

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**NOTICE OF FILING**

John Therriault  
Assistant Clerk  
Illinois Pollution Control Board  
100 W. Randolph Street, Suite 11-500  
Chicago, Illinois 60601

Office of Legal Services  
Illinois Dept. of Natural Resources  
One Natural Resources Way  
Springfield, Illinois 62702-1271

Timothy J. Fox  
Hearing Officer  
Illinois Pollution Control Board  
100 W. Randolph Street, Suite 11-500  
Chicago, Illinois 60601

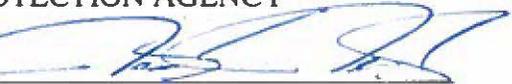
Matt Dunn  
Division Chief, Environmental Enforcement  
Office of the Illinois Attorney General  
69 W. Washington, Suite 1800  
Chicago, Illinois 60602

Attached Service List

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board the Illinois Environmental Protection Agency's Response to Environmental Groups' Motion to Reopen Proceeding, a copy of which is herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

By: 

James Jennings  
Assistant Counsel  
Division of Legal Counsel

DATED: October 1, 2015

1021 N. Grand Ave. East  
P.O. Box 19276  
Springfield, IL 62794-9276  
(217) 782-5544

THIS FILING IS SUBMITTED ELECTRONICALLY AND SERVED ON RECYCLED PAPER

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**RESPONSE TO ENVIRONMENTAL GROUPS' MOTION TO REOPEN PROCEEDING**

NOW COMES, the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA") by and through its counsel, and hereby submits its response to Prairie Rivers Network, Sierra Club, and the Environmental Law & Policy Center's (collectively, "the Environmental Groups") Motion to Reopen Proceeding ("Environmental Groups' motion"). The numerous significant legal and legislative developments that impact this rulemaking necessitate the Board affording interested parties sufficient additional time to evaluate the appropriate manner in which to proceed. For the reasons stated below, the Illinois EPA opposes the Environmental Groups' motion and requests the Illinois Pollution Control Board ("Board") grant its (the Illinois EPA's) Motion to Extend Stay, filed August 5, 2015. However, should the Board grant the Environmental Groups' motion, the Illinois EPA respectfully requests the Board direct the Environmental Groups to comply with 35 Ill. Adm. Code 102.202(b) and the Board's other procedural rules applicable to the necessary contents of rulemaking proposals for rules of general applicability before developing a schedule for soliciting written comments and holding hearings necessary to proceed in this matter.

**Background: USEPA's CCR Rule and Board Proceedings**

1) On June 21, 2010, the United States Environmental Protection Agency ("USEPA") proposed rules to govern coal combustion residuals ("CCR") from electric utilities

("June 2010 proposal"). 75 Fed. Reg. 35128 (June 21, 2010). The USEPA's proposal contained two co-proposals: one would regulate CCR under Subtitle C of the Resource conservation and Recovery Act ("RCRA"). The second co-proposal would regulate CCR under RCRA Subtitle D as a non-hazardous waste. USEPA took no further action on the CCR rule for over four years.

2) On October 28, 2013, the Illinois EPA filed its rulemaking proposal in the above-captioned matter. The rulemaking proposal was intended to fill the regulatory gap between rules applicable to the operation, corrective action, and closure of CCW surface impoundments while also maintaining the applicable groundwater protections. The Illinois EPA's proposal addresses monitoring, corrective action, and closure of CCW surface impoundments at power generating facilities.

3) On February 26, 2014, the Board held its first hearing on the Illinois EPA's rulemaking proposal.

4) On May 13, 2014, the day before the then-final scheduled Board hearing, the Environmental Groups filed proposed amendments to the Illinois EPA's rulemaking proposal. The Environmental Groups' proposal included, among other new items, design criteria, financial assurance requirements, and requirements that owners or operators of CCW surface impoundments submit closure plans and post-closure care plans during the compliance period. The Environmental Groups did not include with their proposal a statement of the reasons supporting their proposal, a statement of the purpose and effect of the proposal, or any environmental, technical, or economic justification supporting the proposal. The Board determined it was necessary to schedule additional hearings, in part to address the issues raised in the Environmental Groups' eleventh hour proposal.

5) On July 24, 2014, the Board's scheduled hearings in this matter concluded. Participants filed post hearing comments by October 20, 2014.

6) On January 20, 2015, the Illinois EPA moved the Board stay proceedings in this rulemaking in order for it (the Illinois EPA) to evaluate whether changes to the proposed rulemaking were necessary as a result of the USEPA indicating its intent to finalize its CCR rule. On May 7, 2015, the Board granted the Illinois EPA's January 20, 2015 motion to stay and directed the Illinois EPA to file a status report on or before August 5, 2015.

7) On April 13, 2015, a bill was introduced in the United States House of Representatives that would alter USEPA's approach to regulating the management and disposal of CCR ("H.R. 1734"). *Improving Coal Combustion Residuals Regulation Act*, H.R. 1734, 114<sup>th</sup> Cong. (2015). H.R. 1734 would permanently bar the USEPA from regulating CCR as hazardous waste under Subtitle C of the Resource Conservation and Recovery Act. H.R. 1734 incorporates the minimum protective standards from USEPA's CCR rule and would allow states to directly enforce those standards.

8) On April 17, 2015, the USEPA's CCR final rule appeared in the Federal Register. 80 Fed. Reg. 21302 (April 17, 2015). The rule is scheduled to become effective on October 19, 2015. 80 Fed. Reg. 37988 (July 2, 2015). USEPA's rule governs CCR under RCRA Subtitle D and contains national minimum criteria for existing and new CCR surface impoundments and CCR landfills. The regulation is self-implementing, with no direct federal oversight.

9) On July 15, 2015, several entities filed Petitions for Review of USEPA's CCR rule with the United States Court of Appeals for the District of Columbia. *Utilities Solid Waste Activities Group v. EPA*, D.C. Cir. No. 15-1219; *Beneficial Reuse Management v. EPA*, D.C. Cir. No. 15-1221; *Lafarge North American Inc. v. EPA*, D.C. Cir. No. 15-1222; *Associated Electric*

*Coop. Inc. v. EPA*, D.C. Cir. No. 15-1223; *City of Springfield, MO v. EPA*, D.C. Cir. No. 15-1227; *Clean Water Action, et al. v. EPA, et al.*, D.C. Cir. No. 15-1229; *AES Puerto Rico, LP v. EPA*, D.C. Circ. No. 15-1229.

10) On July 22, 2015, the United States House of Representatives passed H.R. 1734. On July 23, 2015, H.R. 1734 was introduced in the United States Senate. As of October 1, 2015, the Senate had not taken any action on H.R. 1734.

11) On August 5, 2015, the Illinois EPA moved the Board indefinitely extend the stay in this rulemaking to enable all interested parties to comprehensively evaluate the impact on the rulemaking proposals of existing legal challenges to USEPA's CCR rule and Congressional action that could impact USEPA's CCR rule, once those matters are resolved.

12) On August 17, 2015, two petitioners filed Non-Binding Statements of Issues with the United States Court of Appeals for the District of Columbia in the review of USEPA's CCR rule. Those filings requested review of, among other issues, questions regarding whether USEPA acted unlawfully or arbitrarily when defining the scope of the rule as applied to CCR surface impoundments. Statement of Issues of Conservation Organization Petitioners, *Utility Solid Waste Activities Group, et a. v. EPA*, D. C. Cir. No. 15-1219; Statement of Issues of AES Puerto Rico, LP, *AES Puerto Rico, LP v. EPA*, D. C. Cir. No. 15-1229. As of October 1, 2015, the Court of Appeals has not taken any action on the merits of the Petitions for Review and the universe of specific legal issues under review has not been further identified.

13) On August 19, 2015, the Environmental Groups filed a motion opposing the Illinois EPA's Motion to Extend Stay. On September 15, 2015, the Environmental Groups moved the Board reopen this rulemaking proceeding and submitted another amended proposal which they state will "harmonize" its previous proposal and USEPA's challenged CCR rule.

The Environmental Groups, again, did not include with their proposal a statement of the reasons supporting their proposal, a statement of the purpose and effect of the proposal, or any environmental, technical, or economic justification supporting the proposal.

Illinois EPA Opposes Reopening the Proceeding

1) The Illinois EPA proposed these rules to address the then-existing regulatory gap in rules applicable to the operation of, corrective action necessary at, and closure of CCW surface impoundments. The adoption of USEPA's CCR rule may have altered that regulatory gap. However, it is impossible to accurately evaluate the extent to which a regulatory gap remains and will remain in the immediately foreseeable future until there is certainty regarding the legal challenges and the Congressional action relating to USEPA's CCR rule.

2) The Environmental Groups contend that their proposal is "necessary to protect the water we all depend on in Illinois." Environmental Groups' Motion at 2. That contention is incorrect. Current Illinois law protects groundwater resources and discharges to surface water. Owners and operators of CCW surface impoundments are subject to the Illinois Groundwater Protection Act, the standards applicable to National Pollution Discharge Elimination Systems permits, and the Illinois Groundwater Quality Standards, including the relevant monitoring and corrective action requirements. See 415 ILCS 55, et seq.; 35 Ill. Adm. Code 309, et seq.; 35 Ill Adm. Code 620, et seq. These existing statutory and regulatory protections will ensure there is continued oversight of groundwaters potentially impacted by CCW surface impoundments in Illinois both during the stay of these proceedings and if any Illinois-specific regulations are adopted. Accordingly, proceeding with this rulemaking before there is clarity on the scope and applicability of USEPA's CCR rule will not enhance protection of Illinois groundwater beyond currently applicable state and federal law.

3) The scope and applicability of USEPA's CCR rule will be a critical component of the regulation of CCW surface impoundments in Illinois. In order to avoid adopting a duplicative or confusing rule, it is of paramount importance to have certainty regarding the breadth of the regulatory gap between USEPA's CCR rule and existing Illinois law and regulations. The ultimate extent of the regulatory gap will not be clear until the legal challenges to, and Congressional action impacting, USEPA's CCR rule conclude. The Illinois EPA is extremely concerned that proceeding with this rulemaking without a firm grasp on the scope of the regulatory gap will necessarily promote proposals and comments that are nothing more than speculation of how Illinois might "harmonize" its regulations with USEPA's CCR rule. Developing, reviewing, and debating speculative proposals will not enable the interested participants or the Board to engage in a fully informed dialogue on all relevant legal and environmental issues, and certainly will not facilitate an expeditious or appropriate resolution to these proceedings.

4) The Environmental Groups argue that there is greater certainty today regarding the scope and applicability of USEPA's CCR rule than at the time the Illinois EPA filed its proposal, which would justify immediately proceeding with this rulemaking. The need for certainty regarding the breadth of the regulatory gap driving this rulemaking is not obviated by the fact that many of the regulatory proposals in this proceeding were developed when it was unclear when or if USEPA's CCR rule would be adopted. The fact that it is clear USEPA intends to regulate CCRs does not mean there is sufficient certainty regarding the final scope and applicability of USEPA's CCR rule. That level of certainty will not exist until the pending legal and Congressional matters conclude.

a) In order to move forward with the Illinois EPA's proposal, certainty on the scope and applicability of USEPA's CCR rule is necessary. The Illinois EPA developed its rulemaking proposal to address the then-existing regulatory gap. The Illinois EPA did not specifically rely on USEPA's June 2010 proposal because of the possibility that the proposal would never be adopted. USEPA has now altered the scope of the regulatory gap that this rulemaking is intended to address by adopting the CCR rule. The scope and applicability of USEPA's CCR rule is a necessary part of the calculus that must be evaluated when developing a regulatory structure to bridge any gap between Illinois and federal law. The extent of that gap will not be known until there is a resolution of the pending legal and legislative matters.

b) In order to move forward with the Environmental Groups' proposal, to the extent it differs from the Illinois EPA's proposal, certainty on the scope and applicability of USEPA's CCR rule is determinative. The Environmental Groups heavily relied on USEPA's June 2010 proposal to support sections of its rulemaking proposal that diverged from the Illinois EPA's filing. This heavy reliance is evident from pre-filed testimony submitted on behalf of the Environmental Groups' witnesses, the responses provided by those witnesses at hearing, and the contents of the Environmental Groups' post-hearing comments. The Environmental Groups state that changes included in their most recent proposal were "made in response" to USEPA's CCR rule. Environmental Groups' Motion at 1. Accordingly, it is unclear what would serve as the basis for significant components of the Environmental Groups' proposal if the legal challenges to USEPA's CCR rule are successful, or Congressional action alters USEPA's CCR rule. Given the Environmental Groups' heavy and at times exclusive reliance on USEPA's June 2010 proposal and USEPA's CCR rule, it would be wholly inappropriate to advance this proceeding while there are pending legal and legislative actions that question the legitimacy of the rule on

which the Environmental Groups so heavily relied. These legal and legislative actions will determine whether the Environmental Groups' reliance was misplaced.

5) The Environmental Groups argue that their various proposals bridge the regulatory gap between USEPA's CCR rule and Illinois law, to the extent one exists.

a) A preliminary review of the proposals submitted during post-hearing comments indicates that there may be differences between those proposals and USEPA's CCR rule, including the applicability of the proposals and USEPA's CCR rule, the extent of necessary recordkeeping, location restrictions, inspection requirements, groundwater monitoring requirements, closure requirements, and post-closure care. However, the true extent of those differences and the most efficient mechanism to address the differences will not be clear until the legal challenges to, and the Congressional action involving, USEPA's CCR rule conclude.

b) The Illinois EPA has not had sufficient time to comprehensively review the Environmental Groups' most recent proposal. This is primarily because, for the second time in this rulemaking proceeding, the Environmental Groups did not provide a statement of reasons or any other sufficient justification explaining the purpose and effect of their proposal or the environmental, technical, and economic justification for their proposal, as required by the Board's procedural rules. See 35 Ill. Adm. Code 102.202(b). Such a justification is necessary in this instance because significant components of the Environmental Groups' proposal are entirely independent of the Illinois EPA's initial proposal, which was submitted in a manner that complied with the Board's rules. A purely facial review of the Environmental Groups' most recent proposal indicates that the Environmental Groups have attempted to remedy some of the apparent differences between their proposal and USEPA's CCR rule by merely referencing sections of USEPA's CCR rule in corresponding sections of their own proposal. Without the

supporting information required by the Board's rules, it is impossible to determine how, if at all, the Environmental Groups' proposal actually addresses differences with USEPA's CCR rule beyond token cross-references, how a regulated entity should address potentially conflicting components of the rules, or the environmental, technical, or economic impact of the proposal.

6) As the entity ultimately responsible for implementing Illinois environmental regulations, avoiding duplicative and potentially confusing rules is critically important to the Illinois EPA. Proceeding with this rulemaking in the face of the legal challenges to, and Congressional action involving, USEPA's CCR rule does not effectuate that aim. Indeed, such an action, though well intentioned, could easily result in additional significant inconsistencies in applicable law if any of the legal challenges to USEPA's CCR rule are successful or if Congress acts on the items before it. The inconsistencies generated by prematurely advancing this rulemaking would unquestionably prompt additional and avoidable comment periods and hearings to address those inconsistencies once there is certainty regarding the scope and applicability of USEPA's CCR rule.

7) In light of the existing regulatory protections of Illinois waters and the need for certainty on the scope and applicability of USEPA's CCR rule to properly address the regulatory gap between applicable state and federal law, the Board should not reopen these proceedings until the pending legal challenges and Congressional action conclude in order to provide certainty regarding the necessary scope and criteria of the federal regulations applicable to CCW surface impoundments.

WHEREFORE, the Illinois EPA respectfully requests the Board grant its Motion to Extend Stay and deny the Environmental Groups' Motion, in accordance with the above. Should the Board grant the Environmental Groups' Motion, the Illinois EPA respectfully requests that

the Board direct the Environmental Groups to comply with 35 Ill. Adm. Code 102.202(b) and the Board's other procedural rules applicable to the necessary contents of rulemaking proposals for rules of general applicability before developing a schedule for soliciting written comments and holding hearings necessary to proceed in this matter.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

By: 

James Jennings  
Assistant Counsel  
Division of Legal Counsel

DATED: October 1, 2015  
1021 N. Grand Ave. East  
P.O. Box 19276  
Springfield, IL 62794-9276  
(217) 782-5544

**THIS FILING IS SUBMITTED ELECTRONICALLY AND SERVED ON RECYCLED PAPER**

**CERTIFICATE OF SERVICE**

James Jennings, Assistant Counsel for the Illinois EPA, herein certifies that he has served a copy of the foregoing NOTICE OF FILING and RESPONSE TO ENVIRONMENTAL GROUPS' MOTION TO REOPEN PROCEEDING upon persons listed on the Service List by mailing, unless otherwise noted on the Service List, a true copy thereof in an envelope duly addressed bearing proper first class postage and deposited in the United States mail at Springfield, Illinois on October 1, 2015.

By: 

**THIS FILING IS SUBMITTED ELECTRONICALLY AND SERVED ON RECYCLED PAPER**

**SERVICE LIST**

Stephen Sylvester  
Assistant Attorney General  
Office of the Attorney General  
69 W. Washington Street, Suite 1800  
Chicago, Illinois 60602

N. LaDonna Driver  
Jennifer M. Martin  
Hodge Dwyer & Driver  
3150 Roland Avenue  
Springfield, Illinois 62705-5776

Faith Bugel  
Jack Darin  
Sierra Club  
70 E. Lake Street, Suite 1500  
Chicago, Illinois 60601-7447

Robert G. Mool  
Illinois Dept. Of Natural Resources  
One Natural Resources Way  
Springfield, Illinois 62702-1271

Susan M. Franzetti  
Nijman Franzetti LLP  
10 South LaSalle Street, Suite 3600  
Chicago, Illinois 60603

Traci Barkley  
Prairie Rivers Network  
1902 Fox Drive, Suite 6  
Champaign, Illinois 61820

Michael Smallwood  
Consulting Engineer  
Ameren  
1901 Chouteau Avenue  
St. Louis, Missouri 63103

Electric Energy, Inc.  
2100 Portland Road  
P.O. Box 165  
Joppa, Illinois 62953

Christine G. Zeman  
Office of Public Utilities  
City of Springfield  
800 East Monroe, 4<sup>th</sup> Floor  
Springfield, Illinois 62757-0001

Jessica Dexter  
Jennifer L. Cassel  
Josh Zaharoff  
Environmental Law and Policy Center  
35 East Wacker Drive, Suite 1600  
Chicago, Illinois 60601

Ameren Services  
One Ameren Plaza  
P.O. Box 66419  
St. Louis, Missouri 63166

Jason McLaurin  
Southern Illinois Power Cooperative  
11543 Lake of Egypt Road  
Marion, Illinois 62959-8500

Exelon Law Department  
10 South Dearborn, 49<sup>th</sup> Floor  
Chicago, Illinois 60603

Abby Allgire  
IERG  
215 E. Adams Street  
Springfield, Illinois 62701

Abel Russ  
Environmental Integrity Project  
1000 Vermont Avenue NW, Suite 1100  
Washington, DC 20005

Mark A. Bilut  
McDermott Will & Emery LLP  
227 West Monroe Street, Suite 4700  
Chicago, Illinois 60606-5096

Prairie Power, Inc.  
P.O. Box 10  
Peral, Illinois 62361

Amy Antonioli  
Schiff Hardin LLP  
233 South Wacker Drive, Suite 6600  
Chicago, Illinois 60606

Kincaid Generation LLC  
P.O. Box 260  
Kincaid, Illinois 62540

Walter Stone  
NRG Energy, Inc.  
8301 Professional Place, Suite 230  
Landover, Maryland 20785

Prairie State Generating Company  
3190 County Highway 12  
Marissa, Illinois 62257

David Rieser  
Much Shelist, P.C.  
191 North Wacker Drive, Suite 1800  
Chicago, Illinois 60606

Elizabeth Quirk-Hendry  
Keith Schmidt  
NRG Energy, Inc.  
211 Carnegie Center  
Princeton, New Jersey 08540