

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MIDWEST GENERATION, LLC)
)
 Petitioner,) PCB 2021-108
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY)
)
 Respondents,)

NOTICE OF FILING

To: See attached service list

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board Midwest Generation, LLC's Response to the Recommendation of the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

Dated: July 15, 2021

MIDWEST GENERATION, LLC

By: /s/Kristen L. Gale

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, and Midwest Generation, LLC's Response to the Recommendation of the Illinois Environmental Protection Agency was electronically filed on July 15, 2021 with the following:

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and that copies were sent via e-mail on July 15, 2021 to the parties on the service list.

Dated: July 15, 2021

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**RESPONSE TO THE RECOMMENDATION OF THE
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY**

The Illinois Environmental Protection Agency (“Agency”) does not object to the Illinois Pollution Control Board (“Board”) granting a short extension of the immediate deadlines in the Coal Combustion Residual (“CCR”) Rule to Midwest Generation, LLC (“MWG”) for Ponds 1N and 1S at its Will County Generating Station. Specifically, the Agency does not object to MWG’s request to extend the deadlines to:

- (1) collect and analyze the eight independent samples from each background and downgradient well (35 Ill. Adm. Code 845.650(b)(1)(A)),
- (2) submit the operating permit application (35 Ill. Adm. Code 845.230(d)(1));
- (3) submit the category designation of Ponds 1N and 1S Closure Prioritization under Section 845.700(g) (35 Ill. Adm. Code 845.700(c)); and
- (4) submit the construction permit applications pursuant to Section 845.220 by July 1, 2022 if MWG designates Ponds 1N and 1S as Category 4 CCR surface impoundments (35 Ill. Adm. Code 845.700(h)(1)).

In response to the Agency’s objection to MWG’s request to extend the deadline to complete the initial emergency action plan and the fugitive dust plan, MWG agrees to withdraw its request.

The Agency’s recommendation asserts certain factual and legal issues that are not material to the ultimate issue: that the hardship imposed upon MWG to comply with the CCR deadlines outweighs any potential harm to the public or the environment by granting the variance. But to

correct and clarify the record because of the factual and legal discrepancies alleged by the Agency, MWG will respond at the July 27, 2021 hearing. These issues are further explained below.

A. The CCR Rule Requires Groundwater Quality Data and Statistical Analysis in the Operating Permit Application.

While the Agency does not dispute that it is unreasonably difficult to prepare the numerous technical documents by the deadline for the operating permit application, the Agency does take issue with MWG's interpretation of the submission requirements. Without support either in the language of CCR Rule Section 845.230(d) or by evidence presented in the CCR rulemaking record, the Agency proffers a new CCR Rule interpretation. It contends the application requirements differ depending upon whether groundwater data does or not fully exist. In the Agency's view, the CCR Rule requires only a "proposed" monitoring program "when groundwater monitoring wells, data, or statistical procedures do not yet fully exist," so that an applicant may satisfy the application submission deadline without having the required groundwater monitoring information that the CCR Rule requires. Illinois EPA Recommendation ("Rec."), ¶41. Perhaps in implicit acknowledgement of the inherent weakness of its interpretation, the Agency concedes that the rule "could be construed to mean that the data collection must be complete before submission of the permit [application]." *Id.*

The Agency's interpretation of Section 845.230(d) is contrary to the express language in the rule. The rule does not state groundwater monitoring data, or statistical procedures that do not exist, need not be submitted. It says precisely the opposite. For example, Section 845.230(d)(2)(I)(iii) requires a groundwater sampling and analysis program that includes selection of the statistical procedures for evaluating the groundwater monitoring data under Section 845.640. Section 845.640(f)(3) makes it explicitly clear that the owner or operator must submit documentation of the statistical method chosen "in an operating permit application." 35 Ill. Adm.

Code 845.640(f)(3). The Agency expressed exactly the opposite interpretation of Section 845.230(d) during its CCR rulemaking testimony. The Agency testified that the groundwater monitoring data and statistical procedures for evaluating that data both must be submitted with the operating permit. During the CCR rulemaking, the Agency never suggested or otherwise indicated, as it now does here, that if this information did not yet exist by the application deadline, it could be submitted later.

B. Closure Priority Category Designation Should be Based on Accurate Data

On several points, the Agency agrees with the reasons underlying MWG's variance request. The Agency does not object to extending the deadline to identify the closure priority Category for Ponds 1N and 1S. Rec., ¶54. The Agency agrees that the existing partial groundwater quality data for both ponds does not constitute a comprehensive analysis, and that a priority category designation will be more accurate if established groundwater quality background data is considered. *Id.* The Agency further agrees that it is both important and desirable to obtain independent and seasonably variant samples to establish groundwater quality background data. *Id.*, ¶ 37.

But the Agency contends that MWG has enough information already to determine the appropriate category for Ponds 1N and 1S. It submits that the two ponds should be Category 4 CCR surface impoundments by relying on just an "eyeballing" of the existing partial groundwater data together with its own incorrect interpretation of the CCR Rule. Rec., ¶53.

The Agency mistakenly claims that Section 845.700(g)(2) requires an applicant to use the more conservative of the categories "if groundwater compliance is unknown." Rec., ¶52. Section 845.700(g)(2) provides no such thing. It does not discuss instances of unknown groundwater compliance status and it in no way allows an applicant to guess, educated or otherwise, on the groundwater compliance status of a pond based on incomplete data. What Section 845.700(g)(2)

instead provides is if a CCR surface impoundment “*can be categorized in more than one category*,” the owner or operator of the CCR surface impoundment must assign the CCR surface impoundment the highest priority category. 35 Ill. Adm. Code 845.700(g)(2) (emphasis added). Here, until sufficient groundwater data is collected, the ponds cannot be categorized as either Category 4 (inactive ponds with groundwater exceedances) or Category 6 (inactive ponds without groundwater exceedances).

Nor should the Board accept the Agency’s “eyeballing” of data from only one downgradient well for each pond as an adequate basis for pond categorization, particularly when the Agency did not conduct any statistical analysis. Rather than accepting the Agency’s “guess work” approach, there is no harm caused by waiting a mere five months to collect the requisite data to accurately identify the Category designation for the basins.

C. While MWG Disputes the Agency’s Allegations Concerning the Ponds, these Immaterial and Speculative Allegations do not Prevent Granting the Requested Variance.

For whatever reason, particularly given the Agency does not object to the MWG variance petition, it nevertheless includes certain factual allegations that are not at issue in this variance proceeding and hence, are immaterial to whether the variance should be granted. In doing so, the Agency inappropriately draws into this proceeding the Board’s Interim Opinion and Order in *Sierra Club v. Midwest Generation LLC*, PCB 13-15. See *Midwest Generation, LLC’s Memo in Support of Motion to Reconsider*, PCB 13-15, Sept. 9, 2019. As the Board is well aware, MWG has contested many of the findings of that Interim Order on liability but does not yet have the right to file an appeal to pursue those challenges. They should not be at issue here because they do not address the relevant issue - - whether the hardship imposed upon MWG to comply with the CCR deadlines outweighs any potential harm to the public or the environment by granting the variance.

The Agency also baselessly speculates that MWG may not complete the location restriction demonstrations required by the CCR Rule. First, there is no evidence that MWG will not do so. Second, in its variance petition, MWG is not requesting any relief from the substantive location restriction requirements and hence, this issue is not relevant to the requested variance. MWG is solely seeking a short extension of the regulatory deadlines so that it can properly conduct all work required, including work relating to the location restrictions. Because the ponds will be closed pursuant to the CCR Rule and submitting a complete and accurate applications is preferable, there is no harm in granting MWG's request for a brief extension of submitting the operating permit application and the construction permit application.

D. Conclusion

MWG looks forward to presenting additional and more specific evidence to the Board supporting its Petition for Variance for a brief extension of certain deadlines under the CCR Rule.

Respectfully submitted,

Midwest Generation, LLC

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