

ILLINOIS POLLUTION CONTROL BOARD
December 19, 2024

MIDWEST GENERATION, LLC,)
)
 Petitioner,)
)
 v.) PCB 25-4
) (Permit Appeal - Land)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by J. Van Wie):

On August 8, 2024, at the parties' request, the Board extended until November 5, 2024, the time period for Midwest Generation, LLC (MWG) to appeal a July 3, 2024 determination of the Illinois Environmental Protection Agency (Agency or IEPA). The determination concerns MWG's Powerton Generating Station located at 13082 East Manito Road in Pekin, Tazewell County (Site). On November 6, 2024, MWG timely filed a petition (Pet.) asking the Board to review the Agency's determination concerning MWG's coal combustion residual (CCR) surface impoundment operating permit for the Site. *See* 415 ILCS 5/40(a)(1) (2022); 35 Ill. Adm. Code 101.300(b), 105.206 105.208; *see also* 35 Ill. Adm. Code 101.300(b) (accounting for State legal holidays). Additionally, in its petition, MWG requested a partial stay of the permit while its petition is pending. Pet. at 3. On November 21, 2024, the Board accepted the petition for hearing but reserved ruling on MWG's request for a partial stay. For the reasons below, the Board grants MWG's motion for a partial stay.

MWG requests that the Board stay the effectiveness of Special Conditions 6, 11, 14, 15, 16, 17, 19, 20, 21, 22, 25, 26, and 28 of its CCR surface impoundment operating permit, as well as a stay of "the permit identification information provided in the headers of page of the Permit," while its petition is pending. Pet. at 3. The Agency did not respond to MWG's motion for partial stay.

The Board has the authority to grant discretionary stays of the type requested here. In Illinois Power Generating Co. v. IEPA, PCB 16-60, slip op. at 2 (December 17, 2015), the Board found "that it has the authority to grant discretionary stays from permit conditions." The Board noted it "has previously granted or denied discretionary stays in permit appeals, both when the Agency did and did not consent to such stays." *Id.* (citations omitted); *see also*, AkzoNobel Surface Chemistry, LLC v. IEPA, PCB 13-49, slip op. (Apr. 18, 2013); Community Landfill Co. and City of Morris v. IEPA, PCB 01-48, 01-49 (consol.), slip op. at 4 (Oct. 19, 2000). The Board elaborated that "[t]he permit appeal system would be rendered meaningless in many cases, if the Board did not have the authority to stay permit conditions." Illinois Power Generating Co., PCB 16-60, slip op. at 2.

The Board has long recognized that Illinois law provides standards to help determine whether it is appropriate to grant a discretionary stay:

1. a certain and clearly ascertainable right needs protection;
2. irreparable injury will occur without the injunction;
3. no adequate remedy at law exists; and
4. there is a probability of success on the merits.

Illinois Power Generating Co., PCB 16-60, slip op. at 2 (citations omitted); see Pet. at 15.

The Board is not required to consider each of these factors when deciding whether to grant a discretionary stay. Bridgestone/Firestone Off Road Tire Co. v. IEPA, PCB 02-31, slip op. at 3 (Nov. 1, 2001). The likelihood of environmental harm should a stay be granted is of particular concern for the Board. *Id.* (citing Motor Oils Refining Co. v. IEPA, PCB 89-116, slip op. at 2 (Aug. 31, 1989)).

MWG argues that it has a certain and ascertainable right to appeal the challenged permit conditions, and that that right needs protection. Pet. at 4. MWG further argues that it will suffer irreparable harm if the Board does not issue a stay because it will be forced to operate in a state of noncompliance, putting MWG at “continual imminent risk of enforcement action” against it. *Id.* MWG asserts that neither the public nor the Agency will be harmed if a stay is granted. *Id.* Lastly, MWG contends that this appeal would be rendered moot if it had to comply with the contested permit conditions during the appeal. *Id.*

The Board has reviewed MWG’s request for partial stay, and takes note of the Agency’s lack of response in opposition. Based on that review, the Board finds that granting a discretionary stay is warranted. The Board is persuaded that MWG has an ascertainable right that needs protection. Appeal of the permit conditions would be rendered moot if MWG was required to comply with the contested conditions during the appeal. If petitioner prevailed, “the cost and the point of the appeal would be lost.” Community Landfill Co. and City of Morris v. IEPA, PCB 01-48, PCB 01-49 (consol.), slip op. at 4 (Oct. 19, 2000). The Board also agrees that, if MWG were to continue operating in a state of noncompliance during its appeal of the contested conditions, MWG would be at risk of enforcement action against it.

Exercising its discretion, the Board grants MWG’s motion for partial stay of the contested Special Conditions 6, 11, 14, 15, 16, 17, 19, 20, 21, 22, 25, 26, and 28, and “the permit identification information provided in the headers of page of the Permit,” in MWG’s CCR surface impoundment operating permit. In doing so, the Board “makes no findings on the merits of the permit appeal . . .” Motor Oils Refining Co. v. IEPA, PCB 89-116, slip op. at 2 (Aug. 31, 1989). The partial stay remains in effect until the Board takes final action on the permit appeal, or until the Board orders otherwise.

IT IS SO ORDERED.

Member Tin Abstained.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on December 19, 2024, by a vote of 4-0.

Don A. Brown

Don A. Brown, Clerk
Illinois Pollution Control Board