

ILLINOIS POLLUTION CONTROL BOARD
June 3, 2010

MIDWEST GENERATION, LLC,)
WILL COUNTY GENERATING STATION)
)
Petitioner,)
)
v.) PCB 10-98
) (Permit Appeal - Air)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

ORDER OF THE BOARD (by A. S. Moore):

On May 19, 2010, Midwest Generation, LLC - Will County Generating Station (Midwest Generation) timely filed a petition (Pet.) asking the Board to review an April 14, 2010 determination of the Illinois Environmental Protection Agency (Agency). *See* 415 ILCS 5/40.2(a) (2008); 35 Ill. Adm. Code 101.300(b), 105.302(e). The Agency's determination concerns a construction permit for Midwest Generation's electric generating station located at 529 East 135th Road, Romeoville, Will County. Midwest Generation received the construction permit on April 16, 2010. For the reasons below, the Board accepts Midwest Generation's petition for hearing.

Under the Environmental Protection Act (415 ILCS 5/1 *et seq.* (2008)), the Agency is the permitting authority, responsible for administering Illinois' regulatory programs to protect the environment. If the Agency denies a permit or grants one with conditions, the permit applicant may appeal the Agency's decision to the Board. *See* 415 ILCS 5/4, 5, 40(a)(1) (2008); 35 Ill. Adm. Code 105.Subpart D. In this case, the Agency issued a construction permit, subject to conditions, for installation and operation of a new 2,000-gallon above-ground gasoline storage tank for Midwest Generation's facility.

Midwest Generation has previously appealed various conditions in its Clean Air Act Permit Program (CAAPP) permit, issued September 29, 2005, including actual language or concepts that are incorporated into this construction permit. Pet. at 5. Midwest Generation claims that in issuing the construction permit, the Agency is attempting to impose conditions through the construction permit which "have been appealed in the context of the CAAPP permit prior to the Board's decision on these points, or to impose CAAPP concepts prior to the effectiveness of the CAAPP permit." Pet. at 5-6. Midwest Generation further claims that the Agency is "inappropriately requiring deviation reporting, which is a function of CAAPP permitting and is not appropriate for construction permits." Pet. at 6. Midwest Generation asks the Board to stay the effect of permit conditions 1.4(3)(ii), 1.7, 1.8, and 1.10(a). *See* Pet., Exhibit 2. To date, the Board has not received a response from the Agency regarding Midwest's request

for a stay. The Board today reserves ruling on stay issues until the Agency has filed a response or the response time has elapsed. 35 Ill. Adm. Code 101.500(d).

The Board accepts the petition for hearing. Petitioner 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 permit decision. Accordingly, though the Board hearing affords Midwest Generation 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. 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 5/40.2(c) (2008)), which only Midwest Generation may extend by waiver (*see* 35 Ill. Adm. Code 101.308). If the Board fails to take final action by the decision deadline, "the permit shall not be deemed issued; rather, the petitioner shall be entitled to an Appellate Court order pursuant to Section 41(d) of this Act [415 ILCS 5/41(d) (2008)]." 415 ILCS 5/40.2(c) (2008). Currently, the decision deadline is September 16, 2010, which is the 120th day after the Board received the petition. *See* 35 Ill. Adm. Code 105.114.

Unless the Board or the hearing officer orders otherwise, the Agency must file an answer, including the entire record of its determination within 30 days after it is served with the petition. *See* 35 Ill. Adm. Code 105.116. The record must comply with the content requirements of 35 Ill. Adm. Code 105.302(f).

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 3, 2010 by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board