

**BEFORE THE  
ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF:

ILLINOIS POWER GENERATING  
COMPANY;  
ELECTRIC ENERGY, INC.;  
ILLINOIS POWER RESOURCES  
GENERATING, LLC; and  
DYNEGY MIDWEST GENERATION, LLC

Petitioners,

v.

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,

Respondent.

PCB 2024-045,  
PCB 2024-048,  
PCB 2024-053,  
PCB 2024-055, and  
PCB 2024-056

(Petitions for review – Alternative  
Source Demonstration)

**NOTICE OF FILING**

To:

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PLEASE TAKE NOTICE that today I have electronically filed with the Office of the Clerk of the Illinois Pollution Control Board the **JOINT CONSOLIDATED MOTION TO STAY PROCEEDINGS** and a **CERTIFICATE OF SERVICE**, which are attached and copies of which are herewith served upon you.

Dated: April 15, 2024

Respectfully submitted,

/s/ Samuel A. Rasche

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*Attorney for Illinois Power Generating  
Company; Electric Energy, Inc.; Illinois  
Power Resources Generating, LLC; and  
Dynergy Midwest Generation*

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on this 15<sup>th</sup> day of April, 2024:

I have electronically served true and correct copies of the Joint Consolidated Motion to Stay Proceedings by electronically filing with the Clerk of the Illinois Pollution Control Board and by e-mail upon the following persons:

Don Brown  
Carol Webb  
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My e-mail address is [Sam.Rasche@afslaw.com](mailto:Sam.Rasche@afslaw.com).

The number of pages in the e-mail transmission is 7.

The e-mail transmission took place before 5:00 p.m.

/s/ Samuel A. Rasche

Samuel A. Rasche

Dated: April 15, 2024

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(Petitions for review – Alternative  
Source Demonstration)

**JOINT CONSOLIDATED MOTION TO STAY PROCEEDINGS**

Petitioners Illinois Power Generating Company (“IPGC”), Electric Energy, Inc. (“EEI”), Illinois Power Resources Generating, LLC (“IPRG”), and Dynegy Midwest Generation, LLC (“DMG”) (collectively, “Petitioners”) and Respondent Illinois Environmental Protection Agency (“IEPA” or “Respondent”) (together, the “Parties”), by their attorneys and pursuant to 35 Ill. Adm. Code § 101.514, respectfully jointly request that the Board enter an order staying the above captioned proceedings until 30 days after the Board rules on a motion for summary judgment in the related case involving IEPA’s nonconcurrence with an Alternative Source Demonstration for the Newton Primary Ash Pond, *Illinois Power Generating Company v. Illinois Environmental Protection Agency*, Docket no. PCB 2024-043. In support of this motion, the Parties state as follows:

**I. BACKGROUND AND STATUS REPORT**

1. On December 15, 2023, IPGC filed a Petition For Review of Illinois Environmental Protection Agency's Non-Concurrence with Alternative Source Demonstration Under 35 Ill. Admin. Code Part 845. PCB 24-043, Petition (December 15, 2021) (the "Newton Appeal"). Petitioners filed similar Petitions for Review on December 22, 2023 (PCB 24-045), (the "Joppa Appeal"); January 12, 2024 (PCB 24-48) (the "Duck Creek Appeal"), February 2, 2024 (PCB 24-53) (the "Vermilion Appeal"); and February 20, 2024 (PCB 24-55 & PCB 24-56) (the "Coffeen Appeals") (collectively the "Appeals" and each an "Appeal").

2. Each of the Appeals involve IEPA's nonconcurrence with Alternative Source Demonstrations ("ASD's") submitted by Petitioners to IEPA pursuant to 35 Ill. Admin. Code Part 845. The purpose of an ASD is to demonstrate that a source other than a particular CCR surface impoundment caused the contamination (as demonstrated by an exceedance of applicable groundwater protection standards set forth in 35 Ill. Adm. Code 845.600(a)) and that CCR surface impoundment did not contribute to the contamination. In the Appeals, Petitioners challenge the legal and factual sufficiency of IEPA's nonconcurrences.

3. Each Appeal also included a request for a partial stay of certain requirements of Part 845 that would otherwise result from IEPA's nonconcurrences. Respondent did not object to Petitioners requests for partial stay of certain requirements of Part 845, and the Board granted the requested stays in the Newton, Joppa, and Duck Creek Appeals. Order, PCB 24-43 (Jan. 18, 2024); Order, PCB 24-45 (Feb. 1, 2024); Order, PCB 24-48 (Feb. 15, 2024). Petitioners' motions for stay are pending in the Vermilion and Coffeen Appeals (PCB 24-53, PCB 24-55, and PCB 24-56).

4. Respondent requested, and Petitioners did not object to, extensions of time to file the administrative record for each Appeal. The Hearing Officer granted Respondent's motions for extension of time to file the administrative record in the Newton, Joppa, Duck Creek, Vermilion,

and Coffeen ASD Appeals. Hearing Officer Order, PCB 23-43 (Jan. 22, 2024); Hearing Officer Order, PCB 23-45 (Jan. 22, 2024); Hearing Officer Order, PCB 23-48 (Feb. 2, 2024); Hearing Officer Order, PCB 23-53 (Feb. 26, 2024); Hearing Officer Order, PCB 24-55 (Apr. 1, 2024); Hearing Officer Order, PCB 24-56 (Mar. 14, 2024).

5. The parties have conferred multiple times via telephone and email regarding scheduling and case management issues for the appeals. The parties have also discussed the possibility of settlement in some or all of the Appeals. The parties are in agreement that given common subject matter and legal issues among the appeals, the most efficient path forward is to proceed on the Newton Appeal (PCB 24-043) while holding the remaining appeals in abeyance until after the Board issues a ruling on motions for summary judgment in the Newton Appeal or the Newton Appeal is otherwise resolved through settlement.

## **II. REQUEST FOR STAY**

6. Motions to stay a proceeding “must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed . . .” 35 Ill. Admin Code § 101.514(a). The decision to grant or deny a motion for stay is “vested in the sound discretion of the Board.” *People v. State Oil Co.*, PCB 97-103 (May 15, 2003).

7. The Parties’ requested stay would promote efficiency and judicial economy. Although each Appeal involves unique facts that would make consolidation impractical, the Appeals present common questions of law. In particular, the Appeals each turn in part on disagreements regarding the burden of proof that must be met by an owner or operator submitting an ASD under Part 845, the kinds of evidence that may be used to support an ASD, what facts IEPA may use to justify a non-concurrence with an ASD, and the depth of justification IEPA must provide when issuing a non-concurrence.

8. Because the Appeals are the first of their kind before the Board pursuant to the recently promulgated ASD provisions of 35 Ill. Admin. Code Part 845, some of these legal issues present matters of first impression before the Board. Accordingly, resolving these disputes in the context of the Newton Appeal will provide clarity and narrow the issues in the remaining Appeals. A resolution in the Newton Appeal may, depending on the outcome, moot some or all of the disputed issues in remaining Appeals. At minimum, a resolution in the Newton Appeal will provide clarity on the specific facts that will be material to the remaining Appeals.

9. A stay will not result in environmental harm. As noted above, in the majority of the Appeals the Board has already stayed the requirements of Part 845 that are at issue, and IEPA does not object to the requested stays that remain pending. In granting these stays, the Board has concluded that the stays “will not increase the likelihood of harm to human health or to the environment.” Order at 3-4, PCB 24-43 (Jan. 18, 2024); Order at 3-4, PCB 24-45 (Feb. 1, 2024); Order at 3-4, PCB 24-48 (Feb. 15, 2024). Significantly, each of the CCR surface impoundments at issue will remain subject to groundwater monitoring requirements of 35 Ill. Adm. Code § 845.650(d) throughout the duration of any stay. *Id.*

10. Nor will the requested stays result in prejudice to any party. The parties are in agreement that the stays will serve to increase the efficiency with which the Appeals may be brought to final resolution and decrease the burden on the Parties and on the Board.

11. The requested stay will not impact the Agency filing the records for each of the matters as required by 35 Ill. Adm. Code § 105.116. The stay will also not impede the parties from engaging in settlement discussions, including with respect to the stayed matters, during the course of the stay. The Board has routinely stayed proceedings to allow parties to seek settlement. *See, e.g., Arnold Magnetic Technologies v. IEPA*, Hearing Officer Order, PCB 16-97 (Aug. 9, 2016).

12. To avoid the considerable expenditure of time and resources of the Parties and the Board to brief the same or similar issues simultaneously in six separate proceedings, the Parties request to proceed on the Newton appeal alone and to hold the remaining Appeals in abeyance until after the Board rules on a motion for summary judgment. Doing so could provide precedent or guidance for the remaining Appeals and allow the Parties to narrow the scope of issues before the Board, allowing the remaining Appeals to be more efficiently resolved.

13. The Parties will provide a status report as required by 35 Ill. Admin. Code § 101.514 at the close of the stay.

WHEREFORE, the Parties respectfully request that the Board stay proceedings in Case Nos. PCB 2024-045, PCB 2024-048, PCB 2024-053, PCB 2024-055, and PCB 2024-056 until 30 days after the Board issues a ruling on summary judgment in Case No. PCB 2024-043.

Respectfully Submitted,

/s/ Samuel A. Rasche

/s/ Mallory Meade  
/s/ Samuel Henderson

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