

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

MIDWEST GENERATION, LLC,)	
WILL COUNTY GENERATING STATION))	
)	
Petitioner,)	
)	PCB No. 2006-156
v.)	(Permit Appeal - Air)
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

NOTICE

To:	Dorothy Gunn, Clerk	Sheldon A. Zabel
	Illinois Pollution Control Board	Kathleen C. Bassi
	100 West Randolph Street	Stephen J. Bonebrake
	Suite 11-500	Kavita M. Patel
	Chicago, Illinois 60601	Schiff Hardin, LLP
		6600 Sears Tower
	Bradley P. Halloran	233 South Wacker Drive
	Hearing Officer	Chicago, Illinois 60606
	James R. Thompson Center,	
	Suite 11-500	
	100 West Randolph Street	
	Chicago, Illinois 60601	

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

Respectfully submitted by,

_____/s/_____
Robb H. Layman
Assistant Counsel

Dated: April 25, 2006
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 524-9137

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)	
Respondent.)	

APPEARANCE

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

Respectfully submitted by,

_____/s/_____
Robb H. Layman
Assistant Counsel

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)	
Respondent.)	

APPEARANCE

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

Respectfully submitted by,

_____/s/_____
Sally Carter
Assistant Counsel

Dated: April 25, 2006
Illinois Environmental Protection Agency
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P.O. Box 19276
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(217) 782-5544

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
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MIDWEST GENERATION, LLC,)	
WILL COUNTY GENERATING STATION)	
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Petitioner,)	
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v.)	PCB No. 2006-156
)	(Permit Appeal - Air)
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

**RESPONSE IN OPPOSITION TO PETITIONER'S
REQUEST FOR STAY**

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA" or "Respondent"), by and through its attorneys, and pursuant to 35 Ill. Adm. Code 101.500(d), files with the Illinois Pollution Control Board ("Board") this Response in Opposition to the Petitioner's, MIDWEST GENERATION, LLC, (hereinafter "Midwest Generation" or "Petitioner"), request for stay filed in conjunction with this cause. In support of this Response, the Respondent states as follows:

1. On March 3, 2006, the Illinois EPA granted a construction permit, Construction Permit No. 06020009, to Midwest Generation for the construction of new wet dust extractor control devices for the Unit 3 and Unit 4 coal bunkers at the Will County Generating Station located in Romeoville, Illinois.
2. On or about April 7, 2006, Petitioner filed a petition with the Board seeking an appeal of the Illinois EPA's permitting decision. The Illinois EPA received an electronic version of the appeal on the same date. Formal notice of the appeal was served on the Illinois EPA on April 11, 2006.

3. As part of its Petition, Petitioners seek a stay of the construction permit's contested conditions. Among other things, the Petition devotes several paragraphs to the purported effectiveness of the permit and the Board's recent rulings in the Clean Air Act Permit Program ("CAAPP") appeal proceedings for various coal-fired utility plants in Illinois, including one involving Midwest Generation's Will County Generating Station.

4. In the Board's CAAPP proceeding for this same facility, Petitioner argued that the CAAPP permitting decision by the Illinois EPA was subject to the Illinois Administrative Procedure Act's automatic stay provision, 5 *ILCS 100/10-65(b)(2004)*, thus precluding any of the CAAPP permit's conditions from becoming effective until the Board renders a final ruling on the appeal.

5. In contrast with the aforementioned CAAPP appeal, Petitioner does not seek a blanket stay of the construction permit in this cause. Instead, Petitioner seeks only a limited stay of the permit, presumably because there are certain provisions of the construction permit that Midwest Generation desires to be effective immediately, rather than awaiting the final judgment of the Board regarding the issues raised in the appeal. The permit's construction authorization, which provides a permittee with the requisite legal authority to commence construction of an emission source, may well be a motivating factor for Midwest Generation.

6. Petitioner relies exclusively on the Board's prior CAAPP rulings to support its request for a partial stay of the construction permit. Specifically, Petitioner points to the language contained in a footnote of the Board's ruling, wherein the Board sought to distinguish a prior stay ruling tailored only to a permit's permit conditions. *See, Petition at pages 3-4, citing Midwest Generation, LLC, Will County Generating*

Station v. Illinois EPA, PCB No. 06-60, note 3 (February 16, 2006). In that instance, the Board explained that it could find “nothing in the Act or the APA that prevents a permittee from electing *not* to avail itself of the APA stay.” *Id.* According to the Petitioner, this language confirms the existence of the Board’s discretionary stay authority, as distinct from the automatic stay provision under the APA, whenever the “permittee so requests.” *Petition at page 4.* The Illinois EPA believes such an interpretation is plainly erroneous and, in any event, is irrelevant here.

7. The footnote from the Board’s order in the earlier CAAPP proceeding was purely *dictum* and, judging from its context, was simply a passing remark. The passage reads as though the Board was merely distinguishing its pronouncement regarding the applicability of the APA’s automatic stay provision from an earlier exercise of discretionary stay authority in *Soyland Power Cooperative, Inc., v. Illinois EPA*, PCB 06-55 (January 5, 2006). Indeed, nothing in the footnote, either factually or legally, was essential to the Board’s embrace of the automatic stay provision to the pending CAAPP appeals.

8. Even if the footnote did not constitute *dictum*, it should not be relied upon as good authority. Unless the Board’s reliance upon *Borg-Warner Corporation v. Mauzy*, 427 N.E.2d 415 (3rd Dist. 1981) is fundamentally misplaced, the APA’s automatic stay provision, which is codified within a section devoted to licenses, is independent of the statute’s contested case procedures. While the APA contains a waiver clause for any provisions “concerning contested cases,” it does not expressly allow for such a mechanism for licensing procedures. *See, 5 ILCS 100/10-70* (2004). This distinction is significant in the context of statutory construction, where the express mention of one

thing or object implies the exclusion of all others. *Compare, Mattis v. State Universities Retirement System*, 816 N.E.2d 303 (Ill. 2004); *Browning-Ferris Industries, Inc. of Iowa v. Pollution Control Board*, 468 N.E.2d (3rd Dist. 1984). In this regard, the General Assembly cannot be said to have authorized waiver of the APA's automatic stay provision through language that specifically speaks only to contested cases.

9. The present case does not come before the Board as an appeal of a CAAPP permit, which is tantamount to a new permit for a major source that has demonstrated an on-going existence. Rather, the appeal evolves from the issuance of a state construction permit. This latter category of permits does not possess the attributes of continuity that resulted in the Board's rulings regarding the APA's applicability in CAAPP appeals. *See, 5 ILCS 10/65(b)(2004)*. As such, the APA's automatic stay provision does not manifestly apply to construction permits. Lacking the statutory dictates of the APA, the Board retains its discretion to review a request for stay in accordance with its historical practice.¹

10. In view of the analytical framework discussed above, the Board should evaluate Petitioner's stay request by looking to the traditional factors frequently considered by the Board in prior proceedings. *See, Bridgestone/Firestone Off-road Tire Company v. Illinois EPA*, PCB 02-31 at page 3 (November 1, 2001); *Community Landfill Company and City of Morris v. Illinois EPA*, PCB No. 01-48 and 01-49 (consolidated) at page 5 (October 19, 2000), citing *Junkunc v. S.J. Advanced Technology & Manufacturing*, 498 N.E.2d 1179 (1st Dist. 1986).

¹ Because the Board's rulings in the recent CAAPP appeals are clearly inapposite here, the Petitioner's attack on the Illinois EPA's conduct in issuing the subject permit (i.e., characterized as "subversive and disrespectful of the Board's [stay order]... regarding the applicability of the APA to appealed permits") is shown to be specious. *See, Petition at page 7.*

11. Some of those traditional factors are undoubtedly presented in the Petition. The Illinois EPA generally acknowledges that Petitioner should not be required to expend significant costs, or run the risk that its appeal rights be cut short, in complying with the contested conditions of the permit prior a Board ruling on the merits of the appeal. And for the reasons discussed in the responsive pleadings from the CAAPP appeals, the Illinois EPA generally favors an approach of limiting stay relief to a permit's contested conditions.

12. Notwithstanding the aforementioned, stay requests should be reviewed on a case-by-case basis. A careful review of the contested conditions raised in this case reveals that the requested relief is overly-broad. Petitioner's stay request would unnecessarily afford stay protection to matters unrelated to the substance of the appeal. The Illinois EPA is therefore unable to support the Petitioner's request in this cause due to the slipshod manner in which relief has been pled.

13. One example of this problem is found in Petitioner's discussion of Special Condition 5(a)(i). The challenged portion of the condition is found in the second sentence and addresses the type of personnel (i.e., those not directly involved the day-to-day operations) that must be involved in periodic inspections of the affected operations. *See, Petition at page 7.* However, the heart of the provision is the establishment of the inspections themselves, as shown by the first sentence of the condition. *See, Petitioner's Exhibit 1, page 3.* Petitioner does not challenge this portion of the permit condition and, judging from those conditions that will not be subject to stay protection, Petitioner appears to embrace some of the record-keeping obligations set forth in the subsequent sub-paragraph. Nonetheless, Petitioner seeks a stay from the entire provision, thereby

attempting to evade the unchallenged part of the condition relating to periodic inspections.

14. Petitioner challenges Special Condition 6(a)(i)(A) of the permit, together with another stand-alone subpart of the same condition, on the grounds that the Illinois EPA has erroneously applied the New Source Performance Standards for Coal Preparation Plants found at 40 CFR Part 60, Subpart Y. *Petition at pages 13-14.* Special Condition 6(a)(i)(A) of the permit also generally provides that opacity be determined in accordance with 40 CFR 60.8. *Petitioner's Exhibit 1, page 4.* The Petition is silent with respect to the latter testing requirements and the Petitioner's selective challenge to only that portion of Special Condition 6 relating to Subpart Y clearly implies that it intends that the general testing obligations remain enforceable. However, instead of separating out the contested portion thereto, Petitioner inexplicably seeks a stay of Special Condition 6(a)(i)(A) in its entirety.

15. Petitioner appeals one of the record-keeping requirements in Special Condition 7(d)(ii) on the basis that Midwest Generation lacks the ability to measure the "magnitude" of PM emissions whenever the affected operation is operated in the absence of control measures. *See, Petition at page 6.* The same subpart also calls upon Midwest Generation to maintain records regarding circumstances surrounding the incident itself. *See, Petitioner's Exhibit 1, page 6.* Despite the outward appearance from the Petition that nothing objectionable lies with the latter requirements,² Petitioner seeks a stay from the entire permit condition. As with the previous examples, the language concerning the broader reporting requirements is not so interwoven or connected with the contested

² It is also apparent that Petitioner does not wish to stay the related record-keeping requirements of Special Condition 7(d)(i), (iii), (iv), (v) and (vi).

language as to likewise require a stay; the objectionable part of the permit condition can easily be segregated from the larger part of the condition.

16. No good cause can exist for Petitioner to obtain stay relief beyond the scope of the appeal's contested language. Because of the unnecessarily broad scope of stay relief sought in the Petition, the Illinois EPA cannot support Petitioner's request at this time.

WHEREFORE, the Illinois EPA urges the Board to deny Petitioner's request for stay or order such other relief as is deemed just and appropriate.

Respectfully submitted by,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

_____/s/_____
Robb H. Layman
Assistant Counsel

Dated: April 25, 2006
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 524-9137

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of April 2006, I did send, by electronic mail, the following instruments entitled **APPEARANCES and RESPONSE IN OPPOSITION TO PETITIONER'S REQUEST FOR STAY** to:

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

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

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

Sheldon A. Zabel
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_____/s/_____
Robb H. Layman
Assistant Counsel