

ILLINOIS POLLUTION CONTROL BOARD  
October 5, 2023

IN THE MATTER OF: )  
)  
PETITION OF MIDWEST GENERATION, )  
LLC FOR AN ADJUSTED STANDARD )  
FROM 35 ILL. ADM. CODE 845.740(a) AND ) AS 21-3  
FINDING OF INAPPLICABILITY OF 35 ) (Adjusted Standard - Land)  
ILL. ADM. CODE 845 )

ORDER OF THE BOARD (by B. F. Currie):

On May 11, 2021, Midwest Generation, LLC (Midwest or MWG) filed a petition pursuant to Section 28.1 of the Environmental Protection Act (Act) and Part 104 of the Board’s procedural rules. *See* 415 ILCS 5/28.1 (2022); 35 Ill. Adm. Code 104 Subpart D. In a second amended petition (Pet.), Midwest petitions the Board for an adjusted standard from Part 845 Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments. 35 Ill. Adm. Code 845. Specifically, Midwest seeks a finding that Part 845 is inapplicable to an area it calls the “Grassy Field” at its Waukegan Station in Waukegan, Lake County.

Midwest filed a motion requesting a stay of this proceeding until either one year from the filing of the motion, or the date on which the U.S. Environmental Protection Agency (USEPA) takes final action on a proposed rule relating to legacy coal combustion residual surface impoundments – whichever occurs first. The Illinois Environmental Protection Agency (IEPA) filed a motion opposing the stay. A group of interested parties filed a comment also in opposition of a stay. Midwest has also filed an amended petition. Today, the Board denies Midwest’s motion to stay the proceedings, accepts the second amended petition, and directs the hearing officer to proceed expeditiously to hearing.

In this order, the Board first provides a brief procedural history relevant to the motion and amended petition. Next, the Board summarizes the filings regarding the motion and petition, after which the Board analyzes and provides the reasons for denying the motion to stay and accepting the amended petition.

**PROCEDURAL BACKGROUND**

On July 28, 2023, Midwest filed a motion to stay the proceedings (Mot. to stay) as well as a memorandum in support of its motion to stay (Memo to stay).

On September 6, 2023, IEPA filed a response to Midwest’s motion to stay, requesting that the Board deny the stay (IEPA Resp.). Also on September 6, 2023, four groups filed a collective comment opposing Midwest’s motion to stay. Those groups are: Clean Power Lake County, Earthjustice, Prairie Rivers Network, and Sierra Club (collectively, Environmental Groups).

On July 28, 2023, Midwest filed its second amended petition for an adjusted standard and a finding of inapplicability. No response to the petition was filed by IEPA.

### **Procedural Motions**

On September 20, 2023, Midwest filed a motion for leave to file *instanter* a response to comment opposing its motion to stay. Midwest filed the motion for leave to file pursuant to 35 Ill. Adm. Code 101.500. The Board's procedural rules in Section 101.500 govern the filing of motions, responses, and replies, however in this proceeding, the Environmental Groups' public comment was not styled as a formal response to Midwest's motion to stay, but rather a comment. Therefore, the Board denies Midwest's motion to file a response, however, accepts the filing as a public comment and directs the Clerk to identify it in the docket as PC #8.

### **MOTION TO STAY**

#### **Legal Background**

The Board's rules regarding a motion to stay are found at 35 Ill. Adm. Code Section 101.514(a) and are as follows:

#### Section 101.514 Motions to Stay Proceedings

- a) Motions to stay a proceeding must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed, and in decision deadline proceedings, by a waiver of any decision deadline. A status report detailing the progress of the proceeding must be included in the motion.

The decision to grant or deny a motion for stay is "vested in the sound discretion of the Board." See People v. State Oil Co., PCB 97-103 (May 15, 2004). When exercising its discretion to determine whether an arguably related matter pending elsewhere warrants staying a Board proceeding, the Board may consider the following factors: (1) comity; (2) prevention of multiplicity, vexation, and harassment; (3) likelihood of obtaining complete relief in the foreign jurisdiction; and (4) the *res judicata* effect of a foreign judgment in the local forum, *i.e.*, in the Board proceeding. Sierra Club, et. al v. Midwest Generation, LLC, PCB 13-15, slip op at 11 (April 17, 2014). The Board may also weigh the prejudice a stay would cause the nonmovant against the policy of avoiding duplicative litigation. *Id.* at 11, *citing Village of Mapleton v. Cathy's Tap, Inc.*, 313 Ill. App. 3d 264, 267, 729 N.E.2d 854, 857 (3d Dist. 2000). Additionally, the Board must consider any ongoing environmental harm should the stay be granted. *Id.* at 16.

#### **Discussion**

Midwest seeks a stay in this proceeding to await finalization of a USEPA proposed rule, issued on May 18, 2023. The subject of that proposed rule is legacy coal combustion residual (CCR) surface impoundments and is captioned, *Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface*

*Impoundments*, EPA-HQ-OLEM-2020-0107, 88 Fed. Reg. 31982 (May 18, 2023). Midwest argues that the Board should stay this proceeding, “because any decision the Board might issue in the present proceeding could conflict with or be rendered moot by this imminent federal rulemaking, creating issues of comity and multiplicity, vexation, and harassment and wasting time and resources of both the Board and the parties.” Mot. to Stay at 5.

In its proposed rule, USEPA has listed potential areas that might be regulated under the new rule. USEPA has called this list “Potential CCR Management Unit Universe” and in that list, it has indicated that the “Old Pond” and “Historic Fill” at the Waukegan Station are potential CCR management units. EPA-HQ-OLEM-2020-0107-0155, Exh. 1. Midwest says that the descriptors “Old Pond” and “Historic Fill” “presumably refer to the Grassy Field”. Mot. to Stay at 4.

Further, Midwest says that there is no risk of environmental harm or threats to public health if this proceeding is stayed. Mot. to Stay at 6. “There are no potable wells downgradient of the Station, and Environmental Land Use Controls are established at the Station which prevent any access to groundwater.” *Id.*

IEPA opposes the motion to stay, arguing that there remain uncertainties with the proposed USEPA rule, that the Board’s rules on CCR surface impoundments remain applicable independent of the federal rules, and that Midwest failed to show no environmental harm would result from the stay. IEPA Resp. at 4. As to USEPA’s proposed rule, IEPA says that the date of final action regarding the rule is unknown at this time and that Midwest, “is overstating the certainty that U.S. EPA will take final action regarding the proposed language by May 6, 2024.” *Id.* IEPA points to the consent decree that required USEPA to propose language and solicit comments to revise its Part 257 rules and allows the deadlines in the proposal to be extended. *Id.*, citing Statewide Organizing for Community Empowerment v. US EPA, No. 22-cv2526 (D.D.C., May 3, 2023). IEPA argues that it is possible that USEPA might extend the deadline to take final action on the proposed rules beyond the anticipated deadline of May 6, 2024. IEPA Resp. at 4. “Petitioner is attempting to analyze the impact of proposed language before it has gone through the rulemaking process.” *Id.* at 5.

Further, IEPA argues that there exists a threat of environmental harm from the Grassy Field itself. The lack of potable wells downgradient of the station only eliminates the threat of consuming that downgradient groundwater. *Id.* at 5. “The absence of groundwater consumption has no bearing on environmental harm or the need to protect the groundwater resources.” *Id.* The presence of Environmental Land Use Controls (ELUC) means, in IEPA’s argument, that “environmental harm has already occurred or may occur (e.g. potential for migration of contaminated groundwater), and the property owner has taken appropriate steps to ensure that human health will not also be jeopardized.” *Id.* at 5-6. IEPA points to Midwest’s exhibit 37, Table B 4-2 which show that the average concentration of boron, sulfate, and total dissolved solids at monitoring wells MW-5 and MW-7 exceed Class I groundwater Quality Standards and groundwater protection standards. *Id.* at 6, citing 35 Ill. Adm. Code 620.410 and 845.600(a)(1). Additionally, boring samples provided by Midwest’s environmental experts in exhibit 37 show 40 borings drilled in the Grassy Field and, “all the borings sampled for metals had two or more

leachable metals at concentrations above the groundwater protection standards of 35 Ill. Adm. Code 845.600(a)(1).” *Id.* at 7.

The Environmental Groups’ comment also opposes the motion to stay, arguing, that there is no guarantee USEPA’s proposed rule will become final by May 6, 2024, and even if it does, the Board’s rules in Part 845 currently govern the Grassy Field. PC 7 at 2 and 6. Additionally, the Groups argue that a stay would prolong the environmental harm to the residents of Waukegan. *Id.* at 8.

### **Board Findings**

In the past, the Board has found that it is able to consider Board-specific proceedings while federal rulemakings are on-going. *See Sierra Club, et al v. Midwest Generation, LLC*, PCB 13-15, slip op. at 13 (April 17, 2014). Further, the Board has previously found that requests for stays to await final rules from USEPA are unwarranted, “because of the uncertain timing and duration of the rulemakings. There is no way to predict with any confidence when compliance with proposed rules will be required.” *Id.* at 14. In this case, the Board agrees with IEPA that Part 845 exists independently of USEPA’s proposed rules for legacy CCR surface impoundments. The Board finds no risk of multiplicity, vexation, or harassment in continuing with this adjusted standard proceeding.

The Board has, in a separate proceeding, found that the presence of an ELUC at Waukegan is not “corrective action” and an absence of downgradient receptors at Waukegan does not equate to an absence of environmental harm. PCB 13-15 slip op. at 6 (Dec. 15, 2022). The Board agrees with IEPA that exhibits filed by Midwest in this adjusted standard proceeding indicate that the monitoring wells MW-5 and MW-7 show exceedance of Class I Groundwater Quality Standards and groundwater protection standards. The Board finds that there is a threat to the environment and human health at the Waukegan Station and therefore finds that a stay is inappropriate at this point in the proceedings and denies Midwest’s motion for stay.

### **SECOND AMENDED PETITION**

Midwest’s second amended petition withdraws a request for an adjusted standard allowing Midwest to decontaminate and retain the existing liner of the West Pond at its Waukegan Station. “Since MWG filed its Petition... it has determined it is no longer necessary to reuse the liner in the West Pond. No other changes to the Amended Petition are proposed, and MWG maintains its request for an adjusted standard finding that Part 845 of the Board rules is inapplicable to the Grassy Field.” Pet. at 1.

Section 28.1 of the Act and Section 104.408 of the Board’s procedural rules require publication of notice of an adjusted standard proceeding in a newspaper of general circulation in the area affected by the petitioner’s activity. 415 ILCS 5/28.1(d)(1)(2022); 35 Ill. Adm. Code 104.408(a). Notice must be published within 14 days of filing a petition for an adjusted standard with the Board. 35 Ill. Adm. Code 104.408(a). Midwest filed the second amended petition with the Board on July 28, 2023. As required by Section 104.410, Midwest timely filed a certificate

of publication of notice of the amended petition on August 9, 2023. Notice of filing was published on August 4, 2023, in the *Daily Herald* and the *Daily Herald Reflejos*.

The Board finds that the notice and second amended petition meet the requirements of Section 28.1 of the Act and Section 104.408 of the Board's procedural rules and accepts the amended petition for adjusted standard. *See* 415 ILCS 5/28.1 (2022); 35 Ill. Adm. Code 104.408.

### **CONCLUSION**

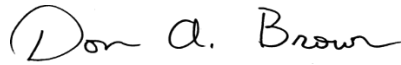
The Board denies Midwest's motion to stay the proceedings, finding that the Board is able to consider an adjusted standard during the same time period a federal rulemaking is occurring. Additionally, the Board finds there exists a risk of environmental harm at the site, which weighs heavily in its decision to deny requested stay. The Board accepts Midwest's second amended petition and directs the hearing officer to proceed to hearing.

### **ORDER**

1. Midwest's motion to stay the proceedings is denied.
2. Midwest's second amended petition is accepted.
3. The hearing officer is directed to proceed expeditiously to hearing.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 5, 2023, by a vote of 4-0.



Don A. Brown, Clerk  
Illinois Pollution Control Board