

ILLINOIS POLLUTION CONTROL BOARD

November 6, 2014

NRG WHOLESALE GENERATION LP,)	
)	
Petitioner,)	
)	
v.)	PCB 15-85
)	(CAAPP Permit Appeal - Air)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by D. Glosser):

On October 29, 2014, NRG Wholesale Generation LP (NRG) timely filed a petition asking the Board to review a September 25, 2014 determination of the Illinois Environmental Protection Agency (Agency). *See* 415 ILCS 5/40.2(a) (2012); 35 Ill. Adm. Code 101.300(b), 105.302(e). The Agency's determination concerns NRG's Aurora Generating Station located at 2909 North Eola Road, Aurora, DuPage County. For reasons below, the Board accepts NRG's petition for hearing.

Section 39.5 of the Environmental Protection Act (Act) (415 ILCS 5/39.5 (2012)) sets forth the Clean Air Act Permit Program (CAAPP), reflecting the requirements of Title V of the federal Clean Air Act Amendments of 1990 (42 U.S.C. §§ 7661-7661f). Generally, a CAAPP permit is designed to be a single, comprehensive document of all air pollution obligations that apply to facility. The Agency decides whether to approve CAAPP permit applications, and Agency decisions may be appealed to the Board by, among others, the permit applicant and persons who participated in the Agency's public comment process. *See* 415 ILCS 5/40.2(a) (2010); 35 Ill. Adm. Code 105.SubpartC. In this case, the Agency granted a CAAPP permit, subject to conditions, for NRG's Aurora facility.

Section 40.2(a) of the Act (415 ILCS 5/40.2(a) (2012)) allows several persons to appeal Agency CAAPP permit determinations: permit applicants; persons who participated in the Agency's public comment process under Section 39.5(8) of the Act (415 ILCS 5/39.5(8) (2012)); and persons who could obtain judicial review under Section 41(a) of the Act (415 ILCS 5/41(a) (2012)). *See* 415 ILCS 5/40.2(a) (2012); 35 Ill. Adm. Code 105.302(c). NRG is the CAAPP permit applicant. *See* 35 Ill. Adm. Code 105.302(d). NRG appeals on the grounds that the Agency's final action with regard to the contested conditions was arbitrary, capricious, and inconsistent with applicable law, including the Act and Board regulations.

The Board accepts the petition for hearing. NRG has the burden of proof. *See* 415 ILCS 5/40.2(a) (2012); 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. Accordingly, though the Board hearing affords petitioner the opportunity to challenge the Agency's reasons for its

decision, 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 5/40.2(c) (2012)), which only NRG may extend by waiver (*see* 35 Ill. Adm. Code 101.308). If the Board fails to take final action by the decision deadline, "the permit shall not be deemed issued; rather, the petitioner shall be entitled to an Appellate Court order pursuant to Section 41(d) of this Act [415 ILCS 5/41(d) (2012)]." 415 ILCS 5/40.2(c) (2012). Currently, the decision deadline is February 28, 2015, 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 19, 2015.

Unless the Board or the hearing officer orders otherwise, the Agency must file an answer, including the entire record of its determination within 30 days after it is served with the petition. *See* 35 Ill. Adm. Code 105.302(f). 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 105.302(f).

The Board notes that NRG requested a stay of the contested conditions. The Board reserves ruling on the stay to allow the Agency an opportunity to respond to the request.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 6, 2014 by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board