

ILLINOIS POLLUTION CONTROL BOARD
December 19, 2024

DYNEGY MIDWEST GENERATION, LLC,)	
)	
Petitioner,)	
)	
v.)	PCB 25-28
)	(Permit Appeal – Alternative Source
ILLINOIS ENVIRONMENTAL)	Demonstration)
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by B.F. Currie):

On December 2, 2024, Dynegy Midwest Generation, LLC (Dynegy) timely filed a petition (Pet.) asking the Board to review an alternative source demonstration (ASD) determination of the Illinois Environmental Protection Agency (Agency) under the coal combustion residual (CCR) surface impoundment rules in 35 Ill. Adm. Code 845. *See* 415 ILCS 5/40(a)(1) (2022); 35 Ill. Adm. Code 101.300(b), 105.206, 845.650(e). The determination concerns Dynegy’s Bottom Ash Pond (BAP) at its Baldwin Power Plant near Baldwin, Randolph County. Dynegy’s petition includes a request that the Board stay contested requirements. Pet. at 17-21. For the reasons below, the Board accepts the petition for review and reserves ruling on the request for a stay.

The Board’s CCR rules on ASD specify that an owner or operator of a CCR surface impoundment may, within 60 days after the detected exceedance of a groundwater protection standard, submit to the Agency a demonstration that a source other than the CCR surface impoundment caused the contamination. *See* 35 Ill. Adm. Code 845.650(e). In this case, the Agency issued a non-concurrence with Dynegy’s BAP ASD on October 3, 2024. Dynegy reports that the Agency served the determination on it on October 28, 2024. Pet. at 1. Under the Board’s rules, persons may petition the Board to review agencies’ final decisions by filing a petition within 35 days after the date of service of the final agency decision. *See* 35 Ill. Adm. Code 105.206(a).

Dynegy appeals on the grounds that the Agency’s non-concurrence is “legally and factually insufficient” to form the basis of the Agency’s decision. Pet. at 10; *see id.* at 17. Dynegy asserts that the Agency’s nonconcurrence relies on data gaps that vague and ambiguous, not consistent with previous ASD determinations, and not supported by the Agency’s regulatory authority and the requirements of 35 Ill. Adm. Code 845. *Id.* at 10. 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. 415 ILCS 5/40(a)(1) (2022); *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. *See* 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 its determination, 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).

Upon its own motion or the motion of any party, the Board or the hearing officer may order that the hearing be held by videoconference. In deciding whether to hold the hearing by videoconference, factors that the Board or the hearing officer will consider include cost-effectiveness, efficiency, facility accommodations, witness availability, public interest, the parties' preferences, and the proceeding's complexity and contentiousness. *See* 35 Ill. Adm. Code 101.600(b), 105.110.

Unless the Board or the hearing officer orders otherwise, the Agency must file the entire record of its determination by Thursday, January 2, 2025, the first business day following the 30th day after the Board received Dynegy's petition. *See* 35 Ill. Adm. Code 105.116(a), 105.212(a). If the Agency seeks 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(a). The record must comply with the Board's requirements for content, organization, and certification. *See* 35 Ill. Adm. Code 101.1030(g), 105.116(b), 105.212(b). In addition, the Agency must file the record electronically instead of in paper. Specifically, the record must be filed through the Clerk's Office On-Line (COOL) or on compact disk or other portable electronic data storage device and, to the extent technically feasible, in text-searchable Adobe PDF. *See* 35 Ill. Adm. Code 101.302(h)(2)(A), 105.116(a).

The Board's CCR rules provide that "[t]he filing of a petition for review under subsection (e)(7) does not automatically stay any requirements of this Part as to the owner or operator, including the 90-day deadline to initiate an assessment of corrective measures." 35 Ill. Adm. Code 845(e)(7). As noted above, Dynegy's petition for review includes a motion to stay the requirements of 35 Ill. Adm. Code 845.650(d) [characterization], 845.660 [Assessment of Corrective Measures], 845.670 [Corrective Action Plan], and 845.680 [Implementation of Corrective Action Plan] relating to the exceedance of the fluoride standard at issue until the later of the Board's final decision on the petition or, if the petition is granted, until the Agency issues a concurrence. Pet. at 17, 21. The Board reserves ruling on the motion for a partial stay.

IT IS SO ORDERED.

Member Tin Abstained.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on December 19, 2024, by a vote of 4-0.

Don A. Brown

Don A. Brown, Clerk
Illinois Pollution Control Board