

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

| | | |
|-----------------------------|---|-----------------------|
| MIDWEST GENERATION, LLC, |) | |
| POWERTON GENERATING STATION |) | |
| |) | |
| Petitioner, |) | |
| |) | PCB No. 2006-059 |
| v. |) | (CAAPP Permit Appeal) |
| |) | |
| 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 | Joshua R. More |
| | Chicago, Illinois 60601 | Kavita M. Patel |
| | | Schiff Hardin, LLP |
| | Bradley P. Halloran | 6600 Sears Tower |
| | Hearing Officer | 233 South Wacker Drive |
| | James R. Thompson Center, | Chicago, Illinois 60606 |
| | 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: December 19, 2005
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

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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 regarding the issue of stay. In support of this Motion, the Respondent states as follows:

1. On November 2, 2005, attorneys for the Petitioner filed this appeal with the Board challenging certain permit conditions contained within the Clean Air Act Permit Program (“CAAPP”) permit issued by the Illinois EPA on September 29, 2005. The Illinois EPA received an electronic version of the appeal on the same date. Formal notice of the appeal was served upon the Illinois EPA on November 4, 2005.
2. As part of its Petition, Midwest Generation sought a stay of the effectiveness of the entire CAAPP permit.

3. On November 18, 2005, the Illinois EPA responded to Midwest Generation's request for stay.¹

4. On December 2, 2005, the Petitioner filed a responsive pleading and an attached Motion for Leave with the Board. The Illinois EPA received service of the filing on December 5, 2005.

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 December 2nd pleading, Petitioner addressed several arguments raised by the Illinois EPA in opposition to the applicability of the Illinois Administrative Procedure Act ("APA"), *5 ILCS 100/10-65(b)(2004)* and the Board's granting of a blanket stay of the entire CAAPP permit pursuant to its discretionary stay authority. The Illinois EPA asserts that Petitioner's pleading contains improper, or perhaps inadvertent, misstatements concerning the Respondent's arguments. 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)*.

¹ In addition to the filing of Appearances on November 18, 2005, the Illinois EPA filed a document entitled "Motion in Partial Opposition To, And Partial Support Of, Petitioner's Request for Stay." In subsequent responsive pleadings, it was noted that the Illinois EPA's filing did not request relief beyond that which was already being sought, and therefore the document was merely a responsive pleading. In retrospect, the Illinois EPA acknowledges that the caption of its "Motion" document was not artfully stated and should have instead been identified as a Response. To this end, and hopefully without adding to the confusion, the Illinois EPA is identifying this pleading as a Surreply to Petitioner's most recent responsive filing.

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: December 19, 2005
Illinois Environmental Protection Agency
1021 North Grand Avenue East
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| ILLINOIS ENVIRONMENTAL |) | |
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| 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 responsive pleading¹ filed with the Board on December 2, 2005.

ARGUMENT

In its Reply, Petitioner challenges assertions by the Illinois EPA that were made with respect to the applicability of the Illinois Administrative Procedure Act (“APA”), 5 *ILCS 100/10-65(b)(2004)*, and the exercise of the Board’s discretionary stay authority in Clean Air Act Permit Program (“CAAPP”) appeals. In doing so, Petitioner presents certain arguments that misstate the Illinois EPA’s arguments or applicable law.

¹ As addressed in the accompanying Motion to this filing, the Illinois EPA’s prior captioning of pleadings was less than artful and, for the reasons explained therein, this responsive pleading is being identified as a Surreply. The Illinois EPA will refer to the Petitioner’s most recent December 2nd filing in the general manner it was captioned (i.e., “Petitioner’s Reply”). Reference to the Illinois EPA’s earlier Motion in Partial Opposition To, And Partial Support Of, Petitioner’s Request For Stay, will be abbreviated herein as “Respondent’s Motion.”

I. The CAAPP program's severability provision can be construed as an exemption to the APA's automatic stay requirements.

One of the arguments raised by the Illinois EPA in its responsive pleading asserted that the severability provision of Section 39.5(7)(i) of the Act could be construed as an exemption from the APA's automatic stay requirements. The main point addressed in this argument is that the statute's reference to "continued validity" is indicative of a statutory intent to preclude a blanket stay of all CAAPP permit conditions during the appeals process. *See, Respondent's Motion at pages 5-6.*

Petitioner charges that the severability provision cannot be relied upon by the Illinois EPA as proof that the State legislature "intended to change Illinois law so that the entire permit must remain in effect during the appeal." *Petitioner's Reply at pages 4-5.* This contention flatly misstates the Illinois EPA's argument. The Illinois EPA's position simply advocated that "some segment of the CAAPP permit" (i.e., the uncontested provisions) should not be subject to the APA's automatic stay provision by virtue of the CAAPP's severability provision. *Respondent's Motion at pages 5-6.* The argument did not evince any sort of declaration, express or implied, that the entire permit must remain effective during the appeal period.

Petitioner generally claims that the statutory language only addresses "potential problems of legal enforceability" and is analogous to contractual severability clauses that operate to protect against the invalidity of certain contractual terms whenever one or another terms are deemed invalid. *See, Petitioner's Reply at pages 5-6.* The Illinois EPA admits that the CAAPP severability provision has something in common with contractual severability clauses. It is not disputed, even in light of the 1993 USEPA document unearthed by Petitioner, that the provision provides a "saving" mechanism for

uncontested permit conditions. However, while Section 39.5(7)(i) assures that the remaining portions of a permit remain viable when and if challenged conditions are struck down, the Illinois EPA maintains that the provision's language also achieves the practical effect of foreclosing the APA's automatic stay provision. It does so by contemplating a continuation of the uncontested permitting requirements contemporaneous with the permit appeal.

The wording of the statutory language in Section 39.5(7)(i) does not require that its force and effect be delayed until the legal challenge is exhausted and a final decision is rendered. Rather, the language emphasizes the "continued validity" of the uncontested permit conditions, implicitly revealing that the non-challenged portion of the permit should remain in effect during the appeal period itself, not simply at its conclusion. *See, Respondent's Motion at pages 5-6.* If the uncontested provisions are somehow left in abeyance until the end of the appeal process, then the "continued validity" of the uncontested provisions could never truly be assured.

Petitioner contends that the General Assembly did not make its intentions sufficiently explicit to create an exemption for CAAPP from the APA's automatic stay requirements. *See, Petitioner's Reply at page 8.* Petitioner also seizes upon a statement from the Illinois EPA's responsive pleading that conjoined the terms "validity" and "effectiveness" in describing the effect of the severability provision. *See, Petitioner's Reply at page 6-7.* Petitioner refutes the reference to permit effectiveness in this context, arguing that a permit's validity addresses its "legality," while the permit's effectiveness addresses when the permit becomes operational (i.e., "the time during which the obligations set forth in the permit are put into operation"). *Id. at page 7.*

Petitioner's argument does not accurately depict applicable law or the Illinois EPA's arguments concerning the proper interpretation of the CAAPP's severability clause. The Illinois EPA cited the Act's administrative citation provisions as one example of the legislature's intent for exempting the APA from certain provisions of the Act. It is not disputed that the General Assembly's intentions in Section 31.1(e) of the Act are expressly and unambiguously stated therein. However, the thrust of the Illinois EPA's argument rests on an implicit meaning of Section 39.5(7)(i), imparted by its language and surrounding statutory text. *See, Respondent's Motion at pages 5-6, 11-13, 17-19.* Petitioner's argument concerning the lack of explicitness is not fatal. A statutory exemption can be "inferred by clear implication," *Holda v. County of Kane, 410 N.E.2d 552 (Ill. App. 2nd Dist., 1980).*

Moreover, Petitioner's distinction between validity and effectiveness does not hold water. One meaning attributed to the base word "valid" is "effective" or "effectual." *Webster's New World Dictionary of American English (Third College Edition).* *See also, The American Heritage Dictionary (Second College Edition)*(showing the term "valid" to mean "legally sound and effective"). If a permit's validity can mean the same thing as its effectiveness, then Petitioner's argument is based on semantics.

II. A stay of a permit's contested conditions pursuant to the Board's discretionary stay authority is not at odds with the CAAPP's statutory scheme.

In discussing issues surrounding the Board's discretionary stay authority, Petitioners present several arguments that misstate the relevant facts or applicable law. One such misstatement concerns one of the permit conditions appealed in this proceeding relating to the permit's effective date. According to Petitioner, a challenge to the permit's effective date is tantamount to a stay of all other permit conditions, seemingly

because none of the permit conditions can be said to become effective until the issue surrounding the effective date is first resolved. *See, Petitioner's Reply at page 12.*

Petitioner's argument is gimmickry. While the Illinois EPA has evidenced its acceptance of a limited stay of the permit's contested conditions, it has opposed a blanket stay of all of the permit's terms. Construing an isolated issue that was raised on appeal so as to affect, or run to, the entire permit does not alter the Illinois EPA's opposition to a blanket stay.

More significantly, the argument misstates the nature of the issue raised in the Petitioner's appeal. The bailiwick of Petitioner's challenge regarding the permit's effective date involves the timing of the permit's effectiveness relative to the date of permit issuance. Specifically, Petitioner has objected to the permit being deemed effective on September 29, 2005, because a signed version of the permit was not received in the mail until the first week of October 2005. *See, Petition at pages 12-14.* Petitioner appears to be particularly concerned with the implications posed by the permit being issued in late September, as it would purportedly cause hardship with respect to the permit's quarterly record-keeping and/or reporting requirements. *Id.* The narrow emphasis of this issue is placed on whether the permit became effective on the date of the Illinois EPA's issuance or, alternatively, on the date that the Petitioner received its permit in the mail a few days later. This issue is wholly distinct from the discussion that is accompanying the merits of the stay issue, the latter of which is addressing a permit's effectiveness as it relates to the pendency of this appeal.

Petitioner criticizes the Illinois EPA for wrongly assuming that the challenged emissions testing, reporting, record-keeping and monitoring requirements of the CAAPP permit are severable from the permit's uncontested conditions. Petitioner contends that

the challenged conditions are too “interwoven” with the rest of the permit and, similarly, that several conditions that were not appealed are so “linked” with the contested conditions as to render the former terms meaningless. *Petitioner’s Reply at page 12-13.*

Petitioner’s argument exaggerates the relevant facts of this appeal. In general, it could be argued that any one of the CAAPP permit’s conditions relate to, or are interwoven with, the aims or objectives of the overall permit, but that does not suggest that contested conditions cannot be severed for purposes of a stay. Moreover, this characterization defies the obvious nature of Petitioner’s appeal. With limited exceptions, Petitioner’s appeal deals with compliance assurance requirements that are mainly associated with particulate matter emissions and, to a lesser degree, carbon monoxide emissions. Indeed, the permit’s conditions governing other regulated pollutants are largely unaffected by the reach of this proceeding. If some conditions that are purportedly linked with contested conditions were not appealed, such an oversight is a self-imposed hardship brought about by the Petitioner, not the CAAPP’s statutory scheme.

Petitioner also misstates applicable law relating to the effect of a CAAPP permit’s issuance upon any underlying state operating permits. Petition purports to rely upon both Sections 39.5(4)(b) and 9.1(f) of the Act in construing the relationship between issued CAAPP permits and underlying operating permits. *See, Petitioner’s Reply at pages 14-15.* However, the former provision does not lead to administrative confusion in this proceeding if it is construed to have nullified the former state operating permits upon the Illinois EPA’s issuance of the CAAPP permit. Indeed, most of the alleged “gap-filling” conditions challenged by the Petitioner were not even present in earlier operating permits.

On the other hand, Section 9.1 applies only to New Source Review (“NSR”) permits. No permit program has ever been promulgated in Illinois for the PSD component of the Clean Air Act’s NSR program. The non-attainment area program is reflected in the Board’s Part 203 regulations, however, it does not address requirements for operating permits. More fundamentally, Section 9.1 has no more bearing upon this CAAPP proceeding than those procedures governing general operating permits issued pursuant to Section 39 of the Act. The requirements concerning the CAAPP program represent a stand-alone permitting program that is exclusive of general permitting requirements for either the state’s NSR or general state operating permit requirements. For these reasons, the provision cited by Petitioner is inapposite to this CAAPP appeal.

CONCLUSION

The Illinois EPA urges the Board to consider the afore-mentioned arguments in its deliberations of the stay issue and to ultimately reject a blanket stay of the CAAPP permit.

Respectfully submitted by,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

_____/s/_____
Robb H. Layman
Assistant Counsel

Dated: December 19, 2005
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 19th day of December 2005, I did send, 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 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 on the next business day, to:

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

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_____/s/_____
Robb H. Layman
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