BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

Operating Permit Issued by the Illinois Environmental Protection Agency for MIDWEST GENERATION EME, LLC to operate WAUKEGAN GENERATING STATION located in Illinois

Application No. 95090047

PETITION OF PEOPLE OF THE STATE OF ILLINOIS REQUESTING OBJECTION BY US EPA TO TITLE V OPERATING PERMIT FOR MIDWEST GENERATION WAUKEGAN GENERATING STATION

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April 5, 2006

Pursuant to Clean Air Act ("CAA") § 505(b)(2) and 40 CFR § 70.8(d), the People of the State of Illinois, by and through the duly elected and authorized Attorney General of the State of Illinois, hereby petition the Administrator of the United States Environmental Protection Agency ("USEPA") requesting objection to the CAA Title V operating permit issued to the Midwest Generation EME, LLC ("Midwest Generation") Waukegan Generating Station (the "Facility") by the Illinois Environmental Protection Agency ("IEPA"). This petition is filed within 60 days following the end of USEPA's 45-day review period pursuant to the above provisions.[1]

Section 505(b)(2) requires that the Administrator respond within 60 days, and that the Administrator "shall issue an objection within such period if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this chapter, including the requirements of the applicable implementation plan." The permits issued to the Facility fails to comply with the CAA in two respects. First, self-reporting by Midwest Generation based on continuous opacity monitoring provides clear, uncontrovertible evidence that the Facility is in violation of its opacity limitations. Yet the permit issued to the Facility includes no schedule of compliance as required by the CAA. CAA § 503(b)(1), 40 CFR 70.5(c)(8)(iii)(C). Second, although IEPA is in possession of substantial information indicating that Midwest Generation is likely in violation of CAA New Source Review ("NSR") requirements at the Facility, it failed to comply with the CAA requirement that it obtain from the applicant the information necessary to determine compliance with these requirements. 40 CFR 70.5(a)(2), (c)(5).

Accordingly, Petitioner requests that the Administrator object to the permit issued to the Facility based on its non-compliance with the CAA, and order IEPA to re-open the permit application process and require Midwest Generation to provide, with respect to the Facility, (1) a schedule of compliance addressing opacity violations, and (2) sufficient information to determine compliance with NSR requirements.

I. IEPA Failed to Require that Midwest Generation Provide a Schedule of Compliance Addressing Violations of its Opacity Limitations

The current IEPA operating permits for the Facility establishes a 30 percent opacity limitation. The permit requires that Midwest Generation maintain a continuous opacity monitor ("COM") and submit the results quarterly to IEPA. Midwest Generation has done so, and the results document more than 2,300 violations of the opacity limitation at the Facility's 3 units over the past 7 years.

Petitioner has compiled a chart summarizing these self-reported violations at Midwest Generation facilities (including the subject Waukegan Facility), entitled "Number of Opacity Excursions per Quarter," attached as Appendix 2. This chart does *not* include any exceedances eligible for the regulatory exemption for exceedances totaling 8-minutes in a one-hour period. See 35 Ill. Adm. Code 212.123. A second

[1] Petitioner's comments submitted to IEPA regarding the permit are attached as Appendix 1 (without exhibits, as the exhibits are appended separately hereto).

chart, "Summary of Opacity Exceedances (30 % or Greater) by MWG 1999-2004," attached as Appendix 3,[2] sets forth the cause of the exceedances claimed by Midwest Generation, indicating that only a fraction of these are potentially eligible for the affirmative defense of startup, breakdown, or malfunction – and there is strong reason to believe that many do not qualify for it at all. The second chart also documents the severity of the exceedances.

The self-reported quarterly opacity reports are conclusive evidence that the violations are occurring. Courts have repeatedly held that continuous monitoring data are equivalent to "reference test method results" – in the case of opacity, Method 9 testing. See, e.g., Sierra Club v. Georgia Power Co., 365 F.Supp.2d 1297 (N.D.Ga. 2004); United States v. LTV Steel Co., Inc., 116 F.Supp.2d 624, 633 (W.D.Pa.2000); L.E.A.D. v. Exide Corp., No. CIV. 96-3030, 1999 WL 124473, at *27-*28 (E.D.Pa. Feb.19, 1999); Sierra Club v. Pub. Serv. Co. of Colo., 894 F.Supp. 1455, 1456, 1458-59 (D.Colo.1995). In Sierra Club v. Georgia Power Co., the court held that COM data are "credible, prima facie evidence" of opacity violations, and found liability on the violations when defendant Georgia Power Co. failed to present specific evidence "that any *particular* COM measurement was contradicted by a Method 9 observation or by other scientific data." Id., 365 F.Supp.2d at 1308 (citation omitted; emphasis in original). Here, Midwest Generation has provided no information to suggest that any particular COM measurement of a violation is incorrect, choosing instead to simply certify compliance with opacity limitations in its Title V permit applications without reference to the abundant self-reported data to the contrary.

Notwithstanding this definitive evidence of ongoing opacity violations, IEPA did not require Midwest Generation to submit a schedule of compliance with respect to opacity. This failure violated the CAA requirement at CAA § 503(b)(1) that applicants be required to "submit with the permit application a compliance plan describing how the source will comply with *all* applicable requirements under this chapter" (emphasis added). 40 CFR 70.5(c)(8)(iii)(C), promulgated pursuant to this provision, states that a permit application must include the following:

> A schedule of compliance for sources that are not in compliance with *all* applicable requirements at the time of permit issuance. Such a schedule shall include a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements for which the source will be in noncompliance at the time of permit issuance. This compliance schedule shall resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject.

[2] Appendix 2 is updated with data through the second quarter of 2005, and Appendix 3 is updated with data through the third quarter of 2005. The quarterly opacity reports submitted by Midwest Generation for the third quarter of 2005 is attached as Appendix 4; we will supplement this petition with the fourth quarter 2005 report when we receive it. Although the number violations has diminished recently, Midwest Generation proffered no information demonstrating that its pattern of chronic exceedances has been cured.

(emphasis added). In NYPIRG v. Johnson, 427 F.3d 172 (2nd Cir. 2005) the court made clear that, where non-compliance has been demonstrated, agencies are obligated under the CAA to require a schedule of compliance in a Title V permit regardless of whether there has been an adjudicated determination of liability. The court rejected the state agency's argument that NOVs were insufficient evidence of violations to require a schedule of compliance. Here, the straightforward self-reported COM-generated opacity exceedance data is as strong evidence of non-compliance as the NOVs at issue in NYPIRG.

In response to an earlier petition to USEPA for objections to the draft Title V permit for the Facility by the Lake County Conservation Alliance ("LCCA") challenging the lack of a schedule of compliance addressing the opacity violations, the Administrator issued objections to the permit, stating, "EPA concludes that IEPA's failure to respond to significant comments may have resulted in one or more deficiencies" in the permits; and that "[a]s a result, EPA is granting the petition on this issue and requiring IEPA to address Petitioner's significant comments." Order Responding to Petitioner's Request that the Administrator Object to Issuance of a State Operating Permit, Petition Nos. V-2004-5, at 5. IEPA's Response to Public Comments dated February 7, 2006 ("Responsiveness Summary"), however, failed to adequately address the issue of opacity compliance.

IEPA's justification in the Responsiveness Summary for its failure to require a compliance plan to remedy them is threefold: first, that the opacity exceedances may not all represent exceedances of particulate matter (PM) limitations; second, that the number of exceedances is not significant; and third, that Midwest Generation certified these sources' compliance. None of these assertions have merit.

With respect to the relationship between opacity and PM exceedances, IEPA specifically concedes, as it must, that opacity violations are independently enforceable, regardless of whether they can be proven to correlate with PM violations. 35 Ill. Adm. Code 212.124. IEPA itself provides the rationale for this approach in the Responsiveness Summary itself. The section entitled "Opacity Surrogate for PM" explains, in dismissing a source's complaint that PM stack tests would more accurately demonstrate PM violations than opacity monitoring, "This is not a constructive comment, as stack tests [for PM] cannot be conducted on a continuous basis." Responsiveness Summary at 45. IEPA strongly defends the basic reliability of opacity as a surrogate for PM compliance, stating, "opacity is certainly a robust means to distinguish compliant operation of a coal-fired boiler and its ESP from impaired operation." Id. Thus, while it is true that opacity violations might not in every case directly correspond with PM limit violations, to ignore the massive number of opacity violations by the permitted sources on this ground alone is utterly unjustifiable.

Moreover, even leaving aside the fact that the opacity violations are independently enforceable – which as a matter of law ought to end the inquiry and require a compliance plan – IEPA acknowledges, as it must, that the strong correlation between opacity and PM allows for determining an opacity exceedance level below

which absence of a PM violation can be concluded with certainty. Id. at 43-44. The same holds true in reverse: it is possible to determine an opacity exceedance level above which the *presence* of a PM violation can be concluded with certainty. Our preliminary research indicates that this level is within no more than a few percentage points above the sources' 30 percent opacity limit. The significance of this fact is highlighted in the last 3 pages of the "Summary of Opacity Exceedances" chart, which indicates the large portion of the violations that exceeded 35, 45, and 60 percent opacity, respectively.

There is no significance to the fact that "[h]istorical emissions testing for PM indicates PM emissions from the coal-fired boilers are typically well within the applicable standard." Id. at 16. The periodically conducted emissions testing also shows compliance with opacity limitations well within the 30 percent limit, proving only that these sources are capable of doing what is necessary to prepare for a stack test to ensure that they pass the PM *and* opacity requirements. It does nothing to ensure compliance between stack tests – which is why, as IEPA itself notes, it is essential to enforce opacity limitations, which are the only continuous source of information regarding particulate content of emissions. Unfortunately, with respect to the Facility, opacity monitoring has demonstrated its woeful inability to maintain compliance with the opacity limits, and no doubt, the PM limits as well. While IEPA claims that the stack test results are consistent with "information" – which IEPA declines to identify – indicating that pollution control equipment at the Facility is sufficient to ensure compliance with the PM standard (Id. at 16), the opacity data showing repeated exceedances far above 30 percent is strong indication to the contrary.

With regard to the significance of the 3,200+ opacity violations documented by commenters, IEPA states that the information in the quarterly opacity reports submitted to it "is not determinative of whether these exceedances constitute violations, much less signify violations." Id. at 16. Although Petitioners cannot fully divine the meaning of this indecipherable assertion, its implication that one cannot determine the number of violations from the quarterly reports is, simply put, not true. The quarterly opacity reports are quite detailed, making it readily possible to determine – as the Attorney General has done – whether the reported excursions are eligible for the 8-minute exemption.

IEPA's additional assertion in the Responsiveness Summary that "past exceedances do not necessarily constitute a sufficient basis to include a compliance schedule in this permit" makes no sense. Id. at 16. If the exceedances were truly "past," in the sense that Midwest Generation submitted evidence demonstrating that the underlying problem had been corrected at the Facility, then there would, indeed, be no need for a schedule of compliance. However, IEPA took no steps to ascertain whether the downward trend in exceedances at the Facility is leading toward permanent elimination of the problem. It thus had no basis to conclude that the Facility was in compliance at the time the permit was issued in light of its history of extensive and continuous violation.

The Responsiveness Summary references, without citation, "state and federal regulations" and "federal guidance" that purportedly "contemplate[s]" that "opacity exceedances may occur intermittently." Id. at 17. However, there is no federal or state regulation that "contemplates" intermittent exceedances – or any exceedances – in the sense of excusing them. Indeed, the opacity regulations expressly provide for a grace allowance of exceedances (eight minutes aggregate exceedances per hour, allowed three times in a 24-hour period), meaning that no exceedances beyond that grace allowance are allowed. 35 Ill. Adm. Code 212.123. "Federal guidance" appears to reference a policy in place more than two decades ago in Region 5 which prioritized the most serious violators for opacity enforcement, as a matter of allocating scarce resources. The policy was a response to the then-recent development of continuous opacity monitoring, which greatly increased the number of reported violations and strained enforcement resources. It did *not* exonerate lesser violators, but rather simply meant the Region did not at that point have the staff time to immediately deal with them.

The fact that the Facility may be in compliance with their opacity limits a majority of the time, in the sense of violation time measured as a fraction of total operating time, is entirely beside the point. The regulatory requirement is for continuous compliance, not compliance most of the time, and the sources have violated it many thousands of times. The opacity violations, regardless of the percentage of time they are occurring, reflect a discharge of harmful pollutants.

In light of these facts, and the overwhelming number of opacity violations documented by the Attorney General and other commenters, IEPA's reliance on the fact that "the source certified compliance" (Id. at 16) is entirely inappropriate. Principles of sound law enforcement do not generally counsel excusing violators because they deny the violations occurred, especially when their self-reported compliance data admits to thousands of violations. Those principles apply with no less force here.

II. IEPA Failed to Require that Midwest Generation Provide All Information Necessary to Determine Compliance with NSR Requirements

IEPA has long been in possession of information strongly indicating that the Facility is in violation of NSR requirements. The NSR program requires that a facility obtain a permit, which will subject it to BACT or LAER standards, for any facility "modification," defined under the CAA to include "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted," excluding only "routine maintenance, repair and replacement." See 42 U.S.C. §§ 7479(2)(C) and 7501(4) (incorporating definition of "modification" found in 42 U.S.C. § 7411(a)(4)); 40 C.F.R. § 52.21(b)(2)(iii)(a). Some of the information available to IEPA describes major, extensive, and non-routine work at the Facility intended to increase operating time and hence emissions, but for which Midwest Generation did not obtain a permit.

The Attorney General has provided IEPA with extensive publicly-available information concerning significant modifications at Midwest Generation's coal-fired facilities, including the subject Waukegan facility, during the mid-1990s, submitted by Midwest Generation's predecessor in interest Commonwealth Edison ("Com Ed") to the Illinois Commerce Commission ("ICC"), that are compelling evidence of failure to comply with NSR permitting requirements. A copy of those documents is attached as Appendix 5. This information contains detailed admissions by Com Ed that it performed extensive, non-routine structural replacement and maintenance at these facilities (transferred from Com Ed in 1999) with the specific intention of increasing the life of the facilities and decreasing the frequency of outages, thus increasing emissions. For example, the 1995 Summary of Major Fossil Station Improvement Projects provided in connection with ICC Docket No. 96-0032 states as follows with respect to Waukegan Unit 8:

> EFOR improvements included the replacement of air heater baskets, boiler corners with windboxes, boiler nose tubes with lower sidewalls, condenser tubing, feedwater heaters, forced draft fan motors, a generator voltage regulation system, turbine electrohydraulic control system, and electrostatic precipitator. *Replacement was necessary because the equipment was at the end of its useful service life,* excepting the precipitator.

Id. at 9 (emphasis added). The ICC documents provide many other examples of extensive modifications at the various Midwest Generation facilities, including the Waukegan Facility. As IEPA is well aware, Com Ed never sought or obtained permits for any of these overhaul projects, which the company admits were both "major" and designed to increase operating time and hence emissions. The projects are similar and/or equivalent in scope to those that formed the basis for the court's finding of NSR liability in Wisconsin Electric Power Company v. Reilly, 893 F.2d 901 (7th Cir. 1990), and more recently in United States v. Ohio Edison Co., 176 F.Supp.2d 829 (S.D. Ohio 2003).

Additionally, IEPA was copied on responses provided by Midwest Generation to USEPA Region 5 requests for information pursuant to CAA § 114. Those requests were aimed at assessing compliance with NSR requirements, seeking information concerning improvements at the Midwest Generation coal-fired facilities, the purpose and cost of those improvements, and their impact on emissions. As documented in the 2004 Petition, Midwest Generation has admitted in its Securities and Exchange Commission ("SEC") filings that the outcome of this USEPA investigation may lead to NSR liability. Midwest Generation disclosed the Region 5 investigation in its May 6, 2003 SEC filing, stating as follows:

> Depending on the outcome of the review and regulatory developments, Midwest Generation could be required to invest in additional pollution control requirements, over and above the upgrades it is planning to install, and could be subject to fines and penalties.

Midwest Generation, LLC, Form 10-K/A Amendment No. 1, "Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 For The Fiscal Year Ended December 31, 2002," May 6, 2003, pp. 25-6, cited in 2004 Petition at 4.

The CAA expressly requires that an applicant provide all information "sufficient to evaluate the subject source and its application and to determine *all* applicable requirements" under the CAA and regulations. 40 CFR 70.5(a)(2). Yet despite the overwhelming evidence that the Facility is in violation of NSR requirements, IEPA asked no further questions. It did not ask Midwest Generation for any further information concerning its admittedly "major" overhauls at its facilities described in the ICC documents. It did not even ask USEPA Region 5 to provide it with the additional response it had been sent by Midwest Generation in response to the CAA § 114 requests, that unlike the initial responses had not been copied to the state. It found, simply and without further explanation, that the Facility's Title V application was complete. To the extent it became aware of the information only after finding the application to be complete (notwithstanding its duty under the CAA to proactively seek compliance information before making that finding), it failed to require, as permitted and obligated by 40 CFR 70.5(a)(2), that Midwest Generation furnish it with the "additional information . . . necessary to evaluate or take final action" on the application.

IEPA's Responsiveness Summary acknowledges the Region 5 investigation, although it ignores the ICC documents and the contractor's article concerning the Fisk modifications. Responsiveness Summary at 17. Despite this, IEPA claims that it is not required to request additional information from Midwest Generation concerning NSR, on essentially three grounds: first, that the permit applications and public comments do not provide sufficient information to demonstrate that NSR violations have occurred; second, that the NSR issue is too complex for IEPA staff to review and address in a compliance schedule; and third, that the sources have certified compliance. Id. at 17-18.

The argument that the permit applications and comments do not prove NSR violations occurred thoroughly begs the question. The CAA regulations specifically make it IEPA's job to find out. As noted above, CAAPP permit applications *must* include information "sufficient to evaluate the subject source and its application and to determine *all* applicable requirements." 40 C.F.R. 70.5(a)(2). If they do not, then IEPA must deem them incomplete. It is simply not an option for IEPA to passively rely on the information submitted to it – by public commenters without access to necessary information and by sources with every incentive not to provide it – without digging deeper and asking for what it needs to determine whether the law has been violated. IEPA has the right *and the obligation* under the law to require the applicants to provide "all information ...sufficient to evaluate the subject source and its application and determine all applicable requirements...." This IEPA has admittedly not done.

IEPA cites USEPAs White Paper I for the proposition that "all applicable requirements" do not include NSR permit conditions that are "obsolete, extraneous, environmentally insignificant or otherwise not required as part of the SIP or NSR program." Responsiveness Summary at 13. To the extent this statement is intended to

constitute an argument that the White Paper excuses it from including NSR requirements in the permits, IEPA has it backwards. In fact, the White Paper not only affirms generally that a complete Title V permit application must address all applicable requirements and provide a compliance schedule as necessary (White Paper at 3-4), but, in the referenced section, cites 40 C.F.R. 70.2 to affirm that NSR requirements are included in the definition of applicable requirements. Id. at 12.[3] In any event, USEPA has clarified that White Paper I "does not limit EPA's ability or authority to object to proposed title V permits based on such previous determinations [of NSR applicability] or to request information (from States and sources) related to such decisions in order to assure compliance with applicable requirements." See letter dated May 20, 1999 from John S. Seitz, Director of the USEPA Office of Air Quality Planning and Standards to Robert Hodanbosi, Enclosure A p. 3, available at http://www.epa.gov/ttn/oarpg/t5pgm.html. Additionally, as noted above, the Second Circuit has held, overturning a contrary finding by the USEPA Administrator, that NOVs issued by a state environmental agency charging NSR violations were sufficient to require an NSR compliance schedule in a Title V permit. NYPIRG v. Johnson, supra. Here, the information available to IEPA was certainly strong enough to require further inquiry, if not NOVs and an NSR compliance schedule.

The fact that investigation of NSR matters is complex and potentially time-consuming is nowhere found in the law as an exception to the requirement that IEPA gather sufficient information to evaluate an applicant's compliance with *all* applicable requirements. See Responsiveness Summary at 18. IEPA's assertion that it should be excused from ascertaining NSR compliance simply because questions have arisen in litigation regarding interpretation of NSR requirements similarly lacks merit. Id. Leaving aside the fact that uncertainties of interpretation would not remove NSR from the category of "all" applicable requirements requiring a compliance plan, there is no uncertainty regarding the fundamental requirements of NSR applicable to the sources in question. The decision by the Court of Appeals for the Seventh Circuit in Wisconsin Electric Power Company v. Reilly, supra – which predates Midwest Generation's Title V permit application by five years – lays out at great length definitions of what constitutes a "physical change" and an "emissions increase" triggering NSR.

The law creates no exception, either, for matters that are being contemporaneously investigated by USEPA, or that are the subject of enforcement litigation elsewhere against sources other than the permitees. Indeed, that enforcement review is simultaneously underway at a source that is applying for a Title V permit is not surprising. Enforcement is a totally separate, but equally important duty of the state and federal Environmental Protection Agencies. Nowhere does the law governing Title V permits provide that non-compliance may be ignored by the permitting authority simply because the inquiry could also be undertaken as an enforcement matter. Congress and the Illinois General Assembly were clear that all items of non-compliance must be dealt with

[3] To the extent IEPA may be arguing that the NSR requirements themselves are in some way "obsolete," in view of proposed and final USEPA regulations narrowing the scope of the NSR program, Petitioner notes that most of those regulations are not yet in effect, either because they are non-final or are the subject of a preliminary injunction staying their effectiveness.

in Title V permits, and suggested no abeyance of these specific requirements in the event of enforcement review regarding those items.

IEPA thus does not have the option under the law to unilaterally determine that enforcement proceedings are a better venue for assessing NSR compliance than Title V permit proceedings. Its further suggestion that NSR compliance could be better assessed in construction permit proceedings (Responsiveness Summary at 18) is baseless. The issue relevant to determining current NSR compliance, as IEPA knows, is whether the sources have undertaken unpermitted modifications in the *past*. Obviously, any *future* major modifications that may be performed after the Title V permits are issued could require permits, and failure to obtain them could be appropriately addressed through enforcement (or at the time the Title V permits are renewed).

Once again, given these facts, it is entirely inappropriate for IEPA to rely on the sources' certification of compliance as a basis for declining further investigation. Id. at 18. The fact that the Facility's permit application "lacks information clearly showing noncompliance with NSR," and "included no compliance schedules" for NSR, is not surprising. Indeed, with this statement, IEPA admits that the applicant filed an incomplete application, since the application does not provide all information sufficient to evaluate the subject source and to determine all applicable requirements. Such is clear grounds for permit denial, not an excuse for permit issuance.

Conclusion

Pursuant to CAA § 505(b)(2) and 40 CFR § 70.8(d), Petitioner People of the State of Illinois have demonstrated to the Administrator that the Title V permit issued to the Facility is not in compliance with the requirements of the CAA. The Administrator is therefore obligated under that section to object to that permit within 60 days of the date of this petition.

Dated: Chicago, Illinois
April 5, 2006

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

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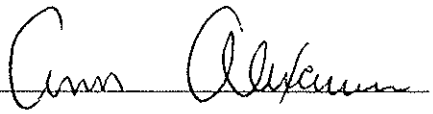
BY: 

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