

ILLINOIS POLLUTION CONTROL BOARD

August 7, 2008

DYNEGY MIDWEST GENERATION, INC.)
(BALDWIN ENERGY COMPLEX))
)
 Petitioner,)
)
 v.)
) PCB 09-9
) (Permit Appeal - Air)
ILLINOIS ENVIRONMENTAL PROTECTION)
AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by N.J. Melas):

On July 29, 2008, Dynegy Midwest Generation, Inc. (Dynegy) timely filed a petition asking the Board to review a June 19, 2008 determination of the Illinois Environmental Protection Agency (Agency). *See* 415 ILCS 5/40(a)(1) (2006); 35 Ill. Adm. Code 101.300(b), 105.206(a). The Agency granted Dynegy a construction permit, with conditions, authorizing the installation of a baghouse, scrubber, sorbent injection systems, and associated booster fans for Unit 1 and Unit 2 boilers at the Baldwin Energy Complex, located at 10901 Baldwin Road, in Baldwin, Randolph County. Additionally, Dynegy requests that the Board stay the effectiveness of various contested permit conditions until the Board has rendered a final decision in the matter. For the reasons below, the Board accepts the petition for review, but reserves ruling on the requested stay.

Under the Environmental Protection Act (Act) (415 ILCS 5 (2006)), the Agency is the permitting authority, responsible for administering Illinois' regulatory programs to protect the environment. If the Agency denies a permit or grants one with conditions, the permit applicant may appeal the Agency's decision to the Board. *See* 415 ILCS 5/4, 5, 40(a)(1) (2006); 35 Ill. Adm. Code 105. In this case, the Agency granted Dynegy a construction permit subject to conditions. Dynegy appeals on the grounds that the Agency has inappropriately included multiple permit conditions that exceed the scope of the Agency's authority under the Act and its applicable regulations. Dynegy's petition meets the content requirements of 35 Ill. Adm. Code 105.210. The Board accepts the petition for hearing.

Dynegy has the burden of proof. *See* 415 ILCS 5/40(a)(1) (2006); *see also* 35 Ill. Adm. Code 105.112(a). Hearings "will be based exclusively on the record before the Agency at the time the Agency issued its permit decision." 35 Ill. Adm. Code 105.214(a). 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)(2) (2006)), 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 “may deem the permit issued” absent the contested conditions. *See* 415 ILCS 5/40(a)(2) (2006). Currently, the decision deadline is November 26, 2008, 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 November 20, 2008.

Unless the Board or the hearing officer orders otherwise, the Agency must file the entire record of its determination by August 28, 2008, which is the 30th day after the Board received Dynegy’s 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).

Within the body of its petition, Dynegy has requested that the Board stay the effectiveness of various conditions of the permit until the Board has rendered its final decision in this matter. The Agency has not yet responded to this request. *See* 35 Ill. Adm. Code 101.500(d). The Board reserves ruling on the issues relating to the requested stay pending any response of the Agency.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 7, 2008, by a vote of 4-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board