

**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 **MOTION FOR LEAVE TO FILE SURREPLY AND SURREPLY** 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: May 26, 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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	)	
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**MOTION FOR LEAVE TO FILE SURREPLY**

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Illinois EPA” or “Respondent”), by and through its attorneys, and moves the Illinois Pollution Control Board (“Board”) for leave to file a Surreply to the Petitioner’s, MIDWEST GENERATION, LLC, (hereinafter “Midwest Generation” or “Petitioner”), recent responsive pleading concerning its Request for Stay. In support of this Motion, 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 coalAs part of its Petition, Dynegy Midwest sought a stay of the effectiveness of the entire CAAPP permit.

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. The Illinois EPA electronically filed a Response in Opposition to the Petitioner's Request for Stay with the Board on April 25, 2006.

4. On or about May 12, 2006, Petitioner filed a Motion for Leave and an accompanying Reply to the Illinois EPA's Response in Opposition to Petitioner's Request for Stay with the Board. 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 May 15, 2006.

5. In accordance with the Board's procedural requirements, the Illinois EPA possesses no formal right to file additional responsive pleadings except as may permitted by the Board or a hearing officer to prevent material prejudice. Any such reply or surreply must be filed with the Board within 14 days after service of the response. *See, 35 Ill. Adm. Code 101.500(e).*

6. In its recent Reply, Petitioner asserts several legal-related arguments concerning the Illinois Administrative Procedure Act ("APA"), *5 ILCS 100/10-65(b)(2004)*, that are, in fact, misstatements of applicable law. This filing is necessary to avoid undue prejudice arising from those misstatements. The Board has previously held that a surreply is an appropriate filing when brought to correct misstatements contained in briefing documents. *See, Illinois Ayers Oil Company v. Illinois EPA, PCB No. 03-214, UST Appeal (August 5, 2004).*

**WHEREFORE**, the Illinois EPA respectfully seeks leave from the Board to file the attached Surreply in the above-captioned matter.

Respectfully submitted by,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,

\_\_\_\_\_/s/\_\_\_\_\_  
Robb H. Layman  
Assistant Counsel

Dated: May 26, 2006  
Illinois Environmental Protection Agency  
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ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

**SURREPLY**

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Illinois EPA”), by and through its attorneys, and files this Surreply to correct several misstatements expressed by the Petitioner, MIDWEST GENERATION, LLC, (hereinafter “Midwest Generation” or “Petitioner”), in its Motion for Leave and an accompanying Reply (“Reply”) to the Illinois EPA’s Response in Opposition to Petitioner’s Request for Stay filed with the Illinois Pollution Control Board (“Board”) on May 12, 2006.

**ARGUMENT**

In its Reply, Petitioner challenges certain assertions that were presented in the Illinois EPA’s Response in Opposition to the Petitioner’s Request for Stay (“Response”) that was filed with the Board on April 25, 2006. The focus of the relevant issue is the automatic stay, contested case and waiver provisions of the Illinois Administrative Procedure Act (“APA”), *5 ILCS 100/10-5-10/70 (2004)*. As set forth below, certain arguments raised by Petitioner in its Reply misstate applicable law and should therefore be rejected by the Board in its consideration of the pending Request for Stay.

**I. The permitting decision challenged on appeal does not involve a state operating permit for the Will County Generating Station.**

In its Response, the Illinois EPA urged the Board to reject Petitioner's argument that the APA's automatic stay provision applies to the state construction permit challenged here on appeal. The Illinois EPA sought to distinguish between the state operating permits issued under the Illinois' Title V program, which represented a new type of license for an on-going activity, from the current state construction permit for a new emissions control equipment. It is the Illinois EPA's position that a state construction permit is not the type of new license for a continuous activity that is encompassed by the APA's automatic stay provision. *See, 5 ILCS 100/10-65(b)(2004)*.

Petitioner argues in its Reply that the construction permit issued by the Illinois EPA on March 3, 2006, was, in essence, a combined construction and operating permit. According to Petitioner, the permitting decision included conditions relating to existing emissions sources (i.e., coal bunkers) and was not confined to the installation of new wet dust extractor control devices. To the extent that the permit addresses an "activity of a continuing nature," Petitioner reasons that the appealed permit is both a construction and operating permit, thus falling within the ambit of the APA's automatic stay provision. Petitioner's argument misconstrues the permitting requirements for CAAPP emission sources.

Contrary to Petitioner's assertion, the Illinois EPA does not argue that "there is no activity of a continuing nature" relative to the subject permit. Indeed, Petitioner is correct to observe that certain conditions of the construction permit, namely those relating to the "affected operations," necessarily assume an operational aspect. This characteristic of a construction permit is perhaps owing to the fact that the addition of control equipment to

an existing operation cannot usually occur without, in some way, affecting the existing or affected emission units. It is also consistent with the Board's permitting regulations, which require a permittee seeking a construction permit for control equipment to submit information in its application concerning "processes to which the... air pollution control equipment is related." *See*, 35 Ill. Adm. Code 201.152.

While a construction permit may possess certain operational attributes, it does not magically convert a construction permit into an operating permit. The relevant permitting regulations speak in terms of permit type. Midwest Generation sought and obtained a construction permit for the installation of new wet dust extractor control devices. *See generally*, Administrative Record at pages 1-92, 95-109 and 152-164. The company did not seek, and the Illinois EPA, in its discretion, did not issue, a joint construction and operating permit authorized by 35 Ill. Adm. Code 201.163. Furthermore, CAAPP emission sources are required to obtain a construction permit for new emission sources or control equipment but are not subject to the requirements for obtaining a garden-variety operating permit. *See*, 35 Ill. Adm. Code 201.207. In this situation, the relevant permitting scheme for CAAPP emission sources envisions a subsequent amendment to an existing CAAPP permit, not the issuance of a state operating permit. Thus, Petitioner's notion that it has obtained an operating permit through the vessel of a construction permit is fallacious.

Petitioner's argument also reads too much into the APA's statutory scheme. The APA does not expressly contemplate a bifurcated licensing process where one portion of the permit is subject to the APA's requirements and the other portion is not. While the concept bears some resemblance to the Board's discretionary stay authority, in which

certain conditions of the permit can be stayed but others are not, nothing in the APA's language indicates that the automatic stay provision can apply on a partial basis. Rather, the focus of the provision is again placed on permit type, which, in the present context, means a permit renewal or a new permit for existing sources. The permit appealed in this proceeding does not satisfy either of these two types of permit. As previously mentioned, Petitioner made an unambiguous request for a construction permit for new control equipment, not an operating permit, and the Illinois EPA subsequently granted the Petitioner's request consistent with the permitting scheme devised by the Board for CAAPP emission sources.

**II. The present appeal is not a "contested case" under the APA and, as such, Petitioner cannot repudiate the plain meaning of the statute's waiver provision.**

Petitioner appears befuddled by the Illinois EPA's argument concerning the separate nature of the APA's licensing and contested case provisions. The main thrust of the Illinois EPA's position is that the APA's waiver provision only authorizes a waiver of the contested case procedures, not the licensing procedures that have been presented in both this proceeding and the separate CAAPP appeals involving Midwest Generation and the other coal-fired power plants. As such, the Illinois EPA argued that Petitioner's reliance upon prior Board *dicta* concerning waiver of the APA's automatic stay provision is misplaced.

Petitioner attempts to refute the Illinois EPA's argument by contending that the present appeal is, in and of itself, a "contested case." This argument is erroneous. Permitting decisions under the Illinois Environmental Protection Act ("Act"), as where the Illinois EPA issues a permit that is then appealed to the Board, are only subject to the



APA's contested case procedures if and when the relevant permitting "is required by law to be preceded by notice and an opportunity for a hearing." *See*, 5 ILCS 100-10-65(a)(2004). The focal point of this language lies with the requirements that accompanying the Illinois EPA's permitting issuance, not the Board's consideration of whether a particular permit issued by the Illinois EPA can be sustained and made final on appeal. Section 40(a)(1) certainly does not satisfy the two-prong requirement. While the provision may afford a permittee an opportunity for a hearing before the Board in contesting the Illinois EPA's permit decision, it is silent with respect to any kind of notice.

Even if the present proceeding was governed by the contested case proceedings, Petitioner's argument is completely irrelevant as to whether the APA's automatic stay provision can be waived under Section 10-70. Perhaps Petitioner's argument was simply meant to obfuscate the differences between the APA's contested case and licensing procedures. In either event, Petitioner's argument offers nothing to refute the Illinois EPA's proffered interpretation of the APA's waiver provision. .

**III. The Illinois EPA generally accepts Petitioner's alternative proposal for staying certain contested conditions of the construction permit.**

In responding to the Illinois EPA's contention that the pending request for stay is overly-broad, the Petitioner has stated that it is alternatively agreeable to a partial stay, as authorized through the exercise of the Board's discretionary stay authority, of the appealed construction permit. To this end, Petitioner attached a redlined version of the construction permit to its latest Motion that identifies the contested conditions of the permit that would be stayed if the Board does not find a blanket stay of the entire permit warranted.

Upon review, and subject to only one limited exception, the Illinois EPA is prepared to accept the Petitioner's attachment as an accurate representation of conditions currently being challenged on appeal. The one exception involves Condition 9(b)(i)(A), which Petitioner contends is not susceptible to identification through redlining. Instead of addressing its issue through redlining, Petitioner offers to "interpret the condition to imply that the five six-minute periods identified in the condition are consecutive." *See*, Reply at page 8. Unless the Illinois EPA has misunderstood Petitioner's explanation, the Illinois EPA is troubled by this approach.

In its appeal, Petitioner contends that certain references in the challenged provision are inconsistent, but ultimately concludes that the use of the word "consecutive" in the second reference to the permit condition is appropriate. *See*, *Petition at pages 12*. In the redlined version of the contested permit conditions, the existing language of the "five or more 6-minute averaging periods" is retained but the parenthetical language for the "five consecutive 6 minute averaging period" is redlined. If Petitioner contends that the former reference should include the term "consecutive," then it might be more appropriate to show that language as being contested, and thus stayed, even if it leaves the remaining part of the condition without meaning. Otherwise, a part of the permit that will not subject to a stay will remain subject to different interpretation; one reflected by the existing language that lacks the term "consecutive" and the other by Petitioner's "implied" insertion of the term.

**WHEREFORE**, the Illinois EPA reiterates its request that the Board deny Petitioner's request for an automatic stay under the authority of the Illinois APA and, further, that the Board exercise its discretionary stay authority to stay only the contested conditions of the permit, consistent with the views expressed herein, 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: May 26, 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 26<sup>th</sup> day of May 2006, I did file, by electronic mail, the following instruments entitled **MOTION FOR LEAVE TO FILE SURREPLY and SURREPLY** to:

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

and further, that I arranged for a true and correct copy of the same foregoing instruments to be sent, on the 30<sup>th</sup> day of May 2006, by First Class Mail with postage thereon fully paid and deposited into the possession of the United States Postal Service, to:

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

Sheldon A. Zabel  
Kathleen C. Bassi  
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Robb H. Layman  
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