

ILLINOIS POLLUTION CONTROL BOARD

November 1, 2012

NATURAL RESOURCES DEFENSE)	
COUNCIL, PRAIRIE RIVERS NETWORK)	
and SIERRA CLUB,)	
)	
Petitioners,)	
)	
v.)	PCB 13-17
)	(Third-Party NPDES Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY and DYNEGY)	
MIDWEST GENERATION, INC.,)	
)	
Respondents.)	

ORDER OF THE BOARD (by D. Glosser):

On October 18, 2012, Natural Resources Defense Council, Prairie Rivers Network and Sierra Club (petitioners) timely filed a petition asking the Board to review a September 14, 2012 determination of the Illinois Environmental Protection Agency (Agency). *See* 415 ILCS 5/40(e)(1) (2010); 35 Ill. Adm. Code 101.300(b), 105.204(b). The Agency granted a National Pollutant Discharge Elimination System (NPDES) permit to Dynegy Midwest Generation, Inc. (Dynegy) for its Havana Power Station located at 15260 North State Rte. 78, Havana, Mason County.

Under the Environmental Protection Act (415 ILCS 5 (2010)), the Agency is the permitting authority, responsible for administering Illinois' regulatory programs to protect the environment. NPDES permits are required for discharges of contaminants from point sources to surface waters. If the Agency grants a NPDES permit, certain third parties may appeal the Agency's decision to the Board. *See* 415 ILCS 5/40(e)(1) (2010); 35 Ill. Adm. Code 105.204(b). In this case, petitioners appeal on the grounds that: 1) Dynegy failed to adequately address and the Agency failed to adequately consider the elements of antidegradation analysis, specifically, they failed to identify and quantify proposed pollutant load increases and their potential impacts on affected waters, and failed to adequately assess pollution control alternatives; 2) Dynegy failed to provide in the permit application a sufficient basis for the Agency to establish numeric discharge limits based on a determination of best available technology, and the Agency failed to use its best judgment to impose such limits; 3) Dynegy failed to provide in the permit application a sufficient basis for the Agency to establish effluent limits for mercury necessary to achieve water quality standards in the Illinois River receiving water, and the Agency failed to establish such limits; and 4) the Agency failed to respond to significant comments raised by the petitioners. Petitioners also appeal on the grounds that the final permit did not remedy the legal shortcomings identified in the permit application. For the reasons below, the Board accepts petitioners' petition for hearing.

THIRD-PARTY APPEAL

If a third party wishes to appeal an Agency determination to grant an NPDES permit, the Act requires that the third party's petition to the Board contain:

a demonstration that the petitioner raised the issues contained within the petition during the public notice period or during the public hearing on the NPDES permit application, if a public hearing was held; and

a demonstration that the petitioner is so situated as to be affected by the permitted facility. 415 ILCS 5/40(e)(2) (2010); *see also* 35 Ill. Adm. Code 105.210(d).

The petition also must, among other things, specify the grounds for appeal and include a copy of the issued permit. *See* 35 Ill. Adm. Code 105.210(a), (c). The third party must file the petition within 35 days after the "date of issuance of the Agency's decision." 415 ILCS 5/40(e)(1) (2010); *see also* 35 Ill. Adm. Code 105.206(b). If the Board determines that the third party's petition for review is not "duplicative or frivolous," the Board will hear the petition. 415 ILCS 5/40(e)(3) (2010); *see also* 35 Ill. Adm. Code 105.214(d).

Petitioners' petition states that during the Agency's public notice period and hearing on Dynegey's NPDES permit application, petitioners raised the issues on which they now appeal. Petitioners' petition also states that they are so situated as to be affected by the permitted facility and includes a copy of the issued permit. The petition meets the content requirements of 35 Ill. Adm. Code 105.210. Petitioners also filed their petition within 35 days after the Agency issued its determination.

An action before the Board is duplicative if it is "identical or substantially similar to one brought before the Board or another forum." 35 Ill. Adm. Code 101.202. An action before the Board is frivolous if it is "a request for relief that the Board does not have the authority to grant" or "fails to state a cause of action upon which the Board can grant relief." *Id.* No evidence before the Board indicates that this action is duplicative or frivolous. The Board accepts petitioners' petition for hearing.

HEARING AND DECISION DEADLINE

Petitioners have the burden of proof. *See* 415 ILCS 5/40(e)(3) (2010); 35 Ill. Adm. Code 105.112(a). Hearings "will be based exclusively on the record before the Agency at the time the permit or decision was issued." 35 Ill. Adm. Code 105.214(a); *see also* 415 ILCS 5/40(e)(3) (2010). Accordingly, though the Board hearing affords a permit applicant the opportunity to challenge the Agency's reasons for denying or conditionally granting the permit, information developed after the Agency's decision typically is not admitted at hearing or considered by the Board. *See Alton Packaging Corp. v. PCB*, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); *Community Landfill Co. & City of Morris v. IEPA*, PCB 01-170 (Dec. 6, 2001), *aff'd sub nom. Community Landfill Co. & City of Morris v. PCB & IEPA*, 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3rd Dist. 2002).

Hearings will be scheduled and completed in a timely manner, consistent with the decision deadline (*see* 415 ILCS 5/40(a)(3) (2010)), which only Dynegy may extend by waiver (*see* 35 Ill. Adm. Code 101.308). If the Board fails to take final action by the decision deadline, Dynegy “shall be entitled to an Appellate Court order pursuant to subsection (d) of Section 41 [415 ILCS 5/41(d) (2010)].” 415 ILCS 5/40(a)(3) (2010). Currently, the decision deadline is February 15, 2013, which is the 120th day after the Board received the petition. *See* 35 Ill. Adm. Code 105.114. The Board meeting immediately before the decision deadline is scheduled for February 7, 2013.

AGENCY RECORD

Unless the Board or the hearing officer orders otherwise, the Agency must file the entire record of its determination by November 19, 2012, which is the first business day following the 30th day after the Board received petitioners’ petition. *See* 35 Ill. Adm. Code 105.212(a). If the Agency wishes to seek additional time to file the record, it must file a request for extension before the date on which the record is due to be filed. *See* 35 Ill. Adm. Code 105.116. The record must comply with the content requirements of 35 Ill. Adm. Code 105.212(b).

IT IS SO ORDERED.

Chairman Thomas A. Holbrook abstains

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 1, 2012 by a vote of 3-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board