

ILLINOIS POLLUTION CONTROL BOARD
June 22, 2017

MIDWEST GENERATION, LLC,)
)
 Petitioner,)
)
 v.) PCB 16-19
) (Time-Limited Water Quality Standard)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

INTERIM ORDER OF THE BOARD (by K. Papadimitriu):

On February 24, 2017, Midwest Generation, LLC.'s (Midwest Generation) petition for a variance under Section 35(a) of the Environmental Protection Act (Act) (415 ILCS 5/35(a) (2016)) from temperature water quality standards became a petition for a time-limited water quality standard (TLWQS) under Section 38.5 of the Act (415 ILCS 5/38.5(a), (c)). On April 12, 2017, the Board established the class of dischargers potentially covered by such a temperature TLWQS. The Board also established a deadline for petitioners to file any amended or initial petitions—90 days after the Board adopts rules under Section 38.5(k) of the Act. 415 ILCS 5/38.5(f), (k); Midwest Generation, LLC v. IEPA, PCB 16-19 (Apr. 12, 2017).

Section 38.5(g) of the Act requires the Board, as soon as practicable after the April 12, 2017 order, to evaluate Midwest Generation's petition to determine whether it is in substantial compliance with Section 131.14 of the Code of Federal Regulations (Federal Code) (40 C.F.R. § 131.14), Section 38.5 of the Act, and rules adopted under Section 38.5 (not yet in place). If the Board finds that the petition does not substantially comply, it must enter an interim order identifying the petition's deficiencies. 415 ILCS 5/38.5(h)(3). In this order, the Board finds that the previously-filed petition for variance generally does not comply with the elements of 40 C.F.R. § 131.14.

The deadline for amended or initial petitions proposed by the Illinois Environmental Protection Agency (Illinois EPA) and established by the Board, in its April 12, 2017 order, is designed to allow for the petitions to comply with the rules to be adopted by the Board under new Section 38.5(k). Section 38.5(k) requires that the Agency, by August 24, 2017, propose rules prescribing specific procedures and standards to be used by the Board when adopting TLWQS. The Board will not know the final standards to be used until it adopts the rules, which it must do within nine months after receiving Illinois EPA's proposal. However, in compliance with Section 38.5(g), the Board evaluates Midwest Generation's petition today under Section 131.14 of the Federal Code and Section 38.5 of the Act. 415 ILCS 5/38.5(g); 40 C.F.R. § 131.14.

Section 131.14 of the Federal Code allows States to adopt WQS “variances.” 40 C.F.R. § 131.14. The adoption of a WQS variance is subject to approval by the United States Environmental Protection Agency (USEPA). *Id.* at § 131.14(a)(2), (3). Many requirements under Section 131.14 speak to what a *State* must demonstrate to USEPA for approval of a WQS variance. *Id.* at § 131.14(b). Therefore, the Board evaluates Midwest Generation’s petition based, in part, on whether it contains sufficient information to make the necessary demonstration to USEPA under 40 C.F.R. § 131.14.

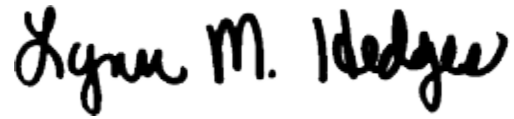
Midwest Generation filed its petition on July 21, 2015, well before new Section 38.5 of the Act became effective. The petition, therefore, was submitted as a variance request under Section 38 of the Act, rather than a TLWQS request under Section 38.5 and 40 C.F.R. § 131.14. Some information submitted in the petition is responsive to 40 C.F.R. § 131.14 and Section 38.5 of the Act. The petition, however, generally lacks information required by Section 131.14. 40 C.F.R. § 131.14. Among many deficiencies, the petition does not specify the “highest attainable condition of the water body or waterbody segment;” it also does not address how the requested TLWQS will represent that condition and “not result in any lowering of the currently attained ambient water quality.” 40 C.F.R. § 131.14(b)(1)(ii), (iii). The petition does not specify the “highest attainable interim use,” or the “highest attainable interim criterion,” or the interim criterion or interim effluent condition “that reflects the greatest pollutant reduction achievable.” 40 C.F.R. § 131.14(b)(1)(ii)(A), (b)(1)(ii)(B), (b)(1)(iii). The petition does not specify whether the requested term of the TLWQS is only as long as “necessary to achieve the highest attainable condition.” 40 C.F.R. § 131.14(b)(1)(iv). The petition lacks information to be included in the TLWQS’s supporting documents under Section 131.14(b)(2). 40 C.F.R. § 131.14(b)(2). The petition also does not reflect limitations and requirements necessary to implement the TLWQS. 40 C.F.R. § 131.14(c).

After evaluating the petition, the Board finds that it is not in substantial compliance with 40 C.F.R. § 131.14. Midwest Generation must file its amended petition by the deadline established in the Board’s April 12, 2017 order, discussed above. The amended petition must comply with Section 38.5 of the Act and 40 C.F.R. § 131.14 as well as the Board rules to be adopted under Section 38.5(k) of the Act. The amended petition must identify the appropriate type of the TLWQS sought by Midwest Generation, to address requirements of Section 38.5 and 40 C.F.R. § 131.14(a) and (b). 415 ILCS 5/38.5(a); 40 C.F.R. § 131.14(a)(1). The Board also requires that the amended petition include an annotated map that identifies outfalls and impacted segments to which the TLWQS would apply, as suggested in the Illinois EPA’s March 16, 2017 response. Illinois EPA Res. at 3.

Any member of the class established by the April 12, 2017 order who is seeking a stay of the temperature water quality standards and who does not have a petition pending with the Board must file an initial petition by the same deadline. 415 ILCS 5/38.5(h)(1)(C).

IT IS SO ORDERED.

I, Lynn Hedges, Acting Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 22, 2017, by a vote of 5-0.

A handwritten signature in black ink that reads "Lynn M. Hedges". The signature is written in a cursive style with a large, prominent initial "L".

Lynn Hedges, Acting Clerk
Illinois Pollution Control Board