

ILLINOIS POLLUTION CONTROL BOARD

August 6, 2009

WISCONSIN ELECTRIC POWER	)	
COMPANY d/b/a WE ENERGIES,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 10-11
	)	(Permit Appeal - Land)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by S.D. Lin):

On July 30, 2009, Wisconsin Electric Power Company d/b/a We Energies (We Energies) timely filed a petition asking the Board to review a June 30, 2009 determination of the Illinois Environmental Protection Agency (Agency). See 415 ILCS 5/40(a)(1) (2008); 35 Ill. Adm. Code 101.300(b), 105.402, 105.404. The Agency’s determination concerns We Energies’ request for a beneficial use determination concerning a coal combustion by-product (CCB) pursuant to Section 3.135(b) of the Environmental Protection Act (Act) (415 ILCS 5/3.135(b) (2008)). For reasons below, the Board accepts We Energies’ petition for hearing.

Section 5(d) of the Act authorizes the Board to conduct proceedings on several specified types of actions, including Agency permit decisions, and on:

other petitions for review of final determinations which are made pursuant to this Act or Board rule and which involve a subject which the Board is authorized to regulate. The Board may also conduct other proceedings as may be provided by this Act or any other statute or rule. Section 5(d) of the Act (415 ILCS 5/5(d) (2008)).

Section 3.135(b) of the Act provides that the Board shall “adopt regulations establishing standards and procedures for the Agency’s issuance of beneficial use determinations.” 415 ILCS 5/3.135(b) (2008). The Agency has not proposed, and the Board has not itself proposed or adopted, any rules implementing Section 3.135(b). But, Section 3.135(b) specifically provides that the Agency may make written beneficial use determinations concerning CCB under the Section prior to the effective date of any Board regulations. Id. Section 3.135(b) of the Act specifically provides that all Agency beneficial use determinations are “subject to review under Section 40” of the Act, which governs appeals of Agency permit decisions. Id, and 415 ILCS 5/ 40 (2008). The Board’s rules at 35 Ill. Adm. Code 105 establish the procedures for appeals under Section 40. See 35 Ill. Adm. Code.Subparts A and B.

The Board accepts the petition for hearing. We Energies has the burden of proof. *See* 415 ILCS 5/40.2(a) (2008); 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 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(a)(2) (2008)), which only We Energies may extend by waiver (*see* 35 Ill. Adm. Code 101.308). If the Board fails to take final action by the decision deadline, We Energies may deem its request granted. *See* 415 ILCS 5/40(a)(2) (2008). Currently, the decision deadline is November 30, 2009, which is the first business date after the 120th day after the date on which the Board received the petition, July 30, 2009. *See* 35 Ill. Adm. Code 105.114. The Board meeting immediately before the decision deadline is scheduled for November 19, 2009.

Unless the Board or the hearing officer orders otherwise, the Agency must file the entire record of its determination by August 31, 2009, which is the first business date after the 30th day after that the Board received We Energies' petition. *See* 35 Ill. Adm. Code 105.116 and 105.212 (a). 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 105.212 (b).

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 6, 2009, by a vote of 5-0.



---

John Therriault, Assistant Clerk  
Illinois Pollution Control Board