

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S STATUS REPORT AND MOTION TO EXTEND THE STAY, a copy of which is herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: 

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Date: March 4, 2016
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**ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S STATUS REPORT AND
MOTION TO EXTEND THE STAY**

NOW COMES, the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Illinois EPA”) by and through its counsel, and hereby submits its Status Report to the Illinois Pollution Control Board (“Board”). This Status Report includes responses to the issues the Board raised in its November 5, 2015 Order. For the reasons stated below and pursuant to 35 Ill. Adm. Code 101.514(b), the Illinois EPA moves the Board extend the stay in the above-captioned proceeding for an additional 90 days in order for the Illinois EPA to complete outreach with interested parties on the Illinois EPA’s proposal and the United States Environmental Protection Agency’s (“USEPA”) coal combustion residuals (“CCR”) rule (“federal rule”). The Illinois EPA has contacted the main participants in this rulemaking proceeding regarding the requested 90 day stay. The members of the regulated community and the Environmental Groups did not object to the Illinois EPA’s request.

I. Background: USEPA’s CCR Rule and Related Board Proceedings

On June 21, 2010, the USEPA proposed rules to govern CCR from electric utilities under the Resource Conservation and Recovery Act (“RCRA”). 75 Fed. Reg. 35128 (June 21, 2010). USEPA took no further action on the federal rule for over four years.

On October 28, 2013, the Illinois EPA filed its rulemaking proposal in this matter. The rulemaking proposal was intended to fill the then-existing regulatory gap between rules applicable to the operation, corrective action, and closure of coal combustion waste surface impoundments (“CCW surface impoundments”)¹ while maintaining the applicable state groundwater protections. The Illinois EPA’s proposal addressed monitoring, corrective action, and closure of CCW surface impoundments at power generating facilities. Between February 26 and July 24, 2014, the Board held numerous hearings on the Illinois EPA’s rulemaking proposal and the counterproposals that Prairie Rivers Network, Sierra Club, and the Environmental Law & Policy Center (collectively, “the Environmental Groups”) subsequently filed. During these hearings, the content of the then-proposed federal rule was discussed, almost universally with the caveat that it was unclear when or if USEPA would finalize the rule. In October 2014, numerous interested parties filed post hearing comments with the Board.

In December 2014, USEPA posted a prepublication copy of the final version of the federal rule on its website. On January 20, 2015, the Illinois EPA moved the Board to stay proceedings in this rulemaking in order for it to evaluate whether changes to its proposal were necessary as a result of the USEPA prepublication copy of the final version of the federal rule. The Board granted the Illinois EPA’s motion to stay and directed the Illinois EPA to file a status report on or before August 5, 2015.

On April 17, 2015, the federal rule appeared in the Federal Register. 80 Fed. Reg. 21302 (April 17, 2015). The federal rule governs CCR under RCRA Subtitle D and contains, among other things, national minimum criteria for existing and new CCR surface impoundments. The

¹ In general, the terms CCR and CCW are synonymous. For the purpose of this motion, the terms are used to distinguish between discussion of the federal rule (where the term CCR is used) and the various proposals before the Board (where the term CCW is used).

regulation is self-implementing, with no direct federal oversight. The federal rule and the Illinois EPA's regulatory proposal are similar, but also contain significant differences.

On July 15, 2015, several entities filed Petitions for Review of federal 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. Cir. No. 15-1229. The Petitions for Review did not identify the factual or legal basis for challenging the federal rule.

On August 5, 2015, the Illinois EPA moved the Board to indefinitely stay this proceeding to enable all interested parties to comprehensively evaluate the impact on the rulemaking proposals of existing legal challenges to federal rule and Congressional action² that could impact federal rule, once those matters are resolved. Numerous participants filed motions supporting the Illinois EPA's position. However, the Environmental Groups and the Office of the Illinois Attorney General filed motions opposing an indefinite stay. On November 5, 2015, the Board denied the Illinois EPA's motion for an indefinite stay and ordered the Illinois EPA to provide a status report and, if the status report included a further extension of the stay, to detail the basis for such an extension.

² H.R. 1734 included provisions that, if passed, would incorporate the minimum protective standards from the federal rule into RCRA Subtitle D and permanently bar the USEPA from regulated CCR as hazardous waste under RCRA Subtitle C. *Improving Coal Combustion Residuals Regulation Act*, H.R. 1734, 114th Cong. (2015). The House of Representatives passed H.R. 1734. On March 2, 2016, the Senate Committee on Environment and Public Works held its first hearing on the bill.

Appeal of the Federal Rule

On November 17, 2015, the United States Court of Appeals for the District of Columbia set the briefing schedule for the appeal of USEPA's CCR rule. *Utility Solid Waste Activities Group, et al. v. USEPA*, D.C. Cir. 15-1219 (November 17, 2015). The briefing schedule established the following deadlines:

Date	Brief(s) due
December 18, 2015	Environmental and Industry Petitioners' briefs
March 17, 2016	USEPA's brief
April 18, 2016	Intervenors' briefs
May 16, 2016	Environmental and Industry Petitioners' reply briefs
July 6, 2016	Final briefs

In accordance with the briefing schedule, on December 18, 2015, Environmental Petitioners³ and Industry Petitioners⁴ each filed briefs articulating their respective challenges to the federal rule. The Environmental Petitioners seek review of the five components of the federal rule relevant to this proceeding, each of which they argue was arbitrary and capricious and violated RCRA's requirement that there is no reasonable probability of adverse effects of health or the environment from the disposal of solid waste. Those components are:

- USEPA's allowing existing unlined CCR surface impoundments to continue to operate;
- USEPA's classifying existing CCR surface impoundments that have a two foot soil liner as "lined";

³ The "Environmental Petitioners" are Clean Water Action, the Environmental Integrity Project, Hoosier Environmental Council, Prairie Rivers Network, Sierra Club, Tennessee Clean Water Network, and Waterkeeper Alliance.

⁴ The "Industry Petitioners" are AES Puerto Rico, LP, American Public Power Association, Associated Electric Cooperative, Inc., Beneficial Reuse Management, City of Springfield, Missouri, Edison Electric Institute, Lafarge S.A., National Rural Electric Cooperative Association, and the Utility Solid Waste Activities Group.

- USEPA's decision not to regulate inactive CCR surface impoundments at inactive power plants;
- USEPA's exempting CCR surface impoundments that are closed before April 17, 2018, from the CCR rule's post-closure care requirements; and
- USEPA's decision to not include Boron on the list of contaminants that could trigger corrective action. Environmental Petitioners Brief at 20, 28, 31, 41, and 42.

The Environmental Petitioners request that the components of the federal rule outlined above be remanded for further consideration. In addition, the Environmental Petitioners request that the components of the federal rule outlined above (other than the exclusion of Boron from the list of contaminants) be vacated.

The Industry Petitioners seek review of five components of the federal rule, which they argue were arbitrary and capricious or, in at least one instance, adopted without statutory authority. Those components are:

- USEPA's decision to regulate inactive CCR surface impoundments at active power plants;
- USEPA's alternative closure options for CCR surface impoundments that, among other things, have exceedances of groundwater protection standards;
- USEPA's two year operating deadline for CCR surface impoundments that do not meet the minimum safety factors;
- USEPA's location restrictions for CCR surface impoundments in seismic impact zones; and
- USEPA's elimination of risk-based compliance alternatives. Industry Petitioners brief at 12, 37, 41, 44, and 48.

The Industry Petitioners request that the components of the federal rule outlined above (other than the elimination of the risk-based compliance alternatives) be vacated. The Industry Petitioners also request that the USEPA's decision to eliminate risk-based compliance alternatives be remanded for further consideration.

II. Extension of the Stay

Since the Board's November 2015 Order extending the stay, the Illinois EPA has identified multiple paths forward in this rulemaking in light of the federal rule's adoption. In addition, the Illinois EPA has conducted preliminary outreach on these possible paths forward. Based on the feedback gathered during this outreach, Illinois EPA has concluded that additional time is necessary to determine the best means for addressing the interplay between the federal rule and applicable Illinois law.

Differences Between Illinois EPA's Proposal and the Federal Rule⁵

The Illinois EPA's most recent regulatory proposal differs from the federal rule in many significant respects. These differences, which may necessitate revising the Illinois EPA's proposal, include the following items:

Issue	Illinois EPA proposal	Federal rule
Groundwater quality standards	Corrective action necessary when monitoring reveals exceedances of established state groundwater quality standards, which include more and different constituents than the federal rule.	Two hierarchical tiers of groundwater quality standards included in Appendices III and IV of the rule. Corrective action and closure are necessary only if monitoring reveals contaminants in Appendix IV above the MCL or background.
Groundwater quality standards compliance point	Lateral distance of 25 feet from the edge of the unit or the property line, whichever is closer, and 15	Waste boundary

⁵ In its November 5, 2015 Order, the Board requested the Illinois EPA identify differences between its proposal and the federal rule.

	feet below the unit or 15 feet into the water table, whichever is greater.	
Location restrictions	None	Limitations on locating CCR surface impoundments above or near aquifers, wetlands, fault areas, seismic impact zones, and unstable areas.
Design criteria	None	Existing CCR surface impoundments must evaluate liner constructions. New CCR surface impoundments must have a composite liner or alternative composite liner.
Operating criteria	None in Part 841 because of other applicable state law	Various air criteria, hydrologic and hydraulic capacity requirements, and inspection requirements
Events that trigger closure	Closure is not mandatory	Existing CCR surface impoundments must close within six months if the impoundment (1) violates the rule's location standards, (2) does not complete a safety factor assessment, or (3) is unlined and violates the MCL for specific contaminants. New CCR surface impoundments that fail to complete a safety factor assessment must close within six months. All CCR surface impoundments must close within 30 days of the final receipt of CCR or, if the date of final receipt is not known at

		the time, within two years of the final receipt of CCR.
Post-closure care duration	At least ten years or compliance with the groundwater quality standards, whichever is longer	Thirty years, unless the CCR surface impoundment closes within three years of the adoption of the federal rule. Not required for closure by removal.

In order to fully examine the extent to which these issues must be addressed,⁶ the Illinois EPA requires additional time to comprehensively conduct outreach with interested stakeholders.

A Stay is Necessary to Ensure the Board Adopts Appropriately Tailored Regulations

Staying this proceeding for an additional 90 days is needed to ensure that CCW surface impoundments are appropriately regulated in Illinois. Changes to the Illinois EPA's most recent proposal may be required to address the possible conflict between the Illinois EPA's proposal and the federal rule. However, the scope and substance of any changes may not be easily ascertainable until additional outreach is completed. Proceeding without accounting for those issues may sacrifice the adoption of a clear, appropriate, and protective regulation. Expediency should not control this matter, especially when exercising prudence will avoid the unnecessary regulatory proposals and hearings. Accordingly, staying this proceeding is appropriate.

Throughout this proceeding, numerous parties championed the necessity of quickly adopting a regulation applicable to CCW surface impoundments. Regulating CCW surface impoundments in an environmentally protective manner is of paramount importance. Developing a clear and understandable regulation is of equal importance. Indeed, such a regulation should not conflict with applicable federal law or cause confusion for the regulated community. The federal rule addresses the environmental and technical issues at CCR surface

⁶ The federal rule also includes requirements related to physical integrity evaluations, recordkeeping, public notice, and additional inspections. Although the Illinois EPA's proposal does not mirror those requirements, it does not appear that these differences necessarily require substantial revision to its regulatory proposal to avoid conflict or confusion.

impoundments in a protective manner. Adopting a rule applicable to CCW surface impoundments before completing necessary outreach would likely result in a long, contentious proceeding before the Board.

During the stay, the self-implementing federal rule will continue to govern CCR surface impoundments. Existing Illinois law protects groundwater resources and discharges to surface waters. Owners and operators of CCW surface impoundments are, and will continue to be, 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 statutory and regulatory protections will ensure there is continued oversight of groundwaters potentially impacted by CCW surface impoundments in Illinois both for the remainder of the stay and once any Illinois-specific regulations are adopted.

The Illinois EPA is committed to ensuring that CCW surface impoundments are operated and, when necessary, closed in a manner that protects the environment while also affording surface impoundment owners and operators sufficient flexibility to maintain those impoundments in a manner that complies with the established federal and state protective standards. To deliver on this commitment and to further the best interests of all parties, the Illinois EPA believes a 90 day stay is necessary. The Illinois EPA has contacted the main participants in this rulemaking proceeding. The Environmental Groups and members of the regulated community did not object to the requested 90 day stay. During the stay, the Illinois EPA will expand its outreach and convene a stakeholders' meeting with interested parties to identify the most effective way of proceeding. In addition, the requested stay will enable all

interested parties sufficient time to evaluate the issues central to the appeal of the federal rule and determine the ideal way to address the various significant differences between the outstanding proposals and the federal rule. The requested stay will provide the Illinois EPA and interested stakeholders sufficient time to confer on the benefits of forging a proposal that weaves the federal rule into the Board's regulations or, if that is not a viable option, to determine the most appropriate regulatory mechanism to address any Illinois-specific concerns regarding the regulation of CCW surface impoundments.

WHEREFORE, the Illinois EPA respectfully requests the Board stay this proceeding an additional 90 days, at the conclusion of which the Illinois EPA will file a pleading containing the Agency's preferred path moving forward in the above captioned matter.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: 

James Jennings
Assistant Counsel
Division of Legal Counsel

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THIS FILING IS SUBMITTED ELECTRONICALLY AND SERVED ON RECYCLED PAPER

CERTIFICATE OF SERVICE

James Jennings, Assistant Counsel for the Illinois EPA, herein certifies that she has served a copy of the foregoing NOTICE OF FILING and ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S STATUS REPORT AND MOTION TO EXTEND THE STAY 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 March 4, 2016.

By: 

THIS FILING IS SUBMITTED ELECTRONICALLY AND SERVED ON RECYCLED PAPER

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