

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MIDWEST GENERATION, LLC,)	
WILL COUNTY GENERATING STATION,)	
)	
Petitioner,)	
)	
v.)	PCB 06-156
)	(Permit Appeal – Air)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

NOTICE OF FILING

To: Pollution Control Board, Attn: Clerk	Sally Carter
James R. Thompson Center	Robb Layman
100 W. Randolph	Division of Legal Counsel
Suite 11-500	Illinois Environmental Protection Agency
Chicago, Illinois 60601	1021 North Grand Avenue, East
	P.O. Box 19276
	Springfield, Illinois 62794-9276
	 Bradley P. Halloran
	Hearing Officer
	Illinois Pollution Control Board
	James R. Thompson Center
	100 West Randolph Street, Suite 11-500
	Chicago, Illinois 60601

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board **Motion for Leave to File Reply, Reply to Agency's Response in Opposition to Petitioner's Request for Stay, and Waiver of Decision Date**, copies of which are herewith served upon you.

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

Dated: May 12, 2006

Sheldon A. Zabel
Kathleen C. Bassi
Stephen J. Bonebrake
Kavita M. Patel
SCHIFF HARDIN, LLP
6600 Sears Tower
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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached **Motion for Leave to File Reply, Reply to Agency's Response in Opposition to Petitioner's Request for Stay, and Waiver of Decision Date,**

by electronic delivery upon the following person:

Pollution Control Board, Attn: Clerk
James R. Thompson Center
100 W. Randolph
Suite 11-500
Chicago, Illinois 60601

and by electronic and first class mail upon the following persons:

Sally Carter
Robb Layman
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276

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

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

Dated: May 15, 2006

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**PETITIONER'S MOTION FOR LEAVE TO FILE REPLY TO THE AGENCY'S
RESPONSE IN OPPOSITION TO PETITIONER'S REQUEST FOR STAY**

NOW COMES Petitioner, MIDWEST GENERATION, LLC, WILL COUNTY GENERATING STATION ("Petitioner" or "Midwest Generation"), by and through its attorneys, Schiff Hardin, LLP, pursuant to 35 Ill.Adm.Code § 101.500(e), and moves that the Board grant Petitioner leave to file the attached Reply to the Agency's Response in Opposition to Petitioner's Request for Stay. In support of this Motion, Petitioner states as follows:

1. On March 3, 2006, the Illinois Environmental Protection Agency ("Agency") granted a construction permit, Construction Permit No. 06020009, to Midwest Generation for the construction of new wet dust extractors for the Unit 3 and 4 coal bunkers at the Will County Generating Station.

2. On April 7, 2006, Petitioner filed a petition with the Board appealing portions of the Agency's decisions reflected in the construction permit and requesting a stay of only certain conditions contained in the construction permit. The Board accepted the permit appeal for

hearing on April 20,2006, but reserved ruling on the request for partial stay until the Agency had the opportunity to file its Response to the request for partial stay.

3. On April 25,2006, the Agency filed its Response in Opposition to Petitioner's Request for Stay ("Response"). Midwest Generation received an electronic copy of the Response from the Agency on April 25,2006, and was served with the Response on May 4, 2006, though it was postmarked April 26. Based upon the mailbox rule, this Reply is due to the Board by May 15,2006. 35 Ill.Adm.Code § 101.300(a). In its Response, the Agency argues that the request for stay is overly broad and objects to the partial stay on that basis. Resp., ¶ 16.

4. In its Response, the Agency argues that the automatic "stay" provisions of the Administrative Procedure Act, 5 ILCS 100/10-65, do not apply and then that the request for partial stay of only certain conditions of the permit is overly broad. The Agency suggests that the Board should rely on the "traditional factors frequently considered by the Board in prior proceedings" in determining whether a partial stay is appropriate. While the Agency cites a number of Board Orders where it has granted stays, the Agency does not delineate what these "traditional factors" are and provides no guidance to the Board.

5. Pursuant to 35 Ill.Adm.Code § 101.500(e), "The moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice." Midwest Generation will be materially prejudiced if the Board does not grant permission for it to file this Reply because the Agency has misstated the applicability of Section 10-65 of the Administrative Procedure Act and has provided the Board with no guidance regarding the factors that should be considered in granting a partial stay of a permit. Additionally, the Agency observes that Midwest Generation objects to only portions of some of the conditions appealed and states that "the objectionable part of the permit condition can easily


be segregated from the larger part of the condition." Resp., ¶ 15. Midwest Generation would be materially prejudiced if it were not granted the opportunity to identify what those lesser, objectionable parts of the conditions are so that the Board, if so inclined, can grant a stay of less than an entire condition.

WHEREFORE, for the reasons set forth above, Petitioner, MIDWEST GENERATION, LLC, WILL COUNTY GENERATING STATION, requests that the Board grant its Motion for Leave to File Reply to the Agency's Response in Opposition to Petitioner's Request for Stay and accept for filing the attached Reply.

Respectfully submitted,

MIDWEST GENERATION, LLC,
WILL COUNTY GENERATING STATION

by:



One of Its Attorneys

Dated: May 12, 2006

SCHIFF HARDIN, LLP
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REPLY TO AGENCY'S RESPONSE IN OPPOSITION
TO PETITIONER'S REQUEST FOR STAY

NOW COMES Petitioner, MIDWEST GENERATION, LLC, WILL COUNTY GENERATING STATION ("Petitioner" or "Midwest Generation"), by and through its attorneys, Schiff Hardin, LLP, pursuant to 35 Ill.Adm.Code § 101.500(e), and replies to the Illinois Environmental Protection Agency's ("Agency") Response in Opposition to Petitioner's Request for Stay ("Response"). In support of this Reply, Petitioner states as follows:

I. On March 3, 2006, the Agency granted a construction permit, Construction Permit No. 06020009, to Midwest Generation for the construction of a replacement pollution control device, new wet dust extractors for the Unit 3 and 4 coal bunkers at the Will County Generating Station.

2. On April 7, 2006, Petitioner filed a petition with the Board appealing portions of the Agency's decisions reflected in the construction permit and requesting a stay of only certain conditions contained in the construction permit. The Board accepted the permit appeal for

hearing on April 20,2006, but reserved ruling on the request for partial stay until the Agency had the opportunity to file its Response to the request for partial stay.

3. On April 25,2006, the Agency filed its Response in Opposition to Petitioner's Request for Stay with the Board electronically. Midwest Generation received an electronic copy of the Response from the Agency on April 25,2006, and was served with the Response on May 4, 2006, though it was postmarked April 26. Based upon the mailbox rule, this Reply is due to the Board by May 15,2006. 35 Ill.Adm.Code § 101.300(a). In its Response, the Agency argues that the request for stay is overly broad and objects to the partial stay on that basis. Resp., ¶ 16.

4. The Agency argues that Section 10-65 of the Administrative Procedure Act ("APA"), 5 ILCS 100/10-65, does not apply because the permit appealed is a construction permit; therefore, the Agency argues, there is no activity of a continuing nature, as required by Section 10-65(b), to trigger the applicability of that section. Resp., ¶ 9. However, the permit issued, though titled a construction permit, includes authorization for Midwest Generation to operate. Therefore, the permit is both a construction permit and an operating permit. The conditions that Midwest Generation has appealed all relate to the portion of the permit that is an operating permit. In that context, contrary to the Agency's contention, the underlying activity, operation of the coal bunkers, is continuing in nature. Replacement of pollution control equipment does not affect the need to operate or the continuing nature of the operation of the coal bunkers. The pollution control equipment would not be needed nor would it operate absent the presence of the coal bunkers, which is the source of the emissions being controlled. The authorization to operate in Condition 11 addresses the "affected operations," *i.e.*, the coal bunkers, with the new pollution control system. It cannot be disputed that operation of the coal

bunkers is a continuing activity. Therefore, Section 10-65 of the APA does apply to the portion of this permit that is an operating permit.

5. If the Board determines that the partial stay is unavailable and if Section 10-65 does not apply to the portion of this permit that is an operating permit, the only way in which Midwest Generation could safely preserve its rights of appeal of the language challenged in the CAAPP Appeal is to shut down the Will County Generating Station, clearly an extreme outcome. Will County cannot operate its boilers if it cannot operate its coal bunkers. Its choice of replacing a type of pollution control equipment on the coal bunker has nothing to do with the operation of the coal bunkers themselves, as the emissions from the coal bunkers will still be controlled with this new equipment, which is better equipment than the rotoclones that are being replaced. If Will County operated the coal bunkers pursuant to the language contained in the construction permit, then it would be subject to provisions that it has appealed in Docket PCB 06-060, contrary to Section 10-65. For the same reasons it should not be subject to those provisions while that appeal is pending, it should not be subject to them pursuant to a separate permit issued for a different reason. That is, Midwest Generation should not have to implement, pursuant to this construction permit, measures that it has lawfully appealed in Docket 06-060, and it should not have to shut down its operations in order to preserve its rights under Docket 06-060.

6. Moreover, the only way in which the Board can protect its own jurisdiction and authority in Docket 06-060 is if a partial stay in this matter is available or to acknowledge that the challenged permit conditions are stayed under Section 10-65, discussed in greater detail below. Without a stay here, the Agency can impose the challenged language despite the Board's findings in Docket 06-060. To require a stay of the entire permit would, effectively, require Will

County to shut down in order to avoid imposition of the challenged provisions until the Board completes its deliberations under Docket 06-060.

7. The Agency argues that the "APA's automatic stay provision . . . is independent of the statute's contested case procedures," apparently because the automatic stay provision is set forth in Section 10-65 regarding licenses, including permits. Resp., ¶ 8. However, appeals of licensing or permitting decisions are contested cases by definition. The APA defines *contested cases* as follows:

"Contested case" means an adjudicatory proceeding (not including ratemaking, rulemaking, or quasi-legislative, informational, or similar proceedings) in which the individual legal rights, duties, or privileges of a party are required by law to be determined by an agency only after an opportunity for a hearing.

5 ILCS 100/1-30. Clearly, permit appeals fall within this definition. Furthermore, the Act supports this definition by stating, in Section 40(a) regarding permit appeals, that the applicant may "petition for a hearing before the Board to contest the decision of the Agency." 415 ILCS 5/40(a). Therefore, Petitioner is very puzzled by the Agency's argument that the automatic stay provision is independent from the APA's contested case procedures.

8. Additionally, the Agency argues that because the automatic stay provisions of the APA are independent of the statute's contested case provisions, the waiver provisions of Section 10-70, 5 ILCS 100/10-70, do not apply to permit appeals. Resp., ¶ 8. The Agency opines that 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." Resp., ¶ 8. However, the Agency fails to consider the entire context of Sections 10-65 and 10-70 in the APA. Article 10 of the APA addresses administrative hearings. Section 10-65, regarding licensure, contains the provisions applicable not only when a new or renewal license – or permit

– is issued but also when issuance is denied or challenged. Such circumstances are clearly contested cases, thus the inclusion of Section 10-65 immediately following several sections specifically addressing contested cases and the inclusion of Section 10-70, immediately following Section 10-65. Therefore, the argument that statutory placement somehow means that the automatic stay provisions do not apply is misplaced.

9. As for the partial stay, Section 10-70 provides for such a stay. In the case of permit appeals, only the petitioner holds rights that may be waived, both with respect to the Board's decision time of 120 days under the Act – i e , the petitioner alone can waive that time, *see* 415 ILCS 5/40(a)(2) and 35 Ill.Adm.Code § 101.308(b) ("Where the petitioner does not waive the decision deadline. . . .") – and to the automatic stay of Section 10-65 of the APA – i e , the petitioner is the only party granted the benefit of or right to the automatic stay and so only the petitioner can waive that right in part. While the Board may not have historically couched its grants of partial stays in this manner, its authority to recognize partial stays of the effectiveness of appealed permits derives from Section 10-70 of the APA.

10. The Agency also challenges Petitioner's reliance on a footnote in the CAAPP permit appeal for Will County, PCB 06-060, as authority for the Board to recognize partial stays of contested permits. Petitioner could have relied directly on the Board's Order in *Soyland Power Cooperative, Inc v IEPA*, PCB 06-055 (January 5,2006). However, Soyland Power's CAAPP permit appeal was filed on or about the same date as the CAAPP permit appeal filed for Will County, and the documents generated by Petitioners, the Agency, and the Board regarding the 21 CAAPP permit appeals are very similar with the exception of Soyland Power's partial stay. Footnote 3 in the Board's February 26,2006, Order recognizing the applicability of the automatic stay under Section 10-65 of the APA in PCB 06-060 references the Order in *Soyland*

Power. Neither the Agency nor the Board nor the public was deprived of any relevant information by reliance on that footnote rather than directly on the Order in *Soyland Power*. That the Board did not cite authority for the partial stay for *Soyland Power* does not obviate the fact that the Board could not have recognized the partial stay if it was not authorized, and the Agency did not challenge that authority in *Soyland Power*.

11. The Board, like any court or quasi-judicial administrative agency, has inherent authority to protect the integrity of its proceedings by granting stays. The Agency's Response appears to support this concept by advocating the application of the "traditional factors frequently considered by the Board in prior proceedings," Resp., ¶ 10, as the standard by which the Board should determine whether it should grant a partial stay of the construction permit in this case. The "traditional factors" that the Board considers when determining whether to grant a stay are (1) whether a certain and clearly ascertainable right needs protection, (2) whether irreparable injury will occur without the stay, (3) whether an adequate remedy at law exists, and (4) whether there is a probability of success on the merits. *Bridgestone/Firestone Off-Road Tire Company v Illinois Environmental Protection Agency*, PCB 02-31 (November 1, 2001), p. 3; *Community Landfill*, p. 4. Without conceding the legitimacy of its claim to a partial stay through Section 10-65 of the APA and the waiver provisions of Section 10-70, Petitioner agrees that the four "traditional factors" do apply to the circumstances at Will County. Petitioner has a certain and clearly ascertainable right that needs protection, *i e* , its right to appeal the CAAPP permit would be undercut, as would the Board's authority to effectively review the conditions, if the contested language in the challenged permit is not stayed. Moreover, Petitioner has a statutory right to appeal conditions in its permit. Petitioner would suffer irreparable injury without the stay, as it would be required to implement measures that are under appeal in Docket PCB 06-060

and upon which the Board has not yet rendered its decision. Moreover, in the context of this appeal alone, Petitioner would suffer irreparable injury if it were required to implement measures that it believes are inappropriate. An adequate remedy at law does not exist outside this forum at this time. Petitioner believes there is a probability of success on the merits of its petition for appeal.

12. The Agency 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 [to] a Board ruling on the merits of the appeal.

Resp., ¶ 11. Moreover, the Agency "generally favors an approach of limiting stay relief to a permit's contested conditions." Resp., ¶ 11.

13. The Agency objects to the partial stay in this matter, however. because it is, in the Agency's opinion, overly broad. Resp., ¶ 16. The Agency interprets Midwest Generation's Petition to Appeal the identified conditions as encompassing more than Midwest Generation actually objects to and cites Special Condition 5(a)(i), regarding who performs inspections, as an example. Resp., ¶ 13. The Agency notes that Midwest Generation did not discuss the requirement for there to be inspections performed in its appeal, only who should perform the inspections. Resp., ¶ 13. The Agency cites several other specific challenges in the appeal in subsequent paragraphs of the Response as further evidence of its perception that Midwest Generation's concerns are with provisions within conditions rather than with entire conditions, even though the entire condition has been appealed.

14. The Agency is correct that, in at least some instances, Midwest Generation objects to only certain limited provisions contained within the conditions and not the entire condition in all cases. However, Section 40(a)(1) of the Environmental Protection Act ("Act") says, "If the

Agency . . . grants with conditions a permit under Section 39 of this Act. the applicant may . . . petition for a hearing before the Board to contest the decision of the Agency." 415 ILCS 5/40(a)(1). (Emphasis added.) Because the Act identifies only conditions, not parts of conditions, that may be the basis of appeal, Midwest Generation appealed the entirety of the conditions containing objectionable language rather than attempting to parse through the conditions to strike out the objectionable language and appeal only that. Identifying only the specific language that is objectionable appeared to be a level of detail that exceeded the scope of what was appropriate for inclusion in the Petition for Appeal, though it is a level of detail that would be addressed in a hearing on the matter.

15. However, Midwest Generation is agreeable to a surgical stay of only certain portions of some of the identified conditions and has attached a redlined version of the permit that lines out the language that is objectionable and that is truly the object of Midwest Generation's appeal. *See* Exhibit 1. If the Board determines that a surgical stay is statutorily available, Petitioner notes that it is not able to "correct" Condition 9(b)(i) merely through redlining, however, and will interpret the condition to imply that the five six-minute periods identified in the condition are consecutive, even though the word consecutive is not included in the condition. If the Board is not persuaded that a partial stay as set forth in the redlined version of the permit is statutorily available, then Midwest Generation the entirety of the objectionable conditions are stayed.

WHEREFORE, for the reasons set forth above, Petitioner MIDWEST GENERATION, LLC, WILL COUNTY GENERATING STATION, reiterates its request that the Board determine that a partial stay of the construction permit that is the subject of this appeal is

statutorily applicable, that the partial stay is reflected by the language struck out in Exhibit 1 to this Reply, or, in the alternative, that all of the conditions contested in the appeal are stayed.

Respectfully submitted,

MIDWEST GENERATION, LLC,
WILL COUNTY GENERATING STATION

by:



One of Its Attorneys

Dated: May 12, 2006

SCHIFF HARDIN, LLP
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Attachment A

217/782-2113

CONSTRUCTION PERMIT

PERMITTEE

Midwest Generation EME, LLC
Attn: Andrea Crapisi
440 South LaSalle Street, Suite 3500
Chicago, Illinois 60605

Application No: 06070009

I.D. No.: 197810AAK

Applicants Designation:

Date Received: February 2, 2006

Subject: Wet Dust Extractors for Unit 3 and Unit 4 Coal Bunkers

Date Issued: March 2, 2006

Location: Will County Generating Station, 529 East 135th Street, Romeoville,

Permit is hereby granted to the above-designated Permittee to CONSTRUCT emission source(s) and/or air pollution control equipment consisting of new wet dust extractor control devices for the Unit 3 and Unit 4 coal bunkers, as described in the above referenced application. This Permit is subject to standard conditions attached hereto and the following special condition(s):

1. This permit authorizes installation of new particulate matter control equipment on the coal bunkers for Unit 3 and Unit 4, replacing the existing Rotoclone control devices, as requested by the Permittee to improve safety and operational performance. For the purpose of this permit, the "affected operations" are the coal bunkers for Unit 3 and Unit 4 following installation of the new air pollution control equipment.

~~2a. The affected operations are subject to the New Source Performance Standards (NSPS) for Coal Preparation Plants, 40 CFR 60 Subpart Y. This requirement is being imposed because coal is prepared at the source and the application did not demonstrate that the changes in the control equipment would not be modifications, i.e., the hourly particulate matter emissions from the coal bunkers would not increase with the new air pollution control equipment.~~

~~b. i. The opacity of the exhaust into the atmosphere from each affected operation shall not be 20 percent or greater, pursuant to the NSPS, 40 CFR 60.252.~~

~~ii. Notwithstanding the above, as provided by 40 CFR 60.8(e), opacity in excess of the above limit during periods of startup, shutdown and malfunction, as defined by 40 CFR 60.2, shall not be considered a violation.~~

~~c. At all times, the affected operations shall be operated in accordance with good air pollution control practice, as required by 40 CFR 60.11(d).~~

- 3a. Pursuant to 35 IAC 212.123(a), the emission of smoke or other particulate matter from each affected operation shall not exceed an

opacity greater than 30 percent, on six-minute average, except as allowed by 35 IAC 212.123(b) and 212.124.

- b. Subject to the following terms and conditions, the Permittee is authorized to continue operation of an affected operation in violation of the applicable limit of Condition 3(a) (35 IAC 212.123) in the event of a malfunction or breakdown. This authorization is provided pursuant to 35 IAC 201.149, 201.161 and 201.262, as the Permittee has applied for such authorization in its application, generally explaining why such continued operation would be required to provide essential service or to prevent injury to personnel or severe damage to equipment, and describing the measures that will be taken to minimize emissions from any malfunctions and breakdowns.
 - i. This authorization only allows such continued operation as related to the operation of the Unit 3 and Unit 4 boilers as necessary to provide essential service or to prevent injury to personnel or severe damage to equipment and does not extend to continued operation solely for the economic benefit of the Permittee.
 - ii. Upon occurrence of excess emissions due to malfunction or breakdown, the Permittee shall as soon as practicable repair the affected operation, remove the affected operation from service or undertake other action so that excess emissions cease.
 - iii. The Permittee shall fulfill applicable recordkeeping and reporting requirements of Conditions 7(e) and 9(b), respectively.
 - iv. Following notification to the Illinois EPA of a malfunction or breakdown with excess emissions, the Permittee shall comply with all reasonable directives of the Illinois EPA with respect to such incident, pursuant to 35 IAC 201.263.
 - v. This authorization does not relieve the Permittee from the continuing obligation to minimize excess emissions during malfunction or breakdown. As provided by 35 IAC 201.265, an authorization in a permit for continued operation with excess emissions during malfunction and breakdown does not shield the Permittee from enforcement for any such violation and only constitutes a prima facie defense to such an enforcement action provided that the Permittee has fully complied with all terms and conditions connected with such authorization.

Note: These provisions addressing continued operation during a malfunction or breakdown event may be revised in an operating permit addressing the affected operations.

- 4a. Particulate matter emissions from the Unit 3 affected operation shall not exceed 1.7 pounds/hour and 7.6 tons/year and from the Unit 4 affected operation shall not exceed 1.6 pounds/hour and 7.1 tons/year.
- b. Notwithstanding the above, in the event of a malfunction or breakdown, the particulate matter emissions from the Unit 3 and Unit 4 affected operations may exceed 1.7 and 1.6 pounds/hour, respectively, subject to the terms and conditions established in Condition 3(b) for an exceedance of 35 IAC 212.123(a) in the event of malfunction or breakdown.

- 5a. i. The Permittee shall perform inspections of the affected operations at least once per month, including the associated control measures, while the affected operations are in use, to confirm compliance with the requirements of this permit. ~~These inspections shall be performed with personnel not directly involved in the day-to-day operation of the affected operations.~~
- ii. The Permittee shall maintain records of the following for the above inspections:
- A. Date and time the inspection was performed and name(s) of inspection personnel.
- B. The observed condition of the control measures for the affected operations, including the presence of any visible ~~emissions or accumulations of coal fines in the vicinity of an operation.~~
- C. A description of any maintenance or repair associated with the control measures that is recommended as a result of the inspection and a review of outstanding recommendations for maintenance or repair from previous inspection(s), i.e., whether recommended action has been taken, is yet to be performed or no longer appears to be required.
- D. A summary of the observed implementation or status of actual control measures as compared to the customary control measures.
- b. i. The Permittee shall perform detailed inspections of the control equipment for each affected operation ~~at least every 15 months~~ while the operation is out of service, with an initial inspection performed before any maintenance and repair activities are conducted during the period the operation is out of service and a follow-up inspection performed after any such activities are completed.
- ii. The Permittee shall maintain records of the following for the above inspections:
- A. Date and time the inspection was performed and name(s) of inspection personnel.
- B. The observed condition of the control equipment
- C. A summary of the maintenance and repair that is to be or was conducted on the control equipment.
- D. A descriptor of any maintenance or repair that is recommended as a result of the inspection and a review of outstanding recommendations for maintenance or repair from previous inspection(s), i.e., whether recommended action has been taken, is yet to be performed or no longer appears to be required.

- E. A summary of the observed condition of the control equipment as related to its ability to reliably and effectively control emissions.
- 6a. i. The Permittee shall have the opacity of the emissions from the affected operations during representative weather and operating conditions determined by a qualified observer in accordance with USEPA Test Method 9, as further specified below.
- A. ~~For each affected operation, an initial performance test shall be conducted in accordance with 40 CFR 60.8 and 60.252 following installation of the new control equipment.~~
 - B. ~~Following the initial performance test,~~ Periodic testing shall be conducted at least annually for each affected operation.
 - C. Upon written request by the Illinois EPA, testing of the affected operations shall be conducted within 45 calendar days of the request or on the date agreed upon by the Illinois EPA, whichever is later.
- ii. A. ~~The initial performance tests for opacity shall be conducted in accordance with 40 CFR 60.254.~~
- B. For periodic testing, the duration of opacity observations 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.
- iii. A. The Permittee shall notify the Illinois EPA at least 7 days in advance of the date and time of these tests, in order to allow the Illinois EPA to witness testing. This notification shall include the name(s) and employer(s) of the qualified observer(s).
- B. The Permittee shall promptly notify the Illinois EPA of any changes in the time or date for testing.
- iv. The Permittee shall provide a copy of its observer's readings to the Illinois EPA at the time of testing, if Illinois EPA personnel are present.
- v. The Permittee shall submit a written report for this testing within 15 days of the date of testing. This report shall include:
- A. Date and time of testing.
 - B. Name and employer of qualified observer
 - C. Copy of current certification
 - D. Description of observation condition, including recent weather
 - E. Description of the operating conditions of the affected operations.

F. Raw data.

G. Opacity determinations.

H. Conclusions.

- b. i. ~~Within 90 days of a written request from the Illinois EPA, the Permittee shall have the particulate matter emissions at the stacks or vents of the affected operations, as specified in such request, measured during representative operating conditions, as set forth below.~~
- ii. ~~A. Testing shall be conducted using appropriate USEPA Reference Test Methods, including Method 5 for particulate matter emissions.~~
- ~~B. Compliance may be determined from the average of three valid test runs, subject to the limitations and conditions contained in 35 IAC Part 283.~~
- iii. ~~The Permittee shall submit a test plan to the Illinois EPA at least 60 days prior to testing in accordance with 35 IAC Part 283.~~
- ~~v. The Illinois EPA shall be notified prior to these tests to enable the Illinois EPA to observe these tests. Notification of the expected date of testing shall be submitted a minimum of 30 days prior to the expected date. Notification of the actual date and expected time of testing shall be submitted a minimum of 5 working days prior to the actual date of the test. The Illinois EPA may, at its discretion, accept notification with shorter advance notice provided that the Illinois EPA will not accept such notification if it interferes with the Illinois EPA's ability to observe the testing.~~
- v. ~~The Permittee shall expeditiously submit complete Final Report(s) for required emission testing to the Illinois EPA, no later than 90 days after the date of testing. These reports shall include the following information:~~
 - ~~A. A summary of results.~~
 - ~~B. Detailed description of test method(s), including description of sampling points, sampling train, analysis equipment, and test schedule.~~
 - ~~C. Detailed description of the operating conditions of the affected process during testing, including operating rate (tons/hr) and the control measures being used.~~
 - ~~D. The date and time of the sampling or measurements;~~
 - ~~E. The date any analyses were performed;~~
 - ~~F. The name of the company that performed the tests and/or analyses;~~

- ~~G. The detailed results of the tests including raw data, and/or analyses including sample calculations;~~
- ~~H. The name of any relevant observers present including the testing company's representatives, any Illinois EPA or USEPA representatives, and the representatives of the source.~~

~~7a. The Permittee shall fulfill the applicable recordkeeping requirements of the NSPS, 40 CFR 60.7(b), for the affected operations.~~

- b. The Permittee shall keep the following file(s) and log(s) for the air pollution control equipment for the affected operations:
 - i. File(s) containing the following data for the equipment, with supporting information, which file(s) shall be kept up to date:
 - 1) The design particulate matter control efficiency or performance specification for particulate matter emissions, gr/dscf; 2) The maximum design emission rate, pounds particulate matter/hour, and 3) The applicable particulate matter emission factor normally used by the Permittee to calculate actual particulate matter emissions, if a factor other than the maximum hourly emission rate is normally used.
 - ii. Maintenance and repair log(s) for the control equipment, which log(s) shall list the activities performed on each item of equipment, with date and description.
- c. The Permittee shall maintain records for the amount of material handled, operating hours, or other measure of activity of each affected operation on a monthly and annual basis, which data is in the terms normally used by the Permittee to calculate actual emissions of each affected operation.
- d. The Permittee shall maintain records of the following for each incident when an affected operation operated without the customary control measures:
 - i. The date of the incident and identification of the affected operation that was involved.
 - ii. A description of the incident, including the customary control measures that were not present or implemented; the customary control measures that were present, if any; other control measures or mitigation measures that were implemented, if any; ~~and the magnitude of the particulate matter emissions during the incident.~~
 - iii. The time at and means by which the incident was identified, e.g., scheduled inspection or observatioc by operating personnel.
 - iv. The length of time after the incident was identified that the affected operations continued to operate before customary control measures were in place or the operations were shutdown (to resume operation only after customary control measures were in place) and, if this time was more than one hour, an explanation why this time was not shorter, including a description of any mitigation measures that were implemented during the incident.

- v. The estimated total duration of the incident, i.e., the total length of time that the affected operations ran without customary control measures and the estimated amount of material handled during the incident.
 - vi. A discussion of the probable cause of the incident and any preventative measures taken.
 - vii. ~~A discussion whether an applicable standard, as listed in Condition 2(b) or 3(a) or a particulate matter emission limitation in Condition 4(a) may have been violated during the incident, with an estimate of the amount of any additional or excess particulate matter emissions (pounds) from the incident, with supporting explanation.~~
- e. Pursuant to 35 IAC 201.263, the Permittee shall maintain records, related to malfunction and breakdown for each affected operation that, at a minimum, shall include:
- i. Maintenance and repair log(s) for the affected operation that, at a minimum, address aspects or components of such operations for which malfunction or breakdown has resulted in excess emissions, which shall list the activities performed on such aspects or components, with date, description and reason for the activity. In addition, in the maintenance and repair log(s), the Permittee shall also list the reason for the activities that are performed.
 - ii. Records for each incident when operation of an affected operation continued during malfunction or breakdown, including continued operation with excess emissions as addressed by Condition 3(a), that include the following information:
 - A. Date and duration of malfunction or breakdown.
 - B. A description of the malfunction or breakdown.
 - C. The corrective actions used to reduce the quantity of emissions and the duration of the incident.
 - D. Confirmation of fulfillment of the requirements of Condition 9(b)(i), as applicable, including copies of follow-up reports submitted pursuant to Condition 9(b)(i)(B).
 - E. If excess emissions occurred for two or more hours:
 - I. A detailed explanation why continued operation of the affected operation was necessary.
 - II. A detailed explanation of the preventative measures planned or taken to prevent similar malfunctions or breakdowns or reduce their frequency and severity.
 - III. An estimate of the magnitude of excess emissions occurring during the incident.

- f. The Permittee shall maintain the following records for the particulate matter emissions from each affected operation (tons/month and tons/yr), with supporting calculations.
- g. The Permittee shall keep records for any opacity observations performed by Method 9 that the Permittee conducts or are conducted at its behest, including name of the observer, date and time, duration of observation, raw data, results, and conclusion.
- 8. The Permittee shall retain all records required by this permit at the source for at least 5 years from the date of entry and these records shall be readily accessible to the Illinois EPA for inspection and copying upon request.
- 9a. The Permittee shall promptly notify the Illinois EPA of deviations from requirements of this permit for the affected operations, as follows. Such notifications shall include a description of each incident and a discussion of the probable cause of deviation, any corrective actions taken, and any preventative measures taken.
 - 1. Notification and reporting as specified in Condition 9(b)(i) for certain deviations from an applicable opacity standard.
 - ii. ~~Notification within 30 days for operation of an affected operation without customary control measures or with emissions in excess of the applicable hourly limitation in Condition 4(a) that continued for more than 12 operating hours from the time that it was identified. Such notifications shall be accompanied by a copy of the records for the incident required by Condition 7(c)(ii).~~
 - iii. A. ~~Notification with the quarterly reports required by Condition 9(b)(ii) for other deviations, including deviations from applicable emission standards, inspection requirements and recordkeeping requirements.~~
 B. ~~With the quarterly report, the Permittee shall also address deviations that occurred during the quarter that have been separately reported to the Illinois EPA, with a summary of such deviations. For this purpose, the Permittee need not resubmit the detailed information provided in prior notifications and reports for such deviations.~~
- b. Pursuant to 35 IAC 201.263, the Permittee shall provide the following notifications and reports to the Illinois EPA, concerning incidents when operation of an affected operation continued with excess emissions, including continued operation during malfunction or breakdown as addressed by Condition 3(b).
 - i. A. The Permittee shall immediately notify the Illinois EPA's Regional Office, by telephone (voice, facsimile or electronic) for each incident in which the opacity from an affected operation exceeds or may have exceeded the applicable opacity standard for five or more 6-minute averaging periods.
~~{Otherwise, if opacity during a malfunction or breakdown includes only exceeds or may have exceeded the applicable standard for no more than five consecutive 6-minute averaging~~

~~periods, the Permittee need only report the incident in accordance with Condition 9(b)(ii).~~

- B. Upon conclusion of each incident that is two hours or more in duration, the Permittee shall submit a written follow-up notice to the Illinois EPA, Compliance Section and Regional Office, within 15 days providing a detailed description of the incident and its cause(s), an explanation why continued operation was necessary, the length of time during which operation continued under such conditions, the measures taken by the Permittee to minimize and correct deficiencies with chronology, and when the repairs were completed or the affected operation was taken out of service.

- ii. ~~The Permittee shall submit quarterly reports to the Illinois EPA that include the following information for incidents during the quarter in which the affected operation continued to operate during malfunction or breakdown with excess emissions.~~

~~A. A listing of such incidents, in chronological order, that includes: (1) the date, time, and duration of each incident, (2) the identity of the affected operation(s) involved in the incident, and (3) whether a follow-up notice was submitted for the incident pursuant to Condition 9(b)(i)(B), with the date of the notice.~~

~~B. The detailed information for each such incident required pursuant to Condition 9(a). For this purpose, the Permittee need not resubmit information provided in a prior report for an incident, as identified above, but may elect to supplement the prior submittal.~~

~~C. The aggregate duration of all incidents during the quarter.~~

~~D. If there have been no such incidents during the calendar quarter, this shall be stated in the report.~~

- 10a. Unless otherwise specified in a particular condition of this permit or in the written instructions distributed by the Illinois EPA for particular reports, reports and notifications shall be sent to the Illinois EPA - Air Compliance Section with a copy sent to the Illinois EPA - Air Regional Field Office.

- b. The current addresses of the offices that should generally be utilized for the submittal of reports and notifications are as follows:

- i. Illinois EPA - Air Compliance Section

Illinois Environmental Protection Agency (MC 40)
Bureau of Air
Compliance & Enforcement Section (MC 40)
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

Phone: 217/782-5811 Fax: 217/782-6348

ii. Illinois EPA - Air Regional Field Office

Illinois Environmental Protection Agency
Division of Air Pollution Control
9511 West Earrison
Des Plaines, Illinois 60016

Phone: 847/294-4000 Fax: 847/294-4018

11. The affected operations may be operated with the new control systems pursuant to this construction permit until an operating permit becomes effective that addresses operation of these operations with the new control systems.

If you have any questions concerning this permit, please contact Manish Patel at 217/782-2113.

Donald E. Sutton, P.E.
Manager, Permit Section
Division of Air Pollution Control

DES:MNP:psj

cc: Region 1

CH2\1425989.1

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

**MIDWEST GENERATION, LLC,
WILL COUNTY GENERATING STATION**

Petitioner,

v.

**ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,**

Respondent.

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**PCB 06-156
(Permit Appeal – Air)**

WAIVER OF DECISION DATE

NOW COMES Petitioner, Midwest Generation, LLC, Will County Generating Station,
by and through its attorneys, Schiff Hardin LLP, and waives the Board's statutory decision date
in this matter for approximately 49 days from the current decision deadline, until September 21,
2006.

Respectfully submitted,

MIDWEST GENERATION, LLC,
WILL COUNTY GENERATING STATION

by:



One of Its Attorneys

Dated: May 12, 2006

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