

ILLINOIS POLLUTION CONTROL BOARD

July 25, 2019

MIDWEST GENERATION, LLC,)
)
 Petitioner,)
)
 v.) PCB 16-19
) (Time-Limited Water Quality Standard)
 ILLINOIS ENVIRONMENTAL PROTECTION)
 AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by K. Papadimitriou):

On July 21, 2015, Midwest Generation, LLC.'s (Midwest Generation) petition for a variance under Section 35(a) of the Environmental Protection Act (Act) (415 ILCS 5/35(a) (2016)) from temperature water quality standards became a petition for a time-limited water quality standard (TLWQS) under Section 38.5 of the Act (415 ILCS 5/38.5(a), (c)). On June 27, 2018, Midwest Generation timely filed an amended petition. Specifically, Midwest Generation seeks a TLWQS from temperature standards for a class of thermal dischargers in contiguous portions of: the Chicago Sanitary and Ship Canal (CSSC), Brandon Pool, Upper Dresden Island Pool (UDIP), and the "Five-Mile Stretch" of the Des Plaines River extending downstream of the Interstate-55 Bridge. The class of thermal dischargers include Midwest Generation's Will County, Joliet 9 and Joliet 29 generating stations.

In this order, the Board first provides background information on TLWQS. The Board then discusses its orders that established both the class of dischargers potentially covered by a temperature TLWQS and the deadline for members of that class to file amended or initial petitions. Next, the Board assesses whether the resulting petitions are in substantial compliance. The Board then discusses a motion to amend the amended petition and consolidation of the temperature TLWQS. The Board concludes by describing the next steps in this proceeding.

BACKGROUND

The Environmental Protection Act (Act) and Board rules allow a petitioner, or several petitioners as a class, to request a TLWQS from a water quality standard that would otherwise apply to the petitioner or petitioners. 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 found in Part 104, Subpart E of the Board's procedural 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. Subsection (a) of Section 104.530 lists 17 requirements that must be in every petition for a TLWQS. 35 Ill. Adm.

Code 104.530(a)(1)-(17). There are two additional requirements if the petition is for a TLWQS covering a watershed, water body, or waterbody segment. First, the petition must identify and document any cost-effective and reasonable “best management practices” (BMPs) for nonpoint source controls related to the pollutant of the TLWQS. 35 Ill. Adm. Code 104.530(b)(1). Second, each discharger applying as a member of the TLWQS class must provide its specific information individually with the petition. 35 Ill. Adm. Code 104.530(d).

CLASS OF DISCHARGERS AND THE AMENDED PETITION

When a petition for a TLWQS is filed, the Board must establish the “classes of dischargers that may be covered by the time-limited water quality standard” (415 ILCS 38.5(f), *see* 35 Ill. Adm. Code 104.540), and then review the petition for substantial compliance (35 Ill. Adm. Code 104.545(a)).

Here, the Board established the class of dischargers in Midwest Generation LLC v. IEPA, PCB 16-19 (Apr. 12, 2017) as:

heated effluent dischargers into Chicago Sanitary and Ship Canal, and Upper Dresden Island Pool, including Flint Hills¹, Midwest Generation (Will County Station, Joliet 9 Station, and Joliet 29 Station), and Stepan Chemical as the class of dischargers that may be covered by a time-limited water quality standard for temperature under Section 38.5(f) of the Act; Exxon Mobil as a potentially-affected discharger, subject to the Agency’s further evaluation. *Id.* slip op. at 2.

Because Midwest Generation’s initial petition, filed originally as a variance petition but converted by operation of law to TLWQS petitions (*see* 415 ILCS 5/38.5(b)(2)), was not in substantial compliance with the regulations of the United States Environmental Protection Agency (USEPA) at 40 CFR §131.14, the Board directed the Midwest Generation to file an amended petition within 90 days after adoption of TLWQS rules to preserve the stay of the temperature water quality standard. *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, slip op. (Apr. 26, 2018). Within 90 days after that, on June 27, 2018, Midwest Generation timely filed an amended petition. With the class of dischargers established and the amended petition timely filed for purposes of the stay, the Board must review the 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

¹ INEOS, formally known as Flint Hills has a petition pending in INEOS f/k/a Flint Hills v. IEPA, PCB 16-24, which is the subject of a separate order today.

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, R 18-18, 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.*

The petition seeks a TLWQS from the Board’s temperature water quality standards in 35 Ill. Adm. Code 302.408(b) and (c). The amended petition offers that the designated use and temperature water quality standard cannot be met because:

- 1) Human caused conditions or sources of pollution prevent the attainment of the designated use and cannot be remedied or would cause more environmental damage to correct than to leave in place. 35 Ill. Adm. Code 104.560(a)(3).
- 2) Dams, diversions or other types of hydrologic modifications preclude the attainment of the designated use, and it is not feasible to restore the water body to its original condition or to operate that modification in a way that would result in the attainment of the designated use. 35 Ill. Adm. Code 104.560(a)(4).
- 3) Physical conditions related to the natural features of the water body, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to water quality, preclude attainment of aquatic life protection uses. 35 Ill. Adm. Code 104.560(a)(5).
- 4) Controls more stringent than those required by CWA Sections 301(b) and 306 would result in substantial and widespread economic and social impact. 35 Ill. Adm. Code 104.560(a)(6). *See generally* Am. Pet at 40-60.

The petition covers a single, contiguous water body in Will and Grundy Counties that includes the portions of the CSSC, Brandon Pool, UDIP, and a five-mile stretch of the Des Plaines River. Am. Pet. at 26, Exh. P, Q, R, and S. Midwest Generation relies on modeling conducted by its consultant EA Engineering that indicate that compliance with the 2018 Thermal Standards’ summer limits would not be consistently assured, especially under “worst case” summer conditions. Am. Pet. At 37-38, Exh. A. Midwest Generation recommends that the highest attainable condition be expressed using highest attainable interim criteria. Am. Pet. at 67. Midwest Generation notes that two of its stations have significantly reduced their thermal output. Therefore, Midwest Generation proposes that its pollutant minimization program consists of continuing to maintain and operate the existing pollution-control equipment and fully comply with the existing NPDES permits for the Stations. Am. Pet. at 73-74.

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).

CONSOLIDATION

While the parties did not request consolidation of this petition with similar petitions, the Board on its own motion consolidates this case with INEOS Joliet, LLC v. IEPA, PCB 16-24.

These two cases are consolidated for the purposes of hearing. The issues are similar, and consolidation will allow for “convenient, expeditious, and complete determination of claims”. 35 Ill. Adm.101.406. Further, no material prejudice to any party will occur. Therefore, the Board consolidates, for hearing these two proceedings.

MOTION TO AMEND THE AMENDED PETITION

On January 25, 2019, Midwest Generation filed a motion to amend the amended petition, after discussions with USEPA and IEPA. The Board notes that acceptance of an amended petition in adjudicatory cases is not unusual, and in fact the Board may order the filing of an amended petition. *See e.g. Ted’s State Line v. IEPA*, PCB 18-72 (Apr. 12, 2018). However, TLWQS are not adjudicatory cases. *See* 415 ILCS 5/39.5(a). The statutory provisions for TLWQS set forth specific procedural steps, and the Board’s rules further delineate procedural steps in consideration of a TLWQS. Under the statute, if the Board determines that the petition is not in substantial compliance, then the Board will enter an interim order, identifying the deficiencies in the petition. 415 ILCS 5/38.5(h)(2). The petitioner must file an amended petition by the deadlines adopted by the Board, and the Board will then enter a final order that determines whether the amended petition is in substantial compliance. *Id.*

For a petition where a stay of the underlying standard is in place, the stay remains in effect if the Board determines the amended petition is in substantial compliance until: 1) the TLWQS is adopted, or 2) the petition is denied and all rights to judicial review are exhausted. 415 ILCS 5/38.5(h)(4).

The Board’s rules also allow for an amended petition to be filed in response to a determination by the Board that a petition is not in substantial compliance, and by a specified deadline. 35 Ill. Adm. Code 104.545. Neither the statute or the Board’s rules discuss amendments to the petition other than in response to a Board determination on substantial compliance.

In the instant case, the underlying temperature standard is stayed because of the filing of the petition and amended petition. Because the effectiveness of the stay is linked in both the statute and Board rules with the timely filing of an amended petition, the Board believes that accepting a second amended petition, outside the Board’s deadline to file an amended petition, may impact the effectiveness of the stay.

Further, when a petition is found to be in substantial compliance, as the first amended petition has been determined to be in today’s order, the proceeding to adopt a TLWQS is still in its early stages. A hearing is to be held, after receipt of a recommendation by IEPA. 35 Ill. Adm. Code 104.555. At that hearing witnesses will be heard, and comments accepted. Also, post hearing comments will be allowed. *Id.* Certainly, it is anticipated that USEPA may even weigh in with substantive comments that need to be addressed by the petitioner and IEPA. 35 Ill. Adm. Code 104.555(h). Thus, the Board envisions the acceptance of a substantially compliant petition as merely the beginning of the information gathering process in a TLWQS determination.

For these reasons, the Board denies the motion to amend the petition. However, Midwest Generation may file additional materials, which will be accepted as a comment, and given a public comment number. The materials may be used by the petitioner, as well as any other participant, in preparing for hearing in this proceeding, including in testimony at the hearing.

CONCLUSION

Because the Board finds that the amended petition is in substantial compliance, IEPA must file its recommendation by September 9, 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). Midwest Generation or any person may file questions or responses to the IEPA's recommendation by the 14th day after the 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 the Joint Petitioners and the IEPA through a Board or hearing officer order prior to the public hearing.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2016); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. 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, 102.700, 102.702. 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 July 25, 2019, by a vote of 5-0.



Don A. Brown, Clerk
Illinois Pollution Control Board