BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
REGULATORY RELIEF MECHANISMS:	)	PCB R18-018
PROPOSED NEW 35 ILL. ADM. CODE	)	(Rulemaking – Procedural)
PART 104, SUBPART E	)	

NOTICE OF FILING

To:

Don Brown, Clerk of the Board Illinois Pollution Control Board James R. Thompson Center, Suite 11-500 100 W. Randolph Street Chicago, IL 60601 don.brown@illinois.gov (via electronic mail)	Attached Service List

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board Midwest Generation, LLC's Post-Hearing Comments, a copy of which is herewith served upon you.

Dated: December 5, 2017

MIDWEST GENERATION, LLC

By: /s/ Susan M. Franzetti

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing and Midwest Generation, LLC's Post-Hearing Comments was electronically filed on December 5, 2017 with the following:

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	**)**	
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REGULATORY RELIEF MECHANISMS:	**)**	**R18-18**
PROPOSED NEW 35 ILL. ADM. CODE	**)**	**(Rulemaking – Procedural)**
PART 104, SUBPART E	**)**	

MIDWEST GENERATION, LLC'S POST-HEARING COMMENTS

I. INTRODUCTION

Midwest Generation, LLC ("MWGen")[1] has been an active participant in this rulemaking proceeding because its interests will be directly and significantly affected by the proposed 35 Illinois Administrative Code Subpart E, Part 104, Time-Limited Water Quality Standard rules (the "Proposed TLWQS Rules").[2] Midwest Generation commends the Illinois Environmental Protection Agency ("the Agency"), for the effort it has put into the Proposed TLWQS Rules under a tight, statutorily directed time frame, including the stakeholder process it initiated prior to commencing this rulemaking and which it has continued during this proceeding. Through the stakeholder outreach process and the Agency's post-hearing comments, including its revisions to the Proposed TLWQS Rules, most of the issues and questions raised by MWGen have been satisfactorily addressed.

MWGen's remaining concerns relate to:

(1) the Agency's proposed definition of "substantial compliance" and the lack of clarity regarding the standard of review and scope of the Board's "substantial compliance" evaluation;

(2) the need to clarify that a Section 104.565 order granting a TLWQS is an "interim order" and not a "final order" until after the U.S. EPA reviews it;

(3) strengthening the Board's ability to control the progress of TLWQS proceedings to avoid unnecessary delays;

(4) allowing the Board discretion to determine the appropriate length of the comment period on petitions to modify a TLWQS disapproved by the U.S. EPA;

[1] On April 1, 2014, NRG Energy, Inc. ("NRG") acquired certain of the subsidiaries of Edison Mission Energy, including Midwest Generation, LLC.

[2] Unless otherwise stated, "Proposed TLWQS Rules" refers to the version submitted by the Agency on November 14, 2017.

(5) revising the proposed Board Note to Section 104.540 to directly address the role that extensions of Section 105.540 deadlines play in ensuring that TLWQS petitions are treated fairly during the "substantial compliance" phase;

(6) allowing a stay to continue while a U.S. EPA TLWQS disapproval decision is being appealed or if petitioners file a good faith petition to modify under Section 104.570(c); and

(7) including additional safeguards to secure timely U.S. EPA participation in TLWQS proceedings.

Each of the above concerns is addressed in the comments below.

II. ARGUMENT

A. The Board's "Substantial Compliance" Review Determines the Adequacy of the TLWQS Petition's Contents – Not the Merits of the Requested TLWQS Relief.

Section 38.5 of the Act does not define "substantial compliance," but it is clear that an "evaluation of the petition to assess its substantial compliance" with the relevant legal authorities is not the same as evaluating the petition's merits. This is evident from the structure of Section 38.5: The Board evaluates substantial compliance *before* the Agency offers a recommendation on whether the TLWQS petition should be granted on its merits:

> As soon as practicable after entering an order under subsection (f), the Board shall conduct an evaluation of the petition to assess its substantial compliance with 40 C.F.R §131.14, this Section, and rules adopted pursuant to this Section. After the Board determines that a petition is in substantial compliance with those requirements, the Agency shall file a recommendation concerning the petition.

415 ILCS 5/38.5(g).

During the October hearing, the Hearing Officer asked the Agency to provide a definition of "substantial compliance" to establish what this evaluation entails. (Hearing Tr., at 129.) The Agency's Proposed Regulation adds a definition, but not a very clear one:

> Section 104.515(b): "Substantial Compliance" means compliance with substantial or essential requirements of 40 CFR §131.14, Section 38.5 of the Act, and §104.530.

This definition fails to distinguish the substantial compliance review from the Board's post-hearing review of the merits of the petition. The "substantial compliance" evaluation was intended to play a screening role: It confirms that the TLWQS petition contains information responsive to each element of Section 104.530, so that the Agency and Board do not have to waste resources on incomplete petitions.

The Board's variance rules have a similar screening process. Sections 104.204, 104.206 and 104.208 of the Board's variance rules identify the requirements for the contents of a variance petition. 35 Ill. Adm. Code §104.204. Section 104.228 authorizes the Board to conduct a review of the variance petition to determine whether or not it contains the required information specified in the rules:

> Section 104.228 Insufficient Petition
>
> If the Board finds the petition fails to contain information as required by Sections 104.204, 104.206, and 104.208, the Board may order the petitioner to supplement the information contained in the petition. Filings made in response to the order constitute an amended petition for the purposes of calculating the decision deadline under Section 104.232. Alternatively, under Section 104.230, the Board may dismiss the petition for lack of sufficient information. Failure of the Board to require supplemental information does not preclude a later finding that the information provided is insufficient to support grant of variance, or constitute a Board decision on the merits of the petition. (emphasis added)

35 Ill. Adm. Code §104.228.

As Section 104.228 makes clear, the Board's review of a variance petition, prior to receipt of the Agency's recommendation regarding that petition, is for the purpose of determining whether the petition does or does not lack information required under the Rules. It is not a finding on the merits of the petition.

Similarly, in the case of site-specific rulemaking petitions, which also bear some similarity to a TLWQS petition, the Board also is authorized to review the petition's adequacy in satisfying the requirements under the Board's Rules in Subpart B of Part 102 for site-specific rulemaking petitions. Section 102.212(a) of the Board's Rules provides as follows:

> Section 102.212 Dismissal
>
> a) Failure of the proponent to satisfy the content requirements for proposals under this Subpart or failure to respond to Board requests for additional information will render a proposal subject to dismissal for inadequacy.

35 Ill. Adm. Code §102.212(a). [3]

MWGen submits that the legislative intent behind the requirement that the Board evaluate a TLWQS petition for "substantial compliance" with the federal TLWQS requirements, Section 38.5 of the Act and the Board's TLWQS Rules should be interpreted consistently with

[3] As drafted, Section 104.525(b)(2) indicates that if a petitioner is unable to file a substantially compliant petition before the applicable deadline the Board will "deny" the petition. Traditionally, a disposition that is not based on the merits of the petition is termed a "dismissal."

the Board's authority to assess the adequacy of variance, site-specific rulemaking and other petitions allowed under the Act and the Board's Rules. The evaluation should be for the purpose of determining the substantial completeness and adequacy of the petition's contents in addressing the TLWQS petition requirements set forth in the Board's Rules. In other words, the Board reviews the TLWQS petition to evaluate whether each of the TLWQS petition requirements is addressed and whether facially adequate information is presented on each of those requirements. The Board's "substantial compliance" evaluation should not be a review of the merits of the TLWQS petition, particularly given that no Agency recommendation will yet have been filed and no hearing on the petition held.

The Board's "substantial compliance" evaluation must focus on the adequacy of the information in the petition in the same way a civil court would assess a motion to dismiss: Reviewing the allegations to confirm that the essential elements of each count are present. This review is conducted under the presumption that the facts plausibly alleged by the party bringing the suit are true. Thus, the Board should look to the facial adequacy of the information contained in the petition. It should not rule that a petition failed to "substantially comply" with Section 104.530 because, for instance, the Board believes that the proposed term of the TLWQS should be shorter. The Board should defer such decisions on the merits of the petition to the post-hearing phase.

For these reasons, MWGen submits that if the Board decides to include a definition of "substantial compliance" in the TLWQS Rules, the definition should reflect the following:

> Section 104.515(b): "Substantial Compliance" means that the TLWQS petition substantially satisfies the content requirements for a petition under Section 104.530 of this Subpart.

The above-proposed definition of "substantial compliance" more accurately and clearly reflects the Illinois General Assembly's intent in requiring the "substantial compliance" review. The Agency's proposed definition is unworkably vague and will cause significant confusion if adopted. The Board should not depart from the screening practices it uses under Sections 104.204, 104.206 and 104.208 of the Board's variance rules.

B. The Board Should Clarify That a Section 104.545 Board Order Granting a TLWQS is not Final Until the U.S. EPA Issues its Decision on the TLWQS.

The Illinois General Assembly's TLWQS legislation addresses the need to limit premature appeals of a Board decision in TLWQS proceedings. The legislation amends

Section 29 of the Act to include a new subsection illustrating the distinction between "interim orders" and "final orders":

> This Section does not apply to orders entered by the Board pursuant to Section 38.5 of this Act. Final orders entered by the Board pursuant to Section 38.5 of this Act are subject to judicial review under subsection (j) of that Section. Interim orders entered by the Board pursuant to Section 38.5 are not subject to judicial review under this Section or Section 38.5.

415 ILCS 5/29(c).

The Board should adopt rules that use the terms "interim orders" and "final orders" consistently, so that TLWQS proceedings are not unnecessarily delayed by premature appeals to the circuit court. For instance, the Proposed TLWQS Rules deem the Board's Section 104.545 order finding a petition or amended petition to be substantially compliant a "final order." But the decision to establish classes and deadlines is clearly interlocutory in nature; as noted above, the "substantial compliance" review is a decision by the Board on the adequacy of a petition to cover the required contents under the rules.[4] If a non-petitioner believes that the Board overlooked a required element under Section 104.530, 40 C.F.R §131.14 or Section 38.5 of the Act, the issue can be raised during the post-substantial compliance decision phase of the TLWQS proceeding. Allowing immediate appeals to state court is unnecessary and inefficient. Nothing in Section 38.5 requires the Board to designate a Section 104.545 order as a "final order"; the Board's regulations should designate this as an "interim order."

The distinction between "interim orders" and "final orders" is even more critical to the orders described in Section 104.565, which are simply called "order[s]" under the Proposed TLWQS Rules. The Board's order and opinion adopting the TLWQS is interim in nature—the finality of that order depends on a subsequent decision by the U.S. EPA. Yet the Agency insists that the order is immediately appealable, and participants' appeal deadlines fall 35 days after the Board's order *even if the U.S. EPA is still reviewing the TLWQS.* Thus, participants wishing to preserve their appeal rights will routinely file unripe suits in Illinois appellate courts in order to preserve an appeal that may not be necessary depending upon the outcome of the U.S. EPA's review.

This cannot be what the General Assembly intended, and Section 38.5 does not require the Board to enter a final order before waiting for U.S. EPA's decision under 40 C.F.R §131.14.

[4] Returning to the civil-complaint comparison: Under Illinois law, a party cannot typically appeal an order denying a motion to dismiss a complaint for failing to state a claim. *See* Ill. Ct. Rule 306(a).

The Board should specify that the Section 104.565 order is an "interim order." The Board should also add a provision to Section 104.570 that automatically reissues the interim order as a "final order" once the U.S. EPA issues an approval or disapproval of the TLWQS.

Alternatively, if the Board makes no changes and shares the Agency's position that the deadline to appeal falls 35 days after the Board's Section 104.565 order, regardless of the status of the U.S. EPA's deliberations, this should be explicitly stated in the regulations. At a minimum, the regulations should say that orders under Section 104.565 are final orders, if that is the Board's intention.

C. The Proposed TLWQS Rules Require Further Revision to Avoid Unnecessary Delays.

Section 38.5 of the Act endorses having TLWQS proceedings move forward in an efficient manner. *See, e.g.*, 415 ILCS 5/38.5(f) (directing the Board to establish "prompt" deadlines). As such, the Board should minimize the ability of participants to unnecessarily delay TLWQS proceedings.

The Proposed TLWQS Rules empower any "participant" to ask the Board to reconsider its Section 104.565 order on the merits of the TLWQS petition. When asked at the October hearing whether this would delay submission of the adopted order to the U.S. EPA, the Agency responded that if the petitioner files a motion to reconsider, the Agency will delay forwarding the order until the Board rules on the motion. If, however, a non-petitioner files the motion, the Agency will not delay submission, and will instead forward a copy of the non-petitioner's motion to the U.S. EPA. (Hearing Tr., at 232-33.)

The Agency's distinction between petitioners and non-petitioners is consistent with the legislative intent expressed in Section 38.5 of the Act as well as being practical and reasonable. However, the Agency did not incorporate this distinction into the Proposed TLWQS Rules. It does not materially prejudice non-petitioners to wait until after the U.S. EPA approves the Board's TLWQS to file motions to reconsider; indeed, the Agency correctly anticipates that the objections they would raise in a motion to reconsider would be functionally identical to the comments that the non-petitioners would have the opportunity to transmit to the U.S. EPA.

On the other hand, there is a real need to empower petitioners to file motions to reconsider the Board's Section 104.565 order. First, the Board order may be a final order denying the TLWQS petition, and the petitioner's motion to reconsider would serve the useful purpose of identifying unintended Board errors or prompting the reassessment of key issues that

might result in amended Board findings without the involvement of Illinois appellate courts. Second, even if the Board approves the TLWQS petition, it is possible that it will modify the TLWQS relief the petitioners asked for, or add terms and conditions. If the Board's modified TLWQS language carries unintended consequences or is more strict than the Board intended, allowing petitioners to raise those issues in a motion to reconsider would help avoid unnecessary appeals[5] and, in some circumstances, might avoid having the U.S. EPA evaluate a TLWQS petition that the petitioner no longer finds acceptable and does not wish to pursue.

Non-petitioners should have the opportunity to file a motion to reconsider if the U.S. EPA approves a Board-adopted TLWQS variance. But there is no corresponding need for them to be allowed to move to reconsider a Section 104.545 order finding that a petition or amended petition is substantially compliant. If a non-petitioner believes that the Board overlooked a required element under Section 104.530, 40 C.F.R §131.14 or Section 38.5 of the Act, that issue can be raised during subsequent proceedings before the Board on the merits of the TLWQS petition. Allowing non-petitioners to file motions to reconsider early orders like "substantial compliance" decisions by the Board will cause unnecessary delay and redundancy to the TLWQS proceeding. This is not required by the public participation requirements of the federal TLWQS requirements and threatens to tax the resources of the Board and of the petitioners for no justifiable purpose.

The Board should still allow petitioners to file motions to reconsider under Section 104.545(e). This is not favoritism: It's for the basic reason that petitioners will typically only file motions to reconsider Section 104.545 orders when the Board enters a final order dismissing the amended petition for failure to substantially comply with the submission criteria. Final orders in a case are precisely when the Board has traditionally allowed motions to reconsider. It should take the same approach to the TLWQS Rules.

D. The Board Should Include an Example of When an Extension of a Section 104.540 Deadline Should be Granted.

During the October Board hearing, there was extensive discussion of the possibility that converted petitions would not receive the same opportunities to obtain a substantial compliance finding that newly filed petitions would. (Hearing Tr., at 213-31.) The Agency's Proposed

[5] Under the Proposed TLWQS Rules, Section 104.565 orders can be immediately appealed. As MWGen mentioned earlier, the Board should adopt regulations that allow appeals of Section 104.565 orders only when the order denies the TLWQS petition or when the U.S. EPA has approved a Section 104.565 order granting the petition.

TLWQS Rules include a new Board Note to Section 104.540 stating that the Board retains discretion to extend Section 104.540 deadlines for cause.

The Agency's proposed Board Note to Section 104.540 is helpful, but it requires expansion to fully address this significant issue. This provision was driven by the need to treat converted petitions fairly. It is substituting for more complicated changes to the regulations that would specifically address this problem. MWGen asks that the Section 104.540 Board Note be expanded to read as follows:

> The Board may, in its discretion, extend the deadlines established under Section 104.540 for good cause shown, including allowing a Petitioner whose petition was converted by Section 104.520(a)(2) additional time to file a second amended petition after the Board has found its amended petition substantially noncompliant. The Board will take into account that such converted petitions should be afforded the same procedural opportunities to obtain a substantial compliance ruling from the Board prior to the expiration of an automatic stay as received by petitions filed subsequent to the adoption of Section 38.5 of the Act and these rules.

This proposed language clarifies that the Board has the authority to extend the time within which a converted petition may be amended to address any deficiencies the Board identifies under the TLWQS Rules for good cause shown. The language clearly expresses the equitable principle that petitioners pursuing converted petitions will receive the same opportunities during the substantial compliance phase that a petitioner who initially files its TLWQS petition after these proposed TLWQS Rules are adopted by the Board would. The above-proposed Board note also assists the Board in providing reasonably predictable rulings when extensions are requested for other reasons.

E. The Board Should Allow Stays to Continue while a U.S. EPA TLWQS Disapproval Decision is Being Appealed or if Petitioners File a Good Faith Petition to Modify under Section 104.570(c).

As discussed at the hearing, the Agency's initial TLWQS rules proposal called for Section 104.525 stays to be terminated immediately upon U.S. EPA "disapproval." The Agency noted that it interpreted Section 38.5 as requiring this even if the U.S. EPA's disapproval is appealed and even if the disapproval was accompanied by instructions from U.S. EPA on how to modify the TLWQS variance such that it could be approved. (Hearing Tr., at 234-45.)

The Board should regard the language in 415 ILCS 5/38.5(h)(4)(B)(II) as ambiguous, at least as applied to U.S. EPA disapprovals that could still be modified by a successful appeal

under the federal Administrative Procedures Act or through a petition to modify under Section 104.570(c). In resolving this ambiguity, the Board should clarify in its regulations that the stay will continue in the wake of an "initial U.S. EPA disapproval" while federal judicial remedies are exhausted or while a good-faith petition to modify is pending before the Board.

In its new "Responses to Questions" filing, the Agency repeats its position that it was required by the text of 415 ILCS 5/38.5(h)(4)(B)(II) to adopt regulations that punish dischargers who obtain a TLWQS from the Board if that TLWQS is subsequently disapproved by the U.S. EPA. (Response to Questions, at 6.) In the Agency's view, the stay must be terminated even if the U.S. EPA disapproves the TLWQS variance for small, remediable, concerns or if the U.S. EPA disapproval is later shown to be contrary to federal law.[6]

Even if one agreed with the Agency's position that the text of 415 ILCS 5/38.5(h)(4)(B)(II) plainly requires these results, which it does not, the Board is not compelled to adopt regulations that produce arbitrary results that were not intended by the General Assembly. *See Grams v. Autozone, Inc*., 745 N.E.2d 687, 690 (Ill. App. Ct. 2001) (noting that courts may look beyond statutory language to correct "absurd results" that are not consistent with the legislature's intent); *People v. Bubolz*, 679 N.E.2d 854, 855 (Ill. App. Ct. 1997) (same).

The Agency's Proposed Regulations produce the perverse result of giving favorable treatment to weaker TLWQS petitions and heavily penalizing petitions with better documentation and more merit. A petitioner that fails to persuade the Board to grant it a TLWQS variance is allowed to remain covered by a stay while they exhaust judicial remedies. *See* Section 104.525(b)(1)(A). Yet, a petitioner that has a stronger case and succeeds before the Board faces severe consequences if the U.S. EPA subsequently disapproves its petition, even if the U.S. EPA invites the Board to resubmit the TLWQS with minor changes.

These absurd and arbitrary results are contrary to the driving purpose of Section 38.5. The General Assembly set up the procedures in Section 38.5 to sort out meritorious TLWQS variance petitions from meritless ones. Imposing severe financial consequences on meritorious petitions while giving more lenient treatment to those petitions that lack merit is clearly an

[6] During the hearing, the Hearing Officer said the following: "But if [the U.S. EPA's disapproval decision is] appealed, and if there is an appeal period, then surely the stay would stay in effect while it's under appeal." (Hearing Tr., at 241.) An Agency representative promised to investigate whether disapproval decisions can be appealed. The Agency's new Responses to Questions document does not answer this question. The answer is that the U.S. Environmental Appeals Board does not believe that it has jurisdiction over U.S. EPA's decisions on water quality standards under Part 131, and this would appear to apply to TLWQS decisions as well. *In re: Mesabi Nugget Delaware, LLC*, 15 E.A.D. 812; 2013 EPA App. LEXIS 17 (Mar. 19, 2013). The decisions are, however, challengeable in federal court under the Administrative Procedures Act. *Id.*

absurd result.[7] Not surprisingly, an Agency representative that attended stakeholder negotiations when 415 ILCS 5/38.5 was being drafted testified at the Board's hearing that he had no recollection of any discussions that would indicate that the stakeholders or legislators wanted these outcomes. (Hearing Tr., at 236, 244.) The Board should redraft Section 104.525 so that it reflects the legislature's intent and common sense to allow the continuation of a stay while petitioners exhaust federal judicial remedies and/or pursue a motion to modify the Board's TLWQS order to address the reasons for U.S. EPA's initial disapproval.[8]

F. As Proposed by the Agency, Section 104.525 Needs Additional Safeguards to Assure Timely U.S. EPA Participation Concerning a Proposed TLWQS.

There are significant hardships to a petitioner imposed by the termination of a stay under proposed Section 104.525(b)(1)(B) upon U.S. EPA disapproval of a Board order granting a TLWQS. The Board needs to ensure that the TLWQS Rules will fairly address this issue. The Agency's assurances that the U.S. EPA will be an active participant in TLWQS proceedings and will give clear guidance to the Board and petitioners during that process has not been proven by past experiences in Board rulemakings or other proceedings where U.S. EPA review of Board decisions is required by federal law. For this reason, such assurances are not sufficient to forego clearly setting forth adequate safeguards against unforeseen U.S. EPA decisions on Board-approved TLWQS relief.

To that end, MWGen proposes that, following the comment period outlined in Section 104.555(g) of the Proposed Rules, if the Board intends to grant the TLWQS petition, it should first issue a "tentative order and opinion" and submit it to the U.S. EPA for review and comment. This U.S. EPA comment process would better assure that the U.S. EPA will disclose any perceived grounds for disapproval of the TLWQS before the Board proceeds to enter a formal Section 104.565 opinion and interim order. While this course of action is not as reliable as simply drafting stay provisions that treat TLWQS petitioners reasonably, it represents the most that the Board can do to avoid being surprised by the outcome of subsequent U.S. EPA review.

[7] Despite the severe financial consequences embodied in Section 104.525 of the Proposed Regulations, there is no evidence that the Agency evaluated the economic consequences of that provision per 415 ILCS 5/27.

[8] During the Hearing, the Agency stated that the Proposed TLWQS Rules allow petitioners to file a petition to modify under Section 104.570(c) even if they are also challenging the U.S. EPA's disapproval decision in federal court. (Hearing Tr., at 234.) The Board should consider making this interpretation explicit in the final TLWQS rules.

G. The Comment Period Allowed on Petitions to Modify a TLWQS Disapproved by the U.S. EPA Should be Within the Board's Discretion.

The Board should ensure that Section 104.570(c)'s modification procedures move as efficiently as possible. This is particularly true if the Board chooses not to reform the unduly punitive language in proposed Section 104.525(b)(1)(B) so that dischargers do not face an extended period between the termination of a stay and a Board order modifying the TLWQS to address the U.S. EPA's disapproval.

The Proposed TLWQS Rules are not blind to this issue: The Board has discretion whether to hold a supplemental hearing on the petition to modify and can order the Agency to file an expedited recommendation on the petition to modify Section 104.570(c)(5). But the Agency proposal sets an apparently mandatory 21-day comment period on the petition to modify. *See* Section 104.570(c)(3). That amount of time will be excessive in many instances where the U.S. EPA asks only for discrete, technical, changes to the TLQWS. There should not be a mandatory 21-day comment period. The Board should have full discretion to determine the duration of the comment period based on the nature and extent of the issues to be addressed and should even be empowered to waive the comment requirement in appropriate instances.

H. The Board Should Clear Up Ambiguities in Section 104.525(b)(2)-(3).

The Board also should clarify that Section 104.525(b)(2) terminates the stay only if the Board either (1) issues a non-substantial compliance order after the Section 104.540 deadline or, (2) issues a non-substantial compliance order prior to the Section 104.540 deadline, and the petitioner fails to file an amended petition before that deadline. This revision would make Section 104.525(b)(3) redundant, and it could be eliminated. That provision is inadvisable anyway. Subsection (b)(3) appears to be based on 415 ILCS 5/38.5(h)(6).[9] But Section 38.5(h)(6) is limited to petitions that have been found to not be substantially compliant. As drafted, Section 104.525(b)(3) could apply to petitions that are substantially compliant as filed, and would seem to instruct that those petitions lose their stay. This is not an intended outcome.

III. CONCLUSION

MWGen appreciates the opportunity to comment on this rulemaking proposal and the Board's attention to this complex matter. The comments here serve three key purposes. First, MWGEN (like the Illinois General Assembly) wants TLWQS petitions to be reviewed under

[9] "If the Board determines that a petition for a [TLWQS] is not in substantial compliance and if the person fails to file, on or before the Board-established deadline, an amended petition, the Board shall dismiss the petition and the stay shall continue until all rights to judicial review are exhausted."

rules that operate efficiently and without undue delays. This is why the Board should not require or allow premature appeals of fundamentally interim orders, like a Section 104.545 substantial-compliance order, or a Section 104.565 order that is still awaiting action by U.S. EPA. Similarly, the Board should strive to create procedural rules that do not create opportunities for delay tactics and help the Board reach informed and reasonable outcomes. For that reason, the Board should restrict motions to reconsider certain interlocutory orders to petitioners, while creating opportunities for non-petitioners to further address such orders later in the review process. The Board should also make minor changes that will streamline and expedite the Section 104.570(c) petition to modify process in appropriate cases.

Second, MWGen would also like to proceed under regulations that are clear and predictable. For that reason, the Board should adopt regulations that clearly establish the purpose of the "substantial compliance" review. And the Board should not have the "substantial compliance" review be an entirely novel process; the facial adequacy reviews that are conducted for variances should form the basis of "substantial compliance" reviews of TLWQS petitions.

MWGen's third goal is to avoid unduly punitive outcomes. The Agency's position that the Board *must* adopt regulations which abruptly terminate a petitioner's stay if the U.S. EPA disapproves the petition in any way is not consistent with the purpose of Section 38.5 of the Act and defies common sense. Petitioners that have already convinced the Board of the merits of their case should not be exposed to enforcement actions or forced to cease operations because of a U.S. EPA disapproval decision that identifies easily remedied deficiencies in the TLWQS. The Board should allow stays to continue while petitioners pursue federal appeals of the U.S. EPA disapproval and/or pursue a petition to modify in good faith. The Board should also adopt additional procedures for ensuring a reasonable opportunity to receive timely feedback from the U.S. EPA that might successfully avoid a U.S. EPA disapproval. MWGen appreciates the opportunity afforded by the Board to present these comments for its consideration.

Respectfully submitted,

Dated: December 5, 2017

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