BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

THE CITY OF SPRINGFIELD,	)	
a municipal corporation,	)	
Petitioner,	)	
	)	**PCB 06-75**
v.	)	**(Permit Appeal – Air)**
	)	
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE OF FILING

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Please take notice that on December 2, 2005, we filed electronically with the Office of the Clerk of the Illinois Pollution Control Board the **REPLY TO THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S MOTION IN PARTIAL OPPOSITION TO, AND PARTIAL SUPPORT OF, PETITIONER'S REQUEST FOR STAY,** which is served upon you.

Respectfully submitted,

THE CITY OF SPRINGFIELD,
a municipal corporation

By _____
One of its attorneys

Dated: December 2, 2005

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REPLY TO THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S MOTION IN PARTIAL OPPOSITION TO, AND PARTIAL SUPPORT OF, PETITIONER'S REQUEST FOR STAY

Petitioner, the City of Springfield, as owner and operator of an electric generation and transmission utility commonly known as City Water, Light & Power ("CWLP"), by and through its attorneys, Cynthia A. Faur, Mary A. Gade, Elizabeth A. Leifel, and Sonnenschein Nath & Rosenthal LLP, hereby submits its reply to the Illinois Environmental Protection Agency's (the "Agency's" or the "Respondent's") Motion In Partial Opposition To, and Partial Support Of, Petitioner's Request for Stay ("Respondent's Motion").

INTRODUCTION

On September 27, 2005, the Agency issued a Clean Air Act Permit Program ("CAAPP") permit for the City of Springfield's Lakeside and Dallman Generating Stations. Contemporaneous with its Petition For Hearing To Review Clean Air Act Permit Program Permit Issuance ("Petition"), filed on November 3, 2005, CWLP filed a Motion to Stay Effectiveness of CAAPP Permit ("Motion") In its Motion, CWLP noted that the Illinois Pollution Control Board (the "Board") could find that CWLP's CAAPP permit never became effective pursuant to § 10-65(b) of the Illinois Administrative Procedures Act (the "APA") and

the holding in *Borg-Warner Corp. v. Mauzy*, 100 Ill. App. 3d 862, 427 N.E.2d 415 (3d Dist. 1981). CWLP further demonstrated that even if the Permit became effective, a stay of effectiveness of the CAAPP permit is warranted in this instance because each one of the factors considered by the Board when reviewing a motion for stay is satisfied.

As analyzed further below, both bases set forth in CWLP's Motion support a stay of the *entire* Permit pending a decision from the Board on CWLP's Petition. The Agency has not presented convincing reasons for the Board to deviate from its past practice of granting a stay of an entire permit pending a determination on appeal. In some instances, the Agency has gone so far as to misconstrue the procedural framework under which the CAAPP operates. When viewed properly, the APA, the Board's regulations and prior decisions, and Illinois case law, all support a stay of the Permit in its entirety.

ARGUMENT

I. Section 10-65(b) Applies To CAAPP Permits

Section 10-65(b) of the APA provides as follows:

> 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). It is undisputed that the Permit is a "license" within the meaning of the APA. (See Respondent's Motion at pp. 3-4). Under *Borg-Warner Corp. v. Mauzy*, 100 Ill. App. 3d 862, 427 N.E.2d 415 (3d Dist. 1981), the Board, not the Agency, makes the "final agency decision" on any issued permit when it rules on an appeal. Here, as in *Borg-Warner*, there will be no "final agency action" with respect to the Permit until the Board has fully considered and ruled on CWLP's Petition. Until such time, Section 10-65(b) dictates that the new Permit will

not take effect. Instead, CWLP's existing permits continue in full force and effect and represent the complete set of requirements with which CWLP must comply.

Application of *Borg-Warner* and Section 10-65(b) of the APA is not a stay of the Permit; instead, under Section 10-65(b), the Permit never became effective because it was not "final agency action." *Borg-Warner*, 100 Ill. App. 3d at 870-71, 427 N.E.2d at 421 ("A final decision, in the sense of a final and binding decision coming out of the administrative process before the administrative agencies with decision making power, will not be forthcoming in the instant case until the PCB rules on the permit application . . . ."). Neither *Borg-Warner* nor Section 10-65(b) of the APA draw a distinction, as the Agency does, between contested terms and uncontested terms. Instead, both authorities dictate an all-or-nothing approach. The entire new license is ineffective until the Board has rendered a final decision. The Agency's attempts to point to contrary authority are unpersuasive. The Agency points to 415 ILCS 5/31.1(e), a provision with no applicability to the case at hand, which specifically exempts "administrative citations" from Section 10-65(b).[1]

Additionally, the Agency attempts to draw a comparison between Section 31.1(e) and the "severability" provision in 415 ILCS 5/39.5(7)(i). Unlike Section 31.1(e), which explicitly exempts administrative citations from Section 10-65(a), Section 39.5 contains no such explicit exemption. Nowhere in its text does Section 39.5 exempt CAAPP permits from the requirements of the APA. To the contrary, scattered throughout Section 39.5 is the mandate that the Agency adhere to the strictures of the APA. *See, e.g.*, 415 ILCS 5/39.5(4)(h), stating that the Agency has the authority to promulgate regulations "in accordance with the [APA]." It is an elementary rule

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[1] A CAAPP permit is not an "administrative citation." See 35 Ill. Admin. Code § 101.202, defining an "administrative citation" as "a citation issued pursuant to Section 31.1 of the Act by the Agency . . . ."

of statutory construction that by using certain language in one provision and entirely different language in another, the General Assembly intended the two provisions to have different results. *See In re K.C.*, 186 Ill. 2d 542, 550-51, 714 N.E.2d 491, 495 (1999); *see also Hamilton v. Conley*, 356 Ill. App. 3d 1048, 827 N.E.2d 949, (2d Dist. 2005) (holding that if the legislature wished for two provisions of the Business Corporation Act to have the same impact, it would have written the two sections with the same language). Thus, the severability provision in Section 39.5(7)(i) does not have the same impact as the explicit exemption from the APA under Section 31.1(e). Moreover, as the Agency concedes, the permit content requirements of the Clean Air Act and the Illinois CAAPP are not directly binding on the Board. (See Respondent's Motion at p. 16).

Even if Section 39.5(7)(i) could be read to make Section 10-65(b) of the APA inapplicable to CAAPP permitting, which it cannot, Section 1-5 of the APA, 5 ILCS 100/1-5, provides that the provisions of the APA take precedent over inconsistent provisions contained in other statutes. Although Section 1-5 of the APA contains a "grandfathering" provision for rules in effect prior to July 1, 1977, that provision has no effect here. The statute implementing the CAAPP, Section 39.5 of the Illinois Environmental Protection Act, first became effective on September 26, 1992 (P.A. 87-1213). The Board's procedural rules for administrative appeals of CAAPP permits, found at 35 Ill. Admin. Code § 105.300 et seq., took effect on March 31, 2000, well after the enactment of the statute. The Agency asserts that the Board's "procedural rules" were in place long before July 1, 1977. Section 1-5 of the APA does not refer to some amorphous "procedural rules;" on the contrary, the grandfathering provision specifically refers to existing procedures "specifically for . . . licensing." Clearly, before Section 39.5 was enacted, the Board would have no reason or authority to have procedural rules specific to the issuance of permits under the CAAPP.

The Agency also attempts to distinguish *Borg-Warner* on the basis that the NPDES regulations at issue there, although they were promulgated in 1974, did not become effective until after the July 1, 1977 date under Section 1-5 of the APA. This argument misses the mark. The *Borg-Warner* court's analysis of the NPDES permitting regulations is immaterial to the extent that it addresses the effective date of the regulations. However, the analysis is useful in one regard: the *Borg-Warner* court was not considering general Board "procedural rules" in determining the applicability of the grandfathering provision. Rather, the court evaluated the grandfathering provision in the context of the Board's rules relating specifically to the NPDES licensing procedures. *Borg-Warner*, 100 Ill. App. 3d at 865, 427 N.E.2d at 418. Thus, the Borg-Warner analysis supports the notion that it is the Board's rules for CAAPP permitting, not its general "procedural rules," that are considered in determining the applicability of the grandfathering provision under Section 1-5 of the APA.

Thus, the Agency has shown no reason that the holding of Borg-Warner should not apply here, as it does in the NPDES permitting context, and the Board should find that CWLP's Permit does not take effect until its final decision on CWLP's Petition.

II. CWLP Is Entitled To A Stay Of Its CAAPP Permit

Even if the Board finds that Borg-Warner and the APA do not apply, CWLP has shown that a stay of the Permit is appropriate within the Board's discretionary authority. Illinois law provides that the Board has discretion to stay a permit if (1) an ascertainable right requires protection, (2) irreparable injury will occur without the stay, (3) no adequate remedy at law exists, and (4) there is a probability of success on the merits. *See Nielsen & Bainbridge, L.L.C. v. Illinois Environmental Protection Agency*, Docket No. 03-98 (Ill. Pollution Control Bd. Feb. 6, 2003); *see also Saint-Gobain Containers, Inc. v. Illinois Environmental Protection Agency*, Docket No. 04-47 (Ill. Pollution Control Bd. Nov. 6, 2003); *Noveon, Inc. v. Illinois*

Environmental Protection Agency, Docket No. 04-102 (Ill. Pollution Control Bd. Jan. 22, 2004); and *Bridgestone/Firestone Off Road Tire Company v. Illinois Environmental Protection Agency*, Docket No. 02-31 (Ill. Pollution Control Bd. Nov. 1, 2001) (noting that it is not necessary for the Board to consider all four factors). The Agency has conceded that CWLP has demonstrated that each of these factors is present. Its primary argument appears to be based on various "other related factors." This argument appears to be centered on three key factors, which dovetail with the traditional factors considered by the Board. CWLP addresses each of those arguments in turn.

A. A stay of only the contested portions of the Permit would result in substantial confusion.

Contrary to the Agency's contention that the "vast majority" of permit conditions are unaffected by its appeal, CWLP has challenged a large number of permit conditions (over 140 subparts of 48 permit conditions) that have been imposed by the Agency without adequate basis. These conditions pervade the entire Permit, running the gamut from monitoring and testing requirements to recordkeeping and reporting requirements. To sever these provisions would be to require CWLP to develop different monitoring and testing protocols for various types of equipment and to implement different recordkeeping systems depending on the applicability of the challenged condition. For example, Condition 7.2.10-1(a) concerns reporting of deviations for CWLP's Unit 33. In its Petition, CWLP objected to numerous subparts of this Condition for different reasons. First, CWLP objected to Condition 7.2.10-1(a)(i) and (ii) to the extent that they require compliance with Condition 7.2.10-3(a), which is another contested condition. Condition 7.2.10-2(a)(iii) is also objectionable to the extent it requires compliance with Condition 7.2.10-2(d)(iii). Condition 7.2.10-2(a)(iii) also requires compliance with Conditions 7.2.10-2 (b), (c), and (e), to which CWLP did not object. Condition 7.2.10-2(a)(iv) requires prompt notification of all deviations not otherwise specifically addressed in Conditions 7.2.10-

2(a)(i), (ii) and (iii), including all other applicable requirements, some of which have been contested and some of which have been contested. This is just one of many examples where CWLP has appealed numerous portions of conditions because of their relation to other contested conditions.

As demonstrated by this one example, if only those provisions contested by CWLP were stayed, CWLP would be required to parse all the cross references in its permit and its Petition and essentially create an entirely different reporting system for only the non-contested requirements. Such a result would unduly burden CWLP and could lead to confusion concerning compliance with non-contested portions of the Permit as the Board, the Agency and other interested parties would need to undertake a similar parsing of the 154 page Permit and the 70 page Petition to verify compliance with Permit terms. To require such parsing would place an undue burden on the enforcement process, resulting in a chilling effect that the Agency clearly wishes to avoid.[2]

In the event that portions of the Permit are stayed pending this appeal while other portions remain in effect, CWLP would be required to comply with applicable laws and regulations and would evidence such compliance by meeting the terms of its former operating permits.[3] The Agency argues that the former operating permits would have no effect. This

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[2] The Agency has expressed concern that granting a stay of the entire Permit would take away enforcement avenues under the Clean Air Act. (See Motion at pp. 17-18, discussing the dangers of allowing "protective appeals" to operate as an enforcement bar). CWLP disagrees with the Agency's assertion regarding so-called "protective appeals" and believes that a stay of the entire Permit would actually make enforcement under the Clean Air Act more expeditious than would a stay of the contested provisions only. (See Section II.B, *infra*).

[3] Contrary to the Agency's assertion in its Response (Respondent's Motion at p. 13), CWLP does not find it confusing to comply with its former operating permits, all of which specifically identified the emissions source subject to the permit and the applicable requirements for that source.

argument is unreasonable and contrary to the plain language of Section 39.5(4)(g). That provision states that once a newly issued CAAPP permit becomes effective, it supersedes the State operating permit. 415 ILCS 5/39.5(4)(g). As discussed above and in CWLP's Petition, CWLP contests whether the Permit has become effective at all. (See Petition at ¶¶ 28-32, challenging the Effective Date of the Permit).[4] Moreover, because the former operating permits contain applicable requirements, CWLP will, by default, comply with their provisions to the extent that they embody applicable requirements pending a decision by the Board on its Petition. Because CWLP has challenged so many of the Permit's conditions, particularly those that require the implementation of systemic and/or operational changes,[5] it is reasonable to require CWLP to comply with its former operating permits until the Board has reached a decision.

B. No environmental harm will result from a stay of the entire Permit.

The Agency spends considerable time discussing the philosophical underpinnings of the CAAPP, concluding that the General Assembly did not intend for existing permits to remain in effect even during an appeal by drawing a distinction between contested conditions and uncontested conditions. (See Respondent's Motion at pp. 15-18). While the Agency focuses on nuances and inferences within the statutory framework of the CAAPP, CWLP posits that the most fundamental principle behind the CAAPP and its implementing regulations is the

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[4] The Agency has apparently attempted to address the merits of CWLP's Petition in its Motion, stating that Sections 39.5(4)(b) and 39.5(4)(g) "indicate that permit issuance and permit effectiveness for a CAAPP permit are synonymous . . ." (See Respondent's Motion at pp. 11-13). CWLP takes issue with this bald assertion, but declines to address this argument here.

[5] CWLP respectfully refers the Board to its Petition, which outlines objections to a total of 146 subparts of 48 conditions within the Permit. These contested conditions include monitoring, recordkeeping, reporting, and inspection requirements. Requiring CWLP to parse through the Permit to determine which equipment is subject to inspections at what time, what new information should be included in various reports, what records should be kept and for how long, only to face the possibility that those requirements may change following the Board's decision, would be unduly burdensome.

prevention of environmental harm. In this case, no environmental harm would result from a stay of the entire Permit, as opposed to a stay of the contested provisions only.

First, as discussed in Section II.A, *supra*, the former operating permits, by default, remain in effect until the new Permit becomes effective. 415 ILCS 39.5(4)(g). The former operating permits contain all requirements for recordkeeping, reporting, monitoring, and testing, as well as emissions limits, under Illinois law. Thus, a stay of the entire Permit would result in no environmental harm.

Second, as noted in Section II.A., supra, compliance with the former operating permits would still allow the State and/or private citizens to enforce the applicable requirements under Illinois law. Moreover, avenues of enforcement not tied to the permit are still available. For example, the United States Environmental Protection Agency ("U.S. EPA") could bring an action against CWLP in the event a provision under the New Source Performance Standards was violated. The Illinois Attorney General would also be able to bring an action against CWLP for any violation of the Clean Air Act, with or without the Agency's participation. Finally, private citizens could bring an action under Section 304 of the Clean Air Act to enforce state implementation plans. *See* 42 U.S.C. § 1857h-2, authorizing individuals to act as private attorneys general to enforce State Implementation Plans upon notice to U.S. EPA and failure of U.S. EPA to act.

For these reasons, the Agency's concern that a stay of the entire Permit "would effectively shield an entire segment of Illinois' utilities sector from potential enforcement" is unfounded. (See Respondent's Motion at p. 17).

C. The Board should not deviate from its past practice of granting a stay where requested.

The Board has a practice of granting stays of CAAPP permits where requested to do so.[6] The Agency concedes that this has been the Board's practice, noting that the only instances in which the Board has declined to stay an appealed permit is where the petitioner has not requested a stay. (See Respondent's Motion at p. 14).[7] CWLP notes that while the Board is not necessarily bound by its decisions in prior cases in which a stay of an entire permit was granted, it is constrained by the confines of rationality if it elects to deviate from its past practices. *See, e.g., Alton Packaging Corp. v. Pollution Control Board,* 146 Ill. App. 3d 1090, 1093-94, 497 N.E.2d 864, 867-68 (5th Dist. 1986) (holding that the Board acted arbitrarily in deviating from its previous custom and practice in interpreting and applying its rules); *see also Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 505-06, 524 N.E.2d 561, 581 ("While an agency is not required to adhere to a certain policy or practice forever, sudden and unexplained changes have often been considered arbitrary"). Here, the Agency asserts that recently, it had a conversation with U.S. EPA concerning the severability provisions required to be included in CAAPP permits. The Agency does not explain in its Response or in the attached affidavit the content of the conversation or the ramifications, if any, of that conversation. Accordingly, the Agency has provided no rational basis for the Board to deviate from its prior practice of granting a stay of the entire permit where requested.

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[6] *See, e.g., Lone Star Ind. v. Illinois Environmental Protection Agency*, Docket No. 03-94, slip op. at p.2 (Ill. Pollution Control Bd. Jan. 9, 2003); *Saint-Gobain Containers, Inc. v. Illinois Environmental Protection Agency*, Docket No. 04-47, slip op. at pp. 1-2 (Ill. Pollution Control Bd. Nov. 6, 2003); *Midwest Generation, LLC v. Illinois Environmental Protection Agency*, Docket No. 04-108, slip op. at p. 1 (Ill. Pollution Control Bd. Jan. 22, 2004).

[7] The Agency also notes that it has not challenged a party's request for a stay in the past, even where the requested relief is a stay of the entire permit. (See Motion at p. 14). The Agency, however, has not presented a reason for its inaction in the past, nor has it presented an adequate reason for its sudden pressing need to challenge a stay in the present case.

CONCLUSION

For all the reasons set forth above, the Board should grant CWLP's Motion to Stay Effectiveness of CAAPP Permit and grant any other such relief as it finds necessary and appropriate. If the Board determines that a stay of the entire Permit is unwarranted, CWLP requests, in the alternative, that the contested conditions should be stayed in their entirety in order to prevent confusion.

Respectfully submitted,

THE CITY OF SPRINGFIELD,
a municipal corporation

By: _____
One Of Its Attorneys

Dated: December 2, 2005

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certify that I have served upon the individuals named on the attached Notice of Filing true and correct copies of the **REPLY TO THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S MOTION IN PARTIAL OPPOSITION TO, AND PARTIAL SUPPORT OF, PETITIONER'S REQUEST FOR STAY** by electronic file and First Class Mail, postage prepaid on December 2, 2005.