

ILLINOIS POLLUTION CONTROL BOARD
February 5, 2015

DYNEGY MIDWEST GENERATION, LLC,)
BALDWIN ENERGY COMPLEX,)
)
Petitioner,)
)
v.) PCB 15-138
) (Permit Appeal - Water, NPDES)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

ORDER OF THE BOARD (by J.D. O’Leary):

On January 22, 2015, the Board accepted for hearing a petition for review (Pet.) filed by Dynegy Midwest Generation, LLC, Baldwin Energy Complex (petitioner). Petitioner requested that the Board review a December 12, 2014 determination of the Illinois Environmental Protection Agency (Agency). *See* 415 ILCS 5/40(a)(1) (2012); 35 Ill. Adm. Code 101.300(b), 105.206. The determination issued a National Pollutant Discharge Elimination System (NPDES) permit with conditions to petitioner’s coal-fired steam electric generating plant located at 10901 Baldwin Road, Baldwin, Randolph County. Petitioner asserted that conditions concerning Outfall B01 are not lawful, not necessary to accomplish the purposes of the Illinois Environmental Protection Act and Board regulations, and are arbitrary and capricious. Pet. at 1, 8. Petitioner also requested that the Board stay the contested conditions until either the Board takes final action in this appeal or the Agency’s reissuance of the permit on specified terms. Pet. at 1, 5, 8.

Although the Illinois Administrative Procedure Act subjects certain permits in their entirety to an automatic stay during appeals (5 ILCS 100/10-65(b) (2012)), a petitioner may choose not to avail itself of this stay and instead request that the Board stay only the contested conditions of the permit. *See Ameren Energy Generating Co. v. IEPA*, PCB 06-67 (Feb. 16, 2006), slip op. at 7, n.1. The Board has consistently held that it “has the authority to grant discretionary stays from permit conditions.” *Community Landfill Co. and City of Morris v. IEPA*, PCB 01-48, PCB 01-49 (consol.) (Oct. 19, 2000); *see also, e.g., Hartford Working Group v. IEPA*, PCB 05-74, slip op. at 1 (Nov. 18, 2004). As the Board has explained, the permit appeal system would be “rendered meaningless in many cases, if the Board did not have the authority to stay permit conditions.” *Community Landfill*, PCB 01-48, PCB 01-49 (consol.), slip op. at 4 (granting stay of challenged permit conditions).

In deciding whether to grant a discretionary stay, the Board may consider various factors, including avoidance of irreparable harm to the petitioner and “the likelihood of environmental harm if a stay is granted.” *Community Landfill*, PCB 01-48, PCB 01-49 (consol.), slip op. at 4, citing *Motor Oils Refining Co. v. IEPA*, PCB 89-116, slip op. at 2 (Aug. 31, 1989).

Petitioner first argues that it will suffer irreparable injury if the contested conditions are not stayed. Pet. at 6. Petitioner claims that compliance with the contested conditions would require as long as four years of implementation and substantial financial and regulatory costs, which would be lost if it prevails in this appeal.

Petitioner also argues that “no harm to human health or the environment will result” from staying the contested conditions. Pet. at 7. Petitioner states that it will continue current operations and that treatment of waste streams will continue to be performed as required by the previous permit. *Id.*

In addition, Petitioner claims that this appeal is its only remedy to contest these conditions and that it “has no other adequate remedy at law. . . .” Pet. at 7. Petitioner also believes that it is likely to succeed on the merits of its appeal, as it is prepared to demonstrate on the basis of various authorities that the Agency incorrectly imposed the contested conditions. *Id.* Finally, petitioner claims that “[t]he Board has granted discretionary stays in a number of cases.” *Id.* (citations omitted).

In its January 22, 2015 order accepting this petition for review, the Board reserved ruling on the requested stay of the contested permit conditions to allow the Agency’s response deadline to run. *See* 35 Ill. Adm. Code 100.500(d). The Board has received no response to that request from the Agency, and the Agency is deemed to have waived any objection to the granting of the motion. *Id.*

The Board has reviewed petitioner’s motion for a stay of the contested permit conditions and also considered the absence of any Agency response to that request. Exercising its discretion, the Board grants a stay of the contested conditions in petitioner’s NPDES permit. In making this determination, the Board “makes no findings on the merits of the permit appeal. . . .” Motor Oils, PCB 89-116, slip op. at 2. The partial stay is to remain in effect until the Board takes final action in this appeal or until the Board orders otherwise.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 5, 2015, by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board