

ILLINOIS POLLUTION CONTROL BOARD
March 28, 2019

METROPOLITAN WATER RECLAMATION)
DISTRICT OF GREATER CHICAGO,)
)
Petitioner,)
)
v.) PCB 16-28
) (Time-Limited Water Quality Standard)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

ORDER OF THE BOARD (by K. Papadimitriou):

On July 26, 2018, the Metropolitan Water Reclamation District of Greater Chicago (MWRD) filed an amended petition (Am. Pet.) for a dissolved oxygen (DO) time-limited water quality standard (TLWQS). 35 Ill. Adm. Code 104.Subpart E. MWRD is seeking a TLWQS for discharges from Combined Sewer Overflow (CSO) outfalls into the Chicago Area Waterways System (CAWS). MWRD requests TLWQS for CSO outfalls covered under the National Pollutant Discharge Elimination System (NPDES) permits issued to its O'Brien, Calumet and Stickney wastewater treatment plants (Plants). In today's order, the Board finds that the amended petition contains the required components for a TLWQS petition and is therefore in "substantial compliance" as defined by the Board's rules.

In this order, the Board first provides background information on TLWQS proceedings, and the class of discharges and deadlines established in this proceeding. The Board then reviews the amended petition's content before finding it in substantial compliance. The Board concludes by describing the next steps in this proceeding. The Board directs the Illinois Environmental Protection Agency (IEPA) to file its recommendation by May 13, 2019 and transmit it and other required documents to the United States Environmental Protection Agency (USEPA).

BACKGROUND

The Environmental Protection Act (Act) and Board rules allow a single discharger or a group of dischargers to petition for a TLWQS from a water quality standard. *See* 415 ILCS 5/38.5 (enacted by P.A. 99-937, eff. Feb. 24, 2017); 35 Ill. Adm. Code 104.Subpart E. A TLWQS is "a time-limited designated use and criterion for a specific pollutant or water quality parameter that reflects the highest attainable condition during the term of that relief." 35 Ill. Adm. Code 104.515.

The procedures that govern a TLWQS proceeding are in Part 104, Subpart E of the Board rules. 35 Ill. Adm. Code 104.Subpart E. Section 104.530 specifies the content requirements of a

TLWQS petition. 35 Ill. Adm. Code 104.530. Section 104.530(a) lists 17 elements that must be in every petition for a TLWQS. 35 Ill. Adm. Code 104.530(a)(1)-(17). Additional requirements apply to multi-discharger petitions and petitions for a TLWQS covering a watershed, water body, or waterbody segment. 35 Ill. Adm. Code 104.530(b)(1) and(d).

When a petition for a TLWQS is filed, the Board must establish the “discharger or classes of dischargers that may be covered by the time-limited water quality standard” and deadlines for the dischargers to file their initial or amended petitions. 415 ILCS 38.5(f) (2016); 35 Ill. Adm. Code 104.540. The Board must then review the petitions for substantial compliance with Section 131.14 of the Code of Federal Regulations (40 C.F.R. § 131.14), Section 38.5 of the Act (415 ILCS 38.5 (2016)), and Board rules adopted under Section 38.5 (35 Ill. Adm. Code Part 104.Subpart E). *See* 415 ILCS 38.5(g) (2016); 35 Ill. Adm. Code 104.515(b), 104.545(a). If the Board finds that a petition does not substantially comply, it must enter an interim order identifying the petition’s deficiencies. 415 ILCS 5/38.5(h)(3). The petitioner must then file an amended petition by the Board’s set deadlines. 415 ILCS 38.5(g)(3) (2016); 35 Ill. Adm. Code 104.545(d).

CLASS OF DISCHARGERS

The Board established a class of dischargers potentially covered by the DO TLWQS sought in this proceeding as:

MWRD, City of Chicago and other CSO dischargers into North Shore Channel, North Branch of the Chicago River, South Fork of the South Branch of the Chicago River (Bubbly Creek), Chicago Sanitary and Ship Canal, Little Calumet River, Calumet Sag Channel, and Calumet River, as the class of dischargers that may be covered by a time-limited water quality standard for dissolved oxygen under Section 38.5(f) of the Act; CSO dischargers into the streams not in the CAWS, with outfalls that influence downstream waters that are eligible for a stay, including Des Plaines River, Addison Creek, and Deer Creek, as dischargers that may potentially be covered, subject to identifying their outfalls into the streams that influence the waters eligible for a stay. MWRD, PCB 16-28, slip op. at 2 (Apr. 12, 2017).

In the same order, the Board set a deadline for the members of this class of dischargers to file any amended or initial petitions within 90 days after the Board adopts rules under Section 38.5 of the Act. 415 ILCS 5/38.5(f), (k); MWRD, PCB 16-28 (Apr. 12, 2017). On June 22, 2017, the Board found MWRD’s initial petition not in substantial compliance; the original petition was filed as a variance petition on July 21, 2015 (Pet.) and was converted by operation of law to a TLWQS petition (*see* 415 ILCS 5/38.5(b)(2) (2016)). MWRD, PCB 16-28, slip op. at 2 (Jun. 22, 2017). The Board directed MWRD to file its amended petition within 90 days after adoption of TLWQS rules to preserve the stay of the DO water quality standard. *Id.* By the same deadline, any other member of the discharger class seeking a stay of the DO water quality standard was required to file its initial petition. *Id.*

The Board adopted its TLWQS rules on April 26, 2018. *See Regulatory Relief Mechanisms: Proposed New Ill. Adm. Code Part 104, Subpart E, R18-18*, (Apr. 26, 2018). Within 90 days after that, on July 26, 2018, the MWRD filed its amended petition seeking a single discharger TLWQS. The Board received no other petitions in this proceeding.

The Board now reviews MWRD's amended petition for substantial compliance. 415 ILCS 5/38.5(g); 35 Ill. Adm. Code 104.545(a).

SUBSTANTIAL COMPLIANCE ASSESSMENT

A petition is in substantial compliance when it meets “the substantial or essential content requirements of 40 CFR 131.14, Section 38.5 of the Act [415 ILCS 5/38.5], and Section 104.530 of this Part [35 Ill. Adm. Code 104.530].” 35 Ill. Adm. Code 104.515. The Board's substantial compliance review assesses a petition “on a case-by-case basis by determining whether the petition is responsive to the content requirements of Section 104.530.” *Regulatory Relief Mechanisms: Proposed New 35 Ill. Adm. Code Part 104, Subpart E, R18-18*, slip op. at 6 (Feb. 8, 2018). The substantial compliance assessment, therefore, serves as “a screening mechanism,” “determining only whether the petition contains the required components of a TLWQS petition.” *Id.*

MWRD's amended petition “supplements previous filings by MWRD” (Am. Pet. at 1) and includes Exhibits A-N. Am. Pet. at 23; *see* 35 Ill. Adm. Code 104.530(a)(16). MWRD requests a single discharger TLWQS from the Board's DO water quality standards at 35 Ill. Adm. Code 302.206 and 302.405¹ for discharges from CSO outfalls listed in the Plants' NPDES permits into the CAWS and waters upstream of the CAWS. Am. Pet. at 2, 3, 4; Pet. at 2-3; *see* 35 Ill. Adm. Code 104.530(a)(1), (2), (3). MWRD requests to include one CSO outfall that discharges into North Creek, which is upstream of the CAWS, because it may contribute to exceedances of the DO standards within the CAWS. Am. Pet. at 5.

The amended petition, however, specifies that MWRD is not seeking to include in this TLWQS “CSOs that are located on the Des Plaines River and Addison Creek,” “since they are not upstream of the CAWS.” Am. Pet. at 5. Further, MWRD clarifies that “discharges from the O'Brien, Stickney, and Calumet Plants themselves are not intended to be covered by the requested TLWQS for DO; the Amended Petition relates only to discharges from the combined sewer overflow (“CSO”) outfalls that are owned and operated by the MWRD” and identified in Part I.A.3 of the amended petition. *Id.* at 10.

The amended petition provides the locations of covered CSO outfalls (Am. Pet. at 4-7) and their related NPDES permit details (*id.* at 9), as well as a map (Am. Pet. Exh. B). *See* 35 Ill. Adm. Code 104.530(a)(4), (9). The designated uses of the covered water body and waterbody

¹ The amended petition identifies the General Use DO standards under Section 302.206 as the currently applicable standard for which a TLWQS is sought. Am. Pet. at 4. However, the Board is including the CAWS DO standards under Section 302.405 because both MWRD's initial and amended petitions generally state that MWRD is seeking relief from the CAWS DO standards adopted by the Board in July 2015. *See* Pet. at 2 and Am. Pet. at 2-3.

segments include General Use Waters (Chicago River and North Creek), CAWS Aquatic Life Use A Waters, and CAWS and Brandon Pool Aquatic Life Use B Waters under 35 Ill. Adm. Code Part 303.235 and 303.240. *See* 35 Ill. Adm. Code 104.530(a)(5). MWRD states that no variance or TLWQS has been issued to MWRD concerning similar relief. *See* 35 Ill. Adm. Code 104.530(a)(8).

The amended petition posits that attainment of the designated use and DO water quality standards are not feasible because of two factors: (1) human caused conditions or sources of pollution that cannot be remedied or would leave more environmental damage to correct than to leave in place; and (2) controls more stringent than those required by Section 301(b) and 306 of the Clean Water Act would result in substantial and widespread negative economic and social impact on the public. Am. Pet. at 12-15; *see* 35 Ill. Adm. Code 104.530(a)(7), 104.560(a)(6). The “various reaches of the CAWS do not and cannot meet the new DO standards for five years or longer”; “extraordinary measures ... would be needed to move the reaches closer to attainment in the immediate future.” Am. Pet. at 11, Exh. I; *see* 35 Ill. Adm. Code 104.530(a)(7).

MWRD’s CSO outfalls contribute to nonattainment of DO standards in the CAWS because they provide relief from local flooding during heavy wet weather events due to “finite pumping and hydraulic capacity of the collection system and treatment plants”; “during and after wet-weather events, the DO levels can be significantly lower than the standards.” Am. Pet. at 9. Further, “recent reductions in the amount of water that the MWRD is allowed to divert from Lake Michigan into the CAWS, and further reductions that are expected to occur in the future, should only increase the frequency of DO nonattainment situations in the CAWS.” *Id.* at 9-10, Exh. J; *see* 35 Ill. Adm. Code 104.530(a)(6).

Regarding attainment of new DO standards in the CAWS, the amended petition notes that it may take at least 8.5 years and could cost approximately \$669,900,000. Am. Pet. at 11, 13. The attainment upgrades include the addition of 28 supplementary aeration stations and three proposed aerated flow augmentation stations. *Id.* MWRD asserts that the high compliance cost would place a large burden on MWRD and Cook County tax payers without guaranteeing consistent attainment of the DO standards. *Id.* MWRD notes that CSO outfalls covered by this TLWQS proceeding are subject to technology-based requirements under MWRD’s respective NPDES permits and a Consent Decree between MWRD, IEPA, and USEPA (Consent Decree, Am. Pet. Exh. L), including the Nine Minimum Controls (NMC) and additional NMC-related requirements. Am. Pet. at 10; *see* 35 Ill. Adm. Code 104.530(a)(11). MWRD is also implementing major construction projects to minimize CSO events, including the Tunnel and Reservoir Plan (TARP) measures required under the Consent Decree. Am. Pet. at 11, Exh. J.

The amended petition identifies the highest attainable condition as the “effluent condition authorized by the existing NPDES Permits that address the MWRD’s CSO outfalls, and conditions of the Consent Decree” (Am. Pet. at 15-16), as well as the series of conditions and interim measures proposed in the amended petition (Am. Pet. at 16-21). *See* 35 Ill. Adm. Code 104.530(a)(12) and (13). MWRD requests an initial term of the TLWQS of five years. However, MWRD recognizes that coverage through December 31, 2029, might be needed to allow for completion of TARP. Am. Pet. at 21; *see* 35 Ill. Adm. Code 104.530(a)(14).

The duration of the TLWQS beyond the initial 5-year term “will likely be different than for the initial TLWQS because TARP completion and other developments will change the DO attainment situation.” Am. Pet. at 21. MWRD will collect and analyze data while implementing interim measures and will use the data to support its likely request for issuance of another, revised TLWQS after the initial 5-year term. *Id.* at 16; *see* 35 Ill. Adm. Code 104.530(a)(15). MWRD states that the proposed highest attainable condition would not conflict with the attainment of downstream DO water quality standards because the TARP actions and interim DO-related measures will help minimize DO non-attainment and reduce any possible impacts. Am. Pet. at 22; *see* 35 Ill. Adm. Code 104.530(a)(17).

The Board finds that the amended petition contains the required components for a TLWQS petition, and is, therefore, in substantial compliance. *See* 35 Ill. Adm. Code 104.545(a), 104.530(a), (b)(1) and (d).

NEXT STEPS

Because the Board finds that the amended petition is in substantial compliance, IEPA must file its recommendation by May 13, 2019, which is the first business day following the 45th day after this order. *See* 35 Ill. Adm. Code 104.545(b), 104.550(a). Concurrent with that filing, IEPA must transmit copies of its recommendation and the amended petition to USEPA. *See* 35 Ill. Adm. Code 104.550(d). MWRD or any person may file questions or responses to IEPA’s recommendation by the 14th day after IEPA files its recommendation. *See* 35 Ill. Adm. Code 104.550(c). Thereafter, the Board will hold a public hearing that will be set by the hearing officer with at least 45 days’ written notice. *See* 35 Ill. Adm. Code 104.555. The Board may submit questions to MWRD and IEPA through a Board or hearing officer order before the hearing.

CONCLUSION

The Board finds MWRD’s amended petition for DO TLWQS in substantial compliance with the Board rules. The Board directs IEPA to file its recommendation by May 13, 2019, and to transmit required documents to USEPA.

IT IS SO ORDERED.

Board Member Santos abstained.

Section 38.5(j) of the Environmental Protection Act provides that any person adversely affected or threatened by a final Board order in a time-limited water quality standard proceeding may appeal the order directly to the Illinois Appellate Court within 35 days after the Board serves the order by publishing it on the Board’s website. 415 ILCS 5/38.5(j) (2016); *see also* 35 Ill. Adm. Code 104.585. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board’s procedural rules provide that motions for the Board to reconsider or modify its final order may be filed with the Board within 35 days after the order is received. 35

Ill. Adm. Code 104.545(e), 101.520; *see also* 35 Ill. Adm. Code 101.902. Filing a motion asking that the Board reconsider this final order is not a prerequisite to appealing the order. 35 Ill. Adm. Code 101.902.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 28, 2019, by a vote of 4-0.

A handwritten signature in black ink that reads "Don A. Brown". The signature is written in a cursive style with a large, looped initial "D".

Don A. Brown, Clerk
Illinois Pollution Control Board