

ILLINOIS POLLUTION CONTROL BOARD
October 15, 2015

MIDWEST GENERATION, L.L.C.,)
POWERTON GENERATING STATION,)
)
Petitioner,)
)
v.) PCB 06-59
) (CAAPP Permit Appeal – Air)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

ORDER OF THE BOARD (by C.K. Zalewski):

On October 1, 2015, Midwest Generation, L.L.C., Powerton Generating Station (Midwest Gen) and the Illinois Environmental Protection Agency (IEPA) filed a joint motion asking the Board to lift the stay of the uncontested conditions and remand the permit to the IEPA. For the reasons discussed below the Board grants the motion.

The Board will first discuss the procedural background of this proceeding and then summarize the motion. The Board will then set forth its decision.

PROCEDURAL BACKGROUND

On November 2, 2005, Midwest Gen timely filed a petition asking the Board to review a September 29, 2005 determination of the IEPA to issue a Clean Air Act Permit Program (CAAPP) permit with conditions. *See* 415 ILCS 5/40.2(a) (2012); 35 Ill. Adm. Code 105.302(e). In the petition, Midwest Gen challenged the issuance and effective dates, as well as numerous conditions of the CAAPP permit. The CAAPP permit subject of this petition is the Powerton Generating Station located at 13082 East Manito Road, Pekin, Tazewell County.

On February 16, 2006, the Board found that the Administrative Procedure Act (APA) automatic stay provision¹ applied to this case, consistent with long-standing case law under the Environmental Protection Act. Borg-Warner Corp. v. Mauzy, 100 Ill. App. 3d 862, 426 N.E.2d 415 (3rd Dist. 1981). The Board found that Section 10-65(b) of the APA (5 ILCS 100/10-65 (2004)) in effect issues a stay by operation of law. Midwest Generation, LLC, Powerton Generating Station v. IEPA, PCB 06-59, slip op. at 2, 6, 10 (Feb. 16, 2006).

On October 1, 2015, the parties filed a joint motion (Mot.) asking the Board to lift the stay of uncontested permit conditions and remand the permit to the IEPA.

¹ *See generally* 5 ILCS 100/1-5, 1-35, 1-40, 10-65 (2012).

MOTION

The parties indicate that an agreement concerning petitioner's contested permit conditions has been reached. Mot. at 3. Further, the agreement has been noticed and undergone United States Environmental Protection Agency review. *Id.* at 3-4. In order to incorporate the negotiated changes, the parties ask the Board to lift the stay as to conditions not contested by the petitioner and remand the permit back to the IEPA. *Id.* at 4. The IEPA will establish a new effective date and expiration date and issue a modified permit on the same day the Board remands the permit. *Id.* Petitioner will file a motion to dismiss this permit appeal when the new permit, with the negotiated changes is issued. *Id.*

DISCUSSION

The parties ask the Board to lift the stay on the uncontested provisions of the permit and ask the Board to remand the permit, while retaining jurisdiction over the contested conditions. The parties make this request without citation to authority. The Board will discuss each request below.

Lifting the Stay

As noted before, the Board had previously found on February 16, 2006 that the automatic stay provisions of Section 10-65(b) of the APA (5 ILCS 100/10-65 (2012)) applied to this appeal. *See supra* at 1. On June 21, 2010, Section 40.2(f) of the Act was added by P.A. 96-934 to provide that "subsection (b) of Section 10-65 of the Illinois Administrative Procedure Act shall not apply to actions" taken under the CAAPP provisions at Section 39.5 of the Act. 415 ILCS 5/40.2(f) (2012); *see* 415 ILCS 5/39.5 (2012). Section 40.2(f) of the Act requires the Board to stay the contested conditions upon the request of the applicant, and gives the Board discretion to stay the effectiveness of "any or all uncontested conditions." *Id.* The Board grants the joint motion and lifts the stay of the uncontested conditions, while continuing to stay the contested conditions.

Remand of Permit

As indicated above, the parties ask that the permit be remanded to the IEPA while the Board retains jurisdiction. In Ameren Energy Generating Company, Coffeen Power Station v. IEPA, PCB 06-64 (Sept. 20, 2012), the parties asked the Board to lift the stay of contested CAAPP permit conditions, remand the permit, and retain jurisdiction. The Board reviewed relevant portions of the Act and determined that remanding a CAAPP permit was appropriate. *See Ameren Energy Generating Company, Coffeen Power Station v. IEPA*, PCB 06-64, slip op. at 3 (Sept. 20, 2012). The Board further found that the Board could retain jurisdiction. *Id.* The requests made in this case are similar to those in the Ameren case. *See also Kincaid Generation, L.L.C. v. IEPA, PCB 06-62 (Feb. 5, 2015). Therefore, the Board will grant the parties' request to remand the permit and retain jurisdiction.*

The Board lifts the stay of the uncontested CAAPP permit conditions and remands the permit to the IEPA as requested by the joint motion. The Board reminds that when the IEPA

issues the permit with modifications, Section 40.2 of the Act provides for appeals by persons who have standing other than the applicant. 415 ILCS 5/40.2 (2014). Thus, even though the Board retains jurisdiction of this matter, if other persons have standing and wish to appeal, those appeals, if appropriate, will be accepted and docketed under a different case number.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 15, 2015, by a vote of 5-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John T. Therriault, Clerk
Illinois Pollution Control Board