BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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| IN THE MATTER OF | ) |
| MIDWEST GENERATION, LCC | ) |
| ROMEOVILLE GENERATING STATION | ) |
| | ) ORDER RESPONDING TO PETITIONER'S |
| Petition number V-2004-4 | ) REQUEST THAT THE ADMINISTRATOR |
| CAAPP No. 95090080 | ) OBJECT TO ISSUANCE OF A STATE |
| Proposed by the Illinois | ) OPERATING PERMIT |
| Environmental Protection Agency | ) |
| | ) |

ORDER PARTIALLY DENYING AND PARTIALLY GRANTING
PETITION FOR OBJECTION TO PERMIT

On October 10, 2003, pursuant to its authority under the Illinois Clean Air Act Permitting Program ("CAAPP"), the Illinois Environmental Protection Act, 415 ILCS 5/39.5, Title V of the Clean Air Act ("Act"), 42 U.S.C. §§ 7661-7661f, and U.S. EPA's implementing regulations in 40 C.F.R. part 70 ("part 70"), the Illinois Environmental Protection Agency ("IEPA") published a proposed title V operating permit for Midwest Generation, LLC, Romeoville Generating Station ("Romeoville permit"). The Romeoville Generating Station operates four coal-fired boilers with nominal capacities of 1728, 1712, 2709, and 5016 mmBtu/hour, respectively, an electrostatic precipitator and low nitrogen oxide burners. Other equipment at the facility includes coal handling and processing units, fly ash processing units, and gasoline storage tanks.

On January 26, 2004, the United States Environmental Protection Agency ("U.S. EPA") received a petition from the Chicago Legal Clinic requesting on behalf of Citizens Against Ruining the Environment ("Petitioner") that U.S. EPA object to issuance of the Romeoville permit, pursuant to section 505(b)(2) of the Act and 40 C.F.R. § 70.8(d).

Petitioners allege that, in issuing the Romeoville permit, IEPA failed to comply with the requirements of section 503(e) of the Act, 42 U.S.C. § 7661b(e), and 40 C.F.R. § 70.7(h)(2), and that the permit (1) fails to comply with state and federal requirements; (2) allows excess emissions during startup and malfunction, contrary to U.S. EPA policy; (3) contains conditions that are not practically enforceable; (4) allows the plant to continue to operate in a manner which causes severe health impacts on the surrounding communities; (5) contains numerous typographical errors, mistakes, and omissions; (6) is legally inadequate because it does not impose an enforceable schedule to remedy non-compliance; and (7) fails to address mercury and other hazardous air pollutants. Petition at 2-3.

U.S. EPA has reviewed these allegations pursuant to the standard set forth in section 505(b)(2) of the Act, which requires the Administrator to issue an objection if the Petitioner demonstrates to the Administrator that the permit is not in compliance with the applicable requirements of the Act. *See also* 40 C.F.R. § 70.8(d); *New York Public Interest Research Group v. Whitman*, 321 F.3d 316, 333 n.11 (2nd Cir. 2002).

Based on a review of all available information, including the petition, the Romeoville proposed permit, project summary, additional information provided by the permitting authority in response to inquiries, the information provided by Petitioner, and relevant statutory and regulatory authorities and guidance, I grant the Petitioner's request in part and deny it in part for the reasons set forth in this Order.

STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act requires each state to develop and submit to U.S. EPA an operating permit program to meet the requirements of title V. U.S. EPA granted final full approval of the Illinois title V operating permit program effective November 30, 2001. 66 *Fed. Reg*. 62946 (December 4, 2001).

Sections 502(a) and 504(a) of the Act make it unlawful for major stationary sources of air pollution and other sources subject to title V to operate except in compliance with an operating permit issued pursuant to title V that includes emission limitations and such other conditions necessary to assure compliance with applicable requirements of the Act.

A title V operating permit program generally does not authorize permitting authorities to establish new substantive air quality control requirements ( referred to as "applicable requirements") but does require permits to contain monitoring, recordkeeping, reporting, and other compliance requirements to assure compliance by sources with existing applicable requirements. One purpose of the title V program is to enable the source, U.S. EPA, states, and the public to better understand the applicable requirements to which the source is subject and to determine whether the source is meeting those requirements. *See* 57 *Fed*. *Reg*. 32250, 32251 (July 21, 1992). Thus, the title V operating permit program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units in a single document and that compliance with these requirements is assured. *Id*.

Section 505(a) of the Act, 42 U.S.C. § 7661d(a), and 40 C.F.R. § 70.8(a), through the state title V programs, require states to submit all operating permits proposed pursuant to title V to U.S. EPA for review. U.S. EPA may comment on and object to permits determined by the Agency not to be in compliance with applicable requirements or the requirements of part 70. If U.S. EPA does not object to a permit on its own initiative, section 505(b)(2) of the Act, 42 U.S.C. § 7661d(b)(2), and 40 C.F.R. § 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of U.S. EPA's 45-day review period, to object to the permit. Section 505(b)(2) requires the Administrator to object to a permit if a petitioner demonstrates that the permit is not in compliance with the requirements of the Act, including the requirements of part 70 and the

applicable implementation plan. Petitions must be based on objections to the permit that were raised with reasonable specificity during the public comment period, unless the petitioner demonstrates that it was impracticable to raise the objection within the public comment period, or unless the grounds arose after the close of the public comment period. If the permitting authority has not yet issued the permit, it may not do so unless it revises the permit and issues it in accordance with section 505(c) of the Act 42, U.S.C. § 7661d(c). However, a petition for review does not stay the effectiveness of the permit or its requirements if the permitting authority issued the permit after the expiration of U.S. EPA's 45-day review period and before receipt of the objection. If, in response to a petition, U.S. EPA objects to a permit that has been issued, U.S. EPA or the permitting authority will modify, terminate, or revoke and reissue the permit consistent with the procedures in 40 C.F.R. § 70.7(g)(4) or (5)(i) and (ii), and 40 C.F.R. § 70.8(d).

## BACKGROUND

Midwest Generation, LLC submitted an application for a title V permit on September 7, 1995 for the Romeoville Generating Station ("Romeoville Generation," "Romeoville plant" or "Romeoville facility"). IEPA issued a draft CAAPP permit on July 1, 2003 and a proposed CAAPP permit on October 10, 2003. During the public comment period, IEPA received comments on the draft permit, including comments from the Petitioner. On December 8, 2004, IEPA issued a "draft revised proposed permit" for the Romeoville Generation facility, but has not reproposed the permit to U.S. EPA or issued a final title V permit to the Romeoville Generation facility. IEPA has discussed issues with U.S. EPA and has attempted to address some of them in the draft revised proposed permit; however, U.S. EPA is reviewing and responding to the Petitioner's issues based only on the October 10, 2003 proposed Romeoville permit.

IEPA had notified the public that January 23, 2004 was the deadline, under the statutory time frame in section 505(b)(2) of the Act, to file a petition requesting that U.S. EPA object to the issuance of the final Romeoville permit. Petitioner submitted to U.S. EPA its request, dated January 21, 2004, to object to the issuance of the Romeoville permit. Accordingly, U.S. EPA finds that Petitioner timely filed this petition.

## ISSUES RAISED BY THE PETITIONER

As noted previously, Petitioner generally alleges that the permit does not meet the requirements of the Act in seven categories, the permit (1) fails to comply with state and federal requirements; (2) allows excess emissions during startup and malfunction, contrary to U.S. EPA policy; (3) contains conditions that are not practically enforceable; (4) allows the plant to continue to operate in a manner which causes severe health impacts on the surrounding communities; (5) contains numerous typographical errors, mistakes, and omissions; (6) is legally inadequate because it does not impose an enforceable schedule to remedy non-compliance; and (7) fails to address mercury and other hazardous air pollutants.

## I. The permit is inadequate because it contains conditions that fail to comply with applicable state and federal regulations

The Petitioner alleges that the proposed title V permit fails to comply with the Illinois Environmental Protection Act requirements for Illinois to receive approval for and to administer the title V permit program, the Illinois Administrative Code, and the Clean Air Act.

### A. The permit contains conditions that do not comply with the Illinois Environmental Protection Act

1. Reporting deviations

Petitioner alleges that the Romeoville permit does not require prompt reporting, as required by section 39.5(7)(f)(ii) of the Illinois Environmental Protection Act. Specifically, Petitioner asserts that the quarterly reports required in sections 7.1.10(g)(iii), 7.2.10(a), 7.3.10(a), 7.4.10(a), and 7.5.10(a) of the permit do not qualify as "prompt reporting." Petitioner further asserts that sections 7.2.10(a), 7.3.10(a), and 7.4.10(a) provide for reporting of deviations, but that these sections must comply with section 39.5(7)(f)(ii) of the Illinois Environmental Protection Act, which requires that reporting be prompt. Petition at 3-4.

Title V permits must provide for prompt reporting of deviations from permit requirements. 40 C.F.R. § 70.6(a)(3)(iii)(B) states that "[t]he permitting authority shall define 'prompt' in relation to the degree and type of deviation likely to occur and the applicable requirement." States may specify prompt reporting requirements for each permit term on a case-by-case basis, or may adopt general reporting requirements by rule,[1] or both. Moreover, states must consider whether the reporting requirements of explicit applicable requirements constitute prompt reporting. Therefore, whether IEPA has addressed prompt reporting sufficiently in a specific permit is a case-by-case determination under the rules applicable to the approved program.

Subsection 7.1.10(g)(iii) of the Romeoville permit, which governs reporting of deviations at the coal fired boilers for any requirements not covered specifically in subsections 7.1.10(g)(i) and (ii), requires quarterly reporting of deviations. Subsection 7.2.10(a)(i) provides that the permittee must report deviations from work practice requirements of section 7.2.6 within 30 days of the deviation. Subsection 7.2.10(a)(ii) requires quarterly reporting of all other deviations from the requirements for coal handling equipment. Sections 7.3.10 (a) and 7.4.10 (a) require quarterly

[1] U.S. EPA's rules which govern the administration of the federal operating permit program require, inter alia, that permits contain conditions providing for the prompt reporting of deviations from permit requirements. Under 40 C.F.R. § 71.6(a)(3)(iii)(B), deviation reporting is governed by the time frame specified in the underlying applicable requirement unless the applicable requirement does not provide for deviation reporting. In such a case, the part 71 regulations set forth the deviation reporting requirements that must be included in the permit. For example, emissions of a hazardous or toxic air pollutant that continue for more than an hour in excess of permit requirements must be reported to the permitting authority within 24 hours of the occurrence. And, if excess emissions of any regulated air pollutant, other than a hazardous or toxic air pollutant, continue for more than two hours, the facility must report these deviations within 48 hours.

reporting of deviations from applicable emission standards, inspection requirements and recordkeeping requirements at the coal processing equipment and fly ash equipment respectively. Section 7.5.10(a) provides for reporting within 30 days of any deviation from applicable emissions standards governing the loading of organic material and the transfer of gasoline into stationary storage tanks. As noted, each of these permit terms requires that the permittee submit reports at least quarterly. U.S. EPA has found that quarterly reporting can constitute prompt reporting,[2] and believes that quarterly reporting, in these cases, serves as prompt reporting of deviations.

Although U.S. EPA has determined that the Romeoville permit contains prompt reporting requirements in the instances described above, the permit record does not include IEPA's explanation of how the monitoring required for the remaining applicable requirements is prompt "in relation to the degree and type of deviation likely to occur and the applicable requirement." For example, condition 7.1.4(d) limits carbon monoxide (CO) emissions. Condition 7.1.10 does not appear to require any reporting of deviations from this CO limit. Therefore, the permittee is required to report deviations of its CO limit on a semi-annual basis under condition 8.6.1. The permit record does not provide any indications that the monitoring in 7.1.9 was designed to meet the requirements of 40 C.F.R. § 70.6(a)(3)(iii)(B). Similarly, the permit record does not address prompt reporting for condition 7.5.4(c) – (e).

The Petitioner brought to IEPA's notice the issues raised in the petition during the public comment period on the draft permit. September 25, 2003, Comments on Application No. 95090080. IEPA, however, did not respond to the Petitioner's comments regarding prompt reporting. 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. *See* U.S. EPA's order *In the Matter of Consolidated Edison Company, Hudson Avenue Generating Station*, Petition II-2002-10, at 8 (September 30, 2003), available on the internet at http://www.epa.gov/Region7/programs/artd/air/title5/petitiondb/petitions; *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.

U.S. EPA concludes that IEPA's failure to respond to Petitioner's significant comments may have resulted in one or more deficiencies in the Romeoville permit. Neither the permit nor the permit record explains how the permit meets the requirements of 40 C.F.R. § 70.6(a)(3)(iii)(B). As a result, U.S. EPA is granting the petition on this issue. IEPA must address Petitioner's significant comments and include appropriate prompt reporting requirements for conditions 7.1.4(d) and 7.5.4(c) – (e) or explain how and where the existing permit terms meet the prompt reporting requirements.

2. Incomplete conditions

[2] *See*, for example, U.S. EPA's order *In the Matter of Huntley Generating Station, Towanda, New York*, Petition II-2002-01, at12-14, (July 31, 2003), available on the internet at http://www.epa.gov/Region7/programs/artd/air/title5/petitiondb/petitions.

a. Petitioner states that section 8.1 provides for a permit shield and cites to section 39.5(7)(j) of the Illinois Environmental Protection Act. Section 39.5(7)(j) specifies that "[t]he permit shall identify the requirements for which the source is shielded." Petitioner asserts that the permit fails to do this and must be rewritten to include a recitation of the specific requirements for which the permittee is shielded. Petition at 4.

Section 8.1 of the permit states that the shield applies provided "that either the applicable requirements are specifically identified within this permit, or the Illinois EPA, in acting on this permit application, has determined that other requirements specifically identified are not applicable to this source and this determination (or a concise summary thereof) is included in this permit." This language is consistent with the requirements of 40 C.F.R. § 70.6(f). This language does not extend the shield to compliance with or violation of applicable requirements that are not specifically included in the permit. In addition, there are several instances where the permit specifically identifies requirements not applicable to the source. (*See* sections 7.1.5, 7.2.5, 7.3.5, 7.4.5, 7.5.5., 7.6.5, and 7.7.5.) While the permit shield would be clearer if the state included in a statement of basis its interpretation of the extent of the shield, the language in the permit is consistent with part 70; therefore, the petition is denied on this issue.

b. Petitioner states that section 9.2.3 of the permit fails to include all of the requirements of section 39.5(6)(c) of the Illinois Environmental Protection Act because it omits the phrase "consistent with this Act and applicable Board regulations." Petition at 4.

EPA's review of the permit proposed for Romeoville facility on October 10, 2003 shows that the language Petitioner points to is included in the permit. Therefore, the petition is denied on this issue.

c. Petitioner states that section 9.12.1 of the permit does not include the provision that the filing of a request by the permittee for permit termination does not stay any permit condition, as provided in section 39.5(7)(o)(iii) of the Illinois Environmental Protection Act. Petition at 4.

EPA's review of the permit proposed for Romeoville facility on October 10, 2003 shows that the language Petitioner points to is included in the permit. Therefore, the petition is denied on this issue.

d. Petitioner states that section 9.12.2(b) of the permit is incomplete because it does not include all of the language of section 39.5(15)(a)(ii) of the Illinois Environmental Protection Act, and that the condition must be supplemented to include the missing language. Petition at 4.

Section 9.12.2(b) of the permit does not include all the requirements of the section 39.5(15)(a)(ii) of the Illinois Environmental Protection Act. However, the Illinois Environmental Protection Act is not an applicable requirement, as that term is defined at 40 C.F.R. § 70.2. While the permit term does not reflect the exact language of the Illinois Environmental Protection Act, it meets the requirements of the CAAPP program. The state's failure to include in the permit all the language of section 39.5 does not demonstrate that the permit is not in compliance with the

requirements of the Act. The petition is denied on this issue.

3. Inconsistent conditions

Petitioner asserts that a number of permit conditions are inconsistent with relevant requirements of the Illinois Environmental Protection Act.

a. Petitioner asserts that the compliance certification requirement at section 9.8 is inadequate because it fails to comply with provisions of the Illinois Environmental Protection Act and lacks "specificity regarding the individual facility." Petition at 4-5. Specifically, Petitioner alleges that the requirement does not make clear whether the permittee must certify compliance annually, and, therefore, fails to indicate a compliance certification frequency as required by section 39.5(7)(p)(v)(A). Second, Petitioner further asserts that the permit does not require that the methods used to determine compliance status be consistent with subsection 7 of section 39.5 of the Illinois Environmental Protection Act. Petitioner also complains that the permit does not reflect the precise language of section 39.5(7)(p)(v)(C)(4) which references subsection 7 of Section 39.5 of the Illinois Environmental Protection Act and instead requires that the compliance certification be consistent with the conditions of the permit. Finally, Petitioner alleges that section 9.8(a) of the permit is unenforceable because it refers to "'applicable requirement[s]' that may or may not apply and 'permit conditions' that may or may not be included" in the permit. Petitioner asserts that the permit must be rewritten to include the missing language and to make section 9.8(a) clear, enforceable, understandable by the public and tailored to the individual facility. Petition at 4-5.

First, U.S. EPA believes that section 9.8 makes clear that the permittee must certify compliance annually on May 1. The first sentence in section 9.8 states that the permittee "shall submit annual compliance certifications." (emphasis added). The condition then goes on to state that these certifications must be submitted no later than May 1 if there are no other dates specified in either the applicable requirement or the permit condition. Second, the title of subsection 7 is "permit content" and therefore, a condition requiring that the compliance certification be consistent with the permit content (i.e., the conditions of the permit) is no different than requiring it to be consistent with subsection 7 of 39.5 of the Illinois Environmental Protection Act. U.S. EPA does not believe that the language of section 9.8 of the permit is vague because it provides for more frequent certifications "as specified in the applicable requirements or by permit condition." In the absence of other sections requiring compliance certification, section 9.8 requires the permittee to certify compliance annually on May 1. Therefore, the petition is denied on this issue.

b. Petitioner asserts that section 9.10.2 is inconsistent with section 39.5(7)(k) of the Illinois Environmental Protection Act because it provides examples of situations that constitute emergencies, rather than defining the term. Petitioner further asserts that section 9.10.2(b) of the Romeoville permit is incomplete because it does not provide that the permittee seeking to establish the occurrence of an emergency has the burden of proof. Petition at 5.

Regarding the first matter, the state uses appropriate language to describe an emergency in

the permit proposed on October 10, 2003. Second, U.S. EPA agrees that section 9.10.2 of the Romeoville permit does not include all of the language from 9.5(7)(k)(iv), which puts the burden of proof on a permittee seeking to establish an emergency defense. Nevertheless, the language of Illinois' CAAPP program is not an applicable requirement as defined at 40 C.F.R. § 70.2. While permit term does not reflect the exact language of the Illinois Environmental Protection Act, it meets the requirements of the CAAPP program. Therefore, the state's failure to include this language in the permit does not demonstrate that the permit is not in compliance with the Act. The petition is denied on this issue.

**B. The permit contains conditions that do not comply with state regulations**

Petitioner asserts that conditions in the permit do not comply with the Illinois Administrative Code provisions that are approved into the Illinois State Implementation Plan (SIP).

1. Petitioner states that section 7.1.9(e) of the Romeoville permit does not meet the requirements of 35 IAC § 217.712(g), because it does not specify that the permittee must submit copies of requested records and data within 30 days of receipt of a written request from IEPA. Petition at 6.

35 IAC § 217.712(g) is part of the federally-approved Illinois SIP, and, as such, is an applicable requirement, as that term is defined at 40 C.F.R. § 70.2. Permitting authorities have an obligation to issue title V permits that assure compliance with all applicable requirements. 40 C.F.R. § 70.1(b). The petition is granted on this issue. IEPA must revise the permit to require the permittee to comply with 35 IAC § 217.712(g).

2. Petitioner alleges that section 7.1.10 of the Romeoville permit does not meet the requirements of 35 IAC § 201.405, a SIP provision which contains requirements on reporting excess emissions. Specifically, Petitioner asserts that, although section 7.1.10(c) and (d) of the permit requires the permittee to submit a "copy of the records for the excess emission, as maintained pursuant to Condition 7.1.9[(d) (ii) and (e)(ii), respectively]," section 7.1.9 requires only the "records of emissions, and not records of 'magnitude of excess emissions.'" Finally, Petitioner alleges that section 7.1.10(e) does not require the permittee to include in the excess emission report the operating status of the monitoring system, including the dates and times of any periods during which it was inoperative. Petition at 6.

U.S. EPA agrees that sections 7.2.9 and 7.1.10 of the Romeoville permit do not reflect all of the requirements of 35 IAC § 201.405 regarding the reporting of excess emissions. However, 35 IAC § 201.403 of the Illinois SIP exempts from the requirements of subpart L, among other things, any emission source "subject to monitoring requirements which are part of a new source performance standard adopted by U.S. EPA pursuant to Section 111 of the Clean Air Act and made applicable in Illinois pursuant to Section 9.1 of the [Illinois Environmental Protection] Act . . . ." In a note to section 7.1.8(a)(iv) of the Romeoville permit proposed on October 10, 2003, IEPA states that "[p]ursuant to 35 IAC 201.403(a), the Permittee is not subject to the requirements of 35 IAC Part 201 Subpart L for opacity monitoring because the Permittee must conduct opacity monitoring

on the affected boilers in accordance with the NSPS pursuant to the federal Acid Rain program." Therefore, the petition is denied on this issue.

### C. The permit fails to include conditions that meet the legal requirements for monitoring

Petitioner, quoting parts of 40 C.F.R. § 70.6(a)(3)(i), alleges that the Romeoville permit fails to meet the requirements for monitoring under this section. Petitioner further notes that 40 C.F.R. § 70.6(c)(1) requires that all title V permits contain testing, monitoring, reporting and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit. Finally, Petitioner asserts that section 504 of the Act and 40 C.F.R. § 70.6(a)(3) require that the permits indicate the frequency at which testing shall take place. Petitioner alleges that there are a number of sections of the Romeoville permit that do not meet these requirements. Petition at 6-7.

1. Petitioner alleges that section 7.5 of the Romeoville permit does not require any monitoring and fails to provide a testing frequency in violation of section 504 of the Act and 40 C.F.R. § 70.6(a)(3). Petitioner further alleges that testing is required only in response to a written request by IEPA, in violation of 40 C.F.R. § 70.6(a)(3) and (c)(1). Petitioner asserts that the lack of monitoring conditions makes it impossible for the public, U.S. EPA, and IEPA to ensure that the permittee is complying with applicable emissions standards. Petition at 7.

Sections 7.5.9 and 7.5.10 contain recordkeeping and reporting requirements regarding design and maintenance and repair of the tanks; the material stored in the tanks and its Reid vapor pressure; and compliance with section 7.5.4(a) and (b) of the permit. Although section 7.5 does not include testing or monitoring requirements, U.S. EPA believes that the Romeoville permit requires recordkeeping sufficient to demonstrate compliance with the applicable requirements in 7.5.4.[3] The petition is denied on this issue.

2. Petitioner states that section 7.5.4 of the Romeoville permit requires the permittee to comply with nitrogen oxides standards pursuant to 40 C.F.R. § 60.44b, opacity standards contained in section 5.2.2(b) pursuant to 35 IAC § 214.304, and carbon monoxide standards pursuant to 35 IAC § 216.121. Petitioner asserts that section 7.5 of the Romeoville permit fails to include testing and monitoring provisions sufficient to verify the permittee's compliance with sections 7.5.4 and 5.2.2 of the permit and 35 IAC §§ 214.304 and 216.121, as applied to the permittee in section 7.5 of the permit. Petition at 7.

Section 7.5.4 of the proposed Romeoville permit contains emission standards for tanks used to store gasoline for onsite use. It does not refer to opacity, $NO_x$ or CO requirements. Therefore, the petition is denied on this issue.

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[3] *See*, for example, U.S. EPA's order *In the Matters of Dougherty County Landfill, Albany, Georgia*, Petition IV-2001-02, at 5, (July 3, 2002) and *Kerr-McGee Chemicals, LLC, Mobile Alabama*, Petition IV-2000-1, at 4-5, (February 1, 2002), available on the internet at http://www.epa.gov/Region7/programs/artd/air/title5/petitiondb/petitions.

### D. The permit contains conditions that violate the requirements related to credible evidence

Petitioner states that the proposed Romeoville permit contains numerous conditions that "violate the credible evidence rules." Section 113(a) of the Act, 42 U.S.C. § 7413(a), authorizes U.S. EPA to bring enforcement actions "on the basis of any information available to the Administrator." Petitioner asserts that, in the Region 9 Title V Permit Review Guidelines, September 9, 1999, p. III- 46, U.S. EPA interpreted this language to mean any "credible evidence" that a court would accept. Petitioner further cites the Region 9 Guidelines to assert that "any credible evidence can be used to show a violation of or, conversely, demonstrate compliance with an emission limit." Consequently, Petitioner reasons, permit language may not exclude the use of any data that may provide credible evidence. Further citing to the Region 9 Guidelines, Petitioner alleges that, specifically with regard to monitoring, U.S. EPA has viewed permit conditions which provide that compliance will be demonstrated by certain test methods as tacitly excluding the use of other data to demonstrate compliance or noncompliance and, therefore, that those conditions violate the credible evidence rules. Petition at 7-8.

Petitioner notes that the Romeoville permit includes section 9.1.3, which allows the use of other credible evidence notwithstanding specific conditions that may specify compliance practices for specific applicable requirements. Petitioner alleges that this term is insufficient to negate the violations of the credible evidence rules contained in the other conditions that limit the use of credible evidence. Petition at 8.

U.S. EPA has clarified through rulemaking (generally referred to as the "credible evidence" rule) that various kinds of information, including non-reference test data, may be used "to demonstrate compliance or non-compliance with emission standards." 62 *Fed. Reg.* 8314, 8315 (February 24, 1997).

#### 1. Language establishing compliance methods

a. Petitioner first alleges that section 5.2.2(a) limits credible evidence by specifying how compliance with that requirement will be determined. Petition at 8.

Section 5.2.2(a) contains a facility-wide opacity limitation on fugitive particulate matter emissions. It states that "compliance with this requirement shall be based on the procedures in Section 7 (Unit Specific Conditions) of this permit."

After reviewing the term cited by the Petitioner and the general terms in section 9, U.S. EPA concludes that the proposed Romeoville permit appropriately provides for the use of credible evidence by U.S. EPA, IEPA, or citizens to demonstrate whether or not a facility is in compliance with federally enforceable requirements. Petitioner has failed either to point to any language in the permit condition which excludes the use of credible evidence or to provide any instances where IEPA improperly excluded the use of credible evidence. The language in the specific permit condition that Petitioner cites does not say that the specified methods or procedures are the

exclusive or sole methods or procedures to be used to determine compliance. In addition, section 9.1.3 specifically makes any other credible evidence available for use, notwithstanding other conditions of the permit, by any person to prove compliance or violation of any applicable requirement. For these reasons, U.S. EPA denies the petition with respect to this issue.

b. Petitioner also alleges that, because section 7.1.8(b) requires continuous monitoring for $SO_2$ and states that such monitoring "shall be used to demonstrate compliance," it establishes an exclusive link between the test method (continuous monitoring) and the emissions limit for sulfur, unacceptably limiting the use of credible evidence. Petition at 8.

Section 7.1.8(b) provides that "...the Permittee shall install, operate, calibrate and maintain continuous monitoring equipment for the measurement of $SO_2$ from the affected boilers which shall be used to demonstrate compliance with the limits in Condition 7.1.4(c) based on the average hourly $SO_2$ emission rate determined from monitored data from three-hour block averaging periods . . . ."

After reviewing the term cited by the Petitioner and the general terms in section 9, U.S. EPA concludes that the proposed Romeoville permit appropriately provides for the use of credible evidence by U.S. EPA, IEPA, or citizens to demonstrate whether or not a facility is in compliance with federally enforceable requirements. Petitioner has failed to either point to any language in the permit condition cited in the petition that excludes the use of credible evidence or provide any instances where IEPA improperly excluded the use of credible evidence. The language in the specific permit condition that Petitioner cites does not say that the specified methods or procedures are the exclusive or sole methods or procedures to be used to determine compliance. In addition, section 9.1.3 specifically makes any other credible evidence available for use, notwithstanding other conditions of the permit, by any person to prove compliance or violation of any applicable requirement. For these reasons, U.S. EPA denies the petition with respect to this issue.

c. Petitioner claims that section 7.1.12.d is "completely contrary to the credible evidence rule and citizens' right to enforce a permit by stating that 'compliance is assumed to be inherent.'" Petition at 8.

Section 7.1.12(d) states:

> "Compliance with the CO emission limitation in 7.1.4(d) is addressed by emission testing in accordance with Condition 7.1.7.
>
> Note: Further compliance procedures are not set by this permit as compliance is assumed to be inherent in operation of an affected boiler under operating conditions other than startup or shutdown." (emphasis added)

Although U.S. EPA believes that the proposed Romeoville permit generally provides for the use of credible evidence, U.S. EPA agrees that the note in term 7.1.12(d) is inappropriate in the permit and leads to confusion. U.S. EPA is requiring IEPA to remove the note because it provides

that "compliance is assumed to be inherent" when the boiler is operating under normal conditions. Such language, on its face, is not consistent with part 70, which requires permits to contain "testing, monitoring, reporting and recordkeeping requirements" and to have "periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance." 40 C.F.R. § 70.6(c)(1) and (a)(3)(i)(B). In essence, the Note in Section 7.1.12(d) could be read as eliminating the need for any of the compliance requirements (testing, monitoring, recordkeeping, and reporting) of part 70 to determine whether the facility is complying with the CO emission limits in the permit. In addition, the language in the note is not in compliance with the annual compliance certification requirements under part 70. Compliance certifications must be based, among other things, on the monitoring data described in 40 C.F.R. § 70.6(c)(5)(iii)(B) and (C). Every source's annual compliance certification must be based on its own evaluation of its data. The permit may not authorize the facility to certify compliance based on something else, such as an assumption that compliance is inherent. Therefore, U.S. EPA grants the petition on this issue to the extent that IEPA is required to remove the note.[4]

d. Petitioner alleges that sections 5.9.1, 7.1.12, 7.2.12, 7.3.12, 7.4.12, and 7.5.12 violate credible evidence requirements because they include a limited list of "compliance procedures." Petition at 8.

Sections 7.1.12, 7.2.12, 7.3.12 and 7.4.12 of the Romeoville permit contain language stating that compliance with specific limits is "addressed by" monitoring, testing, or record keeping provisions required by specific terms of the permit. Section 5.9.1 states that there are no general procedures for calculating emissions. Section 7.5.12 of the Romeoville permit provides that compliance with section 7.5.4(a) and (b) "is considered to be assured by the use of submerged loading pipe or submerged fill as required in Condition 7.5.4(a) and by the recordkeeping requirement of 7.5.9."

After reviewing sections 7.1.12, 7.2.12, 7.3.12, and 7.4.12 and the general terms in section 9 of the Romeoville permit, U.S. EPA concludes that the proposed Romeoville permit appropriately provides for the use of credible evidence by U.S. EPA, IEPA, or citizens to demonstrate whether or not a facility is in compliance with federally enforceable requirements. Petitioner has failed to either point to any language in these sections of the permit that excludes the use of credible evidence or to provide any instances where IEPA improperly excluded the use of credible evidence. The language in these sections of the permit does not say that the specified methods or procedures are the exclusive or sole methods or procedures to be used to determine compliance. In addition, section 9.1.3 specifically makes any other credible evidence available for use, notwithstanding other conditions of the permit, by any person to prove compliance or violation of any applicable requirement. For these reasons, U.S. EPA denies the petition with respect to this issue.

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[4] *See U.S. EPA's* order *In the Matter of TVA Gallatin Power Plant, Gallatin, Tennessee and TVA Johnsonville Power Plant, New Johnsonville, Tennessee Electric Power Generation*, Petition IV-2003-04, at 4-9, (July 29, 2004), available on the internet at http://www.epa.gov/Region7/programs/artd/air/title5/petitiondb/petitions.

## II. The permit conditions regarding startup, malfunction, and breakdown violate U.S. EPA policy

The Petitioner alleges that automatic exemptions for excess emissions during startup and malfunction are inconsistent with U.S. EPA's guidance (Kathleen M. Bennett, "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions," September 28, 1982 ("Bennett Memo"); Steven A. Herman, "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown," September 20, 1999 ("Herman Memo")). Petition at 8-9. Petitioner alleges that the Romeoville permit has numerous conditions that allow for automatic exemptions from applicable emission limits and standards during startup, shutdown and malfunction. Petition at 8-11.

### A. Affirmative defense in startup, malfunction, and breakdown permit conditions

Petitioner alleges that sections 7.1.3(b), 7.1.3(c), 7.2.3(b), 7.3.3(b), 7.4.3(b), 7.5.3(b), and 7.5.3(c) of the Romeoville permit are unclear, and can be read as impermissibly excusing a violation. Petitioner further states that these conditions must be revised to make clear that these periods are still violations and that the permit is only providing an "affirmative defense" in actions for penalties and not in actions for injunctive relief. Petition at 9-10.

First, U.S. EPA notes that there are no subsections 7.5.3(b) or (c) in the proposed Romeoville permit. Therefore, the petition is denied on this issue with respect to these subsections.

The remaining permit sections to which the Petitioner cites provide for continued operation of various emissions units during startup, malfunction and breakdown. The startup provision in Section 7.1.3(b) of the Romeoville permit states that the permittee is allowed to continue to operate the coal fired boiler in violation of specified applicable standards during startup because the permittee "has affirmatively demonstrated that all reasonable efforts have been made to minimize startup emissions, duration of individual startups and frequency of startups." The general authorization is qualified in subsection 7.3.1(b)(i) by a limit on the time period that the boiler can continue to operate under the authorization and by a provision that the authorization "does not shield the Permittee from enforcement for any such violation and shall only constitute a prima facie defense to such an enforcement action." The malfunction and breakdown provisions in sections 7.1.3(c), 7.2.3(b), 7.3.3(b), and 7.4.3(b) provide that the permittee is authorized to continue operation of specific emissions units in violation of applicable requirements because the permittee "has submitted … 'proof that continued operation is required to provide essential service, prevent risk of injury to personnel or severe damage to equipment.'" In each section, the authorization is qualified to provide that it does not shield the permittee from enforcement for violation and only constitutes a prima facie defense to an enforcement action. See, for example, section 7.4.3(b)(i). Since the permit makes clear in each of these sections that the authorization to continue operation during a start up, malfunction or breakdown constitutes only a prima facie defense from enforcement, U.S. EPA denies the petition on this issue.

### B. Startup provisions

Petitioner alleges that the startup provisions in conditions 7.1.3(b) and 7.5.3(b) do not reflect U.S. EPA's policy that requires a permittee to demonstrate that "all reasonable efforts have been made to minimize startup emissions, duration of individual startups and frequency of startups." Herman Memo, Attachment "Policy on Excess Emissions during Malfunctions Startup, and Shutdown." Further, for the affirmative defense to be available, the permittee must be required to demonstrate its adherence to U.S. EPA policy and to demonstrate that (1) periods of excess emissions during startup and shutdown were short, infrequent and could not have been prevented through careful planning and design; and (2) excess emissions were not part of a recurring pattern indicative of inadequate design, operation or maintenance. Petition at 10.

The Romeoville permit does not contain section 7.5.3(b). Therefore, the petition is denied on this issue with respect to section 7.5.3(b).

The startup provision in Section 7.1.3(b) of the Romeoville permit states that the permittee is allowed to operate the coal fired boiler in violation of specified applicable standards during startup because the permittee "has affirmatively demonstrated that all reasonable efforts have been made to minimize startup emissions, duration of individual startups and frequency of startups."

The Illinois SIP provision at 35 IAC § 201.262 provides that a permitting authority shall not authorize a permittee to operate in violation of emission limits and standards during startups unless the permittee has affirmatively demonstrated that it has made all reasonable efforts to, among others, minimize excess emissions. Section 7.1.3(b) mirrors the language of this SIP provision. The Romeoville permit contains a determination that the source already has made a demonstration that it has made all reasonable efforts to minimize startup emissions, duration of startups and frequency of startups. However, neither the permit nor the permit record (e.g., a statement of basis) provide any information about, or explanation of, how IEPA determined in advance that the permittee met its burden of affirmatively demonstrating that it had complied with the affirmative defense requirements of the permit. U.S. EPA is granting the petition and requiring IEPA to explain how it determined in advance that the permittee had met the requirements of the Illinois SIP at 35 IAC § 201.262.

### C. Malfunction provisions

1. Petitioner alleges that, because sections 7.1.3(c), 7.2.3(b), 7.3.3(b), 7.4.3(b), and 7.5.3(c) do not include a definition of "malfunction," and because the word is vague, these permit terms are unenforceable as a practical matter. Petition at 10-11.

The purpose of a title V permit is to ensure that a source operates in compliance with all applicable requirements. The lack of a definition for the term "malfunction" in the permit does not, on its face, render the permit unenforceable. This is a commonly used regulatory term, and the plain meaning of the term is clear. Moreover, Petitioner has not demonstrated that IEPA has improperly or inconsistently interpreted the term in practice so as to render it unenforceable. Petitioner points out that U.S. EPA recommends that "malfunction" be defined as "a sudden and unavoidable breakdown of process or control equipment." Petition at 10 (*citing* Herman Memo). However, Petitioner fails to identify any instance where IEPA has interpreted "malfunction" in a manner that contradicts or is inconsistent with U.S. EPA's recommended definition in the Herman Memo. For these reasons, the petition is denied on this issue.

2. Petitioner alleges that malfunction provisions in conditions 7.1.3(c), 7.2.3(b), 7.3.3(b), 7.4.3(b), and 7.5.3(c) do not reflect U.S. EPA policy. Herman Memo, Attachment "Policy on Excess Emissions During Malfunctions Startup, and Shutdown." Petitioner sets out a number of requirements that allegedly must be included in the permit to address continued operation during malfunctions and breakdowns. Petitioner also asserts that the permittee must demonstrate its compliance with certain requirements to rely on the affirmative defense provided by the permit. Petition at 10-11.

The malfunction or breakdown provisions cited above state that that the permittee is allowed to operate the units in violation of specified applicable standards during malfunction or breakdown because the permittee has submitted "proof that continued operation is required to provide essential service, prevent risk of injury to personnel or severe damage to equipment." These sections mirror the language of the Illinois SIP provision at 35 IAC § 201.262, which provides that a permitting authority shall not authorize a permittee to operate in violation of emission limits and standards during malfunctions or breakdowns unless the permittee has submitted proof that continued operation is required to provide essential service, prevent risk of injury to personnel or severe damage to equipment. To authorize continued operation of units in violation of applicable standards, IEPA must have received proof that such operation is necessary to provide essential services, or to prevent injury to personnel or severe damage to equipment. The specific proof required in each instance usually will depend on the nature and the cause of the malfunction or breakdown. Thus, a determination that the permittee has met the requirements of 35 IAC § 201.262 to authorize continued operations during malfunction or breakdowns is a case-by-case determination. U.S. EPA therefore is granting the petition and requiring IEPA either to explain in the statement of basis how it determined in advance that the permittee had met the requirements of the Illinois SIP at 35 IAC § 201.262, or to specify in the permit that continued operation during malfunction or breakdown will be authorized on a case-by-case basis if the source meets the SIP criteria.

### D. Operating log

The Petitioner, citing the Herman Memo, alleges that, because sections 7.1.9(g), 7.1.9(h)(ii), 7.2.9(g)(ii), 7.3.9(f)(ii), 7.4.9(f)(ii), 7.5.9(c), and 7.5.9(d)(ii) of the Romeoville permit do not require that the source's responses to excess emissions be documented by a properly signed, contemporaneous operating log, they warrant U.S. EPA objection to the permit. Petition at 11.

Section 7.1.9(g) of the proposed Romeoville permit contains recordkeeping requirements for different emissions units during startup. Sections 7.1.9(h)(ii), 7.2.9(g)(ii), 7.3.9(f)(ii), and 7.4.9(f)(ii) contain recordkeeping requirements for various emissions units during malfunctions. Section 7.5.9 does not address startups and malfunctions. All of these sections, with the exception of 7.5.9, are similar in that they require the source to maintain records of, among other things, the date and description of the startup or malfunction, the duration of the startup or malfunction, and an estimate of the magnitude of excess emissions occurring during the startup or malfunction. In addition, for malfunctions, the source is required to keep records of the corrective actions used to reduce the quantity of emissions.

The 1999 Herman memo, "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown," cited by Petitioner, states that, to be approved into a SIP, an affirmative defense must require that an owner's or operator's actions during startup, shutdown or malfunctions be "documented by properly signed, contemporaneous operating logs, or other relevant evidence." 35 IAC §§ 201.261-201.265, which provide for an affirmative defense to the continued operation and emission of pollutants in excess of established limits during startup, shutdown and malfunction, do not contain the requirement that a source document its response with properly signed, contemporaneous operating logs or other relevant evidence. However, U.S. EPA approved sections 201.261-201.265 into the Illinois SIP in 1972, before publication of the Herman Memo. Sections 7.1.9(g), 7.1.9(h)(ii), 7.2.9(g)(ii), 7.3.9(f)(ii), and 7.4.9(f)(ii) of the Romeoville permit are consistent with sections 201.261-201.265 of the Illinois SIP. U.S. EPA cannot properly object to including in a title V permit a term that mirrors the language of federally approved SIP rules. Such provisions are "applicable requirements," as that term is defined in 40 C.F.R. § 70.2. Therefore, the petition is denied on this issue.

As noted above, section 7.5.9(c) does not address startups or malfunctions. Accordingly, the petition is denied on this issue for section 7.5.9(c).

## III. The permit contains conditions that violate U.S. EPA policy requiring a permit to be practically enforceable

Petitioner claims that the proposed Romeoville permit contains numerous terms which are not enforceable as a practical matter, and that violate U.S. EPA policy regarding practical enforceability. Petition at 11. The Petitioner cites U.S. EPA Region 9 Title V Permit Review Guidelines, September 9, 1999, p. III-46:

> A permit is enforceable as a practical matter (or practically enforceable) if permit conditions establish a clear legal obligation for the source [and] allow compliance to be verified. Providing the source with clear information goes beyond identifying the applicable requirement. It is also important that permit conditions be unambiguous and do not contain language which may intentionally or unintentionally prevent enforcement.

Petitioner goes on to argue that, even if words such as "reasonable" or "significant," are quoted directly from the Illinois Environmental Protection Act or regulations, their use may render the permit insufficiently clear to be enforceable as a practical matter. Petitioner claims that permit conditions which reference undefined procedures, documents, or instructions are not practically enforceable. Petitioner cites U.S. EPA Region 9 Title V Permit Review Guidelines, September 9, 1999, p. III-52 - III-53, which states that undefined terms such as "reasonable precautions" or "best engineering practices" must be defined in the permit. Petition at 11.

### A. Permit conditions that reference undefined procedures, documents, etc., are not practically enforceable

1. Petitioner alleges that the requirement to operate according to "other written instructions" in sections 7.1.3(b)(ii) and 7.5.3(b)(ii) of the Romeoville permit is vague and fails to specify what instructions the permittee is required to follow and where these instructions come from in the permit. As a result, petitioner contends, these terms are unenforceable as a practical matter. Petition at 12.

The proposed Romeoville permit points to the Illinois SIP at 35 IAC § 201.262 as authorizing permit section 7.1.3(b)(ii), to which Petitioner objects here. This permit section requires the permittee to conduct startup operations in accordance with either the manufacturers' or other written instructions. When a permittee develops other written instructions, the instructions must "minimize excess emissions from the startups" by including measures detailed in section 7.1.3(b)(ii)(A) through (D). The requirement for the permittee "to minimize excess emissions from the startups" in this section reflects language of the Illinois SIP at 35 IAC 201.262, which requires a permittee to affirmatively demonstrate that it has made all reasonable efforts "to minimize startup emissions, duration of individual startups and frequency of startups."

The Illinois SIP at 35 IAC § 201.262 prohibits IEPA from granting a source permission to violate certain standards or limitations during startup unless, as noted above, the person applying for permission has affirmatively demonstrated that all reasonable efforts have been made to minimize startup emissions, duration of individual startups and frequency of startups. Section 7.1.3(b)(ii) of the proposed Romeoville permit appears to be designed to specify how Romeoville must comply with the SIP requirement to minimize excess emissions. Section 504(a) of the Clean Air Act provides that each title V permit shall include conditions necessary to assure compliance with applicable requirements of the Act, including the requirements of the applicable implementation plan. Because the permit includes a requirement for written instructions that outlines the measures to fulfill the SIP requirement "to minimize startup emissions" and the terms of those instructions are enforceable under this condition, the petition is denied on this issue.

Section 7.5.3(b)(ii) does not exist in the Romeoville permit. Therefore, the petition is denied on this issue with respect to section 7.5.3(b)(ii).

2. Petitioner observes that section 7.1.7(b)(i) requires the permittee to perform testing at "other operating conditions that are representative of normal conditions." Petitioner alleges that this phrase is vague and not practically enforceable, and that the permit must include specific operating conditions at which testing must be performed. Petition at 12.

This section specifies the conditions under which a performance test run at the facility is acceptable. Although the language cited by Petitioner is not specific, the remainder of section 7.1.7(b) sets out test methods and procedures that the source must follow in performing tests. These conditions are not specifically identified in a regulation, but are negotiated on a site-specific basis between the permittee and regulatory agency, either prior to a performance demonstration, or as determined during the agency's review of the test report. These conditions are not only site-specific, but may also vary with time, manufacturing conditions, or other factors that change at an individual facility. This term, in conjunction with the other requirements of section 7.1.7, provides detail about how the permittee must conduct performance tests and what the criteria are for an acceptable performance demonstration. The phrase to which the Petitioner objects does not affect the enforceability of these provisions, therefore, the petition is denied with respect to this issue.

3. Petitioner notes that sections 7.1.8(a)(i) and (b) require that monitoring equipment must be operated pursuant to written monitoring procedures that include a quality assurance/control plan. Further, section 7.1.8(a)(i) requires that "procedures shall reflect the manufacturer's instruction as adapted by the Permittee based on its experience." Petitioner alleges that these terms are vague because they allow the permittee unlimited discretion in developing such procedures. As a result, the terms are practically unenforceable. Petition at 12-13.

The permit condition that the Petitioner cites requires that, among other things, the permittee must, pursuant to 40 C.F.R. § 75.14, operate continuous monitoring equipment to measure opacity from the boilers. The condition goes on to require written monitoring procedures and that such "procedures shall reflect the manufacturer's instruction as adapted by the Permittee based on its experience." This language is not from 40 C.F.R. § 75.14, which is the authority cited in the permit for this permit language. U.S. EPA grants the petition on the issue. IEPA must remove from section 7.1.8(a)(i) language which is not required by the underlying applicable requirement or explain in the permit or statement of basis how this language is consistent with or clarifies the underlying applicable requirement.

4. Section 8.5 requires that the permittee conduct tests using "standard test methods." Petitioner alleges that the permit must define the term "standard test methods," or, at a minimum, cite a regulation or statute where that term is defined. Petitioner further asserts that the term, as written, allows the permittee too much discretion in deciding what qualifies as a standard test method, and, therefore, is unenforceable as a practical matter. Petition at 13.

Section 8.5 is a general term included under the "General Permit Conditions" provisions of Section 8. IEPA includes generic requirements for facilities as supplemental language in every title V permit in Illinois. As a general matter, specific terms and conditions for each emission unit specify which test methods the source must use to monitor the emission of particular pollutants. Therefore, the petition is denied on this issue.

### B. Permit conditions that contain imprecise timeframes are not practically enforceable

Petitioner claims that permit conditions which contain imprecise timeframes are not practically enforceable, and cites U.S. EPA Region 9 Title V Permit Review Guidelines, September 9, 1999 as a basis for this claim. Petition at 13.

1. Petitioner alleges that the language in section 5.2.3(b), which requires the permittee to amend its operating program "from time to time" so that it is "current," is vague, subjective, and not practically enforceable. Petitioner further alleges that the section 5.2.3(c) requirement that paved areas be cleaned on a "regular" basis is vague, undefined, and not practically enforceable. Finally, Petitioner claims that the language in section 5.2.7, which requires the permittee to "immediately" implement the episode action plan is vague and subjective, and, therefore, not practically enforceable. Petition at 14.

The language in sections 5.2.3(b) and (c) and 5.2.7 comes directly from the U.S. EPA-approved Illinois SIP provisions 35 IAC §§ 212.312, 35 IAC § 212.306, and 35 IAC §§ 244.142 thru 144, respectively. U.S. EPA cannot properly object to including in a title V permit a term that mirrors the language of federally approved SIP rules. Such provisions are "applicable requirements," as that term is defined in 40 C.F.R. § 70.2. The petition is denied on this issue.

2. Petitioner alleges that the terms "timely" and "as soon as" used in section 7.1.3(b)(ii)(D) are vague and undefined. This term, which requires only "timely energization of the electrostatic precipitator as soon as this may be safely accomplished," allows the permittee too much discretion. Furthermore, Petitioner asserts that this language is vague and not practically enforceable. Petition at 13.

Section 7.1.3(b)(ii)(D) lists the procedures that a permittee must include in written instructions that it develops to minimize excess emissions during startups. Included in this list of procedures is the "[t]imely energization of the electrostatic precipitator as soon as this may be safely accomplished without damage or risk to personnel or equipment." Petitioner alleges that the phrases ("timely" and "as soon as") in this provision are vague because they allow the permittee too much discretion. Petitioner is, however, reading these phrases in isolation. U.S. EPA believes that these phrases, when read in the context of the entire sentence, require the facility to energize the electrostatic precipitator as soon as the facility can safely do so without risk to personnel or damage to equipment, thus limiting the facility's discretion and tying it to safety concerns. Therefore, the petition is denied on this issue.

3. Petitioner alleges that the language "as expeditiously as possible" in section 7.1.8(a)(iv) is vague and not practically enforceable. Petition at 14.

U.S. EPA's review of the permit proposed for Romeoville Generation shows that this phrase in not used in section 7.1.8(a)(iv). The petition is denied on this issue.

4. Petitioner notes that sections 7.1.10(b)(i), 7.2.10(b)(i), 7.3.10(b)(i), 7.4.10(b)(i), and 7.5.10(b)(i) of the Romeoville permit require the permittee to "notify the Illinois EPA's Regional Office, by telephone . . . as soon as possible during normal working hours for each incident of continued operation during malfunctions and breakdowns." Petitioner alleges that the term "as soon as possible" is vague and allows the permittee too much discretion in determining when to notify IEPA. Consequently, Petitioner asserts, the conditions are not practically enforceable. Petition at 14.

The underlying applicable requirement for this term is found in 35 IAC § 202.263 of the SIP. The timeframe for reporting emissions to IEPA during a malfunction or breakdown required by this SIP provision is "immediately" not "as soon as possible during normal working hours," as the permit allows. The petition is granted on this issue. IEPA must revise the permit to require the permittee to report to the agency "immediately" or explain how the phrase "as soon as possible" meets the requirements of 35 IAC § 202.263.

5. Petitioner alleges that sections 7.2.9(a) and (b) in the permit require the permittee to keep records "which shall be kept up to date." According to Petitioner, this wording is vague and therefore not practically enforceable. Petition at 14.

U.S. EPA believes this language clearly requires the permittee to maintain current records on an ongoing basis. Therefore the petition is denied on this issue.

### C. Permit conditions that use the term "reasonable" are not practically enforceable

The permit contains the terms "reasonable" and "reasonably" in a number of sections. Petitioner alleges that these terms are vague, subjective, and allow the permittee too much discretion. According to the Petitioner, the terms "reasonable" and "reasonably" are vague, and their use leads to conditions that are not practically enforceable. Petition at 14.

1. Petitioner alleges that sections 7.1.3(c)(ii), 7.2.3(b)(ii), 7.3.3(b)(ii), 7.4.3(b)(ii), and 7.5.3(b)(ii) are not practically enforceable because they require only that the "affected boiler . . . reasonably be repaired or removed" and that the permittee take only "reasonable steps to minimize emissions." Petition at 14-15.

Section 7.5.3(b)(ii) does not exist in the proposed Romeoville permit. Therefore, the petition is denied on this issue as it relates to section 7.5.3(b)(ii).

Sections 7.1.3(c)(ii), 7.2.3(b)(ii), 7.3.3(b)(ii), and 7.4.3(b)(ii) of the proposed Romeoville permit state:

> "… The Illinois EPA, Air Compliance Section, in Springfield, may grant a longer extension if the Permittee demonstrates that extraordinary circumstances exist and the affected operation can not reasonably be repaired or removed from service within the allowed time, the affected operation can not be repaired or removed from service as soon as practicable; and the Permittee is taking all reasonable steps to minimize excess emissions, based on the actions that have been and will be taken."

The Illinois SIP at 35 IAC § 201.262 allows the permittee to continue to operate the affected operation in violation of the applicable requirements in the event of a malfunction or breakdown if the permittee has submitted "proof that continued operation is required to provide essential service, prevent risk of injury to personnel or severe damage to equipment."

The language in the permit condition may be an attempt to specify the kind of "proof" that the facility must provide for IEPA to grant an extension of time for the facility to continue to operate the malfunctioning unit in violation of the applicable emission limits. However, because the permit condition does not specify criteria, consistent with the SIP, to determine whether a unit can be "reasonably" repaired or what constitutes "reasonable" steps during malfunction or breakdown, the condition is practicably unenforceable. U.S. EPA grants the petition on this issue. IEPA must remove "reasonably" and "reasonable" from sections 7.2.3(b)(ii), 7.3.3(b)(ii), and 7.4.3(b)(ii), define the terms, or provide criteria to determine "reasonably" and "reasonable," and revise the condition to be consistent with the provisions of the underlying applicable requirement.

2. Petitioner notes that sections 7.1.3(c)(iv), 7.2.3(c)(iv), 7.3.3(c)(iv), 7.4.3(c)(iv), and 7.5.3(c)(iv) of the permit provide that "the permittee shall comply with all reasonable directives of the Illinois EPA." Petitioner alleges that the permit is deficient because it does not require the permittee to comply with all IEPA directives. Petition at 15.

Some of the sections to which Petitioner refers in the discussion of this issue do not contain the language about which Petitioner is concerned. U.S. EPA believes that Petitioner meant to refer in this section of the petition to sections 7.2.3(b)(iv), 7.3.3(b)(iv), 7.4.3(b)(iv), and 7.6.3(b)(iv) rather than 7.2.3(c)(iv), 7.3.3(c)(iv), 7.4.3(c)(iv), and 7.6.3(c)(iv), and will address the issue as if Petitioner had done so. Furthermore, 7.5.3(c)(iv) is not a permit term in this permit.

The language in these sections is taken directly from 35 IAC § 201.263, which is part of the federally approved Illinois SIP. As discussed above, U.S. EPA could not properly object to including in a title V permit, a permit term that mirrors the language of federally approved SIP rules. Such provisions are "applicable requirements," as that term is defined in 40 C.F.R. § 70.2. Therefore, the petition is denied on this issue.

3. Petitioner states that sections 7.2.6(a)(i), 7.3.6(a)(i), and 7.4.6(a)(i) provide that the permittee must implement measures that "minimize visible emissions of particulate matter and provide a reasonable assurance of compliance" with applicable emission standards. Petitioner alleges that the permit does not require compliance with applicable requirements because of the use of the word "reasonable" in these sections, and asserts that the term renders the condition vague and not practically enforceable. Petition at 15.

U.S. EPA agrees that the term "reasonable," as it is used here, is inappropriate because "reasonable" is not a requirement of Part 70, Section 504 of the Act or Section 39.5 of the Illinois Environmental Protection Act. The permittee has an obligation to comply with all applicable emission standards, and to implement control measures that will assure compliance with those limits. Therefore, by including the word "reasonable" in these sections, the permit term goes beyond what is allowed by the applicable requirements. The petition is granted on this issue. IEPA must remove the term "reasonable" from these permit conditions.

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**D. Permit conditions that allow for too much agency discretion are not practically enforceable**

Petitioner asserts that the permit has numerous provisions that are not practically enforceable because the permit conditions allow for too much agency discretion. As a result, citizens are not able to enforce the permit conditions without access to determinations by IEPA. Such agency discretion allows the source to negotiate conditions "off-permit" and bypass the permitting process requirements and procedures. Petition at 15-16.

1. Petitioner notes that section 5.2.3(a) provides for IEPA review of the operating program regarding fugitive particulate matter. Petitioner asserts that allowing this sort of agency discretion renders the condition not practically enforceable. The condition is also vague because it fails to indicate what this review entails, for instance, whether review of the program involves IEPA approval or provides IEPA with the opportunity to alter the program. Petition at 16.

The origin for section 5.2.3(a) of the Romeoville permit is 35 IAC § 212.309(a), a part of the Illinois SIP. 35 IAC § 212.309(a) refers for implementation to sections 212.310 and 212.312 of the Illinois SIP, which require the plan to be submitted to IEPA for review. Section 5.2.3(a) appropriately incorporates the SIP requirement which provides that the plan must be submitted to IEPA for review. The petition is denied for this issue.

2. Petitioner alleges that section 7.1.7(a)(i)(B) allows the IEPA to waive the requirement to test for particulate matter. Petitioner believes that this provision makes the testing requirement not practically enforceable because citizens would have trouble disputing a finding by the Director that the testing requirement should be waived. Petition at 17.

Section 7.1.7(a)(i) details the testing requirements to measure particulate matter emissions. However, the permit term goes on to say in section 7.1.7(a)(i)(B) that, "[n]otwithstanding [the testing requirement], the Illinois EPA may upon request of the Permittee . . . waive this

requirement." The ability of IEPA to waive the testing requirement altogether would result in an absence of monitoring, which is inconsistent with the requirements of 40 C.F.R. § 70.6(a)(3)(i)(B) and Section 39.5 of the Illinois Environmental Protection Act. The petition is granted on this issue. IEPA either must remove the provision authorizing it to waive the testing requirements or explain how such a waiver would meet the requirements of part 70.

3. Petitioner alleges that condition 7.1.7(c) provides for IEPA review and approval of a test plan for the coal-fired boiler and allows IEPA to impose additional conditions through the test plan. Petitioner asserts that this sort of agency discretion renders the condition not practically enforceable because citizens would not be able to enforce the permit condition without access to a determination by IEPA, and would have difficulty challenging a decision by the IEPA to approve the test plan. Further, this kind of agency discretion allows the source to negotiate the test plan "off-permit" and bypass the permitting process requirements and procedures. Petition at 16.

The language of section 7.1.7(c) is taken from 35 IAC § 283.220 of the federally-approved Illinois SIP. As discussed in section II.D, a permitting authority cannot use a title V permit to modify a requirement from a federally approved SIP. Therefore, the petition is denied on this issue.

4. Petitioner alleges that condition 7.2.6(a) which states that "[d]etermination of whether acceptable operating and maintenance procedures are being used will be based on information available to the Illinois EPA or the U.S. EPA . . ." is practically unenforceable. Petitioner alleges this permit term does not allow for citizen oversight because the public would have difficulty disputing a finding by the Director. Further, this agency discretion allows the source to negotiate the test plan "off-permit" and bypass the permitting process requirements and procedures. Petitioner further alleges that the term "acceptable" is vague and subjective, and, therefore, is not practically enforceable. Petition at 16.

U.S. EPA's review of the permit proposed for Romeoville shows that this phrase in not used in section 7.2.6(a). The petition is denied on this issue.

### E. Certain other permit conditions that contain vague language are not practically enforceable

Petitioner alleges that the permit has a number of other conditions that are not practically enforceable because they are vague. Petitioner asserts that for a permit condition to be enforceable, the permit must leave no doubt as to exactly what the facility must do to comply with the permit condition. Petition at 17.

1. Petitioner states that section 5.2.3(a) of the Romeoville permit requires the permittee to operate the source "under the provisions of an operating program . . . designed to significantly reduce fugitive particulate matter emissions." Petitioner asserts that the term "significantly" is vague and, therefore, not practically enforceable. Petition at 17.

The language in this section is taken directly from 35 IAC § 212.309(a),[5] which is part of the federally approved Illinois SIP. As discussed above, U.S. EPA could not properly object to including in a title V permit, a permit term that mirrors the language of federally approved SIP rules. Such provisions are "applicable requirements," as that term is defined in 40 C.F.R. § 70.2. Therefore, because section 5.2.3(a) tracks the SIP provision, the petition is denied on this issue.

2. Petitioner alleges that section 5.2.7, which addresses the episode action plan, is vague and lacking sufficient detail to be practically enforceable. For section 5.2.7(a) to be enforceable, Petitioner asserts, the episode action plan would need to be defined and the contents of the plan delineated in much greater detail. Section 5.2.7(b) requires that the permittee implement only the "appropriate" steps in the plan. Petitioner contends that the term "appropriate" is subjective, vague and not practically enforceable. Petitioner states that section 5.2.7(c) uses the term "changed," and alleges that it is subjective and not practically enforceable. Finally, Petitioner asserts that the permit must state affirmatively whether the permittee must have a plan. Petition at 17.

A source's episode action plan sets out steps which the source must take if IEPA issues various levels of air pollution advisories. 35 IAC § 244.144, with which section 5.2.7(a) of the Romeoville permit requires the source to comply, requires sources to develop a plan describing actions that the source will take at each level of alert. The SIP requires that the plan be available on site and submitted to IEPA. U.S. EPA believes that the term "appropriate," as used in section 5.2.7(b) of the Romeoville permit, means that the source implements the section of its plan for the level of alert issued by the state. The use of the term "appropriate" in this section of the permit, therefore, is not vague and unenforceable. Section 5.2.7(c) does not contain the word "changed," but provides that the permittee must submit to IEPA a revised plan if an "operational change" occurs. Finally, section 5.2.7(a) does require the permittee to have an episode action plan in compliance with the SIP. The petition is denied on this issue.

3. Petitioner notes that sections 5.7.1, 7.1.10(g), 7.2.10(a), 7.3.10(a), 7.4.10(a), and 7.5.10(c) use the term "deviation," and alleges that these sections are not practically enforceable because the term is vague. Petition at 17.

Section 5.7.1 contains general, source-wide reporting requirements. In the remaining sections cited by Petitioner, the permit requires reporting of deviations from specific permit requirements. IEPA cites section 39.5(7)(f) of the Illinois Environmental Protection Act, 415 ILCS 5/39.5(7)(f), as the origin and authority for each of these sections.

[5] The Seventh Circuit addressed EPA's approval of this SIP provision in *Citizens for a Better Environment v. EPA*, 649 F2d. 522 (7th Cir. 1981). The Court decided that the term "significantly," as used in this SIP provision, was not necessarily unenforceable. The question of whether the required fugitive operating program resulted in a significant reduction of emissions was one of fact, to be determined in a particular situation. *Id.* at 528. At the time the Seventh Circuit reviewed U.S. EPA's approval of this SIP provision, it was identified as section 203(f) of the Illinois SIP.

The lack of a definition for the term "deviation" does not, on its face, render the permit unenforceable. This is a commonly used regulatory term, and the plain meaning of the term is clear. Moreover, Petitioner has not demonstrated that IEPA has improperly interpreted it in practice so as to limit impermissibly the reporting required by these sections. For this reason, the petition is denied on this issue.

4. Petitioner alleges that the language in conditions 7.1.3(c)(ii), 7.2.3(b)(ii), 7.3.3(b)(ii), and 7.4.3(b)(ii) is unclear. Petitioner asserts that two consecutive sentences in these sections are inconsistent, because the first allows IEPA to grant an extension if "extraordinary circumstances" exist, while the second provides for an extension if "unusual circumstances" exist. Petitioner asserts that this difference in language sets a lower threshold in the second sentence. Furthermore, the terms "extraordinary circumstances" and "unusual circumstances" are not defined and are unclear in general and, therefore, they are not practically enforceable. Petition at 17-18.

In the proposed permit, the sections at issue provide that IEPA may grant an extension if the permittee demonstrates that "extraordinary circumstances exist." The phrase "unusual circumstance" is not in the proposed permit. Therefore, the petition is denied on the issue of inconsistent use of language in the permit condition. However, U.S. EPA agrees that the term "extraordinary circumstances" is vague. Although the sections at issue are derived from section 201.262 of the Illinois SIP, which provides the criteria for allowing operation of a unit in violation of certain SIP provisions during periods of malfunction, the language of these permit sections goes beyond the provisions of the SIP by allowing continued operation during an undefined set of circumstances. Therefore, the petition is granted for this issue. IEPA either must define "extraordinary circumstances" in a manner consistent with the requirements of the SIP or remove the language from the permit.

5. Petitioner states that section 7.1.7(b)(ii) of the Romeoville permit, which addresses testing requirements for particulate matter and carbon monoxide, provides that "[m]easurements shall be taken at an appropriate location…." Petitioner alleges that the term "appropriate" is vague and not practically enforceable. Petition at 18.

U.S. EPA agrees that the provisions in section 7.1.7(b)(ii) are not specific with respect to measurement location. However, the next section, 7.1.7(b)(iii), requires that the source use U.S. EPA Method 1 to determine the location of sampling points. Method 1 is very clear with respect to the procedures for determining appropriate sampling points or measurement locations. Section 7.1.7, taken as a whole, is enforceable as a practical matter. The petition is denied on this issue.

6. Petitioner alleges that section 7.1.8(d) is not practically enforceable because it is stated "in the conditional." Petition at 18. It places the burden of determining whether the requirements of the permit are consistent with those of 40 C.F.R. part 75 on the permittee or on citizens enforcing the permit. Petition at 18.

Section 7.1.8(d) describes the monitoring requirements for the coal fired boilers. It provides that "[t]o the extent that applicable performance specifications and operating

requirements for monitoring under 40 C.F.R. Part 75 are inconsistent with the above requirements for monitoring, the procedures of 40 C.F.R. Part 75 shall take precedence." Under this provision, the requirements of part 75**,** which are applicable requirements as defined in 40 C.F.R. § 70.2, act as default minimum monitoring requirements in the event that any other monitoring provision in the permit condition is found to be inconsistent with part 75. Petitioner has not cited any instance where a monitoring condition may be inconsistent with part 75 and that the monitoring requirements in part 75 would be inappropriate in that instance. Because Petitioner has failed to demonstrate, as required under section 505(b)(2) of the Act**,** that the permit is not in compliance with the requirements of the Act**,** the petition is denied on this issue.

7. Petitioner alleges that section 7.1.10(d)(ii) provides examples of recordkeeping requirements, but is not clear whether these are requirements or mere suggestions. Petitioner asserts that the permit is deficient because examples are not practically enforceable and the permit failed to require specific actions of the permittee. Petition at 18.

Upon review, U.S. EPA believes that section 7.1.10(d)(ii) contains specific reporting requirements for $NO_x$ emissions, not examples. These particular reporting requirements are triggered either when IEPA specifically requests the information or when the monitoring system downtime is more than five percent of the total operating time for the boiler. Therefore, the petition is denied on this issue.

8. Petitioner alleges that condition 7.2.6(a) states that "the Permittee shall, to the extent practicable, maintain and operate any affected operation in a manner consistent with good air pollution control practice for minimizing emissions." The petition asserts that the term "to the extent practicable" is vague and grants unlimited discretion to the Permittee to determine what is practicable and the term "good air pollution control practice" is vague and not defined. Petition at 18.

U.S. EPA's review of the permit proposed for Romeoville Generation shows that this phrase in not used in section 7.2.6(a). The petition is denied on this issue.

9. Petitioner alleges that the permit language "such as" in sections 7.2.6(b)(i), 7.3.6(a)(i), and 7.4.6(a)(i) is vague and transforms into examples that are not practically enforceable the language that follows "such as." Petitioner asserts that this is especially troublesome in the cited sections because this language relates to control measures. The permit is deficient because it fails to require specific control measures. Petition at 18-19.

U.S. EPA believes that Petitioner meant to refer in this section of the petition to section 7.2.6(a)(i), rather than 7.2.6(b)(i). The sections cited by Petitioner detail the various measures that the facility may use to assure compliance with the applicable emission standards for fugitive particulate matter and opacity. In addition, the facility is required to maintain records of which measures it implements at the facility. *See* sections 7.2.6(a)(ii), 7.3.6(a)(ii), 7.4.6(a)(ii), 7.2.9(b), 7.3.9(b), and 7.4.9(b). Together, these terms are enforceable as a practical matter with respect to

operational restrictions for visible emission from these units. Therefore, the petition is denied on this issue.

10. The Petitioner alleges that it is unclear what is meant by a "summary of compliance compared to the established control measures" in sections 7.3.9(c)(v) and 7.4.9(c)(v). This language is vague and therefore not practically enforceable. Petition at 19.

U.S. EPA agrees with Petitioner that the language of sections 7.3.9(c)(v) and 7.4.9(c)(v) is confusing. The language to which Petitioner cites is ambiguous because there are no compliance measures in sections 7.3 or 7.4 with which the permittee can compare compliance. The petition is granted on this issue. IEPA must either remove the phrase from the permit condition or clarify it such that the reader understands what a "summary of compliance" must contain and how the summary relates to control measures.

11. Petitioner alleges that sections 7.2.6(b)(ii), 7.3.6(a)(ii), and 7.4.6(a)(ii) are devoid of practically enforceable substantive requirements. The permit is deficient because it fails to require specific control measures beyond what is currently being implemented, which, Petitioner asserts, could be "none at all." Petition at 19.

U.S. EPA believes that Petitioner meant to refer in this section of the petition to subsection 7.2.6(a)(ii) rather than 7.2.6(b)(ii), and will respond to the petition as if Petitioner had done so. Petitioner's allegation here is similar to the one raised in paragraph 9, above, and refers to the same sections of the proposed Romeoville permit. Sections 7.2.6(a)(ii), 7.3.6(a)(ii), and 7.4.6(a)(ii) describe the various measures that a facility may undertake to meet the applicable emission standards for fugitive particulate matter and opacity that are specified in sections 7.2.4, 7.3.4, and 7.4.4, respectively. In addition, the facility must document the control measures it is implementing under the recordkeeping provisions at sections 7.2.9(b), 7.3.9(b) and 7.4.9(b), respectively. The reference in section 7.2.9(b) to section 7.2.6(b) appears to be a typographical error. The petition is granted in part on this issue. IEPA must correct section 7.2.9(b) to accurately cite to section 7.2.6(a). Because these sections require the facility to implement and maintain records of the control measures that Romeoville may use to meet the applicable emission standards for fugitive particulate matter and opacity, the petition is denied in part on this issue.

12. Petitioner asserts that the terminology "good air pollution control practice" in section 7.5.4(a)(iii) is vague, not defined, and, therefore, not practically enforceable. Petitioner maintains that the term must be defined, with the exact actions delineated that the permittee must take. Petition at 19.

U.S. EPA's review of the permit proposed for Romeoville Generation shows that this phrase in not used in section 7.5.4(a)(iii). The petition is denied on this issue.

13. Petitioner alleges that the compliance certification contained as a Standard Permit Condition in section 9.8 is inadequate. The section requires that the source submit its compliance

certification no later than May 1. It is unclear whether the requirement means May 1 of every year, and is, therefore, not practically enforceable. Petition at 19.

U.S. EPA disagrees. Section 9.8 requires the submission of annual compliance certifications. (See the discussion in A.3.a.). The language cited by Petitioner requires the Romeoville facility, at a minimum, to submit its compliance certification no later than May 1 of each year. The petition is denied on this issue.

14. Petitioner alleges that the term "normally" in condition 9.10.2(i) is vague and subjective and therefore not practically enforceable. Petition at 19.

U.S. EPA's review of the permit proposed for Romeoville Generation shows that this phrase in not used in section 9.10.2(i). The petition is denied on this issue.

## IV. The permit is inadequate because it allows the facility to continue to cause severe negative health effects

Petitioner asserts that the Romeoville title V permitting process provides an opportunity for IEPA to take action to set limits on the emissions from Romeoville Generation and reduce the severe negative health impacts that facility has on the area and its residents. Petitioner discusses in depth results from a Harvard School of Public Health study as support for the assertion that emissions from the Romeoville facility negatively impact the health of residents of both Romeoville and the greater Chicago region. Petition at 20-21.

Petitioner has not alleged in this section of the petition that an applicable requirement is either missing or incorrectly applied in the Romeoville permit. 40 C.F.R § 70.6(a)(1) requires that title V permits include "emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance." Furthermore, title V generally does not authorize a permitting authority to impose substantive new requirements. 40 C.F.R. § 70.1(b). Since Petitioner has not provided information that IEPA failed to include or incorrectly applied any emission limitations and standards applicable to the Romeoville facility on this issue, Petitioner has not demonstrated that the permit is not in compliance with the requirements of the Act with regard to this issue and, therefore, the petition is denied.

## V. The permit is inadequate because it contains typographical errors, omissions, and other inadvertent mistakes

Petitioner alleges that the proposed permit contains numerous conditions that are deficient because they contain typographical errors, omissions or other inadvertent mistakes. Petition at 21.

A. Petitioner alleges the condition 5.9.1 refers to condition 5.5 which does not contain any limits. Petition at 21.

U.S. EPA's review of the permit proposed for Romeoville Generation shows that there is no reference to section 5.5 in section 5.9.1. The petition is denied on this issue.

B. Petitioner asserts that condition 7.1.9(b) does not refer to section 39.5(7)(b) of the Illinois Environmental Protection Act. Petition at 21.

U.S. EPA's review of the permit proposed for Romeoville Generation shows that condition 7.1.9(b) does refer to section 39.5(7)(b) of the Illinois Environmental Protection Act. The petition is denied on this issue.

C. Petitioner alleges that the introductory paragraph of condition 7.1.9(e) is repeated in 7.1.9(e)(ii). Petition at 21.

U.S. EPA's review of the permit proposed for Romeoville Generation shows that condition 7.1.9(e)(ii) does not exist. The petition is denied on this issue.

D. Petitioner alleges that sections 7.1.10(c) and 7.1.10(d) must refer to section 39.5(7)(b) of the Illinois Environmental Protection Act in addition to 39.5(7)(f). Petition at 22.

Section 39.5(7)(b) of the Illinois Environmental Protection Act provides IEPA the general authority to include applicable monitoring, reporting, record keeping and compliance certification requirements in the permit as authorized by, among others, subsection 39.5(7)(f), that IEPA deems necessary to assure compliance with the Clean Air Act. As a general provision, subsection 39.5(7)(b) does not provide any additional substantive authority not provided by subsection 39.5(7)(f). Therefore, the state's failure to include section 39.5(7)(b) in addition to 39.5(7)(f ) does not demonstrate that the permit is not in compliance with the Act. The petition is denied on this issue.

E. Petitioner alleges that condition 7.1.10(g)(ii) requires reporting of deviations from condition 7.1.6. However, there are no requirements included in condition 7.1.6. Therefore, 7.1.10(g)(ii) is inapplicable, inappropriate and inconsistent. Petition at 22.

Section 7.1.10(g)(ii) falls under the prompt reporting provision of the proposed Romeoville permit. The prompt reporting provisions of this section are applicable to section 7.1.6, which has no requirements and is essentially an empty condition. In this instance, including a prompt reporting requirement for section 7.1.6 does not result in a permit that is not in compliance with the Act. The petition is denied on this issue.

F. The petition alleges that conditions 7.3.9(b) and 7.4.9(b) state that the identified control measures "are referred to as the 'established control measures.'" However, these

conditions go on to discuss "the above established practices." The difference in terminology makes the permit unclear. Petition at 22.

U.S. EPA agrees that the permit would be clearer if IEPA had used consistent terminology in subsequent subsections of the permit. However, it appears that the terms in subsections 7.3.9(b)(i) and 7.4.9(b)(i) are sufficiently similar to those in subsections 7.3.9(b)(ii) and 7.4.9(b)(ii), respectively, that the reader can understand the terms "established control measures" and "established practices" within the context of the permit. The petition is denied on this issue.

G. The petition alleges that conditions 7.4.4(c) and 10.1, Attachment 1, misquote 35 IAC § 212.321(a) by omitting the word "which." Petition at 22.

The title V permit must accurately reflect the underlying applicable requirement. By omitting the word "which" from conditions 7.4.4(c) and 10.1, Attachment 1, IEPA has not accurately reflected the SIP. The omission of this word could result in the permit term having a different meaning than that in 35 IAC § 212.321(a). Therefore, U.S. EPA grants the petition on this issue. IEPA must insert "which" after "any new process emission unit" in conditions 7.4.4(c) and 10.1, Attachment 1.

## VI. The proposed permit is legally inadequate because it does not impose an enforceable schedule to remedy non-compliance

The Petitioner notes that 40 C.F.R. § 70.5(c)(8-9) requires that, if a facility is in violation of an applicable requirement at the time of permit issuance, the facility's permit must include a schedule containing a sequence of actions with milestones, leading to compliance with any applicable requirements. Petition at 22-23. The Petitioner states that the facility certified compliance in its application, and that IEPA accepted the certification despite evidence to the contrary. *Id*. Specifically, Petitioner claims that IEPA possesses evidence of numerous unresolved exceedances of state and federal opacity limitations at the facility and of modifications to the facility that triggered new source review. The Petitioner concludes that the proposed permit therefore must include a compliance schedule and new source review requirements to bring the Romeoville plant into compliance with the requirements of the Act. As discussed in more detail below, U.S. EPA is requiring IEPA to respond to Petitioner's comment in the permit record.

### A. Opacity Exceedances

The Petitioner alleges that the permit lacks a compliance schedule to bring the Romeoville plant into compliance with the opacity standards. Petitioner has attached copies of records submitted by the facility which detail ongoing opacity exceedances. Petition at 23. Petitioner notes that on at least 40 occasions in one quarter, the Romeoville facility recorded opacity

exceedances at levels that were greater than twice the legal limit. Petition at 24. The Petitioner further claims that Romeoville Generation reported 200 unresolved exceedances of opacity limitations from January 1, 2002 through June 30, 2003. Petitioner states that these continued exceedances suggest "more fundamental problems relating to facility operations." Petition at 23. Petitioner asserts that, in light of the number of exceedances of the opacity standard, the number of years these exceedances have been occurring and reported without resolution, and the fact that they are based on continuous emission monitoring data, the CAAPP permit issued by IEPA without a schedule of compliance is not legally adequate and warrants objection. Petition at 24.

In determining whether an objection is warranted for alleged flaws in the procedures leading up to permit issuance, such as Petitioner's claims that IEPA improperly ignored the facility's compliance history as documented in the records Petitioner submitted, U.S. EPA considers whether a petitioner has demonstrated that the alleged flaws resulted in, or may have resulted in, a deficiency in the permit's content. *See* section 505 (b)(2) of the Act (requiring an objection "if the petitioner demonstrates . . . that the permit is not in compliance with the requirements of this Act . . ."). In Petitioner's view, the deficiency that resulted here is the lack of a compliance schedule.

40 C.F.R. §§ 70.5(c)(8) (iii)(C) and 70.6(3) require that if a facility is in violation of an applicable requirement and it will not be in compliance at the time of permit issuance, its permit must include a compliance schedule that meets certain criteria. For sources that are not in compliance with applicable requirements at the time of permit issuance, compliance schedules must include "a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance." 40 C.F.R. § 70.5(c)(8) (iii)(C). If the reported violation has been corrected prior to permit issuance, a compliance schedule is no longer necessary.

The Petitioner brought to IEPA's notice the issues raised in the petition and the supporting documentation during the public comment period on the draft permit. September 25, 2003, Comments on Application No. 95090080. IEPA, however, did not respond to the Petitioner's comments regarding the necessity for a compliance schedule for opacity exceedances. 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.[6]

U.S. EPA concludes that IEPA's failure to respond to significant comments may have resulted in one or more deficiencies in the Romeoville permit. As a result, U.S. EPA is granting the petition on this issue and requiring IEPA to address Petitioner's significant comments.

### B. Requirements under New Source Review

[6] *See* U.S. EPA's order *In the Matter of Consolidated Edison Company, Hudson Avenue Generating Station*, Petition II-2002-10, at 8 (September 30, 2003), available on the internet at http://www.epa.gov/Region7/programs/artd/air/title5/petitiondb/petitions.

The petition alleges that Romeoville Generation improperly avoided new source review (NSR) permitting requirements and, in turn, the requirement to install modern pollution control equipment. Petition at 24. According to Petitioner, there are several sources of information that indicate that, since 1990, Romeoville Generation has undergone extensive modifications that were subject to NSR. The Petitioner cites as evidence that Romeoville Generation has triggered NSR requirements a statement made by Midwest Generation in a filing with the U.S. Securities and Exchange Commission about potential financial liability for resolution of an information request issued pursuant to section 114 of the Act. Petition at 24-25.

Petitioner discusses in some detail why it is important to address the question of NSR applicability at the title V permitting stage. According to the Petitioner, NSR serves two purposes: ensuring that facilities comply with air quality standards when they are modified and ensuring that, when new plants or existing plants undergo a major modification, they install state-of-the-art control technology. Petition at 26-27. Petitioner asserts that NSR is directly relevant to the title V permitting process here because entirely different emissions and operational standards would have applied to the facility from those currently proposed in the permit. Petition at 26. Petitioner believes that IEPA should have determined whether modifications were made at the facility and whether these modifications are exempt from compliance with the Act because they are "routine maintenance, repair or replacement." Petition at 27. Petitioner contends IEPA should have looked at the four factor test adopted by the Seventh Circuit in *Wisconsin Electric Power Company v. Reilly*, 893 F.2d 901 (7th Cir. 1990), to determine whether modifications at Romeoville Generation constitute routine maintenance, repair, or replacement. Petitioner further asserts that, without NSR, IEPA cannot know which emission and operational standards apply to the Romeoville facility and, therefore, the title V permit fails to include applicable requirements that arise under NSR. The Petitioner asserts that the title V permit for Romeoville Generation should include an enforceable schedule of compliance for NSR to occur, coupled with emission and operational standards equivalent to a new facility in this source category. According to the Petitioner, the absence of such a compliance schedule renders the permit insufficient and subject to objection by the Administrator. The Petitioner claims that IEPA developed the permit based solely on the applicant's representation that it is not subject to NSR, despite the fact that evidence to the contrary was provided by commenters during the public participation process. See September 25, 2003 comments on Application No. 95090080. Petitioner concludes that the permit must contain a compliance schedule to bring the source into compliance with NSR requirements. Petition at 27-29.

The Petitioner brought the issues raised here to IEPA's attention during the public comment period on the draft permit. Petitioner's comments were significant, yet IEPA provided no response to the comments. As noted in section I.A., above, 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). Accordingly, IEPA has an obligation to respond to significant public comments.[7]

[7] *See* U.S. EPA's order *In the Matter of Consolidated Edison Company, Hudson Avenue Generating Station*, Petition II-2002-10, at 8 (September 30, 2003), available on the internet at

U.S. EPA concludes that IEPA's failure to respond to Petitioner's significant comments may have resulted in one or more deficiencies in the Romeoville permit. As a result, U.S. EPA is granting the petition on this issue and requiring IEPA to address Petitioner's significant comments.

## VII. The permit fails to address hazardous air pollutants (HAPs), including mercury

Petitioner states that the State of Illinois pledged over a year ago to better determine the sources from which mercury is released into the air and to convene a workgroup to develop reduction strategies as part of a mercury reduction initiative. Petitioner claims that the workgroup created under this initiative should use the title V permits for Romeoville and other Illinois coal fired plants as vehicles for implementing these reduction strategies. Petition at 29.

### A. The bioaccumulative nature of mercury and local impacts to Lake Michigan warrant regulatory attention

Petitioner provides extensive information about the bioaccumulative nature of mercury and the serious harm mercury causes to human health and the environment. Petitioner cites a study on Little Rock Lake in Wisconsin that found that only 1 gram of mercury was required to contaminate all the fish in the lake. Petitioner refers to a study done in April 1999 to describe the risks to humans from consumption of mercury-contaminated fish. Finally, Petitioner describes the levels of mercury found in Lake Michigan and cites the percentages that come from atmospheric deposition from Chicago-area sources. Petition at 30.

Petitioner has not alleged in this section of the petition that an applicable requirement is either missing or incorrectly applied in the Romeoville permit. 40 C.F.R § 70.6(a)(1) requires that title V permits include "emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance." Furthermore, title V generally does not authorize a permitting authority to impose substantive new requirements. 40 C.F.R. § 70.1(b). Since the Petitioner has not provided information that IEPA failed to either include or incorrectly applied any emission limitations and standards applicable to the Romeoville facility, the Petitioner has not demonstrated that the permit is not in compliance with the requirements of the Act with regard to this issue, and, therefore, the petition is denied on this issue.

### B. Annual reporting of HAP emissions should be required in section 5.7.3

Petitioner asserts that, since Romeoville Generation is among the largest emitters of mercury and is in a densely populated urban area, and since the proposed title V permit allows the permittee to continue operating in the case of an equipment failure, the title V permit should

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http://www.epa.gov/Region7/programs/artd/air/title5/petitiondb/petitions.

include and an emission limit for mercury as well as provisions for monitoring mercury emissions. Petition at 30-31.

Petitioner has not alleged in this section of the petition that an applicable requirement is either missing or incorrectly applied in the Romeoville permit. 40 C.F.R § 70.6(a)(1) requires that title V permits include "emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance." Furthermore, title V generally does not authorize a permitting authority to impose substantive new requirements. 40 C.F.R. § 70.1(b). Since the Petitioner has not provided information that IEPA either failed to include or incorrectly applied any emission limitations and standards applicable to the Romeoville facility, the Petitioner has not demonstrated that the permit is not in compliance with the requirements of the Act with regard to this issue. Therefore, the petition is denied on this issue.

### C. Control technology should be required for coal fired boilers in section 7.1

Petitioner asserts that the electrostatic precipitator and low NOx burners required by the permit as control devices are not effective in controlling mercury emissions. Petitioner provides several examples of pollution control devices for mercury which allegedly would provide greater control for mercury emissions than the control devices currently required by the title V permit, including flue gas desulfurization, powder activated carbon injection, and a wet or semi-dry scrubber. Petitioner asserts that IEPA should consider them for inclusion in the Romeoville title V permit as control technology for mercury emissions. Petition at 31.

Petitioner has not alleged in this section of the petition that an applicable requirement is either missing or incorrectly applied in the Romeoville permit. 40 C.F.R § 70.6(a)(1) requires that title V permits include "emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance." Furthermore, title V generally does not authorize a permitting authority to impose substantive new requirements. 40 C.F.R. § 70.1(b). Since the Petitioner has not provided information that IEPA either failed to include or incorrectly applied any emission limitations and standards applicable to the Romeoville facility on this issue, the petition is denied.

### D. Recent scientific studies demonstrate that mercury control technology works

Petitioner cites two studies which allegedly demonstrate that additional controls on mercury would lead to a decrease in mercury deposition in the Upper Midwest and in Wisconsin. Petition at 31-32.

Petitioner has not alleged in this section of the petition that an applicable requirement is either missing or incorrectly applied in the Romeoville permit. 40 C.F.R § 70.6(a)(1) requires that

title V permits include "emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance." Furthermore, title V generally does not authorize a permitting authority to impose substantive new requirements. 40 C.F.R. § 70.1(b). Since the Petitioner has not provided information that IEPA either failed to include or incorrectly applied any emission limitations and standards applicable to the Romeoville facility on this issue, the petition is denied.

### E. The facilities should not be given operational flexibility to burn alternative fuels

The Petitioner asserts that provisions which allow firing of alternative fuels such as used oil, boiler cleaning residues, or other wastes should be removed from the permit. Petitioner asserts that unknown fuel types and inconsistent fuel mixes can result in increased and uncontrolled emissions of HAPs, such as mercury. Petitioner asks that the permit terms allowing Romeoville Generation to burn alternative fuels be removed, especially because the permit neither places any limitations on HAPs nor includes any monitoring or measurement requirements for HAPs. Moreover, the permit should make it clear that if the facility begins combusting wastes, it will become subject to the local siting regulations contained in 415 ILCS 5/39.2, and, potentially, Sections 112 and 129 of the Clean Air Act. Petition at 32.

40 C.F.R § 70.6(a)(1) requires that the title V permit include "emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance." Petitioner appears to allege that, in permitting the use of alternative fuels, the proposed Romeoville permit may trigger additional applicable requirements, namely sections 112 and 129 of the Act and 415 ILCS 5/39.2. The Illinois law cited governs local siting approval for certain pollution control facilities. This law is not incorporated into the SIP, and is not federally enforceable. Accordingly, it is not an applicable requirement for purposes of title V and cannot be included in the federally enforceable portion of a title V permit.

As noted earlier, the Romeoville facility is an electric generating station that operates four coal-fired boilers with nominal capacities of 1728, 1712, 2709, and 5016 mmBtu/hour, respectively. Contrary to Petitioner's statement, these units are not commercial or solid waste incineration (CISWI) units subject to section 129. The CISWI rule applies to units that burn "commercial and industrial waste," which is defined at 40 C.F.R. § 60.2265 as "solid waste combusted in an enclosed device using controlled flame combustion without energy recovery…." In contrast, most boilers that recover thermal energy from combustion would be subject to the industrial boilers NESHAP, which defines "boilers" as "an enclosed device using controlled flame combustion and having the primary purpose of recovering thermal energy in the form of steam or hot water." 70 *Fed. Reg.* 55217, 55267 (Sept. 13, 2004) (to be codified at 40 C.F.R. § 63.7575). However, the industrial boilers NESHAP does not apply to the Romeoville Generation coal-fired boilers because the industrial boiler standard excludes "an electric utility steam generating unit that is a fossil fuel fired combustion unit of more than 25 megawatts that serves a generator that produces electricity for sale." 70 *Fed. Reg.* 55217, 55254 (Sept. 13, 2004) (to be codified at 40

C.FR. § 63.7491(c)). Furthermore, on March 29, 2005, U.S. EPA published a final rule, entitled "*Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air pollutants from Electric Utility Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units from the Section 112(c) List*." See 70 *Fed. Reg.*15994 (March 29, 2005). In that final rule, U.S. EPA removed coal- and oil-fired electric utility steam generating units from the Clean Air Act section 112(c) source category list. As a result of that action, the requirements of section 112(g) no longer apply to coal-fired electric utility steam generation units, such as those at the Romeoville facility. Therefore, section 112(g) is not an applicable requirement for Romeoville Generation within the meaning of 40 C.F.R. § 70.2. The petition is denied on this issue.

### F. The IEPA and the State of Illinois should take a leadership role in reducing mercury emissions

Petitioner advises IEPA to use its own authority under 415 ILCS 5/39 Section 39.5, Subsection 19 to issue permits and promulgate regulations which contain emission limitations equivalent to the emission limits that would apply if U.S. EPA had promulgated a maximum achievable control technology for utilities. Petition at 32-33.

Petitioner has not alleged in this section of the petition that an applicable requirement is either missing or incorrectly applied in the Romeoville permit. 40 C.F.R § 70.6(a)(1) requires that title V permits include "emission limitations and standards, including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance." Furthermore, title V generally does not authorize a permitting authority to impose substantive new requirements. 40 C.F.R. § 70.1(b). Since Petitioner has not provided information that IEPA either failed to include or incorrectly applied any emission limitations and standards applicable to the Romeoville facility on this issue, the petition is denied.

## CONCLUSION

For the reasons set forth above, and pursuant to section 505(b)(2) of the Clean Air Act, I grant in part and deny in part the petition of the Chicago Legal Clinic on behalf of Citizens Against Ruining the Environment requesting the Administrator to object to issuance of the title V CAAPP permit to Midwest Generation, LCC, Romeoville Generating Station.

Dated: June 24, 2005

____/s/_____
Stephen L. Johnson
Administrator