

Order ILLINOIS POLLUTION CONTROL BOARD
May 20, 2021

MIDWEST GENERATION, LLC,)	
)	
Petitioner,)	
)	
v.)	PCB 21-108
)	(Variance - Land)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by C.M. Santos):

On May 11, 2021, Midwest Generation, LLC (MG) filed a petition for a variance (Pet.) for its Will County Generating Station and a motion for expedited review (Mot). For its Pond 1 North (1N) and Pond 1 South (1S) at the Station, MG requests additional time to comply with specified requirements to collect data and submit information under the Board’s rules for coal combustion residuals (CCR) in surface impoundments at 35 Ill. Adm. Code 845. The Board adopted Part 845 on April 15, 2021, and it became effective on April 21, 2021. 45 Ill. Reg. 5884 (May 7, 2021); Standards for Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R 20-19 (Apr. 15, 2021).

SUMMARY OF REQUESTED VARIANCE

MG states that Ponds 1N and 1S were removed from service in 2010 and dewatered in 2013, so they were not subject to the 2015 federal CCR rule. Pet. at 2, citing 40 CFR 257; 80 Fed. Reg. 21301 (Apr. 17, 2015). Consequently, Ponds 1N and 1S had not had monitoring wells in place or do not have the groundwater monitoring data needed to meet requirements under Part 845. Pet. at 2. MG requests a variance extending specific deadlines so that it can obtain representative data and submit a complete operating permit application. Pet. at 3-4, 6-7.

MOTION FOR EXPEDITED REVIEW

In its motion for expedited review, MG acknowledges that the Board’s decision deadline requires it to render a decision on the petition within 120 days by September 8, 2021. Mot. at 3, citing 35 Ill. Adm. Code 104.232. MG argues that, because it must conduct eight independent rounds of groundwater sampling under 35 Ill. Adm. Code 845.650(b)(1)(A) by October 18, 2021, “even the relatively short 120-day deadline for a decision by the Board on MWG’s petition for a variance is insufficient to provide timely relief.” Mot. at 3.

MG states that it will suffer material prejudice if the Board denies its motion. Without expedited review, MG argues that it will not have sufficient time to comply with the rule if the Board concludes not to grant the requested variance. Mot. at 3. Without expedited relief, MG

asserts that it will be required to hurriedly comply with deadlines for Ponds 1N and 1S, which “have never before been subject to these types of requirements.” *Id.* Attached to MG’s motion is an affidavit by the Director of Environment for NRG Energy, Inc., which indirectly owns MG. Mot., Exh. A; *see* 35 Ill. Adm. Code 101.512(a).

A request for expedited review must include, among other elements, “a complete statement of the facts and reasons for the request.” 35 Ill. Adm. Code 101.512(a). When deciding a motion for expedited review, the Board considers, at a minimum, “all statutory requirements and whether or not material prejudice will result from the motion being granted or denied.” 35 Ill. Adm. Code 101.512(b). In addition, the Board will grant a motion for expedited review “consistent with available resources and decision deadlines.” 35 Ill. Adm. Code 101.512(c).

The Board currently has a number of requests for relief from the requirements of Part 845 requiring immediate attention, as well as pressing cases of various other types. The Board’s limited resources make it unlikely that the Board will grant a motion for expedited review in all but unusual circumstances. However, the Board is persuaded that the facts and reasons cited in MG’s motion are unusual circumstances that warrant granting a motion to expedite.

While the Board grants MG’s motion, it stresses that it can expedite review only to an extent consistent with its procedural requirements and deadlines, which it summarizes in the following section of this order. Accordingly, if the Board accepts MG’s petition for hearing, it will proceed as expeditiously as it is able within these limitations. If it accepts the petition, the Board will direct its hearing officer to take steps to avoid delay.

SUMMARY OF PROCEDURAL REQUIREMENTS

MG must provide prompt public notice of filing its petition, including publishing notice within 14 days after filing the petition in a newspaper of general circulation in the county where its facility is located. 415 ILCS 5/37(a) (2018); 35 Ill. Adm. Code 104.214(a). Because MG filed its petition on May 11, 2021, it must provide newspaper notice by Tuesday, May 25, 2021. Within 21 days after publishing notice, MG must file with the Board a certification of publication including the date on which it published notice and a copy of the published notice. 35 Ill. Adm. Code 104.214(e).

The Environmental Protection Agency (IEPA) is required to file its recommendation on the requested variance with the Board within 45 days after the filing of the petition, or at least 30 days prior to a scheduled hearing, whichever is earlier. 35 Ill. Adm. Code 104.216. IEPA’s 45-day deadline is now Friday, June 25, 2021. Within 14 days after service of IEPA’s recommendation, MG may file a response to IEPA’s recommendation or an amended petition. 35 Ill. Adm. Code 104.220.

MG requests a hearing on its petition. Pet. at 24; *see* 35 Ill. Adm. Code 104.204(n). Consequently, the Board intends to hold a hearing if it accepts the petition. 415 ILCS 5/37(a) (2018); 35 Ill. Adm. Code 104.234. Upon its own motion or the motion of any party, the Board or the hearing officer may order that a hearing be held by videoconference. If it accepts MG’s

petition for hearing, factors that the Board or the hearing officer will consider in deciding whether to hold the hearing by videoconference will include cost-effectiveness, efficiency, facility accommodations, witness availability, public interest, the parties' preferences, and the proceeding's complexity and contentiousness. *See* 35 Ill. Adm. Code 101.600(b), 104.106(b).

The Board's hearing officer is responsible, as appropriate, for guiding parties through status conferences and hearing officer orders to promptly resolve this matter. If the Board accepts MG's petition, a hearing will be scheduled and completed in a timely manner consistent with the statutory decision deadline, which only MG may extend through a waiver. 415 ILCS 5/38(a) (2018); 35 Ill. Adm. Code 104.232. As noted above, the statutory decision deadline is now Wednesday, September 8, 2021, the 120th day after MG's May 11, 2021 filing. *See* 35 Ill. Adm. Code 104.232. The Board meeting immediately before the current decision deadline is scheduled for Thursday, August 26, 2021.

CONCLUSION

The Board grants MG's motion for expedited review of its petition. The Board will determine whether to accept the petition for hearing after it receives the required certification of publication. If it accepts MG's petition, the Board will review the petition consistent with its procedural requirements and deadlines.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 20, 2021, by a vote of 4-0.



Don A. Brown, Clerk
Illinois Pollution Control Board