language of Condition 7.1.7(b)*[10] is not clear as to the timing of the required testing, largely because Condition 7.1.7(a)(i) is not clear.

58. With respect to the inclusion of the requirement for Method 202 testing at Condition 7.1.7(b)(iii) at all in a CAAPP permit, the Agency has exceeded its authority and 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 Midwest Generation believes its inclusion in any permit would be inappropriate because there is no regulatory requirement that applies PM10 limitations to the Waukegan Generating Station.. In response to comments on this point, the Agency stated in the Responsiveness Summary at page 19, "The requirement for using both Methods 5 and 202 is authorized by Section 4(b) of the Environmental Protection Act." Midwest Generation does not question the Agency's authority to gather information. 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). However, this authority does not make testing for PM10 condensibles an "applicable requirement" under Title V. As discussed above, an "applicable requirement" is one applicable to the permittee pursuant to a federal regulation or a SIP.

59. Further, simply because 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. The structure of the Board's PM regulations establish the

[10] The asterisk is in the permit.

applicable requirements for the Waukegan Generating Station. The Waukegan Generating Station is subject to the requirements of 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.[11] The Board's PM regulations are structured such that particular PM10 requirements apply to identified sources located in the PM10 nonattainment areas.[12] No such requirements apply now or have ever applied to the Waukegan Generating Station.

60. The measurement method for PM, referencing only Method 5 or derivatives of Method 5, is at 35 Ill.Adm.Code § 212.110. This section of the Board's rules applies to the Waukegan 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. Not subject to PM10 limitations, the Waukegan Generating Station is not subject to § 212.108, contrary to the Agency's attempt to expand its applicability in the Responsiveness Summary by stating, "Significantly, the use of Reference Method 202 is not limited by geographic area or regulatory applicability." Responsiveness Summary, p. 19. This is certainly a true statement if one is performing a test of condensibles. However, this statement does not expand the requirements of § 212.110 to include PM10 condensible testing when the limitations applicable to the source pursuant to 212.Subpart E are for only PM, not PM10. Therefore, there is no basis for the Agency to require in the CAAPP permit, which is limited to including only applicable requirements and such monitoring, recordkeeping, and reporting that

[11] 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.

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

are necessary to assure compliance, that the Waukegan Generating Station be tested pursuant to Method 202.

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

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

Responsiveness Summary, p. 19. (Emphasis added.) 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. 41, or by stating that "the use of Reference Method 202 is not limited by geographic area or regulatory applicability." Responsiveness Summary, p. 19. Under the Board's rules, it is limited to testing for PM, and so, at least in Illinois, its "regulatory applicability" is, indeed, limited. These attempted justifications do not convert testing for condensibles into an applicable requirement.

62. 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. The Board's rules serve as the basis for permit conditions. Therefore, Midwest Generation does dispute that requiring such testing in the CAAPP permit is appropriate. In fact, it is definitely not appropriate. It is unlawful and exceeds the Agency's authority.

63. The requirement for Method 202 testing must be deleted from the permit. Midwest Generation requests that the Board order the Agency to delete the requirement for Method 202 testing from the permit at Conditions 7.1.7(b)* and 7.1.7(b)(iii).

(iv) Measuring CO Concentrations

64. The CAPP permit issued to the Waukegan Generating Station requires Midwest 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). *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). Including these provisions in the permit is not necessary to assure compliance with the underlying standard, is not required by the Board's regulations, and, therefore, exceeds the Agency's authority to gapfill. Maintaining compliance with the CO limitation has historically been a work practice, thus its inclusion in the work practice condition of the permit. Sophisticated control systems are programmed to maintain boilers in an optimal operating mode, which serves to minimize CO emissions. One can speculate that because it is in Waukegan's best interests to operate its boilers optimally and because ambient CO levels are so low,[13] compliance with the CO limitation has been accomplished through combustion optimization techniques historically at power plants. There is no reason to change this practice at this point. Ambient air quality is not threatened, and stack testing has demonstrated that emissions of CO

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

at the Waukegan Generating Station, at 27.4 ppm at Unit 6, 62.5 ppm at Unit 7 and 61.9 ppm at Unit 8 during the latest stack test, are significantly below the standard of 200 ppm.

65. 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 – by a comfortable margin – and for which the ambient air quality is in compliance by a huge margin is overly burdensome and, therefore, arbitrary and capricious. In order to comply with the "work practice"[14] of performing "diagnostic testing" that yields a concentration of CO, Midwest Generation must purchase and install or operate some sort of monitoring devices.

66. 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 Midwest Generation's 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.

67. In addition, the permit requires at Conditions 7.1.9(g)(i), 7.1.9(g)(ii)(C)(5), and 7.1.9(h)(ii)(D)(3)[15] that Midwest Generation provide estimates of the magnitude of CO emitted during startup and operation during malfunction and breakdown. The monitoring device that

[14] Midwest 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, Midwest Generation will have to engage in monitoring or testing; the work practice of combustion optimization that has been the standard historically.

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

Midwest Generation would utilize for the quarterly diagnostic evaluations required by Condition 7.1.6(a) is a portable CO monitor. So far as Petitioner knows, portable CO monitors are not equipped with continuous readout recordings. Rather, they must be manually read. What the Agency is effectively requiring 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 24 hours, and during malfunctions and breakdowns, which are by their nature not predictable. In the first case (startup), the requirement is unreasonable and overly burdensome and perhaps dangerous in some weather conditions; in the second case (malfunction and breakdown), in addition to the same problems that are applicable during startup, it may be impossible for Midwest Generation to comply with the condition.

68. The requirement to perform diagnostic measurements of the concentration of CO in the flue gas is arbitrary and capricious because the Agency has failed to provide any guidance as to how to perform the diagnostic measurements. Midwest 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).

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

70. Midwest Generation 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 at Conditions 7.1.9(g)(i), 7.1.9(g)(ii)(C)(5), and 7.1.9(h)(ii)(D)(3), and to amend the corresponding recordkeeping, reporting, and compliance procedures at Conditions 7.1.9(a)(vi), 7.1.10-1(a)(iv), and 7.1.12(d) accordingly.

(v) Applicability of 35 Ill.Adm.Code 217. Subpart V

71. 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, Midwest Generation submits that the use of the word each in this sentence is misplaced and confusing, given the option available to the Waukegan Generating Station to average emissions among affected units in infinite combinations.

72. Midwest 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

73. 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.

74. Midwest 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 4-hour period for Unit 6 and 6-hour period for Units 7 and 8 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 24 hours typical for startup.

75. Midwest Generation requests that the Board order the Agency to delete Condition 7.1.9(g)(ii)(C), consistent with the startup provisions of 35 Ill.Adm.Code § 201.149 and the inapplicability of § 201.263.

(vii) Malfunction and Breakdown Provisions

76. 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 Midwest

Generation for the Waukegan Generating Station. This grant of authority serves only as an affirmative defense in an enforcement action. *Generally see* Condition 7.1.3(c).

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

78. Also in 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" in the final version of the permit. Versions prior to the July 2005 version include that word. Its deletion completely changes the scope and applicability of the condition. *Please see* Midwest 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. In the December 2004 version of the permit, the word *consecutive* had been replaced with *in a row*, but the concept is the same.

79. The Agency has provided no explanation for this change. As the actual opacity exceedance could alone comprise the "incident," Midwest Generation believes that it is more appropriate to retain the word *consecutive* in the condition (or add it back in to 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, Midwest Generation suggests that the Agency add a two-hour timeframe during which these six or more six-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). Midwest 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.

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

(viii) Alternative Fuels Requirements

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

82. 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,[16] for the Agency to include specific recordkeeping requirements in the compliance section creates a disconnect and uncertainty regarding where the permittee is to find out what it is supposed to do.

83. 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 are 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. . . ,"

[16] 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.

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.

84. Midwest Generation requests that the Board order the Agency to place Conditions 7.1.5(b)(ii)-(iv) in more appropriate sections of the permit and to clarify Condition 7.1.11(c)(ii).

(ix) Stack Testing Requirements

85. 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, Midwest 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.

86. Midwest Generation requests that the Board order the Agency to delete Condition 7.1.7(e) from the permit.

(x) Monitoring and Reporting Pursuant to NSPS

87. It appears from various conditions in the permit that the Agency believes that Waukegan is subject to NSPS monitoring and reporting requirements pursuant to the Acid Rain Program. Midwest Generation's review of the applicable requirements under Acid Rain do not reveal how the Agency arrived at this conclusion. This is an example of how a

statement of basis by the Agency would have been very helpful. 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.

88. 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 Midwest Generation's analysis of the Acid Rain requirements, the permit, and the Board's regulations, it must also appeal Condition 7.1.5(c), which exempts Waukegan from the requirements of 35 Ill.Adm.Code 201.Subpart L based upon the applicability of NSPS. NSPS does not apply to the Waukegan Generating Station through the Acid Rain Program, and so this condition is inappropriate.

89. Conditions 7.1.10-2(b)(i), 7.1.10-2(c)(i), and 7.1.10-2(d)(i) require Midwest 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 Midwest Generation's boilers. Section 60.7(d) is not an "applicable requirement," as the boilers are not subject to the NSPS. For Midwest 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 beyond the limitations of gapfilling. Moreover, contrary to Condition 7.1.10-2(d)(iii), Midwest

Generation does not find a regulatory link between the NSPS provisions of 40 CFR 60.7(c) and (d) and the Acid Rain Program..

90. Midwest Generation requests that the Board order the Agency to delete reference to 40 CFR 60.7(d) from Conditions 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). In addition, Midwest Generation requests the Board to order the Agency to delete Condition 7.1.5(c) in its entirety.

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

91. 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 Midwest 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.

92. First, 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. In fact, it is not. Midwest Generation has been capturing opacity data in compliance with § 212.123(b) for a number of months as of the issuance date of the permit. Arguably, then, Midwest Generation has nothing to report to the Agency pursuant to Condition 7.1.12(a)(ii)(E), because no change is occurring. However, Midwest Generation suspects the Agency assumes that it has not made this so-called change yet. Midwest Generation requests clarification from the Board that such reporting is not required where the permittee has already accomplished the "change" in data capture prior to issuance of the CAAPP permit and that no recordkeeping and data handling practices must be submitted for Agency review.

93. Second, as with Midwest 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 Midwest 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. Midwest Generation is quite capable of taking the responsibility for the data capture and recordkeeping necessary for compliance with § 212.123(b).

94. Moreover, while Condition 7.1.12(a)(ii)(E) says that the Agency will review the recordkeeping and data handling practices of the source, 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 Waukegan Generating Station is required to operate a COMS, all of the opacity readings captured by the COMS are recorded and available to the Agency. The Agency has had ample opportunity to determine whether Waukegan has complied with § 212.123(b). Midwest Generation's providing 15 days' prior notice of its "change" to accommodate § 212.123(b) will not improve the Agency's ability to determine Waukegan's compliance.

95. 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%.

96. 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 the proper sections of the permit, 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, for the Agency to include specific recordkeeping requirements in the compliance section creates a disconnect and uncertainty regarding where the permittee is to find out what he or she is supposed to do.

97. Midwest Generation requests that the Board order the Agency to delete Condition 7.1.12(a)(ii) from the permit. Additionally, if the Board does not order the Agency to delete Conditions 7.1.10-3(a)(i) and (ii) from the permit pursuant to other requests raised in

this appeal, Midwest 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

98. 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 fly ash." This underscores Midwest Generation's point that the fly ash handling system is not a process.

99. Because the fly ash operations at the Waukegan Station are not a process, they are not subject to the process weight rate rule at § 212.321(a). Section 212.321(a) is not an applicable requirement under Title V, since the fly ash operation is not a process.[17] The process weight rate rule is not a legitimate applicable requirement and so is included in the permit impermissibly. 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.

100. 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).

101. Midwest Generation requests that the Board order the Agency to substitute the word *operation* for *process* (and the appropriate derivations) in Section 7.4 of the permit, to delete the Conditions 7.4.4(c), 7.4.9(b)(ii), and all other references to the process weight rate

[17] Midwest Generation does not dispute the Agency's insistence that fly ash handling is subject to the process weight rate rule because it cannot comply; in fact, Midwest Generation complies by an impressive margin.

rule, including in Section 10, and to add Condition 7.4.5(b) identifying § 212.321(a) as a requirement that is not applicable to Waukegan.

(ii) Water Sprays for Coal Processing Operations

102. Midwest Generation employs water spraying as another means of controlling emissions from the coal processing operations. These should be listed at Condition 7.3.1. Midwest Generation requests that the Board order the Agency to add water sprays to the description of the emissions control practices at the Waukegan Generating Station at Condition 7.3.1.

(iii) Fugitive Emissions Limitations and Testing

103. The Agency has applied the opacity limitations of § 212.123 to sources of fugitive emissions at the Waukegan 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. 42.

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 clearly 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 7.3.7(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. Midwest Generation cannot comply with Method 1. The stacks and vents for such sources 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. Midwest Generation requests that the Board order the Agency to delete Conditions 7.2.4(b), 7.2.7(a), 7.2.12(a), 7.3.4(b), 7.3.7(a), 7.3.7(b), 7.3.12(a), 7.4.3(b), 7.4.7(a), 7.4.7(b), and 7.4.12(a) to the extent that they require compliance with § 212.123 and Method 9 or stack testing and, thereby, compliance with Methods 1 and 5.

(iv) Temporary Fly Ash Storage "Facility"

109. Condition 7.4.3(b)(iii) refers to a storage "facility" for temporary storage of fly ash should that become necessary. The implication of the word *facility* is a building or other type of enclosure. Midwest Generation objects to the use of the word *facility* without clarification that it includes temporary storage in piles on the ground. Midwest Generation requests that the Board order the Agency to clarify Condition 7.4.3(b)(iii) appropriately, as discussed above.

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

110. The final permit provides at Condition 7.4.7(a)(ii) that Midwest 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%.

111. 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)[18]) or (2) reducing the threshold from 10% to 5%. Because the Agency has not provided an explanation for this change at the time that the change was made to provide Midwest Generation with the opportunity, at worst, to try to understand the Agency's rationale or to comment on the change, 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 Midwest Generation must appeal this underlying condition as well.

112. Without conceding its appeal of these conditions as to their appropriateness at all, as stated above, Midwest Generation requests that if Condition 7.4.7(a) must remain in the permit the Board order the Agency to amend Condition 7.4.7(a)(ii) to reflect the 10%

[18] "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 six-minute averages) are both less than 10.0 percent." (Emphasis added.)

threshold, rather than the 5% threshold, for discontinuation of the opacity test, although Midwest Generation specifically does not concede that Method 9 measurements are appropriate in the first place..

(vi) 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 [SIC] day operation of the affected operations. . . ." The Agency provides no basis for this requirement other than a discussion, after the permit has been issued, in the Responsiveness Summary at page 19-20. 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.[19]

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 clearly exceeds any gapfilling authority that may somehow apply to these observations of fugitive dust. The requirement must be stricken from the permit.

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

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 boiler. In any given area of the station, station personnel are constantly alert to any "abnormal" operations during the course of the day. Although these are not formal inspections, they are informal inspections and action is taken to address any "abnormalities" observed as quickly as possible. Midwest Generation's best interest is 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*. How these frequencies of inspections accomplish that end is completely obscure. Rather, these conditions appear to be administrative compliance traps for work that is done as part of the normal activities at the station.

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.

117. As these operations must be inspected when they are not operating, and as they would not operate during an outage of the boilers, it is not necessary for the Agency to dictate the frequency of the operations. Rather, it is logical that these inspections should be linked to boiler outages. 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 long before the 15- or nine- month inspections.

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." 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 appears superfluous. However, 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." [20] The Agency has provided no explanation as to why the frequency of the inspections has been increased.

120. Midwest Generation requests that the Board order the Agency to delete those provisions of Conditions 7.2.8(a), 7.3.8(a), and 7.4.8(a), and the corresponding recordkeeping conditions, 7.2.9(d), 7.3.9(c), and 7.4.9(c) that dictate who should perform inspections of these operations, and to delete the requirement contained in these conditions that Midwest Generation inspect before and after maintenance and repair activities. Additionally, Midwest

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

Generation requests that the Board order the Agency to alter the frequency of the inspections contained in Conditions 7.2.8(b), 7.3.8(b), and 7.4.8(b) to correspond to boiler outages.

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

121. The demonstrations confirming that the established control measures assure compliance with emissions limitations, required at Conditions 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 are unnecessarily redundant, and resubmitting the demonstrations pursuant to Conditions 7.3.9(b)(iii) and 7.4.9(b)(iii) serves no compliance purpose. Also, Conditions 7.3.9(b)(iii) and 7.4.9(b)(iii) rely upon Condition 5.6.2(d), contested herein. Conditions 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.

122. Moreover, Conditions 7.2.9(b), 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. Midwest 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.

123. Conditions 7.2.9(d)(ii)(B), 7.3.9(c)(ii)(B), and 7.4.9(c)(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.

124. 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 Midwest Generation to provide the magnitude of PM emissions during an incident where the coal handling operation continues without the use of control measures. Midwest 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.

125. The Agency uses the word *process* in Condition 7.2.9(f)(ii) rather than *operation*,[21] perhaps because use of *operation* at this point would be repetitious. While this may seem a very 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, can be a buzzword that implicates the applicability of the process weight rate rule. Midwest Generation wants there to be no possibility that anyone can construe coal handling as a process subject to the process weight rate rule. Therefore, Midwest Generation has repeatedly requested that the Agency substitute *operation* or some synonym for *process* in this context.

126. The Agency provided no rationale and still provides no authority for its inclusion of Conditions 7.2.9(d)(i)(B), 7.3.9(c)(i)(B), and 7.4.9(c)(i)(B), observations of accumulations of coal fines and 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 as to why the provision is even there. 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 plant, which is required to implement operating programs to minimize emissions of fugitive dust. Accumulations of fines . . . . can potentially contribute to emissions of fugitive dust, as such accumulations could become airborne as a result of vehicle traffic or the wind.

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

Responsiveness Summary, p. 20. The heart of the matter lies in the next-to-last sentence: "the plant which is 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.

127. Observing accumulations of fines is not an applicable requirement; therefore, its inclusion in the permit violates Title V and *Appalachian Power* by imposing a new substantive requirement upon the permittee through the Title V permit. Additionally, observing accumulations of fines cannot reasonably be included under gapfilling, as it is not necessary to assure compliance with the permit. The assurance of compliance with the fugitive dust requirements rests within the adequacy of the fugitive dust plan, which must be submitted to the Agency for its review, pursuant to § 212.309(a), and periodically updated, pursuant to § 212.312. If the permittee does not comply with its fugitive dust plan or the Agency finds that the fugitive dust plan is not adequate, there are procedures and remedies available to the Agency to address the issue. However, those remedies and procedures do not fall within the scope of gapfilling to the extent that the Agency can require by permit what must be included in the fugitive dust plan beyond the specifications of the regulation. Likewise, the Agency cannot supplement the fugitive dust plan, the regulatory control plan, through the permit.

128. 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 one-hour trigger for additional recordkeeping when operating during malfunction/breakdown 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.

129. Midwest Generation requests that the Board order the Agency to delete Conditions 7.2.9(d)(i)(B), 7.2.9(d)(ii)(B), 7.3.9(b)(ii), 7.3.9(b)(iii), 7.3.9(c)(i)(B), 7.3.9(c)(ii)(B), 7.4.9(b)(ii), 7.4.9(b)(iii), and 7.4.9(c)(i)(B), 7.4.9(c)(ii)(B); add the concept of estimating the magnitude of PM emissions to Condition 7.2.9(e)(ii), 7.2.9(e)(vii), 7.3.9(d)(ii), 7.3.9(d)(vii), and 7.4.9(d)(ii); 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).

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

130. 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 Midwest Generation employs to control fugitive emissions at the Waukegan 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. Midwest Generation notes also, consistent with the discussion below, 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.

131. 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. Midwest Generation believes it is beyond the scope of the Agency's authority to require reporting of suppositions of exceedances.

132. 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 6-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. . . ."[22] 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. The way these two conditions are written, the permittee cannot tell whether five six-minute averaging periods of excess opacity readings do or do not require reporting. In older versions of the permit, five six-minute averaging periods did not trigger reporting. In fact, the August 2005 proposed version 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

[22] With no close to the parentheses in the condition.

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.

133. 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. Midwest 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[23] in all three sections – 7.2.10(b)(i)(A), 7.3.10(b)(i)(A), and 7.4.10(b)(i)(A). *C.f.*, 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 as to why they should be different, and given the complexities of the permitting requirements generally, having these reporting timeframes different adds another and an unnecessary layer of potential violation trips for the permittee. No environmental purpose is served by having them different.

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

134. 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 Midwest Generation aggregate the duration of all incidents during the preceding calendar quarter when the operations continued during malfunction/breakdown with excess emissions. Midwest 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 not at all apparent to Midwest Generation why the Agency needs this additional particular bit of data. The Agency has not identified any applicable requirement that serves as the basis for this provision other than the general reporting provisions of Section 39.5 of the Act. It is not apparent that this requirement serves any legitimate gapfilling purpose. For these reasons, these conditions should be deleted from the permit.

135. 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[24] require reporting only if there are excess emissions, and Condition 7.1.10.3, which addresses malfunction/breakdown specifically, 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.

136. Midwest 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 an 8-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

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

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. Turbines
(Section 7.5)

(i) Observations During Startup

137. Condition 7.5.3(b)(ii)(A), under the startup provisions, requires Midwest Generation to observe the operation of the turbines to confirm proper operation and to identify any maintenance issues to be addressed prior to the next startup. This condition is confusing, in the first instance, because it appears to address operation of the turbine but is organizationally located in a condition addressing startup. The ambiguity should be corrected.

138. Assuming the condition is about startup, it presents a number of practical problems, which the Agency recognized in the recordkeeping provisions at 7.5.9(d)(ii)(D): "If the startup of the turbine was observed. . . ." (Emphasis added.) The turbines are usually started by remote operators responding to load demands. Station operators may not know far enough in advance of a startup of the turbines that they are to be utilized and so cannot necessarily observe each operation, let alone each startup. If the condition is about operation, Condition 7.5.6(b)(i) addresses the requirement the Agency appears to be trying to express. Condition 7.5.6(b)(i) requires Midwest Generation to formally observe operation of the turbine at least every six months to ensure proper operation.

139. Condition 7.5.3(b)(ii)(A) is confusing and possibly redundant. It should be deleted from the permit.

140. Midwest Generation requests that the Board order the Agency to delete Condition 7.5.3(b)(ii)(A) from the permit.

(ii) Observations During Operation

141. As with Conditions 7.2.8(a), 7.3.8(a), and 7.4.8(a), the Agency has specified in Condition 7.5.6(b)(i) which of Midwest Generation's personnel may perform the task identified in the condition: " . . . shall be formally observed by operating personnel for the turbine or a member of the Permittee's environmental staff. . . ." Who performs the task is not something that the Agency can prescribe. The Agency already requires that persons who perform certain tests, such as a Method 9 reading of opacity, be certified to do so. The requirement that the personnel performing an opacity observation, as in Condition 7.5.6(b)(i), be certified to do so is implicit in the requirement that the opacity reading be "formal," implying that it should be performed pursuant to Method 9. The Agency has no basis for spelling out which of Midwest Generation's personnel may perform required activities. If Midwest Generation chooses, the persons performing this observation may not be its own engine operator or members of its environmental staff, yet the observations would be valid.

142. There is no applicable requirement that specifies that the engine operator or the environmental staff must be the personnel who observe opacity and operation of the turbines. Specifically identifying which personnel may perform these activities is not within the scope of gapfilling, as it is not necessary to ensure compliance with the permit. Therefore, this requirement is arbitrary and capricious and should be stricken from the permit.

143. Midwest Generation requests that the Board order the Agency to delete the phrase "by operating personnel for the turbine or a member of Permittee's environmental staff" from Condition 7.5.6(b)(i).

(iii) Observations of Excess Opacity

144. Condition 7.5.10.(a)(i)(A) requires reporting when the opacity limitation may have been exceeded. That a limitation may have been exceeded does not rise to the level of an actual exceedance. Midwest Generation believes it is beyond the scope of the Agency's authority to require reporting of suppositions of exceedances.

145. Also in Condition 7.5.10(a)(i)(A), the Agency has deleted the word *consecutive* as a trigger for reporting opacity and potential PM exceedances during an "incident" in the final version of the permit. Versions prior to the July 2005 version include that word. Its deletion completely changes the scope and applicability of the condition. *Please see* Midwest 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. In the December 2004 version of the permit, the word *consecutive* had been replaced with *in a row*, but the concept is the same.

146. Midwest Generation requests that the Board order the Agency to delete the concept of requiring Midwest Generation to report mere suppositions in Condition 7.5.10(a)(i)(A) and to add a timeframe during which excess opacity was observed before reporting is triggered.

(iv) Fuel SO_2 Data

147. The basis for determining compliance with the SO_2 limitation provided in Condition 7.5.12(b) is USEPA's default emissions factors, which are to be used only when better data is not available. The condition should allow Midwest Generation to rely on such

better data, including characteristics of the fuel determined through sampling and analysis, as sampling and analysis will provide better data for determining SO_2 emissions.

148. Midwest Generation requests that the Board order the Agency to amend Condition 7.5.12(b) to provide for the necessary flexibility for Midwest Generation to rely on better data than default emissions factors.

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

149. The permit includes requirements that Midwest 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) and 7.5.9(a)(ii) require logs for each control device or for the permitted equipment without regard to excess emissions or malfunction/breakdown. Conditions 7.1.9(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 Midwest 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.

150. 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.

151. 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." Midwest Generation does not understand what this means. These conditions are ambiguous, without clear meaning, and should be deleted from the permit.

152. 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.

153. Midwest Generation requests that the Board order the Agency to delete 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), and 7.5.9(a)(ii).

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

154. 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. Included as they are, they potentially expose the permittee to allegations of violations based upon multiple conditions, when those conditions are mere redundancies. This is inequitable. It is arbitrary and capricious and such conditions in Section 7 should be deleted from the permit.

155. More specifically, Conditions 7.1.7(c)(i), 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(e), 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 7.3.7(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.

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

I. Standard Permit Conditions
(Section 9)

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

158. Midwest Generation requests that the Board order the Agency to clarify the limitations on surveillance in Condition 9.3 as set forth above.

WHEREFORE, for the reasons set forth herein, Petitioner Midwest Generation requests a hearing before the Board to contest the decisions contained in the CAAPP permit issued to Petitioner on February 7, 2006, for the Waukegan Generating Station. The permit contested herein is not effective pursuant to Section 10-65 of the Administrative Procedures Act (5 ILCS 100/10-65). Midwest Generation's state operating permit issued for the Waukegan Generating Station will continue in full force and effect, and the environment will not be harmed by this stay. Further, Petitioner requests that the Board remand the permit to the Agency and order it to appropriately revise conditions contested herein and any other provision the validity or

applicability of which will be affected by the deletion or change in the provisions challenged herein and to reissue the CAAPP permit.

Respectfully submitted,

MIDWEST GENERATION, LLC,
WAUKEGAN GENERATING STATION

by:

/s/ **Kathleen C. Bassi**

One of Its Attorneys

Dated: March 13, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of March 2006, I did serve, by electronic filing, by electronic mail, and by U.S. Mail postage prepaid, a true and correct copy of the attached **APPEAL OF CAAPP PERMIT** and **APPEARANCES OF SHELDON A. ZABEL, KATHLEEN C. BASSI, STEPHEN J. BONEBRAKE, JOSHUA R. MORE,** and **KAVITA M. PATEL,** upon the following persons:

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