BEFORE THE ADMINISTRATOR

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of the Proposed Operating Permit for:

Midwest Generation, LLC to operate
the source located at 401 East Greenwood Ave.,
Waukegan, IL 60087-5197

Permit No. 95090047
Source I.D. No. 097190AAC

Proposed by Midwest Generation, LLC

PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO THE ISSUANCE OF THE PROPOSED TITLE V OPERATING PERMIT FOR THE MIDWEST GENERATION, LLC WAUKEGAN GENERATION STATION

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On behalf of:

SIERRA CLUB

RESPIRATORY HEALTH ASSOCIATION

ENVIRONMENTAL LAW POLICY CENTER

Date: August 5, 2016

Pursuant to Clean Air Act § 505(b)(2) and 40 C.F.R. § 70.8(d), the Environmental Law and Policy Center, Respiratory Health Association, and Sierra Club hereby petition the Administrator ("the Administrator") of the United States Environmental Protection Agency ("U.S. EPA" or "EPA") to object to a proposed Title V Operating Permit for Midwest Generation's Waukegan Generating Station, Permit Number 95090047 ("Permit"). The Permit was proposed to U.S. EPA by the Illinois Environmental Protection Agency ("IEPA") more than 45 days ago. A copy of the proposed Permit is attached as Exhibit 1.

The Environmental Law and Policy Center, Respiratory Health Association, and Sierra Club provided comments to the IEPA on the revised draft permit. A true and accurate copy of the Environmental Law and Policy Center, Respiratory Health Association, and Sierra Club's joint comments is attached at Exhibit 2.

This petition is filed within sixty days following the end of U.S. EPA's 45-day review period, as required by Clean Air Act ("CAA") § 505(b)(2). The Administrator must grant or deny this petition within sixty days after it is filed. If the Administrator determines that the Permit does not comply with the requirements of the CAA, or fails to include any "applicable requirement," the Administrator must object to the permit. 42 U.S.C. § 7661b(b); 40 C.F.R. § 70.8(c)(1) ("The [U.S. EPA] Administrator will object to the issuance of any permit determined by the Administrator not to be in compliance with applicable requirements or requirements of this part.").

Despite the fact that the Permit must afford more rigorous protections given the City of Waukegan's status as an environmental justice community, the severely delayed Permit fails to comply with the applicable CAA requirements and the requirements of 40 C.F.R. Part 70 in multiple respects. First, the Permit fails to include a compliance schedule for documented opacity violations, as required by 42 U.S.C. § 7661c(a). Second, IEPA improperly allowed at least one private entity to participate in the drafting process for Statements of Basis for Illinois coal plants, a function that under 40 C.F.R. § 70.7(a)(5) can only be executed by the permitting authority. Third, the Permit prescribes inadequate inspections of coal and fly ash handling processes. Fourth, the Permit provides for too long a period before PM emissions testing is required, which raises the risk that the Plant could be operating with excess emissions for an additional six months. Fifth, this permit weakens the trigger for when PM emissions testing should occur if MWG operates at a load higher than the load at which testing was most recently conducted, jeopardizing MWG's obligation to assure compliance with PM standards. Sixth, the Permit also fails to require CO and PM emissions testing to be performed at the maximum operating loads of the affected boilers, which would ensure that authorities are aware of the maximum emissions levels that might occur. Seventh, the Permit does not assure compliance with emission limits because it reduces the nature and frequency of combustion evaluations for the coal-fired boilers. Finally, under this permit, the continuous opacity monitoring system does not require an explanation for exceedances in opacity unless other information shows that PM emission limits were exceeded. This seriously restricts the ability of IEPA and citizens to bring enforcement actions for opacity violations. For all of these reasons, the Permit is not in compliance with the applicable requirements and the Administrator must object.

I. Environmental Justice Concerns

Waukegan has been recognized as an environmental justice community that, compared to the rest of the State of Illinois, has disproportionately suffered from environmental health hazards. IEPA has recognized this fact explicitly in its Statement of Basis, noting that "[t]he area in which the source is located has been identified as posing a potential concern for consideration of Environmental Justice." (Statement of Basis at 11). This conclusion is consistent with IEPA's environmental justice definitions: under IEPA policy, "a 'potential' [environmental justice] community is a community with a low-income and/or minority population greater than twice the statewide average." (IEPA, *Environmental Justice (EJ) Policy* (accessed Sept. 14, 2015)[1]). According to the 2010 U.S. Census, 78.3% of people in Waukegan are minorities, as opposed to 36.3% of people statewide in Illinois.[2] Thus, the minority share of population in Waukegan is more than twice the minority share of population in the State of Illinois, which qualifies Waukegan as an environmental justice community under state guidelines.

Executive Order 12898 makes environmental justice a "key component of federal decisionmaking."

> Executive Order 12898, signed by President Clinton on February 11, 1994, focuses federal attention on the environmental and human health conditions of minority populations and low- income populations with the goal of achieving environmental protection for all communities. Executive Order (EO) 12898 also is intended to promote non-discrimination in federal programs substantially affecting human health and the environment, and to provide minority and low-income communities access to public information on, and an opportunity for public participation in, matters relating to human health or the environment. It generally directs federal agencies to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations. Attention to environmental justice in the implementation of federal environmental programs is a priority for EPA. *See generally*, Office of Environmental Justice *Plan EJ 2014* (September 2011) (outlining EPA's efforts to promote environmental justice and identifying environmental justice and permitting as a focus area).

In the Matter of United States Steel Corporation—Granite City Works, Administrator Order at 5 (Dec. 3, 2012) (hereinafter "USSC-GW Pet. Resp.").[3]

U.S. EPA has strived to "truly create a culture within EPA − and among other federal, state, local, and tribal permitting agencies – in which engaging on issues of environmental justice

[1] Available at http://www.epa.illinois.gov/topics/environmental-justice/ej-policy/index.
[2] 21.7% of 2010 U.S. Census respondents in Waukegan answered that their only race was "White" and they were not Hispanic or Latino. Similarly, 63.7% of 2010 U.S. Census respondents state-wide in Illinois answered that their only race was "White" and they were not Hispanic or Latino. UNITED STATES CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/17/1779293.html (last visited Sept. 4, 2015).
[3] Available at https://www.epa.gov/sites/production/files/2015-08/documents/uss_2nd_response2009.pdf.

more readily translates into greater protections for overburdened communities." U.S. EPA, *Plan EJ 2014* at 1 (Sept. 2011) hereinafter "EJ Plan").[4] The agency has prioritized Environmental Justice for over twenty years. Consistent with Executive Order 12898, U.S. EPA issued an implementation plan "to ensure that environmental justice concerns are given as full consideration as possible in the decision to issue a permit and the terms of the permits issued under existing federal environmental laws." *Id*. While U.S. EPA's *EJ Plan* does not contain environmental justice guidelines for specific permitting actions (but instead lays out a process for developing strategies and activities), it does emphasize the importance of environmental justice in permitting. *Id.* Petitioners raise the *EJ Plan* because it underscores that environmental justice is a priority not only to U.S. EPA but even more specifically in permitting actions. These environmental justice goals were not served in the Waukegan Title V permitting process.

Aside from providing bilingual permit documents and a bilingual interpreter at the September 2, 2015 permit hearing, environmental justice has not been treated as a priority in this process. First and as discussed further below, this community has been deprived of a final and effective Title V permit for this facility for decades due to a breakdown in the Title V permitting process in Illinois. Second, the September 2, 2015 permit hearing was not held in the community where the facility is located—Waukegan—but was in Zion, Illinois instead. Additionally, the Hearing Officer directed members of the public to not offer comments if their comments were going to be repetitive of other commenters. The Hearing Officer repeated this direction more than once. Petitioners characterized this as discouraging members of the public from offering comments at the hearing. IEPA did not agree with this characterization and stood by the Hearing Officer's directions. Resp. Summ. at 28-29. Nonetheless, these actions are not consistent with U.S. EPA's environmental justice goals as embodied in the *EJ Plan*.

While Petitioners appreciate that Title V regulations do not provide an avenue for new emissions limits to be imposed on a facility in the context of a Title V/CAAPP permit action, environmental justice considerations reinforce the need for adequate periodic monitoring, record-keeping, reporting, and permit conditions that are enforceable by citizens as a practical matter to ensure that the Waukegan facility complies with all emission limits and does not place any additional air quality and public health burdens on an already over-burdened environmental justice community. "Focused attention to the adequacy of monitoring and other compliance assurance provisions is warranted in this context." USSC-GW Pet. Resp. at 6.

II. The Agency Has Failed to Meet the Deadlines It Committed to in an Agreement with U.S. EPA.

On September 5, 2014, Illinois EPA and U.S. EPA Region 5 entered an agreement in part for the purpose of "significantly reduc[ing] the Clean Air Act Permit Program permit backlog." Illinois Program Work Plan for Calendar Years 2014-2016, Agreement Between Illinois Environmental Protection Agency and Region 5, U.S. Environmental Protection Agency (Sept. 5 2014) (hereinafter "Agreement" or "Work Plan"). The agreed Work Plan covers the years of 2014-2016 and contains IEPA commitments relating to the Clean Air Act Title V permitting program. The Agreement was signed by then-IEPA Director Lisa Bonnett and the Region 5 Administrator at that time, Susan Hedman. Work Plan at 1.

[4] Available at http://nepis.epa.gov/Exe/ZyPDF.cgi/P100ETRR.PDF?Dockey=P100ETRR.PDF.

The Agreement includes Schedule A, which lays out the timing by which IEPA agreed to issue CAAPP permits for coal plants in Illinois. *Id.* at 8. The schedule includes deadlines by which IEPA agreed to issue, for each plant, both a permit to resolve the permit appeals pending before the Illinois Pollution Control Board and also a reopened permit ("reopeners") for the purpose of updating the permit with requirements that have become applicable during the appeal process. IEPA has been issuing the permits to resolve the permit appeals as significant modifications. Sixteen coal plants are covered in Schedule A, although the number of permits that IEPA must actually issue has been reduced by the announcement of the retirement or refueling of the Joliet, Wood River, and Will County plants. Ideally, Will County would receive a final and updated Title V operating permit for the next two years, but we concede that plants that will be operating indefinitely should be prioritized over Will County.

Nonetheless, even with its permitting burden reduced by retirements, IEPA is far from meeting the schedule that it committed to in this Agreement. By the time the Agreement was signed, the appealed permits for CWLP and Coffeen had already been issued as significant modifications. All that remained for those two permits were the reopeners, and IEPA committed to have those completed by March 31, 2015 and September 30, 2015, respectively. *Id.* Nonetheless, neither of those reopeners was issued until June of 2016, more than eight months behind schedule.

In addition, IEPA agreed to issue all of the remaining permits to resolve the appeals—i.e., significant modifications—by September 30, 2015 at the latest. *Id.* IEPA has fallen far short of meeting that pledge. Fourteen permits were needed to resolve appeals at the time IEPA made the agreement, and – as of August 2016 – IEPA has issued only six such permits, less than half of those pledged. IEPA agreed to issue six additional reopened permits beyond CWLP and Coffeen by July 1, 2016, *id.*, but has only reopened four of the six.

In sum, IEPA is nowhere close to meeting its commitments under the agreed Work Plan with U.S. EPA. IEPA's failure to meet deadlines that the agency itself agreed to continues to deprive communities of the protections offered by updated and final Title V permits containing all applicable requirements.

III. The Permit Fails to Include a Compliance Schedule for Opacity Violations.

The Administrator must object because the Permit must include a compliance schedule for documented opacity violations. In the present proceedings, upon information and belief, the applicant has certified compliance with all the requirements that apply to these facilities. In the Significant Modification of the CAAPP permit, IEPA appears to have accepted this certification, and consequently did not incorporate any schedule of compliance or other remedial measures in the Title V/CAAPP permit. IEPA apparently failed to consider that there is an ongoing enforcement action by the U.S. EPA and the Illinois Attorney General against Midwest Generation over opacity violations at the Waukegan facility, among others. (*U.S. v. Midwest Generation, LLC*, No. 09-cv-05277, Compl. (August 27, 2009).) The Administrator must object because IEPA ignored the record of continuous and ongoing opacity violations established through a federal and state enforcement action and fails to assure compliant operations at these

facilities as required by the CAA and regulations.

A fundamental purpose of the Title V permitting program is to ensure that regulated entities comply with requirements in the Clean Air Act. Under 40 C.F.R. § 70.1(b) and Clean Air Act § 504(a), each regulated major source must obtain a permit that "assures compliance by the source with all applicable requirements." The Act goes on to provide that each Title V permit: "shall include enforceable emission limitations and standards, a schedule of compliance, [submission of the results of any required monitoring], and such other conditions as are necessary to assure compliance with applicable requirements of this Act . . . ." 42 U.S.C. § 7661c(a) (emphasis added). In addition, the Act mandates that the regulations require the permit applicant to "submit with the permit application a compliance plan describing how the source will comply with all applicable requirements." 42 U.S.C. § 7661b(b)(1). The term "applicable requirements" is very broad and includes, among other things, any standard or requirement under Section 111 of the Act or "[a]ny term or condition of any preconstruction permits" or "[a]ny standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the [Clean Air] Act." 40 C.F.R. § 70.2(2)(1)-(2). Applicable requirements include, in other words, state implementation plan ("SIP") requirements. *See* 40 C.F.R. § 70.2.

A Title V permit applicant must disclose its compliance status and either certify compliance or enter into an enforceable schedule of compliance to remedy violations. 42 U.S.C. § 7661b(b); 40 C.F.R. § 70.5(c)(8-9). If a facility is in violation of an applicable requirement at the time that it receives an operating permit, the facility's permit must include a compliance schedule. *See* 40 C.F.R. § 70.5(c)(8)(iii)(C). The only exemption is if the reported violation has been corrected prior to permit issuance. The Act defines "compliance schedule" as "a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with an applicable implementation plan, emission standard, emission limitation, or emission prohibition." 42 U.S.C. § 7661(3).

A state or federal Notice of Violation or an ongoing enforcement action are sufficient demonstrations of violations to trigger the requirement for a compliance schedule. "[I]ssuance of these NOVs and commencement of the suit is a sufficient demonstration to the Administrator of non-compliance for purposes of the Title V permit review process." *NY PIRG v. Johnson*, 427 F.3d 172, 180 (2005); *see also NY PIRG v. Whitman* 321 F.3d 316, 334 (2003).

Thus, if a power plant is subject to an enforcement action for violation of SIP requirements, the plant's operating permit must include an enforceable compliance schedule designed to bring the plant into compliance with those requirements. The plant is then bound to comply with that schedule or risk becoming the target of an enforcement action for violating the terms of its permit—in addition to the original violation that triggered the need for a compliance schedule. In the present case, there is both a Notice of Violation and an ongoing enforcement action over the opacity violations at Waukegan. *U.S. v. Midwest Generation, LLC*, No. 09-cv-05277, Compl. (Aug. 27, 2009). Because of these established opacity violations taking place at the Waukegan facility, the Waukegan Title V permit must include a compliance schedule for opacity. 40 C.F.R § 70.5(c)(8)(iii)(C).

In its Responsiveness Summary, IEPA indicated that this comment raised "an issue that is beyond the scope of this modification proceeding." Resp. Summ. at 73. Petitioners do not agree. IEPA does not have the authority to issue a Significant Modification to a Title V Permit that does not comply with the requirements of the Title V program. "A permit, permit modification, or renewal may be issued only if all of the following condition [sic] have been met: . . . The conditions of the permit provide for compliance with all applicable requirements and the requirements of this part . . . ." 40 C.F.R. § 70.7(a)(1)(iv). Second, the Agency or U.S. EPA must reopen or revise a permit that fails to comply with requirements of the Title V program. "A permit shall be reopened and revised under any of the following circumstances: . . . The Administrator or the permitting authority determines that the permit must be revised or revoked to assure compliance with the applicable requirements." 40 C.F.R. § 70.7(f)(1)(iv). Finally, U.S. EPA not only has the authority to object to a permit that violates the SIP but it must object to a permit that violates the SIP. "The Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this part." 40 C.F.R. § 70.8(c). The Permittee's operation of the source with opacity violations and without a compliance schedule violates the SIP. IL SIP Rule 201.148.

> No person shall cause or allow the operation of an emission source which is not in compliance with the standards or limitations set forth in Part 2 of this Chapter (after the date by which such emission source is required to have an Operating Permit pursuant to Rule 103) without a Compliance Program and a Project Completion Schedule approved by the Agency.

Id. The Permit violates the SIP because it allows the continued operation of the source which is in violation of 35 IAC § 212.123 and without a compliance schedule. Accordingly, the Administrator must object. 40 C.F.R. § 70.8(c).

IV. The Agency Improperly Involved Outside Entities in Drafting the Permit's Statement of Basis.

The Administrator must object because IEPA improperly allowed at least one private entity to give input on Statements of Basis for Illinois coal plants. Under federal law, "[t]he *permitting authority* shall provide a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions)." 40 C.F.R. § 70.7(a)(5) (emphasis added). In the State of Illinois, IEPA issues a Statement of Basis to meet the requirements of this federal regulation. In IEPA's Statements of Basis, it justifies its determinations on facilities, including its discretionary decisions.

However, a review of documents requested by the Sierra Club under the Freedom of Information Act (FOIA) revealed that private entities, including MWG, Dynegy, Southern Illinois Power Cooperative, Dominion/Kincaid, and lawyers from Schiff Hardin, were involved in the behind-closed-door reissuance process for Illinois CAAPP permits. One FOIA'd document was a June 2015 draft of Waukegan's Statement of Basis that included comments and markups from a Schiff Hardin attorney. (Shiff Hardin LLP draft of Waukegan Statement of Basis (June 3, 2015)). This private-sector involvement in drafting the Waukegan Statement of Basis does not comport with federal law and is improper. Under the Code of Federal Regulations, IEPA, as the

permitting authority must issue the Statement of Basis. This document is *not* intended to be a vehicle for private entities to bolster arguments for their preferred regulations. There are other times, such as during the public comment period, when permittees and other private entities can make such arguments. Giving industry this level of access undermines the public's trust in IEPA's ability to represent the best interests of the citizens of the State of Illinois, and issue safe and unbiased permits.

The Administrator must object because IEPA failed to comply with 40 C.F.R. § 70.7(a)(5) in preparing the Statement of Basis. Further, the Administrator must assure that private industry and other members of the public have equal access to documents in permitting proceedings such as the Statement of Basis.

V. The CAAPP Permit Does Not Provide for Adequate Inspections of Coal and Fly Ash Handling Processes.

The proposed CAAPP permit does not require adequate inspections of coal and fly ash handling processes. At issue are Conditions 7.2.8(b), 7.3.8(b), and 7.4.8(b) which, among other things, direct MWG to inspect affected operations by either monitoring visible emissions ("VE") or opacity annually. As U.S. EPA noted during the comment period for the Draft Permit: "Given that the majority of the affected equipment operates regularly throughout the year, it is not clear how the draft CAAPP permit inspection requirements and frequency of the required VE observations are adequate to yield reliable and accurate emissions data, as required by 40 C.F.R § 70.6(a)(3)(i)(B)." Resp. Summ. at 85; *see also* U.S. EPA Comments on Waukegan Plant's Proposed CAAPP Permit.[5] Although IEPA responded to this comment, its response fails to justify the inadequate inspection requirements. As such, the Administrator must object to the permit.

IEPA stated in its Responsiveness Summary for this permit that "[a] key component of the Periodic Monitoring is that Midwest Generation must operate designated control measures for the equipment on an as-needed basis or, in other words, as necessary to assure compliance, whenever equipment is operating and material is being handled." Resp. Summ at 85. This requirement does nothing to remedy the infrequent visible emissions monitoring. It points to a permit provision that is not practicably enforceable—operating control equipment "as needed" is subjective and, as a result, is unenforceable by citizens or the IEPA. IEPA's explanation that more frequent monitoring of visible emissions would not provide "useful information" is contradicted by IEPA's other statements in its response on this comment. If once per year VE monitoring provides useful information it is impossible to understand why more frequent VE monitoring wouldn't provide more useful information. As IEPA itself pointed out "the absence of visible emissions will likely readily confirm proper implementation of control measures." *Id.*

[5] IEPA should also clarify that monitoring opacity every three years pursuant to Conditions 7.2.7(a), 7.3.7(a) and 7.4.7(a) does not obviate the need for annual VE or opacity monitoring pursuant to Conditions 7.2.8(b), 7.3.8(b), and 7.4.8(b). The provision in Conditions 7.2.8(b), 7.3.8(b), and 7.4.8(b) allowing the permit holder to perform "Reference Method 9 observations" in accordance with Conditions 7.2.7(a), 7.3.7(a), and 7.4.7(a) could be misconstrued to provide that merely complying with Conditions 7.2.7(a), 7.3.7(a), and 7.4.7(a) every three years would constitute compliance with Conditions 7.2.8(b), 7.3.8(b), and 7.4.8(b). This interpretation essentially would write Conditions 7.2.8(b), 7.3.8(b), and 7.4.8(b) out of the permit and further reduce the frequency of monitoring from annually to triennially.

at 86. Consequently, whenever control measures are running "as needed," the absence of visible emissions would confirm that the control measures are operating and being implemented properly. Further, if control measures are not operating but there are visible emissions, it would inform the operators that control measures are, in fact, "needed," making the "as needed" requirement more meaningful.

The CAAPP permit must be revised to ensure all necessary forms of coal handling, coal processing, and fly ash handling operations inspections are conducted on a regular basis. Both Commenters and U.S. EPA previously asked that IEPA provide in the Statement of Basis an explanation of how the control measures and monitoring requirements for all points of fugitive emissions will guarantee compliance with all applicable opacity and PM limits. As U.S. EPA stated, "[t]his should include a discussion of the relationship between monitoring frequency and applicable emission limits." *Id*. at 85. While IEPA has pointed to requirements for recording and reporting of operations of the relevant processes if operating without control measures, and has also pointed to formal inspection requirements (Resp. Summ. at 85-86), this explanation still fails to explain how the control measures requirements—plus the identified record-keeping, reporting, and inspection requirement—guarantee compliance. For instance, in the Responsiveness Summary, IEPA stated "[f]or coal processing equipment and fly ash handling equipment, which are subject to the PM emission standards in 35 IAC 212.321 or 212.322, Midwest Generation is required by Conditions 7.3.9(b)(ii) and 7.4.10(b)(ii) to maintain a demonstration that confirms that the control measures used for this equipment are sufficient to assure compliance with the applicable limits pursuant to these standards." The Responsiveness Summary at Comment 52, p. 67. Condition 7.3.9(b)(ii) states:

> the Permittee shall maintain a demonstration that confirms that the control measures identified in the record required by Condition 7.3.9(b)(i) are sufficient to assure compliance with Condition 7.3.4(c) at the maximum process weight rate at which each affected process can be operated (tons coal/hour), with supporting emission calculations and documentation for the emission factors and the efficiency of the control measures . . . .

Requiring reporting of emissions calculations is insufficient to assure what efficiency the control measures are achieving in actuality (as opposed to just on paper) without regularly monitoring actual emissions. Condition 7.4.10(b)(ii) states that "[t]he Permittee shall submit quarterly reports to the Illinois EPA that include the following information for incidents during the quarter in which affected processes continued to operate during malfunction or breakdown with excess emissions or excess opacity. " Recording and reporting operations without control measures does not provide any assurances of compliance. Requiring use of control measures does not provide any assurance that those control measures will achieve compliance without regular monitoring of actual emissions.

U.S. EPA's comment that the "it is not clear how the draft CAAPP permit inspection requirements and frequency of the required VE observations are adequate to yield reliable and accurate emissions data, as required by 40 C.F.R. 70.6(a)(3)(i)(B)," Resp. Summ. at 85, still applies and, as a result, the Administrator must object.

VI. The CAAPP Permit Does Not Provide Adequate Testing, Inspection and Evaluation Standards.

The revised and now final CAAPP permit removed and weakened many inspection requirements from the previous draft CAAPP permit. Inspections are a crucial element of ensuring that permit holders demonstrate reasonable assurance of compliance with all state and federal laws. Otherwise, reduced inspection standards create the risk of unsafe operating conditions by either perpetuating issues that already exist, or allowing preventable issues to develop. The permit should be revised to resolve the problematic conditions below.

A. The CAAPP Permit Provides Too Long a Period Before PM Emissions Testing Is Required.

The revised CAAPP permit under Condition 7.1.7(a)(i) increased the length of time following effectiveness of the permit before MWG must conduct PM emissions measurements. The previous draft of the CAAPP permit required these tests be conducted 180 days after the effectiveness of the condition; however, the revised draft more than doubled this length of time to one year following the effectiveness of the condition. Aside from indicating that this change was made to resolve the permit appeal, IEPA fails to explain why one year is needed instead of 180 days. Resp. Summ. at 52. "IEPA has the obligation to respond to significant public comments." (*In the Matter of Midwest Generation, LLC Fisk Generating Station*, Administrator Order at 5 (Mar. 25, 2005) (hereinafter "Fisk Pet. Resp.)).[6] IEPA also stated that "[b]ased on the past testing that has been conducted for the coal-fired boilers at the Waukegan Station, it should not be expected that future testing will show any violations of the state PM emission standards." Resp. Summ. at 52. IEPA appears to suggest that no future or regular testing is ever needed again where past testing shows compliance. This suggestion fails to pass the laugh test and obviously ignores variations in fuel, operator error, aging equipment, inadequate maintenance or repairs, and all of the other factors that can affect emissions.

PM emissions testing is crucial to ensure that the Waukegan Plant is in compliance with all state and federal laws and is also crucial because of Waukegan's status as an environmental justice community, as discussed above. PM emissions testing is also of higher concern in Illinois in the coming years because the whole state of Illinois has been designated as "unclassifiable" under the 2012 Annual Fine Particle ($PM_{2.5}$) Standard due to improper lab procedures. (*Illinois Unclassifiable Area Designations for the 2012 Primary Annual $PM_{2.5}$ National Ambient Air Quality Standards*, *Technical Support Document* at 2 (hereinafter "$PM_{2.5}$ Technical Support Document")).[7] Doubling the amount of time before conducting PM emission measurements raises the risk that the Plant could be operating with excess emissions for an additional six months, risks that we cannot afford in an environmental justice community and an unclassifiable state. As such, the permit fails to meet the requirement that it include "monitoring…. requirements sufficient to assure compliance with the terms and conditions of the permit." (*In the Matter of Midwest Generation, LLC, Waukegan Generating Station*, EPA Administrator

[6] Available at https://www.epa.gov/sites/production/files/2015-08/documents/midwest_generation_fisk_decision2004.pdf).
[7] Available at https://www3.epa.gov/pmdesignations/2012standards/eparesp/05_IL_120UnclTSD.pdf.

Order at 19 (Sept. 22, 2005)) (hereinafter "Waukegan Pet. Resp.")[8] (citing 40 C.F.R. §§ 70.6(a)(3)(i) and 70.6(c)(1)). For these reasons, the Administrator must object to the Permit.

B. The CAAPP Permit Requires a Trigger for PM Emissions Testing When Operating at Higher Loads.

The revised draft permit weakened the trigger for when PM emissions testing should occur if MWG operates at a load higher than the load at which testing was most recently conducted. *See* Condition 7.1.7(a)(ii). The CAAPP permit previously required testing when loads were more than two percent greater than the load size at which testing occurred. However, under the revised draft permit and now final permit, a load would need to be the greater of 10 Megawatts or five percent higher than the load at which testing was last conducted in order to trigger new PM emissions testing. IEPA explained that the change from the previous permit to the revised draft (and now final) permit was in response to concerns about seasonal variations and seasonal weather conditions. IEPA indicated that "The capacity is highest in the winter when the air is coldest and densest and the temperature of the water in the cooling system is lowest." Resp. Summ. at 53. This fails to explain, however, why PM emissions testing cannot take place "in the winter when the air is coldest and densest" if that is when maximum capacity occurs and the load is highest. IEPA further fails to explain how PM testing assures compliance with the permit's PM limits if the testing occurs when the load is not at its highest and is up to five percent lower than maximum capacity. 40 C.F.R. 70.6(a)(3). IEPA must include in the permit PM "monitoring…. requirements sufficient to assure compliance with the terms and conditions of the permit." Waukegan Pet. Resp. at 19 (citing 40 C.F.R. §§ 70.6(a)(3)(i) and 70.6(c)(1)).

> It is a general principle of administrative law that an inherent component of any meaningful notice and opportunity for comment is a response by the regulatory authority to significant comments. *Home Box Office v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) ("the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.") Accordingly, IEPA has an obligation to respond to significant public comments.

Fisk Pet. Resp. at 4-5. The Administrator must object due to this failure to assure compliance with PM emissions limits and IEPA's failure to respond to comments to explain why the PM emissions testing cannot occur in the winter when the operating load is at its highest.

Petitioners also commented on the fact that the revised draft permit (and now final permit) also extends the duration of time, per quarter, during which the affected boilers could operate at this higher load—from 30 hours to 72 hours—before triggering the need to conduct PM emissions testing. Allowing an affected boiler to operate at a higher load than the level at which testing was conducted for an aggregate of three days before triggering new emissions testing would jeopardize MWG's obligation to assure compliance with PM standards. Once again, this is also a concern because Waukegan is an environmental justice community and because of Illinois's status as unclassifiable for $PM_{2.5}$. *See* $PM_{2.5}$ Technical Support Document. The Responsiveness Summary provided no response on the extension of the duration of

[8] Available at https://www.epa.gov/sites/production/files/2015-08/documents/midwest_generation_waukegan_decision2004.pdf.

operations at higher load from 30 to 72 hours without triggering PM emissions testing. Without indicating what point it was responding to, IEPA stated that "[t]he original condition would potentially have required further PM testing in circumstances in which it would not be warranted, as the purpose of the condition was to assure that testing is conducted when the boilers are operating in the maximum load range." Resp. Summ. at 53. It is not clear whether IEPA intended this as a response to the comment on extending the time trigger from 30 to 72 hours. If so, this response wholly fails to address Petitioners' concern regarding the extended delay of 72 hours before testing would be required. Again, "IEPA has the obligation to respond to significant public comments." Fisk Pet. Resp. at 5. The Administrator must object due to IEPA's failure to respond to comments on extending the time trigger from 30 to 72 hours and due to the heightened concerns about $PM_{2.5}$ emissions in Waukegan and Illinois.

VII. The CAAPP Permit Should Require CO and PM Emissions Testing Closer to the Affected Boilers' Maximum Operating Loads.

Petitioners commented on the revised draft permit, noting that, whereas Condition 7.1.7(b)(i) of the previous CAAPP permit required CO and PM emissions testing to be performed at the maximum operating loads of the affected boilers, the revised draft permit (and now final permit) only requires that measurements be performed at 90 percent or better of the "seasonal" maximum operating loads. Petitioners raised two concerns with this change: use of the term "seasonal" and also testing at 90% instead of maximum capacity. IEPA responded that "the maximum capacity of utility boilers varies slightly based on the season of the year, i.e., summer, spring of fall, and winter. The differences in capacity are relatively small but Midwest Generation was concerned that this seasonal difference in the capacity of the boilers be recognized in the provisions of the CAAPP permit." Resp. Summ. at 53. This responds to Petitioners comment on the term "seasonal." However, IEPA once again failed to respond to other elements of Petitioners' comment: Petitioners' concerns that the testing being at only 90% or better of maximum capacity. Again, "IEPA has the obligation to respond to significant public comments." Fisk Pet. Resp. at 5. As discussed in the previous comment, testing could be within 5% of maximum capacity. But this provision allows testing to be within 10%. This contradiction between these two ranges appears to be arbitrary and at a minimum needs to be explained or removed. Further, CO and PM emissions should be measured under operating conditions that would lend themselves to the highest level of emissions. Otherwise, there might be a spike in emissions between those reflected in testing and those that occur when the affected boilers are operating at maximum operating loads. Thus, the permit should provide for CO and PM emissions testing at as close to maximum operating loads as possible to ensure that authorities are aware of the maximum emissions levels that might occur and if testing is not at maximum loads, IEPA must explain why it is at 90% instead of 95% or 98% of maximum loads. Otherwise the permit fails to assure compliance with the CO and PM limits and meet the requirement that it include "monitoring…. requirements sufficient to assure compliance with the terms and conditions of the permit." Waukegan Pet. Resp. at 19 (citing 40 C.F.R. §§ 70.6(a)(3)(i) and 70.6(c)(1)). In addition, these PM emissions are a concern because Waukegan is an environmental justice community and because of Illinois's status as unclassifiable for $PM_{2.5}$. *Illinois Unclassifiable Area Designations for the 2012 Primary Annual $PM_{2.5}$ National Ambient Air Quality Standards*, Technical Support Document. The Administrator must object due to this

failure to assure compliance with PM and CO emissions limits and IEPA's failure to respond to comments to explain why the emissions testing cannot occur at loads higher than 90%.

VIII. The CAAPP Permit Should Require an Increased Frequency of Combustion Evaluations in the Coal-Fired Boilers.

Condition 7.1.6(a) of the CAAPP permit reduces the nature and frequency of combustion evaluations for the coal-fired boilers. A previous version of this condition in the draft permit required MWG to conduct combustion evaluations of these boilers quarterly, and the revised draft and final version cut this frequency to only semi-annually. Doubling the time period between evaluations risks a several-month delay in detecting any combustion issues with the boilers and does not assure compliance with the permit's emissions limits.

Petitioners had previously raised a concern regarding removal of the requirement to take preventative measures in response to combustion evaluations. The Responsiveness Summary indicates why preventative measures were removed: "in actual practice, combustion evaluations may not identify any preventative measures that need to be taken." Resp. Summ. at 55. The Responsiveness Summary, however, does not explain why the requirement could not have been revised to simply require preventative measures when identified instead of removing the requirement altogether. Further, the Responsiveness Summary failed to respond to Petitioners' comment about the reduced frequency. As noted above, "IEPA has the obligation to respond to significant public comments." Fisk Pet. Resp. at 5. The Administrator must object to the Permit because IEPA failed to respond to this significant public comment.

IX. The CAAPP Permit Should Require Records Explaining Opacity Exceedances.

Finally, records requirements for the COMS in the revised draft permit under Condition 7.1.9(c)(ii)(B) were altered to require a description of, rather than an explanation for, exceedances in opacity unless other information shows that PM emission limits were exceeded. Records that include explanations of opacity exceedances are necessary to enable IEPA and citizens to bring enforcement actions for opacity violations. Without PM stack testing or PM CEMs, there generally will not be records indicating that PM emissions limits were exceeded; indeed, that is why opacity is being used as the CAM indicator for PM. Explanations of opacity violations are thus necessary to show whether an SBM condition was occurring and, thus, whether particular permit provisions concerning SBM conditions apply. These revisions would seriously compromise citizens' abilities to detect violations of the permit. Accordingly, the Administrator must object because violations of the permit's opacity limits must be enforceable.

X. Conclusion

For the above reasons, the Permit fails to comply with all applicable requirements, and the Administrator must object. Petitioners have demonstrated that the Permit was issued based on numerous procedural and substantive errors. The Administrator must direct MWG to correct its errors by revising or revoking the Permit. To this end, the Administrator should include in her order specific terms and conditions necessary to remedy the inadequacies described in this petition. *See* 40 C.F.R. § 70.8(c)(2) ("Any EPA objection under paragraph (c)(1) of this section

shall include… a description of the *terms and conditions that the permit must include* to respond to the objections") (emphasis added).

Respectfully submitted,

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