BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
COAL COMBUSTION WASTE (CCW) ASH	)	R14-10
PONDS AND SURFACE IMPOUNDMENTS	)	(Rulemaking - Water)
AT POWER GENERATING FACILITIES:	)	
PROPOSED NEW 35 ILL. ADM. CODE 841	)	

NOTICE OF FILING

To: John Therriault, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

Persons included on the attached
SERVICE LIST

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **Environmental Groups' Reply in Support of Motion to Reopen Proceeding** copies of which are served on you along with this notice.

Respectfully submitted,

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Dated: October 9, 2015

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COAL COMBUSTION WASTE (CCW) ASH	)	R14-10
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Environmental Groups' Reply in Support of Motion to Reopen Proceeding

On September 15, 2015, Sierra Club, Prairie Rivers Network, and the Environmental Law & Policy Center ("Environmental Groups") filed an Amended Proposal and Motion to Reopen the above captioned proceeding. The City of Springfield, the Illinois Environmental Protection Agency, Ameren Missouri and AmerenEneregy Medina Valley Cogen LLC, Prairie State Generating Company, Midwest Generation, LLC, the Illinois Environmental Regulatory Group, Dynegy Midwest Generation, LLC, Illinois Power Generating Company, Illinois Power Resources Generating, LLC, and Electric Energy, Inc., and Prairie Power, Inc. filed responses opposing Environmental Groups' motion. Environmental Groups now file this Reply in support of their motion, pursuant to 35 Ill. Admin. Code § 101.500(e) and the September 18, 2015 Hearing Officer Order, to reply to the issues raised in the aforementioned responses.

On January 20, 2015, Illinois Environmental Protection Agency (IEPA) filed a motion with the Board to stay this rulemaking proceeding for 90 days, "while the Agency evaluates whether changes to Agency's proposal are necessary as a result of the newly adopted minimum federal criteria, after which time the Agency will file a status report pursuant to Section 101.514." The Board granted that stay on May 7, 2015, to "allow the Agency to review the federal CCR rules and determine whether to revise its proposal." Now, nearly 10 months after the Agency requested a 90-day stay to review the final federal rules, it appears the Agency still

has not conducted the evaluation it promised to the Board. Instead, the Agency's response to Environmental Groups' motion indicates it has only taken a preliminary (and evidently inconclusive) review of the proposals in this rulemaking compared to the federal rule. IEPA Response at 8.

Environmental Groups' September 15, 2015 proposal is an attempt to step in and make up for the Agency's lack of leadership regarding the rulemaking it initiated. IEPA represented to the Board that this state rule was necessary and appropriate despite the fact that a federal rule governing coal combustion waste was simultaneously under development. As will be explained below, an "indefinite stay" is tantamount to killing the state rule altogether. The Board and all the interested parties committed substantial resources to this rulemaking, only to have it be inexplicably abandoned by its proponent. It is no surprise that the regulated community would prefer to walk away from the rule, but the citizens of Illinois are counting on it for the protection of their health and the health of their environment. Approximately 850 such citizens have weighed in on the IEPA's motion to stay the rulemaking, and we join them in asking the Board to move forward with the rule.

U.S. EPA's Coal Combustion Residuals rule does not provide all of the safeguards the proposed state rule does. That rule does not apply to impoundments associated with generating stations that are no longer operating. Coal ash impoundments at such facilities, like those at Vermilion, Crawford, Pearl, Hutsonville, and Meredosia, affect real Illinois communities. These rules would establish a procedure for clean-up and closure of those facilities that does not exist now in state or federal rules. The state rules provide an opportunity to require financial assurances, so the State is not left responsible for clean-up once an owner/operator has walked away with its profits. But perhaps most importantly, the state rules establish a process for

agency oversight and public participation that is absent from the "self-implementing" federal rules. These are just a few examples of the gaps that remain in the current regulatory regime.

Furthermore, the reasons put forward in support of a stay are the very reasons the Board should move forward with the state rule. For the most part, the litigation and legislation discussed are attempts to weaken the federal rules or eliminate them altogether. The state rule is an important backstop if the federal rules do fall apart in the end.

All environmental rules, for all time, could be subject to legal and legislative challenges, in this jurisdiction or another. That is the reality of administrative rulemaking in our cooperative federalist arrangement. The prospect of legal challenge is no excuse for either the Agency or the Board to shy away from doing their jobs to protect the people of Illinois from environmental pollution.

Waiting, perhaps for years, for legal and legislative challenges to resolve means wasting valuable years that should be spent ensuring that the people of Illinois are protected from the hazards of toxic coal ash pollution or a catastrophic coal ash spill. The clock is ticking on each of these 90 or so impoundments, and every moment of delay risks the Board missing the opportunity to prevent harm to the citizens it is charged with protecting.

Furthermore, the longer the Board allows this rulemaking to be delayed, the more difficult it will become to reconcile the two rule systems. As a number of parties pointed out, owners and operators subject to the federal rules are nearing some of the early deadlines for information submission under the rules. The most important requirements of the federal rule – closure plans and corrective action plans – are not far behind. Moving forward with the state rules now provides an opportunity for those owner/operators to consider the requirements of both the state and federal rules simultaneously when they undertake those planning processes.

Waiting, perhaps years, to move forward with the state rules could potentially lead to unnecessarily duplicative planning processes. One can easily imagine those same parties who are arguing to delay the state rule now asking to be exempt from those state rules in the future because that same delay meant they already completed the planning required by the federal rule. Right now is therefore an important window for the Board to move this rulemaking to completion.

Environmental Groups proposed a way to deal with the "moving target" of the federal rules by allowing federal rule requirements to count toward state rule requirements and minimize duplication of efforts. Rather than creating uncertainty or conflict, as several parties suggest, they would provide stability and certainty as to what is required in Illinois.

The September 15, 2015 proposal changed few, if any, substantive provisions of the proposals as they stood when the Board accepted post-hearing comments in October 2014. IEPA seems to suggest that one of the reasons the Board should deny this motion is because they disagree with revisions to the rule proposed by Environmental Groups prior to the time the Board closed the record last year. The Board has heard the parties' positions on those revisions and will decide them in whatever way it sees fit when it develops a first notice rule – it is not our intent to re-open those issues for discussion.

The issue that remains for the Board to decide is whether and how to reconcile the state rule with the now-final federal rule. The Environmental Groups' September 15, 2015 proposal can be a starting point to explore that issue, but it is clear from recent filings that the Board will not receive other constructive suggestions unless and until the Board asks the parties to submit those proposals.

Several parties complained that the Environmental Groups' September 15, 2015 proposal was not accompanied by a Statement of Reasons in accordance with 35 Ill. Adm. Code § 102.202(b). But there is no question that IEPA is the "proponent" that initiated this rulemaking as defined by § 102.202. While Environmental Groups proposed alternative language to supplement or replace the Agency's rulemaking proposal, those amendments are based upon the original Agency proposal. The two rules are fundamentally the same, but reflect a difference of opinion on how the Board should treat certain issues in whatever rule it proposes. While it is true that, because the Board needs an adequate basis to adopt its rules, participants in a rulemaking proceeding should expect to present the Board with the basis to support whatever rule that party favors. It does not follow that any participant who wishes to suggest to the Board regulatory language that differs from the initial proposal must submit that proposal with all the trimmings required of the initial proposal. To interpret the Board's rules to carry such a burden would stifle the opportunity for public participation the statute requires in a Board rulemaking. *See* 415 ILCS 5/27(b)(2); 415 ILCS 5/28; and 35 Ill. Adm. Code 102.108.

Some parties took issue with Environmental Groups' suggestion that hearings are not necessary to resolve the remaining procedural issues in this rulemaking. That suggestion was made with consideration for not wasting the Board's resources holding hearings on an issue for which witness testimony is not necessary or helpful. The work that remains to be done on this rule is in the nature of a problem-solving exercise. The kinds of changes proposed are to the legal mechanics of the rule, not substantive changes that require additional expert testimony. We think those lawyerly debates about regulatory language can be adequately set forth in writing, but of course it is within the Board's discretion to hold additional hearings.

Respectfully submitted,

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Dated: October 9, 2015

CERTIFICATE OF SERVICE

I, Jessica Dexter, hereby certify that a true copy of the foregoing **Environmental Groups' Reply in Support of Motion to Reopen Proceeding** was served via United States Mail, postage prepaid, in Chicago, Illinois on October 9, 2015 upon the service list below.

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Dated: October 9, 2015

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