ORIGINAL

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

DYNEGY MIDWEST GENERATION, INC. (VERMILION POWER STATION),	)	
Petitioner,	)	
v.	)	**PCB _____**
	)	**(Permit Appeal – Air)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE OF FILING

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

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

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution control Board the original and nine copies of the **Appeal of CAAPP Permit** of **Dynegy Midwest Generation, Inc. (Vermilion Power Station)** and the **Appearances** of Sheldon A. Zabel, Kathleen C. Bassi, Stephen J. Bonebrake, Joshua R. More, and Kavita M. Patel, copies of which are herewith served upon you.

Kathleen C. Bassi

Dated: November 3, 2005

Sheldon A. Zabel
Kathleen C. Bassi
Stephen J. Bonebrake
Joshua R. More
Kavita M. Patel
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APPEARANCE

I hereby file my appearance in this proceeding, on behalf of Dynegy Midwest Generation, Inc. (Vermilion Power Station).

Sheldon A. Zabel

Dated: November 3, 2005

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APPEARANCE

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Stephen J. Bonebrake

Dated: November 3, 2005

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APPEARANCE

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Joshua R. More

Dated: November 3, 2005

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APPEARANCE

I hereby file my appearance in this proceeding, on behalf of Dynegy Midwest Generation, Inc. (Vermilion Power Station).

Kavita Patel
Kavita M. Patel

Dated: November 3, 2005

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CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached **Appeal of CAAPP Permit** of **Dynegy Midwest Generation, Inc. (Vermilion Power Station)** and **Appearances** of Sheldon A. Zabel, Kathleen C. Bassi, Stephen J. Bonebrake, Joshua R. More, and Kavita M. Patel,

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 person:

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

Kathleen C. Bassi

Dated: November 3, 2005

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APPEAL OF CAAPP PERMIT

NOW COMES Petitioner, DYNEGY MIDWEST GENERATION, INC. (VERMILION POWER STATION) ("Petitioner," or "DMG"), pursuant to Section 40.2 of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/40.2) and 35 Ill.Adm.Code § 105.300 *et seq.*, and requests a hearing before the Board to contest the permit issued to Petitioner on September 29, 2005, under the Clean Air Act Permit Program ("CAAPP" or "Title V") set forth at Section 39.5 of the Act (415 ILCS 5/39.5). Although this appeal contests many specific provisions of the permit, these specific provisions are so intertwined with the remaining provisions that it would be impractical to implement those remaining provisions. Therefore, DMG appeals the permit as a whole. In support of its Petition, Petitioner states as follows:

I. BACKGROUND
(35 Ill.Adm.Code § 105.304(a))

1. On November 15, 1990, Congress amended the Clean Air Act (42 U.S.C. §§ 7401-7671q) and included in the amendments at Title V a requirement for a national operating permit program. The Title V program was to be implemented by states with approved programs. Illinois' Title V program, the CAAPP, was fully and finally approved by the U.S.

Environmental Protection Agency ("USEPA") on December 4, 2001 (66 Fed.Reg. 72946). The Illinois Environmental Protection Agency ("Agency") has had the authority to issue CAAPP permits since at least March 7, 1995, when the state was granted interim approval of its CAAPP (60 Fed.Reg. 12478). Illinois' Title V program is set forth at Section 39.5 of the Act, 35 Ill.Adm.Code 201.Subpart F, and 35 Ill.Adm.Code Part 270.

2. The Vermilion Power Station ("Vermilion" or the "Station"), Agency I.D. No. 183814AAA, is an electric generating station owned and operated by DMG. The Vermilion electrical generating units ("EGUs") went online between roughly 1948 and 1962. The Station is located at 2150 N. County Road, Oakwood, Illinois 61858. DMG employs approximately 53 people at the Vermilion Power Station.

3. DMG operates two coal-fired boilers at Vermilion that have the capability to fire at various modes that include the combination of coal and/or natural as their principal fuels. In addition, the boilers fire natural gas as auxiliary fuel during startup and for flame stabilization. Certain alternative fuels may be utilized as well. DMG also operates one natural gas and distillate oil fired boiler. In addition to the boilers, DMG operates one distillate oil-fired internal combustion engine to start one distillate oil fired turbine, used during peak demand periods. Vermilion also operates associated coal handling, coal processing, and ash handling activities. Finally, there is a 1000-gallon capacity gasoline tank located at Vermilion.

4. Vermilion is a major source subject to Title V. The two EGUs at Vermilion are subject to both of Illinois' NOx reduction programs: the "0.25 averaging" program at 35 Ill.Adm.Code 217.Subparts V and the "NOx trading program" or "NOx SIP call" at 35 Ill.Adm.Code 217.Subpart W. Vermilion is subject to the federal Acid Rain Program at Title IV of the Clean Air Act and has been issued a Phase II Acid Rain Permit.

5. Currently NOx emissions from Boiler 1 are controlled by rotating over-fire air and Boiler 2 are controlled by low NOx burners and over-fire air. Emissions of SO_2 from the boilers are controlled by limiting the sulfur content of the fuel used for the boilers. PM emissions from Boilers 1 and 2 are controlled by an electrostatic precipitator ("ESP") with a flue gas conditioning system. Fugitive PM emissions from various coal and ash handling activities are controlled through baghouses, enclosures, covers, and dust suppressants, as necessary and appropriate. Emissions of carbon monoxide ("CO") are limited through good combustion practices in the boilers. VOM emissions from the gasoline storage tank are controlled by the use of a submerged loading pipe.

6. The Agency received the original CAAPP permit application for the Station in about September, 1995, and assigned Application No. 95090096. The CAAPP permit application was timely submitted and updated, and Petitioner requested and was granted an application shield, pursuant to Section 39.5(5)(h). Petitioner has paid fees as set forth at Section 39.5(18) of the Act since 2000 in connection with the CAAPP permit for the Station. The Station's state operating permits have continued in full force and effect since submittal of the CAAPP permit application, pursuant to Sections 9.1(f) and 39.5(4)(b)of the Act.

7. The Agency issued a draft permit for public review on June 9, 2003. The Agency subsequently held a hearing on the draft permit in August 2003. DMG filed written comments with the Agency regarding the Vermilion draft permit.[1]

8. The Agency issued a proposed permit for the Vermilion Station on October 10, 2003. This permit was not technically open for public comment, as it had been sent to USEPA

[1] DMG has attached the appealed permit to this Petition. However, the draft and proposed permits and other documents referred to herein should be included in the administrative record that the Agency will file. Other documents referred to in this Petition, such as cases or Board decisions, are easily accessible. In the interest of economy, then, DMG is not attaching such documents to this Petition.

for its comment as required by Title V. Subsequently, in December 2004, the Agency issued a draft revised proposed permit and requested comments of Petitioner and other interested persons. DMG again commented. The Agency issued a second draft revised proposed permit in July 2005 and allowed the Petitioner and other interested persons 10 days to comment. At the same time, the Agency released its preliminary Responsiveness Summary, which was a draft of its response to comments, and invited comment on that document as well. DMG submitted combined comments on this version of the permit for Baldwin and for its four other generating stations together, as well as on the preliminary Responsiveness Summary. The Agency submitted the revised proposed permit to USEPA for its 45-day review on August 15, 2005. The Agency did not seek further comment on the permit from the Petitioner or other interested persons, and DMG has not submitted any further comments, based upon the understanding that the Agency had every intention to issue the permit at the end of USEPA's review period.

9. The final permit was, indeed, issued on September 29, 2005.[2] Although some of Petitioner's comments have been addressed in the various iterations of the permit, it still contains terms and conditions that are not acceptable to Petitioner, including conditions that are contrary to applicable law and conditions that first appeared, at least in their final detail, in the August 2005 proposed permit and upon which Petitioner did not have the opportunity to comment. It is for these reasons that Petitioner hereby appeals the permit. This permit appeal is timely submitted within 35 days following issuance of the permit. Petitioner requests that the Board review the permit, remand it to the Agency, and order the Agency to correct and reissue the permit, without further public proceeding, as appropriate.

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[2] *See* USEPA/Region 5's Permits website at < http://www.epa.gov/region5/air/permits/ilonline.htm > → "CAAPP permit Records" → "Dynegy Midwest Generation Inc." for the source located at #1 Chessen Lane, Alton, for the complete "trail" of the milestone action dates for this permit.

II. EFFECTIVENESS OF PERMIT

10. Pursuant to Section 10-65(b) of the Illinois Administrative Procedures Act ("APA"), 5 ILCS 100/10-65, and the holding in *Borg-Warner Corp. v. Mauzy*, 427 N.E. 2d 415 (Ill.App.Ct. 1981) ("*Borg-Warner*"), the CAAPP permit issued by the Agency to the Station does not become effective until after a ruling by the Board on the permit appeal and, in the event of a remand, until the Agency has issued the permit consistent with the Board's order. Section 10-65(b) provides that "when a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license shall continue in full force and effect until the final agency decision on the application has been made unless a later date is fixed by order of a reviewing court." 5 ILCS 100/10-65(b). The *Borg-Warner* court found that with respect to an appealed environmental permit, the "final agency decision" is the final decision by the Board in an appeal, not the issuance of the permit by the Agency. *Borg-Warner*, 427 N.E. 2d 415 at 422; *see also IBP, Inc. v. IL Environmental Protection Agency*, 1989 WL 137356 (Ill. Pollution Control Bd. 1989); *Electric Energy, Inc. v. Ill. Pollution Control Bd.*, 1985 WL 21205 (Ill. Pollution Control Bd. 1985). Therefore, pursuant to the APA as interpreted by *Borg-Warner*, the entire permit is not yet effective and the existing permits for the facility continue in effect.

11. The Act provides at Sections 39.5(4)(b) and 9.1(f) that the state operating permit continues in effect until issuance of the CAAPP permit. Under *Borg-Warner*, the CAAPP permit does not become effective until the Board issues its order on this appeal and the Agency has reissued the permit. Therefore, DMG currently has the necessary permits to operate the Station. In the alternative, to avoid any question as to the limitation on the scope of the effectiveness of the permit under the APA, DMG requests that the Board exercise its discretionary authority at 35

Ill.Adm.Code § 105.304(b) and stay the entire permit. Such a stay is necessary to protect DMG's right to appeal and to avoid the imposition of conditions that contradict or are cumulative of the conditions in the pre-existing permits before it is able to exercise that right to appeal. Further, compliance with the myriad of new monitoring, inspection, recordkeeping, and reporting conditions that are in the CAAPP permit will be extremely costly. To comply with conditions that are inappropriate, as DMG alleges below, would cause irreparable harm to DMG, including the imposition of these unnecessary costs and the adverse effect on DMG's right to adequate review on appeal. DMG has no adequate remedy at law other than this appeal to the Board. DMG is likely to succeed on the merits of its appeal, as the Agency has included conditions that do not reflect "applicable requirements," as defined by Title V, and has exceeded its authority to impose permit conditions and has imposed permit conditions that are arbitrary and capricious. *See Lone Star Industries, Inc. v. IEPA*, PCB 03-94 (January 9, 2003); *Nielsen & Brainbridge, L.L.C. v. IEPA*, PCB 03-98 (February 6, 2003); *Saint-Gobain Containers, Inc. v. IEPA*, PCB 04-47 (November 6, 2003); *Champion Laboratories, Inc. v. IEPA*, PCB 04-65 (January 8, 2004); *Noveon, Inc. v. IEPA*, PCB 04-102 (January 22, 2004); *Ethyl Petroleum Additives, Inc., v. IEPA*, PCB 04-113 (February 5, 2004); *Oasis Industries, Inc. v. IEPA*, PCB 04-116 (May 6, 2004). Moreover, the Board has stayed the entirety of all the CAAPP permits that have been appealed. *Additionally see Bridgestone/Firestone Off Road Tire Company v. IEPA*, PCB 02-31 (November 1, 2001); *Midwest Generation, LLC – Collins Generating Station v. IEPA*, PCB 04-108 (January 22, 2004); *Board of Trustees of Eastern Illinois University v. IEPA*, PCB 04-110 (February 5, 2004). The Board should continue to follow this precedent.

12. Finally, a large number of conditions included in this CAAPP permit are appealed here. To allow some conditions of the CAAPP permit to be effective while equivalent conditions

in the old state operating permits remain effective under Section 10-65(b) of the Illinois APA would create an administrative environment that would be, to say the least, very confusing. Moreover, the Agency's failure to provide a statement of basis, discussed below, renders the entire permit defective. Therefore, DMG requests that the Board stay the entire permit for these reasons.

13. In sum, pursuant to Section 10-65(b) of the APA and *Borg-Warner*, the entirety of the CAAPP permit does not become effective until the completion of the administrative process, which occurs when the Board has issued its final ruling on the appeal and the Agency has acted on any remand. (For the sake of simplicity, hereafter the effect of the APA will be referred to as a "stay"). In the alternative, DMG requests that the Board, consistent with its grants of stay in other CAAPP permit appeals, because of the pervasiveness of the conditions appealed throughout the permit, to protect DMG's right to appeal and in the interests of administrative efficiency, stay the effectiveness of the entire permit pursuant to its discretionary authority at 35 Ill.Adm.Code § 105.304(b). In addition, such a stay will minimize the risk of unnecessary litigation concerning the question of a stay and expedite resolution of the underlying substantive issues. The state operating permits currently in effect will continue in effect throughout the pendency of the appeal and remand. Therefore, the Station will remain subject to the terms and conditions of those permits. As the CAAPP permit cannot impose new substantive conditions upon a permittee (*see* discussion below), emissions limitations are the same under both permits. The environment will not be harmed by a stay of the CAAPP permit.

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

14. As a preliminary matter, the CAAPP permits issued to the Vermilion Power Station and 20 of the other coal-fired power plants in the state on the same date are very similar

in content. The same language appears in virtually all of the permits, though there are subtle variations to some conditions to reflect the elements of uniqueness that exists at the various stations. For example, not all stations have the same types of emissions units. Some units in the state are subject to New Source Performance Standards ("NSPS"), perhaps New Source Review ("NSR") or Prevention of Significant Deterioration ("PSD"), or other state or federal programs, while others are not. Applicable requirements may differ because of geographic location. As a result, the appeals of these permits filed with the Board will be repetitious with elements of uniqueness reflecting the various stations' circumstances. Further, the issues on appeal span the gamut of simple typographical errors to extremely complex questions of law. Petitioner's presentation in this appeal is by issue per unit type, identifying the permit conditions giving rise to the appeal and the conditions related to them that would be affected, should the Board grant Petitioner's appeal. Petitioner appeals all conditions related to the conditions giving rise to the appeal, however, whether or not such related conditions are expressly identified below.

15. The Act does not require a permittee to have participated in the public process; the permittee merely needs to object to a term or condition in a permit in order to have standing to appeal the permit issued to him. *See* Section 40.2(a) of the Act (the applicant may appeal while others need to have participated in the public process). However, DMG, as will be evidenced by the administrative record, has actively participated to the extent allowed by the Agency in the development of this permit. In some instances, as discussed in further detail below, the Agency did not provide DMG with a viable opportunity to comment, leaving DMG with appeal as its only alternative as a means of rectifying inappropriate conditions. These issues are properly before the Board in this proceeding.

16. Section 39.5(7)(d)(ii) of the Act grants the Agency limited authority to "gapfill." "Gapfilling" is the inclusion in the permit of periodic monitoring requirements, where the underlying applicable requirement does not include them. Section 39.7(7)(d)(ii) faithfully reflects 40 CFR § 70.6(a)(iii)(B), the subject of litigation in *Appalachian Power Company v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000). The court in *Appalachian Power* found that state authorities are precluded from including provisions in permits requiring more frequent monitoring[3] than is required in the underlying applicable requirement unless the applicable requirement contained no periodic testing or monitoring, specified no frequency for the testing or monitoring, or required only a one-time test. *Appalachian Power* at 1028.

17. The *Appalachian Power* court also noted that "Title V does not impose substantive new requirements" and that test methods and the frequency at which they are required "are surely 'substantive' requirements; they impose duties and obligations on those who are regulated." *Appalachian Power* at 1026-27. (Quotation marks and citations in original omitted.) Thus, where the permitting authority, here the Agency, becomes over-enthusiastic in its gapfilling, it is imposing new substantive requirements contrary to Title V.

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

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

for its objection to a term or condition of the permit, Petitioner requests that the Board assume this preceding discussion of gapfilling as part of that discussion of the specific term or condition.

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

20. The Agency has cited generally to Sections 39.5(7)(a), (b), (c) and (f) of the Act or to Section 4(b) of the Act, but it has not cited to the substantive applicable requirement that serves as the basis for the contested condition in the permit. Only applicable requirements may be included in the permit,[4] and the Agency is required by Title V to identify its basis for inclusion of a permit condition (Section 39.5(7)(n)). If the Agency cannot cite to the applicable requirement and the condition is not proper gapfilling, the condition cannot be included in the permit. The Agency has confused general data- and information-gathering authority with "applicable requirements." They are not the same. Section 4(b) of the Act cannot be converted into an applicable requirement merely because the Agency includes it as the basis for a condition. Failure to cite the applicable requirement is grounds for the Board to remand the term or condition to the Agency.

21. Moreover, the Agency's assertion in the Responsiveness Summary that its general statutory authority serves as its authority to include conditions necessary to "accomplish the

[4] In its discussion of gapfilling, the *Appalachian Power* court notes that "Title V does not impose substantive new requirements." 208 F.3d at 1026. (Internal quotation marks and citations omitted).

purposes of the Act" misstates what is actually in the Act. Responsiveness Summary, p. 15; *see* Section 39.5(7)(n). Section 39.5(7)(a) says that the permit is to contain conditions necessary to "assure compliance with all applicable requirements." (Emphasis added.) For the Agency to assume broader authority than that granted by the Act is unlawful and arbitrary and capricious.

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

A. Issuance and Effective Dates
(Cover Page)

23. The Agency issued the CAAPP permit that is the subject of this appeal to DMG on September 29, 2005, at about 7:17 p.m. The Agency notified DMG that the permit had been issued through emails sent to DMG. The email indicated that the permits were available on USEPA's website, where Illinois' permits are housed. However, that was not the case. DMG was not able to locate the permits on the website that evening.

24. The issuance date of the permit becomes important because that is also the date that starts the clock for filing an appeal and the date, unless the permit is appealed, by which certain documents must be submitted to the Agency. USEPA's website identifies that date as September 29, 2005. If that date is also the effective date, many additional deadlines would be triggered, including the expiration date as well as the date by which certain documents must be submitted to the Agency. More critical, however, is the fact that once the permit becomes effective, DMG would become obligated to comply with it (subject to the stay of the permit as discussed herein), regardless of whether it had necessary recordkeeping systems in place, the necessary additional control equipment in place, and so forth. It took the Agency over two years to issue the final permit. Over that course of time, the Agency issued numerous versions of the permit, and it has changed considerably. Therefore, it would be unreasonable to expect DMG to have anticipated the final permit to the degree necessary for it to have been in compliance by September 29, 2005.

25. Moreover, publication of the permit on a website is not "official" notification in Illinois. The Petitioner cannot be deemed to "have" the permit until the original, signed version of the permit has been delivered. Neither Illinois' rules nor the Act have been amended to reflect

electronic delivery of permits, especially by reference to a third party's website. Therefore, until the permit is officially delivered to a permittee, it should not be deemed effective.

26. Prior to the advent of pervasive use of computers and reliance on the internet for communication, the Agency sent permits to sources through the U.S. Postal Service, just as this CAAPP permit was delivered on October 3, 2005. Neither the Act nor the regulations specify when permits should become effective. Prior to the advent of Title V, however, sources were not subject to such numerous and detailed permit conditions, nor were they exposed to enforcement from so many sides. Under Title V, not only the Agency through the Attorney General, but also USEPA and the general public can bring enforcement suits for violation of the least matter in the permit. If the issuance date is the effective date, there is potential for tremendous adverse consequences to the permittee with extremely inequitable effect.

27. If the effective date was September 29, 2005, that would also create an obligation to perform quarterly monitoring and to submit quarterly reports, (*c.f.* Condition 7.1.10-2(a)), for the third quarter of 2005. The third quarter reporting requirements would cover less than 30 hours of operation. A requirement to perform quarterly monitoring, recordkeeping, and reporting for a quarter that consists of less than 30 hours of operation, assuming the permittee would even have compliance systems in place so quickly after issuance of the permit, is overly burdensome and would not benefit the environment in any manner. Therefore, the requirement is arbitrary and capricious.

28. A lawful, and more equitable approach, would be for the Agency to delay the effective date of a final permit after remand and reissuance for a period of time reasonably sufficient to allow sources to implement any new compliance systems necessary because of the

terms of the permit. At the very least, the Agency should delay the permit effective date until the time allowed by law for the source to appeal the permit has expired.

29. Consistent with the APA, the effective date of the permit, contested herein, is stayed, and DMG requests that the Board order the Agency to establish an effective date some period of time after the permittee has received the permit following remand and reissuance of the permit, to allow the permittee sufficient time to implement the systems necessary to comply with all requirements in this very complex permit.

B. Overall Source Conditions
(Section 5)

(i) The Permit Improperly Incorporates Consent Decree Requirements

30. On May 27, 2005, the United States District Court for the Southern District of Illinois entered a Consent Decree in the matter of the United States of America, et al. v. Dynegy Midwest Generation, et al., Case No. 99-833-MJR (the "Consent Decree"). The CAAPP Permit refers to the Consent Decree as Attachment 7. Under Paragraph 158 of the Consent Decree, DMG is required within 180 days after entry of the Consent Decree (by November 23, 2005) to amend any applicable Title V Permit Application, or to apply for amendments of its Title V permits, to include a schedule for all "Unit-specific performance, operational, maintenance, and control technology requirements established by [the] Consent Decree. . . ." In Condition 5.4(a), the Agency purports to incorporate such a schedule for the Hennepin Station through "Attachment 6 of this permit." As noted in Condition 5.4(a), "Attachment 6" is referred to in the permit as the "Schedule." Condition 5.4(a) of the permit requires that DMG comply with the "requirements" of the Schedule. Further, under Section 157 of the Consent Decree, "any term or limit established by or under this Consent Decree shall be enforceable under this Consent Decree regardless of whether such term has or will become a part of a Title V permit . . . ."

31. Although compliance with the requirements set forth in the Schedule is already required by Condition 5.4(a) and the Consent Decree also remains enforceable by its terms, many other sections of the permit also purport to require compliance with various requirements set forth on the Schedule. See, e.g., Conditions 5.4(a), 5.4(b), 5.7.3, 5.7.4, 7.1.3(a)(ii), 7.1.3(b)(ii)(B), 7.1.3(c)(ii), 7.1.4(b)(ii), 7.1.4(c), 7.1.6-1, 7.1.6-2, 7.1.7(a)(i), 7.1.7(a)(iii), 7.1.7(a)(v), 7.1.7(b)(iii)(B), 7.1.8(e), 7.1.9-2(b)(iv) and 7.1.12(b)(ii). The references to, and the characterizations and purported incorporation of Schedule or Consent Decree requirements in multiple conditions results in duplicative and potentially inconsistent obligations, unauthorized requirements, confusion and ambiguity. For instance, as noted in more detail elsewhere in this Petition, Condition 7.1.12(b)(ii) of this permit purports to implement particulate matter CEMS provisions of the Consent Decree but, in reality, would if sustained, create an entirely new and unauthorized obligation. This defect in Condition 7.1.12(b)(ii), and similar defects in some other conditions that address or refer to the Consent Decree, are separately addressed later in this petition. Those specific challenges illustrate the many problems caused by including specific conditions that refer to or otherwise attempt to incorporate obligations or provisions from the Schedule or Consent Decree, and highlight, in particular, why those conditions should be deleted from the permit. Making specific challenges to some conditions is, however, not intended to imply that other conditions do not suffer from similar defects, and should not be construed as a waiver of the request in this section of the petition to delete all conditions that refer to the Schedule or Consent Decree, with the exception of Condition 5.4(a).

32. Given the language of the Consent Decree and nature of its requirements, DMG does not object to Condition 5.4(a). Inclusion of additional conditions in the permit, however, including Conditions 5.4(b) (including all of its subparts), 5.7.3 (including all of its subparts),

5.7.4, 7.1.3(a)(ii), 7.1.3(b)(ii)(B), 7.1.3(c)(ii), 7.1.4(b)(ii), 7.1.4(c), 7.1.4(f)(ii), 7.1.6-1 (including all subparts), 7.1.6-2(b), (c) and (d) (including all subparts), 7.1.7(a)(i), 7.1.7(a)(iii), 7.1.7(a)(v), 7.1.7(b)(iii)(B), 7.1.8(e), 7.1.9-2(b)(iv) and 7.1.12(b)(ii), that purport to implement or adopt requirements from or otherwise characterize or refer to the Consent Decree or Schedule, and conditions that reference or relate to such conditions is arbitrary and capricious and unauthorized by law (the "Additional Consent Decree Conditions").

33. For these reasons, Additional Consent Decree Conditions, all contested herein, are stayed in this proceeding consistent with the APA, and DMG requests that the Board order the Agency to delete these conditions and all references to these conditions from the permit. This stay will have no effect on the enforceability of the Consent Decree under its own terms.

(ii) The Permit Incorrectly Requires Compliance with Consent Decree Requirements that Do Not Accrue within the Term of the Permit.

34. The permit in various conditions purports to specifically impose obligations with respect to matters that are not required under the Consent Decree prior to the stated expiration date of the permit, September 29, 2010. Attempting to impose in this permit requirements that do not accrue until after the termination date of this permit is arbitrary and capricious and unauthorized by law. For example, Conditions 7.1.6-1(a), (b) and (c)(ii)(B) address emission limitations applicable after the expiration of the stated five-year term of the CAAPP permit.

35. For these reasons, conditions that address requirements under the Consent Decree that arise after September 29, 2010, including Condition 7.1.6-1(a), (b) and (c)(ii)(B), and all conditions that reference or relate to these conditions, all contested herein, are stayed consistent with the APA, and DMG requests that the Board order the Agency to delete these conditions and all references to these conditions from the permit. This stay will have no effect on the enforceability of the Consent Decree under its own terms.

(iii) The Schedule Misconstrues Some Consent Decree Requirements and Incorrectly Requires Compliance with Certain Consent Decree Requirements that Are Not Unit Specific.

36. According to Condition 5.4(a), the Schedule sets forth "Unit-Specific Performance, Operational, Maintenance, and Control Technology Requirements of the Consent Decree that Apply to the Vermilion Station . . ." and, according to the Agency, the Schedule is "included in this permit pursuant to Paragraph 158 of the Consent Decree . . . ." The Schedule, however, includes requirements that are not unit-specific and mischaracterizes certain Consent Decree requirements.

37. Contrary to Condition 5.4(a) and the Consent Decree, Paragraphs 57, 58, 59, 60, 61, 62, 73, 74, 83, 87, 89, 91, 92, 94, 95, 96, 98, 99, 119, 125, 157, and 183 of the Schedule impose obligations on the Station that are not unit-specific. In addition, Paragraphs 91, 92, 94, 95 and 96 of the Schedule attempt to impose requirements that are not currently applicable to a Vermilion unit and that might not apply in the future. Paragraph 157 also misconstrues the Consent Decree by purporting to make the Schedule enforceable under the Consent Decree. Furthermore, Paragraphs 42 and 44 do not accurately recite the language of the Consent Decree, creating ambiguity and possibly additional or inconsistent obligations. Accordingly, these Paragraphs of the Schedule are arbitrary and capricious and unauthorized by law.

38. For these reasons, Paragraphs 57, 58, 59, 60, 61, 62, 73, 74, 83, 87, 89, 91, 92, 94, 95, 96, 98, 99, 119, 125, 157, and 183 of the Schedule, all contested herein, are stayed consistent with the APA, and DMG requests that the Board order the Agency to delete Paragraphs 57, 58, 59, 60, 61, 62, 73, 74, 91, 92, 94, 95, 96, 98, 99, 125, 157, and 183 from the Schedule and all references to these Paragraphs from the permit, to revise Paragraphs 83, 87 and 119 to identify the specific unit(s) at the Vermilion Station that the requirement applies to and to correct the

errors contained in Paragraphs 42 and 44 by duplicating the language in the parallel provisions of the Consent Decree.

(iv) Recordkeeping of and Reporting HAP Emissions

39. The CAAPP permit issued to the Station requires DMG to keep records of emissions of mercury, hydrogen chloride, and hydrogen fluoride – all HAPs – and to report those emissions at Conditions 5.6.1(a) and (b) (recordkeeping) and 5.7.2 (reporting). The Agency has not a provided a proper statutory or regulatory basis for these requirements other than the general provisions of Sections 4(b) and 39.5(7)(a), (b), and (e) of the Act. Citations merely to the general provisions of the Act do not create an "applicable requirement."

40. In fact, there is no applicable requirement that allows the Agency to require this recordkeeping and reporting. There are no regulations that limit emissions of HAPs from the Vermilion Power Station. While USEPA has recently promulgated the Clean Air Mercury Rule ("CAMR") (70 Fed.Reg. 28605 (May 18, 2005)), Illinois has not yet developed its corresponding regulations. The Agency correctly discussed this issue relative specifically to mercury in the Responsiveness Summary by pointing out that it cannot add substantive requirements through a CAAPP permit or through its oblique reference to the CAMR. *See* Responsiveness Summary in the Administrative Record, p. 21. However, the Agency was incorrect in its discussion in the Responsiveness Summary by stating that it can rely upon Section 4(b) as a basis for requiring recordkeeping and reporting of mercury emissions through the CAAPP permit. The Agency has confused its duty to gather data pursuant to Section 4(b) and its authority to gapfill to assure compliance with the permit with the limitation on its authority under Title V to include only "applicable requirements" in a Title V permit. *See Appalachian Power*. Even by including only recordkeeping and reporting of HAP emissions in the permit, the Agency has exceeded its

authority just as seriously as if it had included emissions limitations for HAPs in the permit. Section 4(b) does not provide the authority to impose this conditions in a CAAPP permit.

41. Further, the Agency's own regulations, which are part of the approved program or SIP for its Title V program, preclude the Agency from requiring the recordkeeping and reporting of HAP emissions that it has included at Conditions 5.6.1(a) and (b) and 5.7.2. The Agency's Annual Emissions Reporting rules, 35 Ill.Adm.Code Part 254, which Condition 5.7.2 specifically addresses, state as follows:

> Applicable Pollutants for Annual Emissions Reporting
>
> Each Annual Emissions Report shall include applicable information for all regulated air pollutants, as defined in Section 39.5 of the Act [415 ILCS 5/39.5], except for the following pollutants:
>
> * * *
>
> b) A hazardous air pollutant emitted by an emission unit that is not subject to a National Emissions Standard for Hazardous Air Pollutants (NESHAP) or maximum achievable control technology (MACT). For purposes of this subsection (b), emission units that are not required to control or limit emissions but are required to monitor, keep records, or undertake other specific activities are considered subject to such regulation or requirement.

35 Ill.Adm.Code § 254.120(b). (Brackets in original; emphasis added.) Power plants are not subject to any NESHAPs or MACT standards. *See* 69 Fed.Reg. 15994 (March 29, 2005) (USEPA withdraws its listing of coal-fired power plants under Section 112(c) of the Clean Air Act). The Agency has not cited any other applicable requirement that provides it with the authority to require DMG to keep records of and report HAP emissions. Therefore, pursuant to the provisions of § 254.120(b) of the Agency's regulations, the Agency has no regulatory basis for requiring the reporting of HAPs emitted by coal-fired power plants.

42. For these reasons, Conditions 5.6.1(a) and (b) *in toto* and Condition 5.7.2 as it relates to reporting emissions of HAPs in the Annual Emission Report, all contested herein, are stayed consistent with the APA, and DMG requests that the Board order the Agency to amend the permit to delete such conditions.

(v) Retention and Availability of Records

43. Conditions 5.6.2(b) and (c) switch the burden of copying records the Agency requests from the Agency, as stated in Condition 5.6.2(a), to the permittee. While DMG generally does not object to providing the Agency records reasonably requested and is reassured by the Agency's statement in the Responsiveness Summary that its "on-site inspection of records and written or verbal requests for copies of records will generally occur at reasonable times and be reasonable in nature and scope" (Responsiveness Summary, p. 18) (emphasis added), DMG may not be able to print and provide data within the span of an inspector's visit where the records are electronic and include vast amounts of data. Moreover, most of the electronic records are already available to the Agency through its own or USEPA's databases, and where this is the case, DMG should not be required to again provide the data absent its loss for some unforeseen reason, and certainly should not to have to print out the information. Further, DMG is troubled by the qualifier *generally* that the Agency included in its statement. It implies that the Agency may not always choose reasonable times, nature, and scope of these requests.

44. For these reasons, Conditions 5.6.2(b) and (c), all contested herein, are stayed consistent with the APA, and DMG requests that the Board order the Agency to amend them in a manner to correct the deficiencies outlined above.

(vi) Duplicative Reporting

45. Various provisions of the permit impose obligations to submit information to the Agency that DMG already submits electronically to government agencies pursuant to certain federal and state requirements. Information submitted electronically to the USEPA, for instance, is generally available to the Agency through USEPA's electronic databases. The requirement to submit information to the Agency that is already available to the Agency electronically results in duplicative obligations that are burdensome and serve no apparent purpose. Therefore, the requirement is arbitrary and capricious. For these reasons, all conditions that impose obligations upon DMG to submit information to the Agency that is available to the Agency without such submissions, are stayed consistent with the APA, and DMG requests that such conditions be deleted from the permit.

(vii) Submission of Blank, Record Forms to the Agency

46. DMG is unsure as to what the Agency expects with respect to Condition 5.6.2(d). *See* Condition 5.6.2(d). On the one hand, this condition may require submission of the records that are required by Conditions 7.1.9-1. 7.1.9-2, 7.1.9-3, 7.1.9-4, 7.2.9, 7.3.9, 7.4.9, 7.5.9, 7.6.9 and 7.7.9. On the other hand, Condition 5.6.2(d), may require DMG to submit blank copies of its records, apparently so that the Agency can check them for form and type of content. If this latter interpretation is correct, there is no basis in law for such a requirement and it must be deleted.

47. Each company has the right and responsibility to develop and implement internal recordkeeping systems. Even the most unsophisticated company has the right to develop and implement internal recordkeeping systems and bears the responsibility for any insufficiencies it makes in doing so. Absent a statutory grant or the promulgation of reporting formats through rulemaking, the Agency has no authority to oversee the development of recordkeeping or

reporting formats. The Agency has the authority to require that certain information be reported but cites to no authority, because there is none, to support this condition.

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

49. Further, if the company is concerned with the adequacy of its planned recordkeeping, it can ask the Agency to provide it some counsel. Providing such counsel or assistance is a statutory function of the Agency. Even then, however, the Agency will qualify its assistance in order to attempt to avoid reliance on the part of the permittee should there be an enforcement action brought. An interpretation of this condition could be that by providing blank recordkeeping forms to the Agency, absent a communication from the Agency that they are inadequate, enforcement against the permittee for inadequate recordkeeping is barred, so long as the forms are filled out, because they are covered by the permit shield.

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

51. For these reasons, Condition 5.6.2(d), contested herein, is stayed consistent with the APA, and DMG requests that the Board order the Agency to delete it from the permit. In the alternative, DMG requests that the Board interpret this condition such that if the Agency fails to communicate any inadequacies it finds in blank recordkeeping forms submitted to it, enforcement against DMG for inadequate records is barred, so long as those records were completed, as part of the permit shield.

(viii) Reporting Concerning Certain Requirement of the Consent Decree

52. Conditions 5.7.3 and 5.7.4 purport to characterize and impose reporting requirements associated with the Consent Decree. These conditions impose requirements that are not required by the Consent Decree or any other applicable requirement, and the presence of these conditions in addition to the related provisions of the Schedule and Consent Decree creates

ambiguity and unnecessary duplication of requirements. For the reasons stated earlier, the Schedule and Consent Decree requirements are separately enforceable. Conditions 5.7.3 and 5.7.4 are arbitrary and capricious and unauthorized by law. For these reasons, Conditions 5.7.3 and 5.7.4, contested herein, are stayed consistent with the APA, and DMG requests that the Board order the Agency to delete these conditions.

C. NOx SIP Call
(Section 6.1)

53. Condition 6.1.4(a) says, "Beginning in 2004, by November 30 of each year. . . ." While this is a true statement, *i.e.*, the NOx trading program in Illinois commenced in 2004, it is inappropriate for the Agency to include in the permit a condition with a retroactive effect. By including this past date in an enforceable permit condition, the Agency has exposed DMG to potential enforcement under this permit for acts or omissions that occurred prior to the effectiveness of this permit. It is unlawful for the Agency to require retroactive compliance with past requirements in a new permit condition. *Lake Envtl., Inc. v. The State of Illinois*, No. 98-CC-5179, 2001 WL 34677731, at *8 (Ill. Ct. Cl. May 29, 2001) (stating "retroactive applications are disfavored in the law, and are not ordinarily allowed in the absence of language explicitly so providing. The authoring agency of administrative regulations is no less subject to these settled principles of statutory construction than any other arm of government."). This language should be changed to refer to the first ozone season occurring upon effectiveness of the permit, which, for example, if the permit appeal is resolved before September 30, 2006, would be the 2006 ozone season. Rather than including a specific date, DMG suggests that the condition merely refer to the first ozone season during which the permit is effective.

54. For these reasons, Condition 6.1.4(a), contested herein, is stayed consistent with the APA, and DMG requests that the Board order the Agency to amend the language to avoid retroactive compliance with past requirements.

D. Boilers
(Sections 7.1 and 7.7)

(i) Opacity as a Surrogate for PM

55. Historically, power plants and other types of industrial facilities have demonstrated compliance with emissions limitations for PM through periodic stack tests and consistent application of good operating practices. Prior to the development of the CAAPP permits, opacity was primarily a qualitative indicator of the possible need for further investigation of operating conditions or even for the need of new stack testing. However, the Agency has developed and imposed in Condition 7.1.9-3(a)(iii), and related conditions, a requirement that treats opacity as a quantitative surrogate for indicating exceedances of the PM emissions limitation. For the first time in the August 2005 proposed permit, the Agency required Petitioner to identify the opacity measured at the 95th percentile confidence interval of the measurement of compliant PM emissions during the last and other historical stack tests as the upper bound opacity level that triggers reporting of whether there may have been an exceedance of the PM limit without regard for the realistic potential for a PM exceedance. These reporting requirements are quite onerous, particularly for the units that tested at the lowest levels of PM and opacity. Inclusion of these conditions exceeds the scope of the Agency's authority to gapfill, and so is arbitrary and capricious. Condition 7.1.9-3(a)(iii), and related conditions, must be stricken from the permit.

56. The provisions requiring the use of opacity as effectively a surrogate for PM are found in Conditions 7.1.9-3(a)(iii), linked to Conditions 7.1.4(b) and 7.1.6-1(b), which contains

the emissions limitation for PM; 7.1.9-3(a)(iv), also linked to Conditions 7.1.4-1(b) and 7.1.6-1(b); and other related conditions, including 7.1.10-1(a) and its subparts; 7.1.10-2(a)(i)(E), linked to Conditions 7.1.9-3(a)(iv) and 7.1.9-3(a)(iii); 7.1.10-2(d) and its subparts; 7.1.10-3(a)(ii); and 7.1.12(b), relying on continuous opacity monitoring pursuant to Condition 7.1.8(a), PM testing to determine the upper bound of opacity, and the recordkeeping conditions described above to demonstrate compliance with the PM emissions limitation.

57. No one can provide a reliable, exact PM concentration level anywhere in the United States today outside of stack testing. Obviously, it is impossible to continuously test a stack to determine a continuous level of PM emissions, and it would be unreasonable for the Agency or anyone else to expect such. Pursuant to the Consent Decree settling USEPA's enforcement action against DMG concerning the Vermilion Station, DMG will test continuous PM monitoring devices. Consent Decree, Paragraph 91. The Consent Decree does not require the use of these PM CEMS to determine current PM emissions levels for compliance purposes. In fact, the Consent Decree specifically prescribes annual stack testing as the method of determining the concentration of PM in Paragraph 42. PM CEMS are not yet developed to the point of refinement where they should be considered credible evidence of PM emissions levels; DMG is not aware of any case in which government or citizens suing under Section 304 of the Clean Air Act have even relied upon PM CEMS as the basis of a case for PM violations. As a result, sources must rely upon the continuity or consistency of conditions that occurred during a successful stack test to provide reliable indications of PM emissions levels.

58. Historically, opacity has never been used as a reliable, quantitative surrogate for PM emissions levels. The Agency itself acknowledged that opacity is not a reliable indicator of

PM concentrations. (*See* Responsiveness Summary, pp. 15-16, 42-44).[5] Increasing opacity may indicate that PM emissions are increasing, but this is not always the case nor is a given opacity an indicator of a given PM level at any given time, let alone at different times. Relying on stack testing is the best and most appropriate approach to assuring compliance with PM emissions limitations.

59. Despite the Agency's implications to the contrary in the Responsiveness Summary (*see* Responsiveness Summary, pp. 42-44), the permit does make opacity a surrogate for PM compliance. When the Agency requires even estimates of PM levels or guesses as to whether there is an exceedance of PM based upon opacity, opacity has been quantitatively tied to PM compliance. Further, the opacity level triggers reporting that the opacity/PM surrogate level has been exceeded and so indicates that there may have been an exceedance of the PM level regardless of any evidence to the contrary. For example, if the opacity/PM surrogate level of, say, 15% is exceeded, this must be reported despite the fact that all fields in the electrostatic precipitator were on and operating, stack testing indicated that the PM emissions level at the 95th percentile confidence interval is 0.04 lb/mmBtu/hr, and the likelihood that there was an exceedance of the PM emissions limitation of 0.1 lb/mmBtu/hr is extremely remote. There is no legitimate purpose of such reporting. It does not assure compliance with the PM limit and so inclusion of these conditions exceeds the Agency's gapfilling authority and is, thus, unlawful and arbitrary and capricious. Moreover, this unnecessary reporting requirement is a new substantive requirement, according to *Appalachian Power*, not allowed under Title V.

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[5] "[S]etting a specific level of opacity that is deemed equivalent to the applicable PM emission limit . . . is not possible on a variety of levels . . . It would also be inevitable that such an action would be flawed as the operation of a boiler may change over time and the coal supply will also change, affecting the nature and quantity of the ash loading to the ESP. These types of changes cannot be prohibited, as they are inherent in the routine operation of coal-fired power plants. However, such changes could invalidate any pre-established opacity value." Responsiveness Summary, p. 44.

60. Contrary to the Agency's assertion in the Responsiveness Summary that opacity provides a "robust means to distinguish compliance operation of a coal-fired boiler and its ESP from impaired operation" (Responsiveness Summary, p. 43), relying upon opacity as a surrogate for PM emissions levels has the result of penalizing the best-operating units. That is, the units for which the stack testing resulted in very low opacity and very low PM emissions levels are the units for which this additional reporting will be most frequently triggered. For example, if stack testing resulted in PM emissions of 0.02 lb/mmBtu and the opacity during the test at the 95th percentile confidence interval was 2%, DMG would be required to submit reports stating that the unit may have exceeded the PM limit every time opacity exceeds 2%. Clearly, this condition will result in overly burdensome reporting that serves no purpose. As such, it exceeds the Agency's authority to gapfill, is unlawful, and is arbitrary and capricious.

61. Further, this condition effectively creates a false low opacity limitation. In order to avoid the implication that there may have been an exceedance of the PM limit, the opacity limit becomes that level that is the upper bound at the 95th percentile confidence interval in the PM testing. By including these conditions, the Agency has created a new, substantive requirement without having complied with proper rulemaking procedures. This is unlawful and beyond the scope of the Agency's authority under Section 39.5 of the Act and Title V of the Clean Air Act. It also violates the provisions of Title VII of the Act. *See Appalachian Power.*

62. Periodic stack testing according to paragraphs 89 and 119 of the Consent Decree is sufficient to assure compliance with the applicable PM limit and satisfy the periodic monitoring requirements of Section 39.5(7)(d)(ii) of the Act according to the *Appalachian Power* court. In fact, "periodic stack testing" is the Agency's own phrase in Condition 7.1.7(a)(iii) and is consistent with the findings of *Appalachian Power.*

63. Conditions 7.1.10-2(d)(v)(C) and (D) in particular are repetitious of Condition 7.1.10-2(d)(iv). Both require descriptions of the same incident and prognostications as to how the incidents can be prevented in the future. To the extent either condition is appropriate, Condition 7.1.10-2(d)(iv), is sufficient to address the Agency's concern, although DMG also objects to Condition 7.1.10-2(d)(iv) to the extent that it requires reporting related to the opacity surrogate.

64. In conjunction with its attempt to relate opacity to PM, the Agency requires in Condition 7.1.10-2(d)(v)(A) and (B) detailed information regarding recurring and new causes of opacity exceedances in a calendar quarter. The requirements are overly burdensome and the Agency lacks authority to impose such requirements.

65. As with Condition 5.6.2(d) discussed above, Condition 7.1.9-3(a)(iii) denies DMG due process. Condition 7.1.9-3(a)(iii) requires that the

> "[r]ecords . . . that identify the upper bound of the 95% confidence interval (using a normal distribution and 1 minute averages) for opacity measurements . . . , considering an hour of operation, within which compliance with [the PM limit] is assured, with supporting explanation and documentation. . . . shall be submitted to the Illinois EPA in accordance with Condition 5.6.2(d)."

66. Obviously, if Condition 5.6.2(d) denies DMG due process, Condition 7.1.9-3(a)(iii) does as well for the same reasons. DMG was not granted the opportunity to appeal the condition before it was required to submit to the Agency information that DMG believes is not useful or reliable. DMG is particularly loathe to provide the Agency with this information because it believes that the information will be misconstrued and misused.

67. Finally, Condition 7.1.10-2(d)(vi) requires DMG to submit a glossary of "common technical terms used by the Permittee" as part of its reporting of opacity/PM exceedance events. If the terms are "common," they do not require definition. Moreover, this

requirement does not appear anywhere else in the permit. If "common technical terms" do not require definition in other contexts in this permit, then surely they do not require definition in this context. This requirement should be deleted from the permit.

68. For these reasons, the conditions contested in this section, including Conditions 7.1.9-3(a)(iii), 7.1.9-3(a)(iv), 7.1.10-1(a), 7.1.10-2(a)(i)(E), 7.1.10-2(d), 7.1.10-2(d)(v); 7.1.10-2(d)(v)(A), 7.1.10-2(d)(v)(B), 7.1.10-2(d)(v)(C), 7.1.10-2(d)(v)(D), 7.1.10-2(d)(vi), 7.1.10-3(a)(ii), and 7.1.12(b), and any other related conditions, are stayed consistent with the APA, and DMG requests that the Board order the Agency to delete these conditions.

(ii) Reporting the Magnitude of PM Emissions

69. The Agency requires DMG to determine and report the magnitude of PM emissions during startup and operation during malfunction and breakdown. *See* Conditions 7.1.9-4(a)(i), 7.1.9-4(a)(ii)(C)(5), 7.1.9-4(b)(ii)(E)(3), and 7.1.10-2(d)(iv)(A)(3). Compliance with these conditions is not possible and, therefore, the inclusion of these conditions in the permit is arbitrary and capricious. DMG does not have a means for accurately measuring the magnitude of PM emissions at any time other than during stack testing – not even using the opacity surrogate. There is not a certified, credible, reliable alternative to stack testing to measure PM emissions. Although a PM CEMS may be installed at the Station under the Consent Decree, any such CEMS has not been certified (and might not be despite DMG's good faith efforts) and thus the permit should not require or depend on the use of such a CEMS to measure PM emissions.

70. Additionally, Condition 7.1.10-2(d)(iv)(A)(5) requires DMG to identify "[t]he means by which the exceedance [of the PM emissions limit] was indicated or identified, in addition to continuous monitoring." This inaccurately implies that a PM CEMS is installed and

operating at Vermilion or that the installation and operation of a PM CEMS at a Vermilion unit will occur. A PM CEMS may not be installed at Vermilion. Even if a PM CEMS is installed at a Vermilion unit, any such CEMS is not currently an authorized or required basis to determine compliance, as described more fully elsewhere in this petition. DMG believes that this might also be construed to mean that it must provide information relative to some means, such as opacity – which, as discussed in detail above, DMG believes is an inappropriate and inaccurate basis for determining whether there are exceedances of the PM limit, let alone the magnitude of any such exceedance – that DMG relied upon to determine any exceedance of the PM limit. Besides stack testing or perhaps total shutdown of the ESP, there are none. This is a nonsensical requirement.

71. For these reasons, Conditions 7.1.9-4(a)(i), 7.1.9-4(a)(ii)(C)(5), 7.1.9-4(b)(ii)(E)(3), and 7.1.10-2(d)(iv), specifically 7.1.10-2(d)(iv)(A)(3) and (5), all contested herein, are stayed consistent with the APA, and DMG requests that the Board order the Agency to delete these conditions from the permit.

(iii) PM and CO Testing (Condition 7.1.7(a))

72. As noted in Condition 7.1.7(a)(i), the Consent Decree (and related Schedule) impose annual and other periodic PM stack testing requirements. See Schedule, Paragraphs 89 and 119. Because the Schedule imposes annual (subject to frequency reduction if certain conditions are satisfied) and other periodic PM stack testing requirements, and compliance with the Schedule is mandated by Condition 5.4(a), as discussed above, there is no need to impose alternative or additional PM stack testing requirements in Condition 7.1.7(a). The stack testing required by the Consent Decree is more than sufficient to satisfy any applicable monitoring requirement, and any additional, alternative or inconsistent stack test requirement is unauthorized

by law and arbitrary and capricious. Further, as discussed earlier in this petition, the addition of Conditions 7.1.7(a)(i), (iii) and (v), which refer to and characterize requirements set forth independently in the Schedule, creates ambiguity, additional and duplicative requirements and inconsistencies. For these reasons, Conditions 7.1.7(a)(i), (ii), (iii), (iv), (v) and (vii), to the extent the conditions relate to PM testing, and any related conditions, are contested herein and stayed consistent with the APA, and DMG requests that the Board order the Agency to delete Condition 7.1.7(a)(i), (ii), (iii) and (v), to delete the PM testing requirements from Conditions 7.1.7(a)(vi) and (vii) and to delete any other conditions that relate to or reference the PM testing set forth in these conditions.

73. In addition, Condition 7.1.7(a)(vi)(A) provides that if the "standard fuel" is less than 97% of the fuel supply in a quarter, additional testing is required. Condition 7.1.7(a)(vi)(B) provides that "such measurements" (presumably those tests required by Condition 7.1.7(a)(vi)(A)), shall be made "while firing the boiler with at least 1.25 times the greatest percentage of other materials in the calendar quarter that triggered the testing." This may not, however, be possible, and imposing a condition that may not be achievable technically and practically is unauthorized by law and arbitrary and capricious.

74. For these reasons, Conditions 7.1.7(a)(vi) and 7.1.7(a)(vi)(A) and (B), contested herein, are stayed consistent with the APA, and DMG requests that the Board order the Agency to revise these conditions to address the deficiencies identified above.

75. DMG interprets the language in Conditions 7.1.7(a)(i) and (a)(iv) to mean that testing that occurs after January 1, 2005, and before December 31, 2005 satisfies the initial testing requirements included in the permit for CO (as set forth above, DMG believes that the conditions in 7.1.7(a)(i), (ii), (iii), (v), (vi) and (vii) relating to PM should be stricken).

However, the language is not clear, in part because the CO testing timing is tied to the PM stack testing timing, which in turn is tied to the Consent Decree. Even if these CO testing conditions were appropriately included in the permit, which DMG does not concede, the language of Conditions 7.1.7(a) should be revised to make clear that the initial CO test will be required only at the time when the initial PM stack test is required under the Consent Decree. For these reasons, Condition 7.1.7(a)(i) and (iv), contested herein, are stayed consistent with the APA, and DMG requests that the Board order the Agency to revise these conditions to address these deficiencies.

(iv) Other PM Testing Matters

76. The Agency has included a requirement in the permit at Conditions 7.1.7(b)(iii) and, possibly 7.7.7-1(b)(ii) (this Condition contains "including" language regarding test methods that is unclear in light of 7.1.7(b)(iii)'s indication that Method 202 testing is an appropriate reference method; accordingly, this petition will treat 7.7.7-1(b)(ii) as containing a condensible testing requirement without conceding that it does) that DMG perform testing for PM10 condensibles.[6] First, this requirement is beyond the scope of the Agency's authority to include in a CAAPP permit, as such testing is not an "applicable requirement," as discussed in detail below.

77. With respect to the inclusion of the requirement for Method 202 testing at Conditions 7.1.7(b)(iii) and 7.7.7-1(b)(ii), the Agency has exceeded its authority and the requirements should be removed from the permit. The inclusion of Method 202 testing requirements is inappropriate because there is no regulatory requirement that applies PM10 limitations to the Vermilion Power Station. In response to comments on this point, the Agency

[6] *Condensible* is the Board's spelling in the regulations and in scientific publications, thus our spelling of it here despite the Agency's chosen spelling in the permit, which is the preferred spelling in the Webster's dictionary. *See* 35 Ill.Adm.Code § 212.108.

stated in the Responsiveness Summary at page 18. "The requirement for using both Methods 5 and 202 is authorized by Section 4(b) of the Environmental Protection Act." DMG does not question the Agency's authority to gather information. Section 4(b) of the Act says,

> The Agency shall have the duty to collect and disseminate such information, acquire such technical data, and conduct such experiments as may be required to carry out the purposes of this Act, including ascertainment of the quantity and nature of discharges from any contaminant source and data on those sources, and to operate and arrange for the operation of devices for the monitoring of environmental quality.

415 ILCS 5/4(b). However, this authority does not make testing for PM10 condensibles an "applicable requirement" under Title V. As discussed above, an "applicable requirement" is one applicable to the permittee pursuant to a federal regulation or a SIP.

78. Further, just because Method 202 is one of USEPA's reference methods does not make it an "applicable requirement" pursuant to Title V, as the Agency suggests in the Responsiveness Summary. The structure of the Board's PM regulations establish the applicable requirements for the Vermilion Power Station. The Vermilion Power Station is subject to the requirements of 35 Ill.Adm.Code 212.Subpart E, Particulate Matter Emissions from Fuel Combustion Emission Units. It is not and never has been located in a PM10 nonattainment area.[7] The Board's PM regulations are structured such that particular PM10 requirements apply to identified sources located in the PM10 nonattainment areas.[8] No such requirements apply now or have ever applied to the Vermilion Power Station.

79. The measurement method for PM, referencing only Method 5 or derivatives of Method 5, is at 35 Ill.Adm.Code § 212.110. This section of the Board's rules applies to the

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[7] In fact, there are no more PM10 nonattainment areas in the state. *See* 70 Fed.Reg. 55541 and 55545 (September 22, 2005), redesignating to attainment the McCook and Lake Calumet nonattainment areas, respectively.

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

Vermilion Power Station. The measurement method for PM10, on the other hand, is found at 35 Ill.Adm.Code § 212.108, Measurement Methods for PM-10 Emissions and Condensible PM-10 Emissions. This section references both Methods 5 and 202, among others. Not subject to PM10 limitations, the Vermilion Power Station is not subject to § 212.108, contrary to the Agency's attempt to expand its applicability in the Responsiveness Summary by stating, "Significantly, the use of Reference Method 202 is not limited by geographic area or regulatory applicability." Responsiveness Summary, p. 18. This is certainly a true statement if one is performing a test of condensibles. However, this statement does not expand the requirements of § 212.110 to include PM10 condensible testing when the limitations applicable to the source pursuant to 212.Subpart E are for only PM, not PM10. Therefore, there is no basis for the Agency to require in the CAAPP permit, that the Vermilion Power Station be tested pursuant to Method 202.

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

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

Responsiveness Summary, p. 18. (Emphasis added.) Further, the Agency says, "Regulatorily, only filterable[9] PM emissions need to be measured." Responsiveness Summary, p. 18. The Agency attempts to justify inclusion of the requirement for testing condensibles by stating that the data are needed to "assist in conducting assessments of the air quality impacts of power

[9] I.e., non-gaseous PM; condensibles are gaseous.

plants, including the Illinois EPA's development of an attainment strategy for PM2.5" or by stating that "the use of Reference Method 202 is not limited by geographic area or regulatory applicability." Responsiveness Summary, p. 18. Under the Board's rules, it is limited to testing for PM, and so, at least in Illinois, its "regulatory applicability" is, indeed, limited. These attempted justifications do not convert testing for condensibles into an applicable requirement.

81. While the Agency has a duty under Section 4(b) to gather data, it must be done in compliance with Section 4(b). Section 4(b), however, does not create or authorize the creation of permit conditions. The Board's rules serve as the basis for permit conditions. Therefore, DMG does dispute that requiring such testing in the CAAPP permit is appropriate. In fact, it is definitely not appropriate. It is unlawful and exceeds the Agency's authority.

82. For these reasons, Conditions 7.1.7(b), and the inclusion of Method 202 in Conditions 7.1.7(b)(iii) and 7.7.7-1(b) (to the extent this condition includes Method 202), all contested herein, are stayed consistent with the APA, and DMG requests that the Board order the Agency to delete the requirement for Method 202 testing from the permit.

(v) Measuring CO Concentrations

83. The CAAPP permit issued to the Vermilion Power Station requires DMG to conduct, as a work practice, semi-annual or quarterly "combustion evaluations" that consist of "diagnostic measurements of the concentration of CO in the flue gas." *See* Conditions 7.1.6-2(a), semi-annual and 7.7.6(a), quarterly. *See also* Conditions 7.1.9-1(f)(i), 7.1.10-1(a)(v) (related reporting requirements), and 7.1.12(d), 7.7.9(a)(iii) and 7.7.12(d) (related recordkeeping and compliance procedure requirements) and any conditions imposing related reporting requirements. Including these provisions in the permit is not necessary to assure compliance with the underlying standard, is not required by the Board's regulations, and, therefore, exceeds

the Agency's authority to gapfill. Maintaining compliance with the CO limitation has historically been a work practice, thus its inclusion in the work practice condition of the permit. Sophisticated control systems are programmed to maintain boilers in an optimal operating mode, which serves to minimize CO emissions. One can speculate that because it is in DMG's best interests to operate its boilers optimally and because ambient CO levels are so low,[10] compliance with the CO limitation has been accomplished through combustion optimization techniques historically at power plants. There is no reason to change this practice at this point. Ambient air quality is not threatened, and emissions of CO at the Station are significantly below the standard of 200 ppm.

84. Under these circumstances, requiring Stations to purchase and install equipment to monitor and record emissions of CO is overly burdensome and, therefore, arbitrary and capricious. In order to comply with the "work practice"[11] of performing "diagnostic testing" that yields a concentration of CO, DMG must purchase and install or operate some sort of monitoring devices with no environmental purpose served.

85. Furthermore, the Agency has failed to provide any guidance as to how to perform diagnostic measurements of the concentration of CO in the flue gas. It is DMG's understanding that a sample can be extracted from any point in the furnace or stack using a probe. This sample can then be preconditioned (removal of water or particles, dilution with air) and analyzed. The way in which the sample is preconditioned and analyzed, however, varies. Given the lack of

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

[11] DMG questions how the requirement that the Agency has included in Conditions 7.1.6-2(a) and 7.7.6(a) is classified as a "work practice." To derive a concentration of CO emissions, DMG will have to engage in monitoring or testing – far more than the work practice of combustion optimization that has been.

guidance and the variability in the way the concentration of CO in the flue gas can be measured, the data generated is not sufficient to assure compliance with the CO limit and is, therefore, arbitrary and capricious. Stack testing, on the other hand, does yield data sufficient to assure compliance with the CO limit.

86. In addition, the permit requires at Conditions 7.1.9-4(a)(i), 7.1.9-4(a)(ii)(C)(5), 7.1.9-4(b)(ii)(E)(3),[12] 7.7.9(d)(ii)(C)(3), and 7.7.9(e)(ii)(D)(3), that DMG provide estimates of the magnitude of CO emitted during startup and operation during malfunction and breakdown. One monitoring device that DMG could utilize for the semi-annual and quarterly diagnostic evaluations required by Conditions 7.1.6-2(a) and 7.7.6(a), respectively, is a portable CO monitor. So far as Petitioner knows, portable CO monitors are not equipped with continuous readout recordings. Rather, they must be manually read. What the Agency is effectively requiring through these recordkeeping provisions is that someone continually read portable CO monitors, when used for compliance, during startup, and during malfunctions and breakdowns, which are by their nature not predictable. In the first case (startup), the requirement is unreasonable and overly burdensome and perhaps dangerous in some weather conditions; in the second case (malfunction and breakdown), in addition to the same problems that are applicable during startup, it may be impossible for DMG to comply with the condition.

87. The requirement to perform diagnostic measurements of the concentration of CO in the flue gas is arbitrary and capricious because the Agency has failed to provide any guidance as to how to perform the diagnostic measurements. DMG can only speculate as to how to develop and implement a formula and protocol for performing diagnostic measurements of the concentration of CO in the flue gas in the manner specified in Condition 7.1.6-2(a).

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[12] Corresponding conditions appear to include 7.1.10-1(a)(v) (reporting) and 7.1.12(d) (compliance procedures).

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

89. For these reasons, Conditions 7.1.6-2(a), 7.1.9-1(f)(i), 7.1.9-4(a)(i), 7.1.9-4(a)(ii)(C)(5), 7.1.9-4(b)(ii)(E)(3), , 7.7.6(a), 7.7.9(a)(iii), 7.7.9(d)(ii)(C)(3). Conditions 7.1.12(d) and 7.7.12(d) to the extent the Conditions require the quarterly diagnostic measurements and estimates of CO emissions during startup and malfunction/breakdown, and any other related conditions, all contested herein, are stayed consistent with the APA, and DMG requests that the Board order the Agency to amend Condition 7.1.6-2(a) and these other conditions, as appropriate, to reflect a requirement for work practices optimizing boiler operation, to delete the requirement for estimating the magnitude of CO emitted during startup and malfunction and breakdown, and to amend the corresponding recordkeeping, reporting, and compliance procedures accordingly.

(vi) Reporting Requirements Under Condition 7.1.10-1(a) and Related Conditions

90. Condition 7.1.10-1(a) (including all subparts) requires "prompt reporting" with respect to certain events identified in this condition. This condition, in turn, cites to many other conditions, and many other conditions refer to this Condition 7.1.10-1(a). Based upon its review of the parallel provision in the four Title V permits issued for its four other generating stations, which are also being appealed contemporaneously herewith, Condition 7.1.10-1(a) and related conditions differ substantially among the five permits.

91. The Agency has failed to provide any support for or explanation concerning these substantial differences. The differences, if the conditions are sustained, would create confusion

and ambiguity, and would increase the cost and effort necessary to comply with the permits. There is no legitimate reason for these differences, which are arbitrary and capricious.

92. For these reasons, Condition 7.1.10-1(a) and related conditions (including conditions that reference Condition 7.1.10-1(a)), are contested herein and stayed consistent with the APA. DMG requests that the Board order the Agency to revise such conditions to correct the deficiencies set forth above, including, as appropriate, by making the parallel provisions among the DMG Title V permits consistent.

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

93. The Agency has included the word *each* in Conditions 7.1.4(f): "The affected boilers are each subject to the following requirements. . . ." (Emphasis added.) Because of the structure and purpose of 35 Ill.Adm.Code 217.Subpart V, which is the requirement that the NOx emissions rate from certain coal-fired power plants during the ozone season average no more than 0.25 lb/mmBtu across the state, DMG submits that the use of the word *each* in this sentence is misplaced and confusing, given the option available to the Vermilion Power Station to average emissions among affected units in infinite combinations.

94. For these reasons, Conditions 7.1.4(f), and 7.1.4(f)(i)(A), all contested herein, are stayed consistent with the APA, and DMG requests that the Board order the Agency to delete the word *each* from the sentence quoted above in Condition 7.1.4(f) and to insert the word *each* in Condition 7.1.4(f)(i)(A) if the Board determines that its inclusion is necessary at all, as follows for Condition 7.1.4(f)(i)(A): "The emissions of NOx from the affected boiler. . . .".

(viii) Startup Provisions

95. As is allowed by Illinois' approved Title V program, CAAPP permits provide an affirmative defense against enforcement actions brought against a permittee for emissions

exceeding an emissions limitation during startup. In the issued version of the permit, the Agency imposed additional recordkeeping obligations for Boilers 1 and 2 if the startup period exceeds four hours under Condition 7.1.9-4(a)(ii)(C).[13] Similarly, Condition 7.7.9(d)(ii)(C) imposed additional recordkeeping for the heating boiler if the startup period exceeds twelve minutes. The Agency provided no support for its recordkeeping requirements, and no explanation for the period of time that would trigger the additional recordkeeping obligation. Moreover, the timeframes are so short that it is illogical to include the provision for "additional" recordkeeping, as the recordkeeping will be required for virtually every startup.

96. The provisions in the Board's rules allowing for operation of a CAAPP source during startup are located at 35 Ill.Adm.Code 201.Subpart I. These provisions, at § 201.265 refer back to § 201.149 with respect to the affirmative defense available. The rules nowhere limit the length of time allowed for startup, and the records and reporting required by § 201.263 and Sections 39.5(7)(a) and (e) of the Act, the provisions that the Agency cited as the regulatory basis for Conditions 7.1.9-4(a) and 7.7.9(d), do not address startup at all; § 201.263 is limited in its scope to records and reports required for operation during malfunction and breakdown where there are excess emissions. Therefore, one must conclude that the records that the Agency requires here would be considered gapfilling and are limited to what is necessary to assure compliance with emissions limits.

97. Requiring the additional recordkeeping if startups exceed the specified periods does not provide any additional information necessary to assure compliance with the permit and so cannot be characterized as gapfilling. DMG is already required to provide information regarding when startups occur and how long they last by Conditions 7.1.9-4(a)(ii)(A) and

[13] DMG had no input into the length of time that triggered the additional recordkeeping and reporting other than to provide the total length of time necessary for a cold startup.

7.7.9(d)(ii)(A). Emissions of SO_2, NOx, and opacity during startup of the boilers are continuously monitored by the CEMS/COMS. DMG has already established that the magnitude of emissions of PM and CO cannot be reliably provided (*see* above). The additional information that the Agency requires in Conditions 7.1.9-4(a)(ii)(C) and 7.7.9(d)(ii)(C) does nothing to assure compliance with the emissions limitations, which is the purpose of the permit in the first place, and so exceeds the Agency's authority to gapfill.

98. For these reasons, Conditions 7.1.9-4(a)(ii)(C) and 7.7.9(d)(ii)(C), contested herein, are stayed consistent with the APA, and DMG requests that the Board order the Agency to delete the conditions, consistent with the startup provisions of 35 Ill.Adm.Code § 201.149 and the inapplicability of § 201.263.

(ix) Malfunction and Breakdown Provisions

99. Illinois' approved Title V program allows the Agency to grant sources the authority to operate during malfunction and breakdown, even though the source emits in excess of its limitations, upon certain showings by the permit applicant. The authority must be expressed in the permit, and the Agency has made such a grant of authority to DMG for the Vermilion Power Station. This grant of authority provides an affirmative defense in an enforcement action. *Generally see* Conditions 7.1.3(c) and 7.7.3(c).

100. Conditions 7.1.10-3(a)(i) and 7.7.10(c)(i) require that DMG notify the Agency "immediately" if it operates during malfunction and breakdown and there could be PM exceedances. Likewise, Condition 7.1.10-3(a)(ii) imposes additional reporting obligations if the "PM emission standard may have been exceeded." The Agency is demanding that DMG notify it of the mere supposition that there have been PM or opacity exceedances. The Agency has provided no regulatory basis for reporting suppositions. At the very least, DMG should be

granted the opportunity to investigate whether operating conditions are such that support or negate the likelihood that there may have been PM or opacity emissions exceedances. DMG does not believe that even this is necessary, since the Agency lacks a regulatory basis for this requirement in the first place. Reference to reliance on opacity as an indicator of PM emissions should be deleted. The condition as written exceeds the scope of the Agency's authority to gapfill and so is unlawful, arbitrary and capricious.

101. Also in Conditions 7.1.10-3(a)(i) and 7.7.10(c)(i), the Agency has deleted the word *consecutive* as a trigger for reporting opacity and potential PM exceedances during an "incident" in the final version of the permit. Versions prior to the July 2005 version include that word. Its deletion completely changes the scope and applicability of the condition. *Please see* DMG's comments on each version of the permit in the Agency Record. As the series of comments demonstrates, it was not until the draft revised proposed permit issued in July 2005 that the Agency had deleted the concept of consecutive 6-minute averages of opacity from this condition. In the December 2004 version of the permit, the word *consecutive* had been replaced with *in a row*, but the concept is the same.

102. The Agency has provided no explanation for this change. As the actual opacity exceedance could alone comprise the "incident," DMG believes that it is more appropriate to retain the word *consecutive* in the condition (or add it back in to the condition). Random, intermittent exceedances of the opacity limitation do not necessarily comprise a malfunction/breakdown "incident." On the other hand, a prolonged period of opacity exceedance does possibly indicate a malfunction/breakdown "incident." The trigger for PM opacity reporting under Condition 7.7.10(c)(ii) is not specified, but such reporting appears to be triggered when "immediate" reporting is required under 7.7.10(c)(i). Condition 7.7.10(c)(ii)

therefore suffers from the same defect and the Agency has not explained or supported the trigger for additional reporting under this condition. The timeframe for additional opacity reporting under Condition 7.1.10-3(a)(ii) also has not been explained or supported by the Agency and the timeframe is unreasonable. The triggers for additional reporting under Conditions 7.7.10(c)(ii) and 7.1.10-3(a)(ii) are arbitrary and capricious.

103. Additionally, Condition 7.1.10-3(a)(i) requires reporting if opacity exceeded the limit for "five or more 6-minute averaging periods." The next sentence in the condition says, "(Otherwise, . . . for no more than five 6-minute averaging periods. . . .)" The language is inconsistent. The way the condition is written, the permittee cannot tell whether five six-minute averaging periods of excess opacity readings does or does not require reporting. Condition 7.7.10(c)(i) clearly requires reporting only when there are five or more averaging period exceedances. The language of Condition 7.1.10-3(a)(ii) should be amended to remove the inconsistency, and to ensure a consistent trigger for reporting opacity exceedances across all applicable operations for the reasons discussed elsewhere.

104. For these reasons, Conditions 7.1.10-3(a)(i) and (ii), 7.7.10(c)(i) and (ii), contested herein, are stayed consistent with the APA, and DMG requests that the Board order the Agency to make appropriate revisions in these conditions to correct the deficiencies referenced above, including by deleting reporting requirements for possible exceedances and including appropriate triggers for reporting of actual exceedances.

(x) Alternative Fuels Requirements

105. The Agency has included at Conditions 7.1.5(a)(ii)-(iv) requirements that become applicable when Vermilion uses a fuel other than coal as its principal fuel. Condition 7.1.5(a)(ii) identifies what constitutes using an alternative fuel as the principal fuel and establishes emissions

limitations. Condition 7.1.5(a)(iii) also describes the conditions under which the Station would be considered to be using an alternative fuel as its principal fuel. Condition 7.1.5(a)(iv) requires notification to the Agency prior to the Station's use of an alternative fuel as its principal fuel.

106. Inclusions of these types of requirements in Condition 7.1.5, the condition addressing non-applicability of requirements, is organizationally misaligned under the permit structure adopted by the Agency. These provisions should be included in the proper sections of the permit, such as 7.1.4 for emissions limitations and 7.1.10-3 for notifications. In the alternative, they should be in Condition 7.1.11(c), operational flexibility, where the Agency already has a provision addressing alternative fuels. As the Agency has adopted a structure for the CAAPP permits that is fairly consistent not only among units in a single permit but also among permits,[14] for the Agency to include specific recordkeeping requirements in the compliance section creates a disconnect and uncertainty regarding where the permittee is to find out what he or she is supposed to do.

107. Additionally, at Condition 7.1.11(c)(ii), the Agency's placement of the examples of alternative fuels seems to define them as hazardous wastes. The intent and purpose of the condition is to ensure that these alternative fuels are not classified as a waste or hazardous wastes. The last phrase of the condition, beginning with "such as petroleum coke, tire derived fuel. . . ," should be placed immediately after "Alternative fuels" with punctuation and other adjustments to the language as necessary, to clarify that the examples listed are not hazardous wastes and are not considered to be a waste.

108. For these reasons, Conditions 7.1.5(a)(ii), 7.1.5(a)(iii), 7.1.5(a)(iv), and 7.1.11(c)(ii), all contested herein, are stayed consistent with the APA, and DMG requests that the

[14] That is, Condition 7.*x*.9 for all types of emissions units in this permit, from boilers to tanks, addresses recordkeeping. Likewise, condition 7.*x*.9 addresses recordkeeping in all of the CAAPP permits for EGUs.

Board order the Agency to place Conditions 7.1.5(a)(ii)-(iv) in more appropriate sections of the permit and to clarify Condition 7.1.11(c)(ii).

(xi) Control Plans, Operating Logs and Reporting Requirements Related to the Schedule

109. As discussed above, the permit contains a number of conditions that expressly or implicitly characterize, refer to or attempt to implement provisions of the Schedule (which reflects provisions from the Consent Decree). In addition to and without limiting the reasons set forth earlier in this petition for deleting such provisions, the conditions identified in this section of this petition also should be deleted for the reasons set forth below.

110. Conditions 7.1.6-2(b)(ii), 7.1.6-2(c)(iv), 7.1.9-2(b), and 7.1.9-4(c) require DMG to develop, implement, maintain and submit procedures, practices and related records for the control of NOx and PM, emissions, defined in the permit as "control plans." The Agency, however, does not have the authority to require DMG to develop, implement, maintain and submit a "control plan" for NOx and its inclusion is arbitrary and capricious. With respect to PM, the Consent Decree already requires ESP optimization plans. Adding another PM control plan requirement is unnecessary and could result in additional and inconsistent obligations. Accordingly, the requirements concerning PM controls plans are arbitrary and capricious and unauthorized by law.

111. For these reasons, Conditions 7.1.6-2(b)(ii), 7.1.6-2(c)(iv), 7.1.9-2(b), and 7.1.9-4(c), all contested herein, are stayed consistent with the APA, and DMG requests that the Board order the Agency to delete these conditions and all references to these conditions from the permit.

112. Condition 7.1.9-2(a)(i) requires DMG to maintain operating logs with respect to "operating procedures related to control equipment that are required to be or are otherwise

implemented pursuant to Conditions 7.1.6-2(b) and (c)." Condition 7.1.9-1(f)(ii) also requires operating logs with respect to actions required under Conditions 7.1.6-2(b) and (c). Conditions 7.1.6-2(b) and (c), in turn, require compliance with and purport to characterize various provisions in the Schedule relating to NOx and PM emissions and the "control plans" that, as described above, should be deleted from the permit.

113. Neither the Consent Decree nor any other applicable requirement authorizes or imposes the duplicative obligations set forth in Conditions 7.1.9-2(a)(i) and 7.1.9-1(f)(ii) Conditions 7.1.6-2(b) and (c) characterize and describe various requirements of the Consent Decree, which is improper and unnecessary for the reasons set forth earlier in this petition.

114. For these reasons, Conditions 7.1.6-2(b) and (d), 7.1.9-1(f)(ii) and 7.1.9-2(a)(i), all contested herein, are stayed consistent with the APA, and DMG requests that the Board order the Agency to delete these conditions and all references to these conditions from the permit.

115. Condition 7.1.10-2(b)(iii) and (d)(iv) impose reporting requirements with respect to compliance with the SO2 and PM, respectively, emission limits and requirements set forth in 7.1.6-1, which in turn reflects certain emission limits and requirements from the Consent Decree. The reporting requirements set forth in Conditions 7.1.10-2(b)(iii) and (d)(iv) exceed reporting requirements set forth in the Consent Decree, and the reporting requirements set forth in such conditions are not otherwise authorized or required by law. In addition as set forth above, 7.1.6-1 is redundant with the Schedule requirements and imposes requirements after the expiration date of the permit.

116. For these reasons, Conditions 7.1.6-1 and 7.1.10-2(b)(iii) and (d)(iv), all contested herein, are stayed consistent with the APA, and DMG requests that the Board order the Agency to delete these conditions and all references to these conditions from the permit.

(xii) Testing Requirements

117. Conditions 7.1.7(e) and 7.7.7-1(b)(iv) identifies detailed information that is to be included in certain test reports, including target levels and settings. To the extent that these requirements are or can be viewed as enforceable operational requirements or parametric monitoring conditions, DMG contests these conditions. Operation of an electric generating station depends upon many variables – ambient air temperature, cooling water supply temperature, fuel supply, equipment variations, and so forth – such that different settings are used on a daily basis. Using those settings as some type of monitoring device or parametric compliance data would be inappropriate. For these reasons, Conditions 7.1.7(e) and 7.7.7-1(b)(iv), all contested herein, are stayed consistent with the APA, and DMG requests that the Board order the Agency to delete or revise these conditions to correct these deficiencies.

(xiii) Monitoring and Reporting Pursuant to NSPS

118. It appears from various conditions in the permit that the Agency believes that Vermilion is subject to NSPS monitoring and reporting requirements pursuant to the Acid Rain Program. DMG's review of the applicable requirements under the Acid Rain Program does not reveal how the Agency arrived at this conclusion. This is an example of how a statement of basis by the Agency would have been very helpful. The Acid Rain Program requires monitoring and reporting pursuant to 40 CFR Part 75. Specifically, 40 CFR § 75.21(b) states that continuous opacity monitoring shall be conducted according to procedures set forth in state regulations where they exist. Recordkeeping is addressed at § 75.57(f) and reporting at § 75.65. None of this references Part 60, NSPS.

119. Arguably, it is odd that a permittee would appeal a condition in a permit that states that regulatory provisions are not applicable. However, consistent with DMG's analysis of

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

120. Conditions 7.1.10-2(b)(i), 7.1.10-2(c)(i), and 7.1.10-2(d)(i) require DMG to submit summary information on the performance of the SO_2, NOx, and opacity monitoring systems, including the information specified at 40 CFR § 60.7(d). Condition 7.1.10-2(d)(iii), in the "Note," refers, also, to NSPS §§ 60.7(c) and (d). The information required at § 60.7(d) is inconsistent with the information required by 40 CFR Part 75, which sets forth the federal reporting requirements applicable to boilers that are affected units under the Acid Rain program. Section 60.7(d) is not an "applicable requirement," as the boilers at the Station are not subject to the NSPS. For DMG to comply with these conditions would entail reprogramming or purchasing and deploying additional software for the computerized CEMS, effectively resulting in the imposition of additional substantive requirements through the CAAPP permit beyond the limitations of gapfilling. Moreover, contrary to Condition 7.1.10-2(d)(iii), DMG does not find a regulatory link between the NSPS provisions of 40 CFR 60.7(c) and (d) and the Acid Rain Program.

121. For these reasons, conditions contested in this section, including Conditions 7.1.5(b), 7.1.10-2(b)(i), 7.1.10-2(c)(i), 7.1.10-2(d)(i), 7.1.10-2(d)(iii), and the "Note" to 7.1.10-2(d)(iii), are stayed consistent with the APA, and DMG requests that the Board order the Agency to delete all references to NSPS and 40 CFR 60.7(c) and (d).

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

122. The Board's regulations at 35 Ill.Adm.Code § 212.123(b) provide that a source may exceed the 30% opacity limitation of § 212.123(a) for an aggregate of eight minutes in a 60-minute period but no more than three times in a 24-hour period. Additionally, no other unit at the source located within a 1,000-foot radius from the unit whose emissions exceed 30% may emit at such an opacity during the same 60-minute period. Because the opacity limit at § 212.123(a) is expressed as six-minute averages pursuant to Method 9 (*see* Condition 7.1.12(a)(i)), a source demonstrating compliance with § 212.123(b) must reprogram its COMS to record opacity over a different timeframe than would be required by demonstrating compliance with § 212.123(a) alone. The Agency attempts to reflect these provisions at Condition 7.1.12(a), providing for compliance with § 212.123(a) at Condition 7.1.12(a)(i) and separately addressing § 212.123(b) at Condition 7.1.12(a)(ii). Additionally, the Agency requires DMG to provide it with 15 days' notice prior to changing its procedures to accommodate § 212.123(b) at Condition 7.1.12(a)(ii)(E). These conditions raise several issues.

123. First, Condition 7.1.12(a)(ii) assumes that accommodating the "different" compliance requirements of § 212.123(b), as compared to § 212.123(a), is a change in operating practices. In fact, it is not. Arguably, then, DMG has nothing to report to the Agency pursuant to Condition 7.1.12(a)(ii)(E), because no change is occurring.

124. Second, as with DMG's objection to Condition 5.6.2(d), Condition 7.1.12(a)(ii)(E) is an intrusion by government into the operational practices of a source beyond the scope of government's authority to so intrude. The Agency states that the purpose of the 15 days' prior notice is so that the Agency can review the source's recordkeeping and data handling

procedures, presumably to assure that they will comply with the requirements implied by § 212.123(b). This is an unwarranted and unauthorized extension of the Agency's authority.

125. Moreover, while Condition 7.1.12(a)(ii)(E) says that the Agency will review the recordkeeping and data handling practices of the source, it says nothing about approval of them or what the Agency plans to do with the review. The Agency has not explained a purpose for the requirement in a statement-of-basis document or in its Responsiveness Summary or shown how this open-ended condition assures compliance with the applicable requirement. Because the Vermilion Power Station is required to operate a COMS, all of the opacity readings captured by the COMS are recorded and available to the Agency. The Agency has had ample opportunity to determine whether the Station has complied with § 212.123(b). DMG's providing 15 days' prior notice of its "change" to accommodating § 212.123(b) will not improve the Agency's ability to determine the Station's compliance.

126. Conditions 7.1.10-3(a)(i) and (ii) do not accommodate the applicability of § 212.123(b). The Board's regulations do not limit when § 212.123(b) may apply beyond eight minutes per 60 minutes three times per 24 hours. Therefore, any limitation on opacity must consider or accommodate the applicability of § 212.123(b) and not assume or imply that the only applicable opacity limitation is 30%.

127. Finally, inclusion of recordkeeping and notification requirements relating to § 212.123(b) in the compliance section of the permit is organizationally misaligned under the permit structure adopted by the Agency. These provisions, to the extent that they are appropriate in the first place, should be included in the proper sections of the permit, such as 7.1.9 for recordkeeping and 7.1.10 for reporting. As the Agency has adopted a structure for the CAAPP permits that is fairly consistent not only among units in a single permit but also among permits,

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

128. For these reasons, Condition 7.1.12(a)(ii), contested herein, is stayed consistent with the APA, and DMG requests that the Board order the Agency to delete the condition from the permit. Additionally, Conditions 7.1.10-3(a)(i) and (ii), all contested herein, are stayed consistent with the APA, and, if the Board does not order the Agency to delete these conditions from the permit pursuant to other requests raised in this appeal, DMG requests that the Board order the Agency to amend these conditions to reflect the applicability of § 212.123(b).

(xv) Establishment of PM CEMs as a Compliance Method

129. As discussed above, the permit contains a number of conditions that expressly or implicitly characterize, refer to or attempt to implement provisions of the Schedule (which reflects provisions from the Consent Decree). In addition to and without limiting the reasons set forth earlier in this petition for deleting such provisions, the condition identified in this section of this petition also should be deleted for the reasons set forth below.

130. Pursuant to Paragraph 93 of the Consent Decree, DMG may install a PM CEMs at a unit at the Vermilion Power Station. While somewhat ambiguous, Condition 7.1.12(b)(ii) of the Permit appears to identify any such PM CEMs as the, or at least a, method to be used to determine compliance with the particulate matter emission limits identified in Condition 7.1.12(b)(i) of the Permit.

131. The compliance determination condition set forth in Condition 7.1.12(b)(ii) is arbitrary and capricious, assumes inaccurate facts and is unauthorized by law. Among other things, neither the Consent Decree nor any other applicable requirement imposes or authorizes an

obligation to determine compliance by use of any such PM CEMs. In addition, under the schedule set forth in Paragraph 93 of the Consent Decree, such a PM CEM may be installed and operated after December 31, 2012, or after the term of the Permit expires. Further, under Paragraph 95 of the Consent Decree, DMG is not required to operate any installed PM CEMs for more than two years under certain circumstances. Condition 7.1.12(b)(i) incorrectly implies, however, that any PM CEM installed at a unit at the Vermilion Power Station would be operated and used for compliance purposes during the entire term of the Permit. Finally, this condition incorrectly implies that any installed CEMS may be used to determine compliance even when any such PM CEMS is not certified, including prior to any certification.

132. For these reasons, Conditions 7.1.12(b)(i) and (ii), all contested herein, are stayed consistent with the APA, and DMG requests that the Board order the Agency to delete Condition 7.1.12(b)(ii).

E. Coal Handling Equipment, Coal Processing Equipment, and Fly Ash Equipment
(Sections 7.2, 7.3, and 7.4)

(i) Fly Ash Handling v. Fly Ash Processing Operation

133. No processing occurs within the fly ash system. It is a handling and storage operation the same as coal handling and storage.

134. Because the fly ash operations at the Vermilion Station are not a process, they are not subject to the process weight rate rule at § 212.322(a). Section 212.322(a) is not an applicable requirement under Title V, since the fly ash operation is not a process. The process weight rate rule is not a legitimate applicable requirement and so is included in the permit impermissibly.

135. Since the fly ash operation is not a process, reference to it as a process is inappropriate. The word *process* and its derivatives in Section 7.4 of the permit should be

changed to *operation* and its appropriate derivatives or, in one instance, to *handled*, to ensure that there is no confusion as to the applicability of § 212.322(a).

136. For these reasons, Conditions 7.4.3, 7.4.4, 7.4.6, 7.4.7, 7.4.8, 7.4.9, 7.4.10, and 7.4.11, all contested herein, are stayed consistent with the APA, and DMG requests that the Board order the Agency to delete Conditions 7.4.4(c), 7.4.9(b)(ii), and all other references to the process weight rate rule, including in Section 10, and add to Condition 7.4.5 a statement identifying § 212.322(a) as a requirement that is not applicable to the Station.

(ii) Fugitive Emissions Limitations and Testing

137. The Agency has applied the opacity limitations of § 212.123 to sources of fugitive emissions at the Station through Conditions 7.2.4(b), 7.3.4(b), and 7.4.4(b), all referring back to Condition 5.2.2(b). Applying the opacity limitations of § 212.123 to sources of fugitive emissions is improper and contrary to the Board's regulatory structure covering PM emissions. In its response to comments to this effect, the Agency claims that

> [n]othing in the State's air pollution control regulations states that the opacity limitation does not apply to fugitive emission units. The regulations at issue broadly apply to 'emission units.' Moreover, while not applicable to these power plants, elsewhere in the State's air pollution control regulations, opacity limitations are specifically set for fugitive particulate matter emissions at marine terminals, roadways, parking lots and storage piles.

Responsiveness Summary, p. 41.

138. That the Agency had to specifically establish fugitive emissions limitations for such sources is a strong indication that the regulatory structure did not apply the opacity limitations of § 212.123 to fugitive sources. Fugitive emissions are distinctly different in nature from point source emissions, in that point source emissions are emitted through a stack, while fugitive emissions are not emitted through some discrete point. Therefore, fugitive emissions are

addressed separately in the Board's rule at 35 Ill.Adm.Code 212.Subpart K. These rules call for fugitive emissions plans and specifically identify the types of sources that are to be covered by these plans.

139. The limitations for fugitive emissions are set forth at § 212.301. It is a no-visible-emissions standard, as viewed at the property line of the source. The measurement methods for opacity are set forth at § 212.109, which requires application of Method 9 as applied to § 212.123. It includes specific provisions for reading the opacity of roadways and parking areas. However, § 212.107, the measurement method for visible emissions, says, "This Subpart shall not apply to Section 212.301 of this Part." Therefore, with the exception of roadways and parking lots, the Agency is precluded from applying Method 9 monitoring to fugitive emissions, leaving no manner for monitoring opacity from fugitive sources other than the method set forth in § 212.301. This reinforces the discussion above regarding the structure of Part 212 and that § 212.123 does not apply to sources of fugitive emissions other than where specific exceptions to that general nonapplicability are set forth in the regulations.

140. As § 212.107 specifically excludes the applicability of Method 9 to fugitive emissions, the requirements of Condition 7.2.7(a), 7.3.7(a), and 7.4.7(a) are clearly inappropriate and do not reflect applicable requirements. Therefore, they, along with Conditions 7.2.4(b), 7.3.4(b), and 7.4.4(b), must be deleted from the permit. Except for roadways and parking lots, § 212.123 is not an applicable requirement for fugitive emissions sources and the Agency's inclusion of conditions for fugitive sources based upon § 212.123 and Method 9 is unlawful. To the extent that Conditions 7.2.12(a), 7.3.12(a), and 7.4.12(a) rely on Method 9 for demonstrations of compliance, they, too, are unlawful.

141. The Agency also requires stack tests at Conditions 7.3.7(b), and 7.4.7(b) PM stack testing would be conducted in accordance with Test Method 5. However, a part of complying with Method 5 is complying with Method 1, which establishes the physical parameters necessary to test. DMG cannot comply with Method 1 as applied at the Station in the manner required by the permit. The stacks and vents for such sources as baghouses and wetting systems are narrow and not structurally built to accommodate testing ports and platforms for stack testing. The inspections, monitoring, and recordkeeping requirements are sufficient to assure compliance. These conditions should be deleted from the permit.

142. For these reasons, conditions contested in this section, including Conditions 7.2.4(b), 7.2.7(a), 7.2.7(b), 7.2.12(a), 7.3.4(b), 7.3.7(a), 7.3.7(b), 7.3.12(a), 7.4.3(b), 7.4.7(a), 7.4.7(b), 7.2.12(a), 7.3.12(a) and 7.4.12(a), are stayed consistent with the APA, and DMG requests that the Board order the Agency to delete these conditions to the extent that they require compliance with § 212.123 and Method 9, or stack testing and, thereby, compliance with Methods 1 and 5.

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

143. The CAAPP permit provides at Condition 7.4.7(a)(ii) that DMG conduct the opacity testing required at Condition 7.4.7(a)(i) for a period of at least 30 minutes "unless the average opacities for the first 12 minutes of observation (two six-minute averages) are both less than 5.0 percent." The original draft and proposed permits (June 2003 and October 2003, respectively) contained no testing requirement for fly ash handling. This testing requirement first appeared in the draft revised proposed permit of December 2004, and at that time allowed for testing to be discontinued if the first 12 minutes' observations were both less than 10%. In

the second draft revised proposed permit (July 2005), the Agency inexplicably reduced the threshold for discontinuation of the test to 5%.

144. The Agency provided no explanation for (1) treating fly ash handling differently from coal handling in this regard (*see* Condition 7.2.7(a)(ii)[15]) or (2) reducing the threshold from 10% to 5%. Because the Agency has not provided an explanation for this change at the time that the change was made to provide DMG with the opportunity, at worst, to try to understand the Agency's rationale or to comment on the change, the inclusion of this change in the threshold for discontinuing the opacity test is arbitrary and capricious. Condition 7.4.7(a)(ii) is inextricably entwined with 7.4.7(a), and so DMG must appeal this underlying condition as well.

145. For these reasons, Condition 7.4.7(a) (including 7.4.7(a)(ii)), which is contested herein, is stayed consistent with the APA, and without conceding by its appeal that these conditions are appropriate, DMG requests that if the condition is not deleted, the Board order the Agency to amend Condition 7.4.7 to, among other things, reflect the 10% threshold, rather than the 5% threshold, for discontinuation of the opacity test, although DMG specifically does not concede that Method 9 measurements are appropriate in the first place.

(iv) Inspection Requirements for Coal Handling, Coal Processing, and Fly Ash Handling Operations

146. Conditions 7.2.8(a), 7.3.8(a), and 7.4.8(a) contain inspection requirements for the coal handling, coal processing, and fly ash handling operations, respectively. In each case, the condition requires that "[t]hese inspections shall be performed with personnel not directly involved in the day-to [sic] day operation of the affected . . . ." activities. The Agency provides no basis for this requirement other than a discussion, after the permit has been issued, in the

[15] "The duration of opacity observations for each test shall be at least 30 minutes (five 6-minute averages) unless the average opacities for the first 12 minutes of observations (two six-minute averages) are both less than 10.0 percent." (Emphasis added.)

Responsiveness Summary at page 19. The Agency's rationale is that the personnel performing the inspection should be "'fresh'" and "'independent'" of the daily operation, but the Agency does not tell us why being "fresh" and "independent" are "appropriate" qualifications for such an inspector. The Agency rationalizes that Method 22, *i.e.*, observation for visible emissions, applies, and so the inspector need have no particular skill set. The opacity requirement for these operations is not 0% or no visible emissions at the point of operation, but rather at the property line. Therefore, exactly what the observer is supposed to look at is not at all clear.[16]

147. There is no basis in law or practicality for this provision. To identify in a CAAPP permit condition who can perform this type of an inspection is overstepping the Agency's authority and clearly exceeds any gapfilling authority that may somehow apply to these observations of fugitive dust. The requirement must be stricken from the permit.

148. The Agency has included in Conditions 7.2.8(b) and 7.3.8(b) that inspections of coal handling and coal processing operations be conducted every 15 months while the process is not operating. Condition 7.4.8(b) contains a corresponding requirement for fly ash handling, but on a nine-month frequency. The Agency has not made it clear in a statement of basis or even the Responsiveness Summary why these particular frequencies for inspections are appropriate. Essentially, the Agency is dictating an outage schedule, as these processes are intricately linked to the operation of the boilers. In any given area of the station, station personnel are constantly alert to any "abnormal" operations during the course of the day. Although these are not formal inspections, they are informal inspections and action is taken to address any "abnormalities" observed as quickly as possible. It is DMG's best interest to run its operations as efficiently and safely as possible. While the Agency certainly has some gapfilling authority, this authority is

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

limited to what is necessary to ensure compliance with permit conditions. *See Appalachian Power*. It is not clear at all how these frequencies of inspections accomplish that end. Rather, it appears that these conditions are administrative compliance traps for work that is done as part of the normal activities at the station.

149. Moreover, the Agency does not provide a rationale as to why the frequency of fly ash handling inspections should be greater (more frequent) than for the other processes.

150. The contested permit conditions referenced above required that these activities must be inspected every 15 or 9 months, as the case may be, while they are not in operation. They typically would not operate during an entire outage of the boiler. The Agency, without authority, is effectively dictating a boiler outage schedule through these conditions.

151. Conditions 7.2.8(b), 7.3.8(b), and 7.4.8(b) require detailed inspections of the coal handling, coal processing, and fly ash handling operations both before and after maintenance has been performed. The Agency has not provided a rationale for this requirement and has not cited an applicable requirement for these conditions. This level of detail in a CAAPP permit is unnecessary and inappropriate and exceeds the Agency's authority to gapfill. These requirements should be deleted from the permit.

152. Condition 7.2.8(a) requires inspections of the coal handling and coal processing operations on a monthly basis and provides "that all affected operations that are in routine service shall be inspected at least once during each calendar month." Since the first sentence of the condition already states that these operations are to be inspected on a monthly basis, the last clause of the condition appears superfluous. However, until the July 2005 draft revised proposed permit, the language in this clause was "that all affected operations shall be inspected at least

once during each calendar quarter."[17] The Agency has provided no explanation as to why the frequency of the inspections has been increased and the corresponding recordkeeping conditions, 7.2.9(d), 7.3.9(c), and 7.4.9(c) made more onerous.

153. For these reasons, Conditions 7.2.8(a), 7.3.8(a), and 7.4.8(a), which are contested herein, are stayed consistent with the APA, and DMG requests that the Board order the Agency to delete those provisions of these conditions that dictate who should perform inspections of these operations, to delete the requirement contained in these conditions that DMG inspect before and after maintenance and repair activities. Additionally, Conditions 7.2.8(b), 7.3.8(b), and 7.4.8(b), all contested herein, are stayed consistent with the APA, and DMG requests that the Board order the Agency to alter the frequency of the inspections to correspond to boiler outages.

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

154. Conditions 7.2.9(a)(i)(C) and 7.3.9(a)(i)(C) require DMG to maintain a list identifying coal conveying equipment considered an "affected facility" for purposes of NSPS. Such a list was included in the application, and that should suffice. Moreover, the equipment in question is subject to the NSPS identified in Conditions 7.2.3(a)(ii) and 7.3.3(a)(ii), and so has already been identified in the permit itself. To require DMG to create a second list is redundant and not necessary to ensure compliance with emissions limitations. The equipment has been permitted historically. Moreover, the condition requires submission of this list pursuant to Condition 5.6.2(d), which is addressed earlier in this Petition. Conditions 7.2.9(a)(i)(C) and 7.3.9(a)(i)(C) should be deleted from the permit.

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

155. The demonstrations confirming that the established control measures assure compliance with emissions limitations, required at Conditions 7.2.9(b)(ii), 7.3.9(b)(ii) and 7.4.9(b)(ii), have already been provided to the Agency in the construction and CAAPP permit applications. These conditions are unnecessarily redundant, and resubmitting the demonstrations pursuant to Conditions 7.2.9(b)(iii), 7.3.9(b)(iii), and 7.4.9(b)(iii) serves no compliance purpose. Also, Conditions 7.2.9(b)(iii), 7.3.9(b)(iii), and 7.4.9(b)(iii) rely upon Condition 5.6.2(d), contested herein. Conditions 7.2.9(b)(ii), 7.2.9(b)(iii), 7.3.9(b)(ii), 7.3.9(b)(iii), 7.4.9(b)(ii), and 7.4.9(b)(iii) should be deleted from the permit.

156. Moreover, Conditions 7.2.9(b)(iii), 7.3.9(b)(iii), and 7.4.9(b)(iii) include reporting requirements within the recordkeeping requirements, contrary to the overall structure of the permit. DMG has already objected to the inclusion of these conditions for other reasons. In any event, they should not appear in Condition 7.*x*.9.

157. Conditions 7.2.9(d)(ii)(B), 7.3.9(c)(ii)(B), and 7.4.9(c)(ii)(B) are redundant to 7.2.9(d)(ii)(E), 7.3.9(c)(ii)(E), and 7.4.9(c)(ii)(E), respectively. Such redundancy is not necessary. Conditions 7.2.9(d)(ii)(B), 7.3.9(c)(ii)(B), and 7.4.9(c)(ii)(B) should be deleted from the permit.

158. Conditions 7.2.9(e)(ii), 7.2.9(e)(vii), 7.3.9(d)(ii), 7.3.9(d)(vii), 7.4.9(d)(ii), and 7.4.9(d)(vii) require DMG to provide the magnitude of PM emissions during an incident where the coal handling operation continues without the use of control measures. DMG has established that it has no means to measure PM emissions from any process on a continuing basis. Therefore, it is not appropriate for the Agency to require reporting of the magnitude of PM emissions. Though it may seem to be a small difference, it is a difference with distinction to say

that what DMG should be required to report is its estimate of the magnitude of PM emissions, if it must report at all.

159. The Agency uses the word *process* in Condition 7.2.9(f)(ii) rather than *operation*,[18] perhaps because use of *operation* at this point would be repetitious. While this may seem a very minor point, it is a point with a distinction. The word *process*, as the Board can see in Section 7.4 of the permit relative to the fly ash handling operation, can be a buzzword that implicates the applicability of the process weight rate rule. DMG wants there to be no possibility that anyone can incorrectly construe coal handling as a process subject to the process weight rate rule.

160. The Agency provided no rationale and still provides no authority for its inclusion of Conditions 7.2.9(d)(i)(B) and 7.3.9(c)(i)(B), observations of coal fines, and Condition 7.4.9(c)(i)(B), observations of accumulations of fly ash in the vicinity of the operation. The Agency did address these conditions after the fact in the Responsiveness Summary, but did not provide an acceptable rationale as to why the provisions are even there. The Agency says, with respect to the observation of conditions, as follows:

> Likewise, the identification of accumulations of fines in the vicinity of a process does not require technical training. It merely requires that an individual be able to identify accumulations of coal dust or other material. This is also an action that could be performed by a member of the general public. Moreover, this is a reasonable requirement for the plants for which it is being applied, which are required to implement operating programs to minimize emissions of fugitive dust. At such plants, accumulations of fines can potentially contribute to emissions of fugitive dust, as they could become airborne in the wind.

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

Responsiveness Summary, p. 19. The heart of the matter lies in the next-to-last sentence: "plants . . . which are required to implement operation programs to minimize emissions of fugitive dust." This is accomplished through other means under 35 Ill.Adm.Code § 212.309.

161. Observing accumulations of fly ash or fines is not an applicable requirement; *therefore, their inclusion in the permit violates* Title V and *Appalachian Power* by imposing new substantive requirements upon the permittee through the Title V permit. Additionally, requiring such observations cannot reasonably be included under gapfilling, as they are not necessary to assure compliance with the permit.

162. *Given that the fly ash system results in few emissions, rarely breaks down, and is* a closed system, there is no apparent justification for the trigger for additional recordkeeping when operating during malfunction/breakdown being only one hour in Condition 7.4.9(g)(ii)(E) compared to the two hours allowed for coal handling (Condition 7.2.9(f)(ii)(E)) and coal processing (Condition 7.3.9(e)(ii)(E)). The Agency has provided no rationale for this difference. Moreover, in earlier versions of the permit, this time trigger was two hours. *See* the June 2003 draft permit and the October 2003 proposed permit.

163. For these reasons, all of the conditions contested in this section, including Conditions, 7.2.9(a)(i)(C), 7.2.9(b)(ii), 7.2.9(b)(iii), 7.2.9(d)(i)(B), 7.2.9(d)(ii)(B), 7.2.9(e)(ii), 7.2.9(e)(vii), 7.2.9(f)(ii) (including (f)(ii)(E)), 7.3.9(a)(i)(C), 7.3.9(b)(ii), 7.3.9(b)(iii), 7.3.9(c)(i)(B), 7.3.9(c)(ii)(B), 7.3.9(d)(ii), 7.3.9(d)(vii), 7.4.9(b)(ii), 7.4.9(b)(iii), 7.4.9(c)(i)(B), 7.4.9(c)(ii)(B), 7.4.9(d)(ii), 7.4.9(d)(vii), and 7.4.9(e)(ii)(E), are stayed consistent with the APA, and DMG requests that the Board order the Agency to delete or revise each of these conditions, to address the deficiencies set forth above.

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

164. Conditions 7.2.10(a)(ii), 7.3.10(a)(ii), and 7.4.10(a)(ii) require notification to the Agency for operation of support operations that were not in compliance with the applicable work practices of Conditions 7.2.6(a), 7.3.6(a), and 7.4.6(a), respectively, for more than 12 hours or four hours with respect to ash handling regardless of whether there were excess emissions. Conditions 7.2.6(a), 7.3.6(a), and 7.4.6(a) identify the measures that DMG employs to control fugitive emissions at the Vermilion Power Station. Implementation of these measures is set forth in the fugitive dust plan required by § 212.309 but not addressed in Conditions 7.2.6, 7.3.6, or 7.4.6. The Agency's concern here in Conditions 7.2.10(a)(ii), 7.3.10(a)(ii), and 7.4.10(a)(ii) should be with excess emissions and not with whether control measures are implemented within the past 12 or four hours, as the fugitive dust plan does not require implementation of those control measures continuously. There are frequently 12- or four-hour periods when the control measures are not applied because it is not necessary that they be applied or it is dangerous to apply them. These conditions should be amended to reflect notification of excess emissions and not of failure to apply work practice control measures within the past 12 or four hours. DMG notes also, consistent with the discussion below, that the Agency has provided no explanation as to why ash handling in Condition 7.4.10(a)(ii) has only a four-hour window while coal handling and processing have a 12-hour window.

165. Conditions 7.2.10(b)(i)(A), 7.3.10(b)(i)(A), and 7.4.10(b)(i)(A) require reporting when the opacity limitation may have been exceeded. That a limitation may have been exceeded does not rise to the level of an actual exceedance. It is beyond the scope of the Agency's authority to require reporting of suppositions of exceedances.

166. Additionally, in these same conditions (*i.e.*, 7.2.10(b)(i)(A), 7.3.10(b)(i)(A), and 7.4.10(b)(i)(A), the Agency requires reporting if opacity exceeded the limit for "five or more 6-minute averaging periods" ("four or more" for ash handling). The next sentence in the Conditions 7.2.10(b)(i)(A) and 7.3.10(b)(i)(A) say, "(Otherwise, . . . for no more than five 6-minute averaging periods. . . .)" The ash handling provision says "no more than three" (Condition 7.4.10(b)(i)(A)). The language in Condition 7.4.10(b)(i)(A) is internally consistent; however, the language in Conditions 7.2.10(b)(i)(A) and 7.3.10(b)(i)(A) is not. The way these two conditions are written, the permittee cannot tell whether five six-minute averaging periods of excess opacity readings do or do not require reporting. In older versions of the permit, five six-minute averaging periods did not trigger reporting. In fact, the August 2005 proposed versions of the permit is the first time that five six-minute averages triggered reporting. The conditions should be amended to clarify that excess opacity reporting in Conditions 7.2.10(b)(i)(A) and 7.3.10(b)(i)(A) is triggered after five six-minute averaging periods and, as discussed below, that these averaging periods should be consecutive or occur within some reasonable outside timeframe and not just randomly.

167. As is the case with other permit conditions for the fly ash handling operations, the reporting requirements during malfunction/breakdown at Condition 7.4.10(b)(i)(A) for this support operation are different from those for the coal handling and coal processing operations. DMG must notify the Agency immediately for each incident in which opacity of the fly ash operations exceeds the limitation for four or more six-minute averaging periods, while for coal handling and coal processing, such notification is required apparently (*see* discussion above) only after five six-minute averaging periods. *See* Conditions 7.2.10(b)(i)(A) and 7.3.10(b)(i)(A). The Agency has provided no basis for these differences or for why it changed the immediate

reporting requirement for ash handling from five six-minute averaging periods, as in the October 2003 proposed permit, to the four six-minute averaging periods. Additionally, the Agency has deleted the time frame during which these opacity exceedances occur in this provision[19] in all three sections – 7.2.10(b)(i)(A), 7.3.10(b)(i)(A), and 7.4.10(b)(i)(A). *C.f.*, the October 2003 proposed permit. The lack of a timeframe for these operations has the same problems as discussed above regarding the boilers. The trigger for reporting excess opacity for all three of these operations should be the same timeframe. The Agency has provided no justification as to why they should be different, and given the complexities of the permitting requirements generally, having these reporting timeframes different adds another and an unnecessary layer of potential violation trips for the permittee. No environmental purpose is served by having them different.

168. The Agency requires at Conditions 7.2.10(b)(ii)(C), 7.3.10(b)(ii)(C), and 7.4.10(b)(ii)(C) that DMG aggregate the duration of all incidents during the preceding calendar quarter when the operations continued during malfunction/breakdown with excess emissions. DMG is already required at Conditions 7.2.10(b)(ii)(A), 7.3.10(b)(ii)(A), and 7.4.10(b)(ii)(A) to provide the duration of each incident. It is not at all apparent to DMG why the Agency needs this additional particular bit of data. The Agency has not identified any applicable requirement that serves as the basis for this provision other than the general reporting provisions of Section 39.5 of the Act. It is not apparent that this requirement serves any legitimate gapfilling purpose. For these reasons, these conditions should be deleted from the permit.

169. Conditions 7.2.10(b)(ii)(D), 7.3.10(b)(ii)(D), and 7.4.10(b)(ii)(D) require reporting that there were no incidents of malfunction/breakdown, and so no excess emissions, in

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

the quarterly report. Reporting requirements for the support operations during malfunction/breakdown should be limited to reporting excess emissions and should not be required if there are no excess emissions.

170. For these reasons, all of the conditions contested in this section, including Conditions 7.2.10(a)(ii), 7.2.10(b)(i)(A), 7.2.10(b)(ii)(C), 7.2.10(b)(ii)(D), 7.3.10(a)(ii), 7.3.10(b)(i)(A), 7.3.10(b)(ii)(C), 7.3.10(b)(ii)(D), 7.4.10(a)(ii), 7.4.10(b)(i)(A), 7.4.10(b)(ii)(C), and 7.4.10(b)(ii)(D), are stayed consistent with the APA, and DMG requests that the Board order the Agency to address and correct the deficiencies identified above, including by taking action to limit Conditions 7.2.10(a)(ii), 7.3.10(a)(ii), and 7.4.10(a)(ii) to notification when there are excess emissions rather than when control measures have not been applied for a 12-hour period or four-hour period in the case of ash handling; to add a timeframe for opacity exceedances occurring during operation during malfunction/breakdown for immediate reporting to the Agency in Conditions 7.2.10(b)(i)(A), 7.3.10(b)(i)(A), and 7.4.10(b)(i)(A); to change the number of six-minute averaging periods to six and to delete the requirement for reporting suppositions of excess opacity in Conditions 7.2.10(b)(i)(A), 7.3.10(b)(i)(A), and 7.4.10(b)(i)(A); to delete Conditions 7.2.10(b)(ii)(C), 7.3.10(b)(ii)(C), 7.4.10(b)(ii)(C).

F. Maintenance and Repair Logs
(Sections 7.1, 7.2, 7.3, 7.4)

171. The permit includes requirements that DMG maintain maintenance and repair logs for each of the permitted operations. However, the requirements associated with these logs differ among the various operations, which adds to the complexity of the permit unnecessarily. Specifically, Conditions 7.1.9-2(a)(ii), 7.2.9(a)(ii), 7.3.9(a)(ii), and 7.4.9(a)(ii) require logs for each control device or for the permitted equipment without regard to excess emissions or malfunction/breakdown. Conditions 7.1.9-4(b)(i), 7.2.9(f)(i), 7.3.9(e)(i), and 7.4.9(g)(i) require,

or appear to require, logs for components of operations related to excess emissions during malfunction/breakdown. Conditions 7.2.9(d)(i)(C), 7.3.9(c)(i)(C), and 7.4.9(c)(i)(C) require descriptions of recommended repairs and maintenance, a review of previously recommended repair and maintenance, apparently addressing the status of the completion of such repair or maintenance. Conditions 7.2.9(d)(ii)(B)-(E), 7.3.9(c)(ii)(B)-(E), and 7.4.9(c)(ii)(B)-(E) go even further to require DMG to record the observed condition of the equipment and a summary of the maintenance and repair that has been or will be performed on that equipment, a description of the maintenance or repair that resulted from the inspection, and a summary of the inspector's opinion of the ability of the equipment to effectively and reliably control emissions.

172. Each section of the permit should be consistent on the recordkeeping requirements for maintenance and repair of emission units and their respective pollution control equipment. Consistency should be maintained across the permit for maintenance and repair logs whereby records are required only if any emission unit, operation, process or air pollution control equipment has a malfunction and breakdown with excess emissions.

173. Conditions 7.2.9(d)(i)(D), 7.3.9(c)(i)(D) and 7.4.9(c)(i)(D) require "[a] summary of the observed implementation or status of actual control measures, as compared to the established control measures." DMG does not understand what this means. These conditions are ambiguous, without clear meaning, and should be deleted from the permit.

174. These requirements exceed the limitations on the Agency's authority to gapfill. The purposes of maintaining equipment are multifold, including optimization of operation as well as for environmental purposes. The scope of the Agency's concern is compliance with environmental limitations and that is the scope that should apply to recordkeeping. The

maintenance logs required in this permit should be consistently limited to logs of repairs correcting mechanical problems that caused excess emissions.

175. For these reasons, all of the conditions contested in this section, including Conditions 7.1.9-2(a)(ii), 7.2.9(d)(i)(C), 7.2.9(d)(i)(D), 7.2.9(d)(ii)(B)-(E) 7.3.9(c)(i)(C), 7.3.9(c)(i)(D), 7.3.9(c)(ii)(B)-(E), 7.4.9(c)(i)(C), 7.4.9(c)(i)(D), and 7.4.9(c)(ii)(B)-(E), are stayed consistent with the APA, and DMG requests that the Board order the Agency to delete these conditions from the permit.

G. Engines
(Section 7.5)

(i) Observations During Startup

176. As with Conditions 7.2.8(a), 7.3.8(a), 7.4.8(a), and 7.6.6(b)(i), the Agency has specified in Condition 7.5.6(b)(i) which of DMG's personnel may perform the task identified in the condition: " . . . shall be formally observed by operating personnel for the engine or a member of the Permittee's environmental staff. . . ." Who performs the task is not something that the Agency can prescribe. The Agency already requires that persons who perform certain tests, such as a Method 9 reading of opacity, be certified to do so. The requirement that the personnel performing an opacity observation, as in Condition 7.5.6(b)(i), be certified to do so is implicit in the requirement that the opacity reading be "formal," implying that it should be performed pursuant to Method 9. The Agency has no basis for spelling out which of DMG's personnel may perform required activities. If DMG chooses, the persons performing this observation may not be its own turbine operator or members of its environmental staff, yet the observations would be valid.

177. There is no applicable requirement that specifies that the engine operator or the environmental staff must be the personnel who observe opacity and operation of the engines.

Specifically identifying which personnel may perform these activities is not within the scope of gapfilling, as it is not necessary to ensure compliance with the permit. Therefore, this requirement is arbitrary and capricious and should be stricken from the permit.

178. For these reasons, Condition 7.5.6(b)(i), contested herein, is stayed pursuant to the APA, and DMG requests that the Board order the Agency to delete the phrase "by operating personnel for the turbine or a member of Permittee's environmental staff" from this condition.

(ii) Observations of Excess Opacity

179. As with Conditions 7.1.10-3(a)(i) and 7.7.10(c)(i), the Agency has specified in Condition 7.5.10.(a)(i)(A) that DMG notify the Agency "immediately" when the opacity limitation may have been exceeded. The Agency is demanding that DMG notify it of the mere supposition that there have been opacity exceedances. The Agency has provided no regulatory basis for reporting suppositions. At the very least, DMG should be granted the opportunity to investigate whether operating conditions are such that support or negate the likelihood that there may have been an opacity exceedance. DMG does not believe that even this is necessary, since the Agency lacks a regulatory basis for this requirement in the first place. The condition as written exceeds the scope of the Agency's authority to gapfill and so is unlawful, arbitrary and capricious.

180. Also in Condition 7.5.10(a)(i)(A), the Agency has deleted the word *consecutive* as a trigger for reporting opacity exceedances during an "incident" in the final version of the permit. Versions prior to the July 2005 version include that word. Its deletion completely changes the scope and applicability of the condition. *Please see* DMG's comments on each version of the permit in the Agency Record. As the series of comments demonstrates, it was not until the draft revised proposed permit issued in July 2005 that the Agency had deleted the concept of

consecutive six-minute averages of opacity from this condition. In the December 2004 version of the permit, the word *consecutive* had been replaced with *in a row*, but the concept is the same.

181. The Agency has provided no explanation for this change. As the actual opacity exceedance could alone comprise the "incident," DMG believes that it is more appropriate to retain the word *consecutive* in the condition (or add it back in to the condition). Random, intermittent exceedances of the opacity limitation do not necessarily comprise a deviation from permit requirements "incident." On the other hand, a prolonged period of opacity exceedance does possibly indicate a deviation from permit requirements "incident." The trigger for PM reporting under Condition 7.5.10(a)(i)(B) is not specified, but such reporting appears to be triggered when "immediate" reporting is required under 7.5.10(a)(i)(A). Condition 7.5.10(a)(i)(B) therefore suffers from the same defect and the Agency has failed to explain or support the trigger for additional recordkeeping under Condition 7.5.10(a)(i)(B).

182. Additionally, Condition 7.5.10(a)(i)(A) requires reporting if opacity exceeded the limit for "three or more 6-minute averaging periods." The next sentence in the condition says, "(Otherwise, . . . for no more than one or two 6-minute averaging periods. . . .)" The language is ambiguous. The way the condition is written, the permittee cannot tell whether two six-minute averaging periods of excess opacity readings does or does not require reporting. The language of Condition 7.5.10 (a)(i)(A) should be amended to remove the ambiguity.

183. Furthermore, the trigger for reporting opacity exceedances in Condition 7.5.10(a)(i)(A), "three or more 6-minute averaging periods," is different from the trigger for reporting opacity exceedances for other operations at the Station, typically "five or more 6-minute averaging periods." The Agency has provided no explanation or support for this difference in opacity reporting trigger among different operations at the Station or in the other

four Title V permits that DMG is also appeal contemporaneously herewith. The language of Condition 7.5.10(a)(i)(A) should be amended to remove the inconsistency, and to ensure a consistent appropriate trigger for reporting opacity exceedances across all applicable operations for the reasons discussed elsewhere.

184. For these reasons, Condition 7.5.10(a)(i)(A) and (a)(i)(B), contested herein, are stayed, and DMG requests that the Board order the Agency to make appropriate revisions in these conditions to correct the deficiencies referenced above, including by deleting the reporting requirements for possible exceedances and including appropriate triggers for reporting of actual exceedances.

(iii) Fuel SO_2 Data

185. The basis for determining compliance with the SO_2 limitation provided in Condition 7.5.12(b) is USEPA's default emissions factors, which are to be used only when better data is not available. The condition should allow DMG to rely on such better data, including characteristics of the fuel determined through sampling and analysis to calculate SO_2 emissions, as sampling and analysis will produce better data.

186. For these reasons, Condition 7.5.12(b), contested herein, is stayed pursuant to the APA, and DMG requests that the Board order the Agency to amend the condition to provide for the necessary flexibility for DMG to rely on better data than default emissions factors.

(iv) Non-Applicability of Regulation of Concern

187. Condition 7.5.5 fails to state that the engine is not subject to the requirements of CAM. CAM is not applicable to the engine because it is only required for emission sources which are major sources for regulated pollutants which do not have CEMS for that pollutant and it is not required until the first renewal of the permit.

188. For these reasons, Condition 7.5.5, contested herein, is stayed pursuant to the APA, and DMG request that the Board order the Agency to amend the conditions to provide for the statement of non-applicability stated above.

H. Turbines
(Section 7.6)

(i) Observations During Startup

189. Condition 7.6.3(b)(ii)(A), under the startup provisions, requires DMG to observe the operation of the turbines to confirm proper operation and to identify any maintenance issues to be addressed prior to the next startup. This condition is confusing, in the first instance, because it appears to address operation of the turbine but is organizationally located in a condition addressing startup. The ambiguity should be corrected.

190. Assuming the condition is about startup, it presents a number of practical problems, which the Agency recognized in the recordkeeping provisions at 7.6.9(d)(ii)(D): "If the startup of the turbine was observed. . . ." (Emphasis added.) The turbines are usually started by remote operators responding to load demands. Station operators may not know far enough in advance of a startup of the turbines that they are to be utilized and so cannot necessarily observe each operation, let alone each startup. If the condition is about operation, Condition 7.6.6(b)(i) addresses the requirement the Agency appears to be trying to express. Condition 7.6.6(b)(i) requires DMG to formally observe operation of the turbine at least every six months to ensure proper operation.

191. For these reasons, Condition 7.6.3(b)(ii)(A), contested herein, is stayed pursuant to the APA, and DMG requests that the Board order the Agency to delete the condition from the permit.

(ii) Observations During Operation

192. As with Conditions 7.2.8(a), 7.3.8(a), 7.4.8(a) and 7.5.6(b)(i), the Agency has specified in Condition 7.6.6(b)(i) which of DMG's personnel may perform the task identified in the condition: " . . . shall be formally observed by operating personnel for the turbine or a member of the Permittee's environmental staff. . . ." Who performs the task is not something that the Agency can prescribe. The Agency already requires that persons who perform certain tests, such as a Method 9 reading of opacity, be certified to do so. The requirement that the personnel performing an opacity observation, as in Condition 7.6.6(b)(i), be certified to do so is implicit in the requirement that the opacity reading be "formal," implying that it should be performed pursuant to Method 9. The Agency has no basis for spelling out which of DMG's personnel may perform required activities. If DMG chooses, the persons performing this observation may not be its own engine operator or members of its environmental staff, yet the observations would be valid.

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

194. For these reasons, Condition 7.6.6(b)(i), contested herein, is stayed pursuant to the APA, and DMG requests that the Board order the Agency to delete the phrase "by operating personnel for the turbine or a member of Permittee's environmental staff" from this condition.

(iii) Observations of Excess Opacity

195. As with Conditions 7.1.10-3(a)(i), 7.7.10(c)(i) and 7.5.10(a)(i)(A), the Agency has specified in Condition 7.6.10.(c)(i) that DMG notify the Agency "immediately" when the opacity limitation may have been exceeded. Likewise, Condition 7.6.10(c)(ii) imposes additional reporting obligations if the "exceedances of opacity standard are or may have been." The Agency is demanding that DMG notify it of the mere supposition that there have been opacity exceedances. The Agency has provided no regulatory basis for reporting suppositions. At the very least, DMG should be granted the opportunity to investigate whether operating conditions are such that support or negate the likelihood that there may have been an opacity exceedance. DMG does not believe that even this is necessary, since the Agency lacks a regulatory basis for this requirement in the first place. The condition as written exceeds the scope of the Agency's authority to gapfill and so is unlawful, arbitrary and capricious.

196. Also in Condition 7.6.10(c)(i), the Agency has deleted the word *consecutive* as a trigger for reporting opacity exceedances during an "incident" in the final version of the permit. Versions prior to the July 2005 version include that word. Its deletion completely changes the scope and applicability of the condition. *Please see* DMG's comments on each version of the permit in the Agency Record. As the series of comments demonstrates, it was not until the draft revised proposed permit issued in July 2005 that the Agency had deleted the concept of consecutive six-minute averages of opacity from this condition. In the December 2004 version of the permit, the word *consecutive* had been replaced with *in a row*, but the concept is the same.

197. The Agency has provided no explanation for this change. As the actual opacity exceedance could alone comprise the "incident," DMG believes that it is more appropriate to retain the word *consecutive* in the condition (or add it back in to the condition). Random,

intermittent exceedances of the opacity limitation do not necessarily comprise a deviation from permit requirements "incident." On the other hand, a prolonged period of opacity exceedance does possibly indicate a deviation from permit requirements "incident." Likewise, a timeframe for the length of the opacity exceedance triggering Conditions 7.6.10(c)(ii) is unreasonably short. The failure to provide adequate duration thresholds in these conditions is also arbitrary and capricious.

198. Additionally, Condition 7.6.10(c)(i) requires reporting if opacity exceeded the limit for "four or more 6-minute averaging periods." The next sentence in the condition says, "(Otherwise, . . . for no more than three 6-minute averaging periods. . . .)" Although the language is consistent, the trigger for reporting opacity exceedances in Condition 7.6.10(c)(i), "four or more 6-minute averaging periods," is different from the trigger for reporting opacity exceedances for other operations at the Station, typically "five or more 6-minute averaging periods." The Agency has provided no explanation or support for this difference in opacity reporting trigger among different operations at the Station or in the other four Title V permits that DMG is also appeal contemporaneously herewith. The language of Condition 7.6.10(c)(i) should be amended to remove the inconsistency, and to ensure a consistent trigger for reporting opacity exceedances across all applicable operations for the reasons discussed elsewhere.

199. For these reasons, Condition 7.6.10(c)(i) and (ii), contested herein, is stayed, and DMG requests that the Board order the Agency to make appropriate revisions in these conditions to correct the deficiencies referenced above, including by deleting the reporting requirements for possible exceedances and including appropriate triggers for reporting of actual exceedances.

(iv) Fuel SO_2 Data

200. The basis for determining compliance with the SO_2 limitation provided in Condition 7.6.12(b) is USEPA's default emissions factors, which are to be used only when better data is not available. The condition should allow DMG to rely on such better data, including characteristics of the fuel determined through sampling and analysis, as sampling and analysis will provide better data for determining SO_2 emissions.

201. For these reasons, Condition 7.6.12(b), contested herein, is stayed pursuant to the APA, and DMG requests that the Board order the Agency to amend the condition to provide for the necessary flexibility for DMG to rely on better data than default emissions factors.

(v) Non-Applicability of Regulations of Concern

202. Condition 7.6.5 fails to include a statement that the affected combustion turbine is not subject to NSPS or CAM. CAM is not applicable to the affected combustion turbine because it is only required for emission sources which are major sources for regulated pollutants which do not have CEMS for that pollutant and it is not required until the first renewal of the permit. NSPS is not applicable to the affected combustion turbine because the affected combustion turbine is an existing source.

203. For these reasons, Condition 7.65, contested herein, is stayed pursuant to the APA, and DMG request that the Board order the Agency to amend the conditions to provide for the statement of non-applicability stated above.

I. Natural Gas and Distillate Oil Fired Boiler
(Section 7.7)

204. Condition 7.7.7-1(a)(i) requires DMG to determine the opacity of the exhaust from this boiler using method 9 on an annual basis, unless the boiler operated for "less than 25

hours in the calendar year." Although unclear, this seems to mean that DMG should determine whether annual testing is required in a given year based on whether the boiler has operated 25 or more hours in that given year, which of course may not be known until the end of the calendar year. For the first test, the Condition seems to require testing within the first 100 hours of boiler operation after the permit's effective date, regardless of the hours of operation in any given year. Condition 7.7.7-1(a)(i)(B) requires an opacity test within 45 days of a request by the Agency or the next date of boiler operation, whichever is later. Under Condition 7.7.7-1(a)(iii), DMG is to provide seven days advance notice of "the date and time of the testing." Similarly, Condition 7.7.7-1(b)(i) provides that PM and CO must be tested within ninety days of a request by the Agency. Under Condition 7.7.7-1(b)(iv), DMG is to provide notice 30 days prior to such a PM or CO test.

205. Conditions 7.7.7-1(a)(i) and (iii) and 7.7.7-1(b)(i) and (iv) are arbitrary and capricious. The boiler in question operates only intermittently, and specific periods when it will operate are often driven by extrinsic conditions, such as weather or emergency outages, that are not predictable. Accordingly, DMG may not be able to provide notice seven or thirty days in advance of testing, which can only occur while the boiler is operating. Similarly, DMG may not know in any given year if the boiler will operate more than 25 hours at the time when the boiler may be called on to operate, and so it would be difficult to determine whether and when testing would be required. Furthermore, by requiring testing upon written request for a boiler that operates only intermittently, the request could in effect dictate when the boiler operates. The Agency has failed to explain the bases for these conditions. The conditions are vague, ambiguous and not practical or feasible. For these reasons, Conditions 7.7.7-1(a)(i) and (a)(iii) and 7.7.7-1(b)(i) and (iv), all contested herein, are stayed consistent with the APA, and DMG

requests that the Board order the Agency to correct the deficiencies described above by, among other things, eliminating requirements to provide notice seven and thirty days in advance of testing.

206. The Agency has imposed inconsistent obligations and requirements with respect to emission testing requirements for heating and auxiliary boilers at issue in the five Title V permits issued to DMG, which include the Vermilion permit and the four other Title V permits issued to DMG contemporaneously with the Vermilion permit. All four of those other permits also are being appealed contemporaneously herewith. The Agency has failed to provide any explanation for such different requirements among the permits. The different emission testing requirements for heating and auxiliary boilers, if sustained, would impose additional and unnecessary expense upon DMG to comply and is arbitrary and capricious. Accordingly, all requirements and provisions in Condition 7.7.7 of the Vermilion permit relating to emissions testing are contested herein and are stayed consistent with the APA, and DMG requests that the Board order the Agency to revise such conditions as appropriate to be consistent among the five Title V permits issued to DMG.

J. Gasoline Storage Tank
(Section 7.8)

(i) Tank Requirements

207. Refiners and suppliers of gasoline have certain requirements under 35 Ill.Adm.Code § 215.583. DMG is not a "supplier" of gasoline as the term is used in § 215.583; rather, DMG is a consumer of gasoline. The reference to § 215.122(b) and 215.583(a)(1) as applicable standards in Condition 7.6.4 or other conditions should be deleted to the extent this implies that they impose any sampling, analyses or inspection requirements upon DMG. Such obligations of this regulation are not "applicable requirements" for DMG.

208. For these reasons, consistent with the APA, Conditions 7.6.4 contested herein, is stayed, and DMG requests that the Board order the Agency to revise Condition 7.6.4 and related conditions to address the deficiencies set forth above.

(ii) Inspection Requirements

209. The Board's regulations for gasoline distribution are sufficient to assure compliance. Therefore, the Agency's inclusion of permit conditions specifying inspections of various components of the gasoline storage tank operation exceeds its authority to gapfill. These requirements are at Condition 7.8.8. Certainly, there is no regulatory basis for requiring any annual inspections within the two-month timeframe included in Condition 7.8.8. In addition, the Agency has provided no explanation for that selected timeframe, and the timeframe is arbitrary and capricious.

210. Therefore, consistent with the APA, Condition 7.8.8 and the corresponding recordkeeping condition, 7.8.9(b)(i), are contested herein, are stayed consistent with the APA, and DMG requests that the Board order the Agency to delete these conditions from the permit.

IV. Testing Protocol Requirements
(Sections 7.1, 7.3, 7.4, and 7.7)

211. The permit contains testing protocol requirements in Sections 7.1, 7.3, 7.4, and 7.7 that unnecessarily repeat the requirements set forth at Condition 8.6.2. Condition 8.6.2, a General Permit Condition, provides that specific conditions within Section 7 may supersede the provisions of Condition 8.6.2. Where the conditions in Section 7 do not supersede Condition 8.6.2 but merely repeat it, those conditions in Section 7 should be deleted. Included as they are, they potentially expose the permittee to allegations of violations based upon multiple conditions when those conditions are mere redundancies. This is inequitable. It is arbitrary and capricious and such conditions in Section 7 should be deleted from the permit. More specifically,

Conditions 7.1.7(c)(i), 7.3.7(b)(iii), 7.4.7(b)(iii) and 7.7.7-1(b)(iv) (the second (iv) in the section) repeat the requirement that test plans be submitted to the Agency at least 60 days prior to testing. This 60 day submittal requirement is part of Condition 8.6.2.

212. Conditions 7.1.7(e), 7.3.7(b)(v), 7.4.7(b)(v), and 7.7.7-1(b)(iv) (the second (iv) in the section) require information in the test report that is the same as the information required by Condition 8.6.3. To the extent that the information required by the conditions in Section 7 repeat the requirements of Condition 8.6.3, they should be deleted.

213. For these reasons, Conditions 7.1.7(c)(i), 7.1.7(e), 7.3.7(b)(iii), 7.3.7(b)(v), 7.4.7(b)(iii), 7.4.7(b)(v), 7.7.7-1(b)(iv) (the second (iv) in the section) and all other conditions that repeat the requirements of Conditions 8.6.2 or 8.6.3, all contested herein, are stayed pursuant to the APA, and DMG requests that the Board order the Agency to delete all conditions that repeat the requirements of Conditions 8.6.2 or 8.6.3.

(i) Capacity Ratings

214. The permit incorrectly lists the megawatt generating capacity or rating in Conditions 4.0, 7.1.1, 7.1.2. This information is unnecessary in the permit and creates confusion and ambiguity. Furthermore, similar Conditions contained in at least some other Title V permits issued to other facilities in Illinois do not list generating capacity or ratings. There is no reason or authority to include megawatt capacity or rating information, and inclusion of this information could be improperly be construed as imposing some form of limit.

215. For these reasons, Conditions, 4.0, 7.1.1, and 7.1.2, all contested herein, are stayed consistent with the APA, and DMG requests that the Board order the Agency to delete the references to megawatt capacity or rating.

K. Standard Permit Conditions
(Section 9)

216. DMG is concerned with the scope of the term "authorized representative" in Condition 9.3, regarding Agency surveillance. At times, the Agency or USEPA may employ contractors who would be their authorized representatives to perform tasks that could require them to enter onto DMG's property. Such representatives, whether they are the Agency's or USEPA's employees or contractors, must be subject to the limitations imposed by applicable Confidential Business Information ("CBI") claims and by DMG's health and safety rules. DMG believes that this condition needs to make it clear that DMG's CBI and health and safety requirements are limitations on surveillance.

217. For these reasons, Condition 9.3, contested herein, is stayed pursuant to the APA, and DMG requests that the Board order the Agency to clarify the limitations on surveillance in the condition as set forth above.

L. Typographic and Factual Errors
(All Sections)

(i) Typographical and Factual Errors

218. The permit contains numerous conditions that are factually inaccurate, reference the wrong condition or a condition that does not exist or otherwise contain errors. These mistakes and errors create confusion and ambiguity, and result in uncertainty regarding how certain conditions are to be implemented and interpreted.

219. For these reasons: (1) Condition 1.3, the operator should be Charles Nerone; (2) Condition 7.1.7(a)(iv)(B) should read "next RATA" not "preceding RATA"; (3) Condition 7.1.9-3(a)(iv) cites 7.1.6(b), but there is no 7.1.6(b) in the permit; (4) Condition 7.1.9-3(b)(i)(h) does not have an end parenthesis at the end of the requirement; (5) Condition 7.1.9-3(b)(iii)(B) contains 17,050 as the emission limit, however, the emission limit should be 16,805; (6)

Condition 7.1.10-1(a)(i) incorrectly references Condition 7.1.10-1(b); (7) Condition 7.1.10-1(a)(i) incorrectly references Condition 7.1.6-2(b) instead of 7.16-1(b); (8) Condition 7.1.10-1(a)(ii) incorrectly references Condition 7.1.10-1(b); (9) Condition 7.1.10-1(a)(iii) incorrectly cites other Conditions that do not line up; Condition 7.1.10-1(a)(v) does not reference 7.1.10-1(a)(iv); (10) Condition 7.1.10-2(a)(i)(D) incorrectly references Condition 7.1.9-4(b)(ii)(C) when it should cite Condition 7.1.9-4(a)(ii)(C); (11) Condition 7.1.10-2(b)(iv) incorrectly references 7.1.6-2(b) when it should reference Condition 7.16-1(b); (12) In Condition 7.1.10-2(d) "of" should be deleted; (13) In Condition 7.1.10-2(d)(iv) ")" should be deleted after reference to Condition 7.1.4(b); (14) Condition 7.1.10-4(a)(ii)(A)(1) cites to Condition 7.1.10-2(e)(ii)(B), but there is no Condition 7.1.10-2(e)(ii)(B) in the permit; (15) Condition 7.1.10-4(a)(ii)(B)(1) cites to Condition 7.1.10-2(e)(ii)(B), but there is no Condition 7.1.10-2(e)(ii)(B); (16) Condition 7.1.12(b)(i) cites to Condition 7.1.6(c), but there is no Condition 7.1.6(c); (17) Condition 7.1.12(g) cites to Condition 7.1.9(a), but there is no Condition 7.1.9(a); (18) Condition 7.5.12(a) cites to Condition 7.5.7, but there is no Condition 7.5.7 in the permit; (19) Condition 7.6.12(a) cites to Condition 7.6.7, but there is no Condition 7.6.7 in the permit; (20) Condition 7.7.3(b)(ii) ends with the phrase "...the following measures:", however, there are no measures following; (21) Condition 7.7.7-2(a)(ii) cites to 40 CFR 60.46c (d) but there is no 40 CFR 60.46c (d), are contesting herein, are stayed consistent with the APA, and DMG requests that the Board order the Agency to correct these errors.

(ii) Capacity Ratings

220. The permit incorrectly lists the boiler capacity ratings in Conditions 4.0, 7.1.1, 7.1.2, 7.5.1, and 7.5.2. This creates confusion and ambiguity. Furthermore, similar Conditions

contained in other Title V permits issued to other facilities in Illinois do not list the capacity ratings, instead they specify the mmBtu/hr of the boiler.

221. For these reasons, Conditions, 4.0, 7.1.1, 7.1.2, 7.5.1, and 7.5.2, all contested herein, are stayed consistent with the APA, and DMG requests that the Board order the Agency to correct these errors.