

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

ELECTRIC ENERGY,	)	
INCORPORATED,	)	
	)	
Petitioner,	)	
	)	PCB No. 2006-065
v.	)	(CAAPP Permit Appeal)
	)	
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

**NOTICE**

To:	Dorothy Gunn, Clerk	James T. Harrington
	Illinois Pollution Control Board	David L. Rieser
	100 West Randolph Street	McGuireWoods, LLP
	Suite 11-500	77 West Wacker, Suite 4100
	Chicago, Illinois 60601	Chicago, Illinois 60601

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

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board the **MOTION FOR LEAVE TO FILE SURREPLY and SURREPLY** of the Respondent, Illinois Environmental Protection Agency, a copy of which is herewith served upon the assigned Hearing Officer and the attorneys for the Petitioner.

Respectfully submitted by,

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

Dated: December 15, 2005  
Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, Illinois 62794-9276  
(217) 524-9137

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**MOTION FOR LEAVE TO FILE SURREPLY**

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Illinois EPA” or “Respondent”), by and through its attorneys, and moves the Illinois Pollution Control Board (“Board”) for leave to file a Surreply to the Petitioner’s, ELECTRIC ENERGY, INCORPORATED (hereinafter “Electric Energy” or “Petitioner”), recent responsive pleading regarding the issue of stay. In support of this Motion, the Respondent states as follows:

1. On November 3, 2005, attorneys for the Petitioner filed this appeal with the Board challenging certain permit conditions contained within the Clean Air Act Permit Program (“CAAPP”) permit issued by the Illinois EPA on September 29, 2005. The Illinois EPA received an electronic version of the appeal on the same date. Formal notice of the appeal was served upon the Illinois EPA on November 4, 2005.
2. As part of its Petition, Electric Energy sought a stay of the effectiveness of the entire CAAPP permit or, alternatively, a stay of the contested conditions of the CAAPP permit in the event that the Board denies its request for a blanket stay.

3. On November 18, 2005, the Illinois EPA responded to Electric Energy's request for stay.<sup>1</sup>

4. On November 30, 2005, the Petitioner filed a responsive pleading and an attached Motion for Leave with the Board. The Illinois EPA received service of the filing on December 1, 2005.

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

6. In its November 30<sup>th</sup> pleading, Petitioner addressed several arguments raised by the Illinois EPA in opposition to the applicability of the Illinois Administrative Procedure Act ("APA"), *5 ILCS 100/10-65(b)(2004)* and the Board's granting of a blanket stay of the entire CAAPP permit pursuant to its discretionary stay authority. The Illinois EPA asserts that Petitioner's pleading contains improper, or perhaps inadvertent, misstatements concerning the Respondent's arguments. This filing is necessary to avoid undue prejudice arising from those misstatements. The Board has previously held that a surreply is an appropriate filing when brought to correct misstatements contained in briefing documents. *See, Illinois Ayers Oil Company v. Illinois EPA, PCB No. 03-214, UST Appeal (August 5, 2004)*.

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

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

Respectfully submitted by,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,

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

Dated: December 15, 2005  
Illinois Environmental Protection Agency  
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	)	
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

**SURREPLY**

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Illinois EPA”), by and through its attorneys, and files this Surreply to correct several misstatements expressed by the Petitioner, ELECTRIC ENERGY, INCORPORATED (hereinafter “Electric Energy” or “Petitioner”), in its responsive pleading<sup>1</sup> filed with the Board on November 30, 2005.

**ARGUMENT**

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

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<sup>1</sup> As addressed in the accompanying Motion to this filing, the Illinois EPA’s prior captioning of pleadings was less than artful and, for the reasons explained therein, this responsive pleading is being identified as a Surreply. The Illinois EPA will refer to the Petitioner’s most recent November 30<sup>th</sup> filing in the general manner it was captioned (i.e., “Petitioner’s Reply”). Reference to the Illinois EPA’s earlier Motion in Partial Opposition To, And Partial Support Of, Petitioner’s Request For Stay, will be abbreviated herein as “Respondent’s Motion.”

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

Petitioner challenges the Illinois EPA's assertion that the severability provision of the Illinois CAAPP, codified at 415 ILCS 5/39.5(7)(i) of the Environmental Protection Act ("Act"), effectively exempts CAAPP permits from the automatic stay requirement of the Illinois APA. According to Petitioner, the existence of the Act's exemption of the APA in the context of administrative citations does not support the Illinois EPA's position but, rather, "proved the opposite that the legislature intended and believed clearly the APA applied to all proceedings under the [Act] unless specifically exempted." *See, Petitioner's Reply at page 2.* Petitioner reasons that the General Assembly did not "expressly" exempt CAAPP permits from the APA and, as such, the severability clause only applies to circumstances in which "some terms of a permit are successfully challenged so that other unrelated terms may remain in force." *Id.*

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

The Illinois EPA admits that the CAAPP severability provision has something in common with contractual severability clauses and it clearly provides a “saving” mechanism for uncontested permit conditions. However, while Section 39.5(7)(i) assures that the remaining portions of a permit remain viable when and if challenged conditions are struck down, the Illinois EPA maintains that the provision’s language also achieves the practical effect of foreclosing the APA’s automatic stay provision. It does so by contemplating a continuation of the uncontested permitting requirements contemporaneous with the permit appeal.

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

**II. The issue of the permit’s “effective date” is irrelevant to the Board’s exercise of discretionary stay authority.**

In a separate argument, Petitioner observes that one of the permit conditions appealed in this proceeding concerns the permit’s effective date. According to Petitioner, a challenge to the permit’s effective date is tantamount to a stay of all other permit conditions, seemingly because none of the permit conditions can be said to become effective until the issue surrounding the effective date is first resolved. *See, Petitioner’s Reply at page 2-3.* Noting that the Respondent has agreed to a limited stay pertaining

only to the appeal's contested conditions, Petitioners urges the Board to stay the CAAPP permit in its entirety on the basis of the challenged effective date. *Id.*

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

More significantly, the argument misstates the nature of the issue raised in the Petitioner's appeal. The bailiwick of Petitioner's challenge regarding the permit's effective date involves the timing of the permit's effectiveness relative to the date of permit issuance. Specifically, Petitioner has objected to the permit being deemed effective on September 29, 2005, because a signed version of the permit was not received in the mail until October 4, 2005. *See, Petition at pages 5-6.* Petitioner appears to be particularly concerned with the implications posed by the permit being issued in late September, as it would purportedly cause hardship with respect to the permit's quarterly record-keeping and/or reporting requirements. *Id.* The narrow emphasis of this issue is placed on whether the permit became effective on the date of the Illinois EPA's issuance or, alternatively, on the date that the Petitioner received its permit in the mail a few days later. This issue is wholly distinct from the discussion that is accompanying the merits of the stay issue, the latter of which is addressing a permit's effectiveness as it relates to the pendency of this appeal.



**CONCLUSION**

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

Respectfully submitted by,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,

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

Dated: December 15, 2005  
Illinois Environmental Protection Agency  
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P.O. Box 19276  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 15th day of December 2005, I did send, by electronic mail, the following instruments entitled **MOTION FOR LEAVE TO FILE**

**SURREPLY and SURREPLY** to:

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

and a true and correct copy of the same foregoing instrument, by First Class Mail with postage thereon fully paid and deposited into the possession of the United States Postal Service, to:

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

James T. Harrington  
David L. Rieser  
McGuireWoods, LLP  
77 West Wacker, Suite 4100  
Chicago, Illinois 60601

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