ILLINOIS POLLUTION CONTROL BOARD
June 26, 2025

IN THE MATTER OF:	)	
	)	
PETITION OF MIDWEST GENERATION, LLC FOR A FINDING OF INAPPLICABILITY OF 35 ILL. ADM. CODE 845	)	AS 21-3
	)	(Adjusted Standard - Land)
	)	
	)	

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

On March 20, 2025, the Board issued a final opinion and order (final order) denying Midwest Generation, LLC's petition for an adjusted standard for a 10-acre portion of its Waukegan Station in Waukegan, Lake County. On April 23, 2025, Midwest appealed the Board's final order to the Second District Appellate Court. On the same day, Midwest also filed a motion with the Board to stay the Board's final order pending the appeal. For the reasons below, the Board denies the motion to stay.

PROCEDURAL BACKGROUND

Procedural History

On May 11, 2021, Midwest Generation, LLC (Midwest or MWG) filed a petition for an adjusted standard and a finding of inapplicability. Midwest subsequently amended its petition three times; its final petition requested a finding of inapplicability from Part 845 (35 Ill. Adm. Code 845) for a 10-acre site at Waukegan Station, namely, the former slag/fly ash storage area (FSFS Area). Part 845 contains the Board's standards for the disposal of coal combustion residuals (CCR) in surface impoundments.

On September 6, 2023, Midwest filed a motion for a stay of this adjusted standard proceeding to wait for the United States Environmental Protection Agency (USEPA) to issue its final rule on CCR management units. On October 5, 2023, the Board denied the motion to stay, finding, as it has found in the past, that the Board is able to consider Board-specific proceedings while federal rulemakings are on-going. The Board also found that the FSFS Area posed a threat to the environment and human health, and that staying the proceeding would be inappropriate.

The Board held two days of public hearing in Waukegan on Midwest's adjusted standard petition. In addition to seven witnesses testifying at hearing, 34 members of the public provided oral public comment, and the Board received 51 written public comments from members of the public.

On March 20, 2025, the Board issued the final order. The Board held that the FSFS Area is a "CCR surface impoundment", as that term is defined in the Environmental Protection Act (Act) (415 ILCS 5/3.143 (2024)), and therefore is subject to Part 845. The Board further held

that Midwest failed to meet its burden of proof under Section 28.1(c) of the Act (415 ILCS 5/28.1(c) (2024)) for an adjusted standard. The Board therefore denied Midwest's petition

On April 23, 2025, Midwest filed a petition with the Second District Appellate Court for direct administrative review of the Board's final order (No. 2-25-0166). Also on April 23, 2025, Midwest filed a motion with the Board to stay the Board's final order pending the appeal (Mot. to Stay), attaching a memorandum in support of the motion (Stay Memo). On May 7, 2025, the Illinois Environmental Protection Agency (IEPA) filed a response opposing Midwest's motion to stay (Resp.). On May 21, 2025, Midwest filed a motion for leave to reply *instanter* (Reply Mot.), attaching its reply to IEPA's response (Reply).

Midwest's Motion for Leave to File

Under the Board's procedural rules, a movant has no right to reply to a response to its motion, "except as the Board or hearing officer permits to prevent material prejudice." 35 Ill. Adm. Code 101.500(e). Here, Midwest argues a reply is warranted because IEPA "raised new arguments in its Response . . . [and] MWG will be materially prejudiced if it is not permitted to reply." Reply Mot. at 1. Midwest further asserts that IEPA misunderstands the purpose of the requested stay and the factors to consider when ruling on a motion for stay pending appeal. *Id*. at 2. Midwest also reports that in its motion, it had miscalculated the total amount of statutory program fees purportedly owed to IEPA. *Id*., n.1. In the stay motion, Midwest had said the fees totaled $200,000. Mot. to Stay at 5. In its reply, Midwest attaches an IEPA invoice showing $375,000 in fees due for the FSFS Area. Reply, Attach.1.

The Board does not find that IEPA raises new arguments in its response. However, updating Midwest's initial miscalculation of fees warrants a reply to prevent material prejudice. The Board therefore grants Midwest's motion for leave to file *instanter* and accepts the reply.

MOTION TO STAY THE BOARD'S FINAL ORDER

Legal Background

Section 41(a) of the Act (415 ILCS 5/41(a) (2024)) provides for judicial review of final Board orders directly in the Appellate Court. Although the Appellate Court acquired jurisdiction over this case once Midwest timely filed its petition for review with the Appellate Court, the Board retains jurisdiction to determine "matters collateral or incidental to the judgment. *** [A] stay of judgment is collateral to the judgment and does not affect or alter the issues on appeal." GMC v. Pappas, 242 Ill. 2d 163, 174 (2011).

Section 101.906 of the Board's procedural rules addresses judicial review of final Board orders, including how to seek a stay of a final Board order pending appeal to the Appellate Court:

> c) The procedure for stay of any final Board order during appeal will be as provided in Supreme Court Rule 335. 35 Ill. Adm. Code 101.906(c).

In turn, Illinois Supreme Court Rule 335(g) provides as follows:

> g) Stay. Application for a stay of a decision or order of an agency pending direct review in the Appellate Court shall ordinarily be made in the first instance to the agency. A motion for stay may be made to the Appellate Court or to a judge thereof, but the motion shall show that application has been made to the agency and denied, with the reasons, if any, given by it for denial, or that application to the agency for the relief sought was not practicable. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavit. With the motion shall be filed such parts of the record as are relevant to the relief sought. Reasonable notice of the motion shall be given to all parties to the proceeding in the Appellate Court. The court may condition relief under this rule upon the filing of a bond or other appropriate security. Ill. Sup. Ct. R. 335(g).

Stacke Balancing of Factors

For determining whether to grant a stay pending appeal, the Board uses the framework established in Stacke v. Bates, 138 Ill. 2d 295 (1990). There, the Illinois Supreme Court explained:

> we decline to follow a ritualistic formula which specifies the elements a court may consider in passing on a motion to stay, and which limits the court's consideration to those elements. In making the determination whether or not to grant a stay pending appeal, the court, of necessity, is engaged in a balancing process as to the rights of the parties, in which all elements bearing on the equitable nature of the relief sought should be considered. *** We believe that in all cases, the movant, although not required to show a probability of success on the merits, must, nonetheless, present a substantial case on the merits and show that the balance of the equitable factors weighs in favor of granting the stay. If the balance of the equitable factors does not strongly favor movant, then there must be a more substantial showing of a likelihood of success on the merits. Stacke, 138 Ill. 2d at 308-09.

Accordingly, the Board first determines whether the movant has a substantial case on the merits and then the Board considers the balance of equitable factors, including (1) whether a stay is necessary to secure the fruits of the appeal; (2) whether the status quo should be preserved; (3) the respective rights of the litigants; and (4) whether a stay would impose hardship on other parties. *See* People v. AET Environmental and EOR Energy LLC, PCB 07-95, slip op. at 4 (June 20, 2013), citing Stacke, 138 Ill. 2d at 304-06, 309.

Substantial Case on the Merits

Midwest argues that it has a substantial case on the merits because the Board's interpretation of the definition of "CCR surface impoundment" under the Act is "precedent

setting" and "ignores the plain meaning and context of the terms, impermissibly disregarding both legislative intent and established canons of construction." Stay Memo at 9. Midwest also challenges Board findings of fact. *Id*. at 9-10. IEPA asserts that MWG has "failed to present a substantial case on the merits" (IEPA Resp. at 7) but IEPA does not specify any reasons for its assertion.

The Board's final order thoroughly addressed the Act's definition of "CCR surface impoundment" (415 ILCS 5/3.143 (2024)). After evaluating the parties' competing arguments on the term's meaning, analyzing the definition's language, and applying the definition so interpreted to the facts, the Board held that the FSFS Area was an inactive CCR surface impoundment and therefore subject to Part 845's requirements, consistent with IEPA's position. Midwest disagrees with the Board's interpretation, maintaining that its own reading of the definition, which would result in Part 845's inapplicability to the FSFS Area, is correct.

The outcome of this adjusted standard proceeding hinged largely on interpreting the statutory definition of "CCR surface impoundment". The Board's final order recognized that the definition includes words that are themselves not defined in the Act or the Board's rules. Also, although it did not withstand scrutiny, Midwest's interpretation appeared plausible at first. And the Board acknowledges that the definition had not before been precedentially interpreted and applied to specific facts. Under these circumstances, although the Board reiterates that it correctly interpreted the definition, the Board finds that Midwest has a substantial case on the merits within the meaning of Stacke.

Fruits of the Appeal

Midwest argues that a stay is necessary to secure the fruits of its appeal because, without a stay, Midwest would be required to "expend a great deal of effort and funds" to comply with Part 845 for the FSFS Area even though the Appellate Court might find Part 845 inapplicable to the FSFS Area. Mot. to Stay at 5. Specifically, according to Midwest, it will need to undertake "expensive and burdensome engineering projects" to comply with Part 845's permit application requirements for CCR surface impoundments. *Id*. In this adjusted standard proceeding, Midwest argued that the FSFS Area was not a CCR surface impoundment, but rather a CCR management unit (CCRMU) as that term is defined in the federal rules (40 C.F.R. § 257.53). Midwest explains that if the Board denies the stay, Midwest will be obligated to begin compliance with Part 845 while "trying to comply with the related but nonidentical requirements of the federal CCRMU Rule, risking inadvertent noncompliance due to the differences in federal and Illinois regulations." *Id*. Midwest claims that endeavoring to comply with "two distinct and potentially inconsistent rules" would be a "logistical nightmare," and a stay would prevent expending resources to comply with Part 845. Memo to Stay at 5.

Additionally, Midwest points out that under the Act, owners or operators of CCR surface impoundments must pay CCR surface impoundment program fees. Reply at 2, citing 415 ILCS 5/22.59(j) (2024). Midwest's unpaid balance of fees for the FSFS Area is $375,000. Reply, Attach. 1. Midwest is concerned that IEPA will not refund the fees even if Midwest is successful on appeal. Reply at 5.

IEPA asserts that Midwest does not explain "in any particularity the supposed 'expensive and burdensome engineering projects'" necessary to prepare Part 845 permit applications for the FSFS Area. Resp. at ¶ 20. IEPA questions Midwest's claim "in light of the fact that just like Part 845," which apply to CCR surface impoundments, the federal rules for CCRMUs require "groundwater monitoring, corrective action, and closure." *Id*. Also, IEPA argues that the fee amounts for CCR surface impoundments are determined by the Act and, unlike civil penalties, the Act does not allow for any discretion by the Board to lessen the fees in an adjusted standard proceeding. *Id*. at ¶ 18.

MWG, as the stay movant, has the burden to "show that the balance of the equitable factors weighs in favor of granting the stay." Stacke, 138 Ill. 2d at 309. As far as concerns MWG's desire to avoid complying with Part 845 during the appeal, MWG makes only conclusory statements as to what the fruits of its appeal would be. MWG claims that absent a stay, it will "have to *initiate* the technical and engineering assessments to prepare the extensive CCR surface impoundment permit applications." Stay Memo at 3 (emphasis added); *see also* Mot. to Stay at 5 ("*initiating* expensive and burdensome engineering projects to prepare permit applications") (emphasis added). The Board finds that Midwest fails to provide any details about these assessments or what initiating them would entail. In addition, MWG's stay motion is silent on whether this work could also be used to satisfy requirements of the federal CCRMU rules, which became effective on November 8, 2024, and with which Midwest asserts it will comply. The federal CCRMU rules, like Part 845, require groundwater monitoring, corrective action, and closure, as IEPA points out.

The "logistical nightmare" that MWG fears—trying to comply with two different sets of rules—is not a result of the Board's final order, which does not compel MWG to comply with the federal CCRMU rules. On the contrary, the Board found that the FSFS Area constitutes a "CCR surface impoundment", which has the same definition in the Act, the Board's rules, and USEPA's rules. *See* 415 ILCS 5/3.143 (2024); 35 Ill. Adm. Code 845.120; 40 C.F.R. § 257.53. MWG misinterprets the Board's final order when it claims that the Board found that the FSFS Area is a CCRMU. *See* Stay Memo at 10; Reply at 4. In determining whether granting MWG's petition would be consistent with applicable federal law (415 ILCS 5/28.1(c)(4) (2024)), what the Board said was *if* the petition were granted, *i.e.*, *if* the FSFS Area were not considered a CCR surface impoundment but rather a CCRMU, the grant would be consistent with the federal CCR rules, which treat the two distinctly.[1] Final order at 15.

The Board recognizes that the federal CCRMU rules are self-implementing with no USEPA review or permitting requirements. *See* 89 Fed. Reg. 38950, 39094 (May 8, 2024). On the other hand, Part 845 requires a permit application process with IEPA review. The Part 845 deadlines to submit permit applications for inactive CCR surface impoundments have passed.

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[1] USEPA defines a "CCR management unit" in relevant part as "any area of land on which any noncontainerized accumulation of CCR is received, is placed, or is otherwise managed, that is not a regulated CCR unit." 40 C.F.R. § 257.53. And "regulated CCR unit" means "any new CCR landfill, existing CCR landfill, new CCR surface impoundment, existing CCR surface impoundment, inactive CCR surface impoundment, or legacy CCR surface impoundment. This term does not include CCR management units." *Id*.

See 35 Ill. Adm. Code 845.230(d)(1), 845.700(h). The Board also recognizes that the Part 845 permitting process includes a requirement for public hearings on IEPA draft permit determinations. *See* 35 Ill. Adm. Code 845.260(d)(1) ("whenever the Agency determines that there exists a significant degree of public interest in the proposed permit"). The federal CCRMU rules, of course, have no corresponding requirement. It is therefore conceivable that Midwest would have to undertake some steps in complying with Part 845 during the appeal that it would not have to undertake to comply with the federal CCRMU rules. But, in the words of IEPA, Midwest's "asserted potential losses" with respect to Part 845 compliance are "ill-defined." Resp. at ¶ 42.

If the Board were to stay its final order, then the Board's determination that the FSFS Area is a CCR surface impoundment would be stayed. As the program fees under Section 22.59(j) of the Act apply only to CCR surface impoundments, staying the final order would make those fees inapplicable to the FSFS Area during Midwest's appeal. But without the stay, if the Appellate Court reverses the Board's final order, Midwest may request reimbursement from IEPA for program fees paid. Midwest is concerned that IEPA did not affirmatively state, in its response to the stay motion, that it would automatically reimburse the program fees if the Appellate Court ruled in Midwest's favor. The Board finds nothing in the record, however, to show that IEPA would be unable to reimburse Midwest's program fees in that scenario. Moreover, Midwest does not explain why it could not pursue reimbursement in the Court of Claims. *See* 705 ILCS 505/8 (2024).

In sum, Midwest has provided little, if any, support for its claim that a stay is necessary to secure what it describes as the fruits of its appeal. The Board therefore finds this factor weighs neither for nor against staying the Board's final order.

Status Quo

Midwest views the status quo as the time before the beginning of the controversy over the classification of the FSFS Area. Reply at 5. And Midwest considers the controversy to have begun on December 16, 2019, when IEPA issued an invoice for Section 22.59(j) fees to Midwest for the FSFA Area. *Id*. Midwest claims that it will "suffer significant hardship in moving forward with the expense, effort, and risk of noncompliance pending appeal as opposed to maintaining the status quo." Stay Memo at 6. Midwest argues that in contrast, IEPA will not suffer any hardship or prejudice if a stay is granted. *Id*. at 6-7. Instead, Midwest continues, maintaining the status quo will ensure that IEPA's "efforts and resources" will not be "wasted on the [FSFS Area] should MWG's appeal be successful." *Id*. at 7.

As to environmental harm and threats to public health, Midwest maintains that because FSFS Area is a CCRMU, it is subject to "the recently adopted federal CCRMU Rule, and MWG has already begun the process of complying with this extensive rule." Stay Memo at 8. Therefore, in Midwest's view, "delaying regulation" of the FSFS Area as a CCR surface impoundment under Part 845 "does not mean the area will not be managed in a manner that protects human health and the environment." *Id*. Midwest adds that no potable water wells are located downgradient or in the vicinity of the FSFS Area, and its expert testified that the groundwater posed "little to no risk to human health or the surrounding environment." *Id*.

Midwest states that the Environmental Land Use Controls or "ELUCs" at Waukegan Station ensure no potable water wells will be constructed on the property. *Id*. Midwest also notes that the City of Waukegan's drinking water supply's intake is 6,200 feet into Lake Michigan and therefore "has a low susceptibility to shoreline contaminants due to mixing and dilution." *Id*.

IEPA argues that the status quo is complying with the requirements of Part 845, not "deferring Part 845 obligations until after [Midwest's] appeal is resolved," as Midwest claims. Resp. at ¶ 21. According to IEPA, "it was MWG's initial petition that triggered an automatic stay of Part 845's operation under Section 28.1(e) of the Act . . . from May 11, 2021, until the Board's Opinion and Order . . ., which lifted that stay and reinstated Part 845 obligations (including permitting requirements) as the governing regulatory baseline for the FSFS area." *Id*. at ¶ 22. IEPA maintains that because denial of the stay "simply restores the pre-existing Part 845 obligations, rather than delaying or altering MWG's regulatory responsibilities, denying the stay maintains the regulatory status quo and thus weighs against granting the stay." *Id*. at ¶ 24. In IEPA's view, "the public interest in timely CCR enforcement and protection of groundwater and Lake Michigan far outweighs any self-inflicted costs." *Id*. at ¶ 42.

The Board finds that the "status quo" means "the last actual, peaceable, uncontested status which preceded the pending controversy." O'Brien v. Matual, 14 Ill. App. 2d 173, 187 (2d Dist. 1957). Here, the controversy is over the applicability of Part 845 to the FSFS Area. Part 845 became effective on April 21, 2021. But because Midwest filed "a petition for an individual adjusted standard in lieu of complying with the applicable regulation within 20 days after the effective date of the regulation, the operation of the regulation shall be stayed as to such person pending the disposition of the petition." 415 ILCS 5/28.1(e) (2024). The status quo is therefore the FSFS Area not being subject to Part 845. However, for this factor, the Board must determine *whether* the status quo should be preserved during Midwest's appeal.

On June 20, 2019, the Board issued an interim opinion and order (interim order) in Sierra Club *et al*. v. Midwest Generation, LLC, PCB 13-15 (June 20, 2019), a pending enforcement case concerning Waukegan Station and three other MWG electric generating stations. At Waukegan Station, the Board's interim order found that Midwest, in violation of Section 12(a) of the Act (415 ILCS 5/12(a) (2024)), caused or allowed the discharge of contaminants to groundwater so as to cause "water pollution", as defined in the Act, by likely rendering use of the groundwater harmful to public health. *Id*. at 77, 78-79, 85, 92. Also at Waukegan Station, the Board found in its interim order that Midwest violated Sections 620.115, 620.301(a), and 620.405 of the Board's groundwater quality regulations (35 Ill. Adm. Code 620.115, 620.301(a), 620.405) as these discharges resulted in groundwater contaminant concentrations that exceeded the Part 620 Class I groundwater quality standards, precluding the potential use of the groundwater as a potable water resource. *Id*. at 77-84, 92. The Board specifically determined that the FSFS Area contributed to the groundwater contamination. *Id*. at 69. For example, from 2010 to 2017, there were 163 exceedances of the Class I groundwater quality standards in monitoring wells MW-5, MW-7, and MW-15, all of which are downgradient of the FSFS Area. *Id*. The Board found that these 163 exceedances, along with higher concentrations of CCR-indicator constituents, show that the FSFS Area contributed to 264 exceedances of the Class I standards in monitoring wells MW-1 through MW-7 from 2010 to 2017. *Id*. at 69-70. Among

the contaminants with concentrations exceeding the Class I standards were arsenic, boron, sulfate, and total dissolved solids. *Id*.

Midwest's point about the lack of drinking water receptors ignores that the State's waters are resources to be protected. *See* Central Illinois Public Service Co. v. Pollution Control Bd., 116 Ill. 2d 397, 408 (1987) (adopting Board's interpretation of "water pollution" to include "any contamination which prevents the State's water resources from being usable" because it allows "the Board to protect those resources from unnecessary diminishment"); *see also* 415 ILCS 55/2(b) (2024) ("it is the policy of the State of Illinois to restore, protect, and enhance the groundwaters of the State, as a natural and public resource."). "The lack of current receptors is not the equivalent of absence of environmental harm." Sierra Club, PCB 13-15, slip op. at 6 (Dec. 15, 2022). Moreover, both Part 845 and the federal CCRMU rules require compliance with groundwater protection standards regardless of proximity to drinking water sources. *See* 35 Ill. Adm. Code 845.600; 89 Fed. Reg. at 39067-68. And "[w]hile ELUCs include measures to protect against exposure to contaminated soil and groundwater at the MWG stations, they do not include measures to prevent contamination and migration of coal ash constituents from MWG sites. *** ELUCs at MWG facilities do not extend beyond the property boundaries." Sierra Club, PCB 13-15, slip op. at 6 (Dec. 15, 2022).

In the Board's final order in this adjusted standard case, the Board found that not subjecting the FSFS Area to Part 845 would result in environmental and health effects substantially and significantly more adverse than the effects the Board considered when adopting Part 845. Final order at 15. Analyzing the 40 boring samples Midwest took in 2020 in the FSFS Area, the Board found that the sampling showed ash, slag, and wet ash throughout the 10-acre site:

> The 40 borings went to a depth of 15 feet and ash or slag was found at every boring location. The ash and slag were found at a maximum depth of 15 feet below ground level, however, it is unclear as to whether the ash and slag continue to further depths as all boring samples stopped at a depth of 15 feet. *Id*. at 4, record citation omitted.

Three of the 40 borings were sampled for metals; each of those three borings had two or more leachable metals at concentrations exceeding the groundwater protection standards of 35 Ill. Adm. Code 845.600(a)(1). *See* Exh. 37, Table 4, pdf 2147/2952.

Other evidence from this adjusted standard proceeding shows that the average concentration of boron, sulfate, and total dissolved solids at monitoring wells MW-5 and MW-7 exceeded the Class I groundwater quality standards (35 Ill. Adm. Code 620.410) and the Part 845 groundwater protection standards (35 Ill. Adm. Code 845.600(a)(1)). *See* MWG Exh. 35, Table B 4-2. Again, monitoring wells MW-5 and MW-7 are downgradient of the FSFS Area. *See* MWG Exh. 37 at pdf 2129/2952. Plus, monitoring well MW-7 is near the southern property line of Waukegan Station (MWG Exh. 37 at pdf 2141/2952), which indicates the potential for contaminants migrating off-site.

And in its recommendation against granting Midwest's petition, IEPA emphasized its concern that the FSFS Area remains "unlined" and "has never been closed by removal, nor has any type of low permeability cover been installed on top of it." Rec. at 19-20. IEPA added that "[t]he detection of CCR related constituents in excess of the applicable groundwater protection standards show that [the FSFS Area] presents the environmental and health risks." *Id*. at 20.

The Board finds there would be a heightened risk of further harm to the environment from the FSFS Area by not immediately subjecting it to IEPA's permitting oversight under Part 845. The status quo here—the inapplicability of Part 845 to the FSFS Area—should not be preserved during Midwest's appeal. Therefore, the Board finds that the status quo factor weighs heavily against a stay.

Rights of the Litigants

Reiterating its points discussed above, MWG asserts that it will "suffer hardship and irreparable prejudice" if a stay is not granted and it prevails on appeal, while IEPA "will not suffer hardship from a stay" but, instead, the stay will "allow" IEPA to "focus on the many other CCR projects that are awaiting operating permits." Mot. to Stay at 5. Midwest adds that because the statutory fees for CCR surface impoundments are "intended to support the administrative costs associated with [IEPA's] CCR program," IEPA would not be prejudiced if the [FSFS Area] does not participate in the program during the appeal. *Id*. MWG further notes that the fees were stayed during the adjusted standard proceeding, "and there is no indication in the record that [IEPA] has been prejudiced by not having received them." Stay Memo at 7.

IEPA argues that when evaluating the "respective rights of the litigants" here, the Board must consider "whether [Midwest's] asserted costs justify delaying enforcement of a duly issued final order." Resp. at ¶ 26. IEPA argues that it has "a statutory right and duty to immediately enforce Part 845," adding that Section 22.59 of the Act requires it to "oversee compliance with surface impoundment rules statewide." *Id*. at ¶ 27. Thus, continues IEPA, "[d]elaying MWG's obligations directly undermines [IEPA's] ability to carry out that mandate." *Id*. According to IEPA, a stay would also result in "inconsistent regulatory treatment by allowing MWG to delay compliance while similarly situated entities must continue complying with Part 845," which "would undermine the uniform application of the law and diminish the credibility of the CCR regulatory program." *Id*. at ¶ 29.

IEPA further asserts that MWG has been "on notice since at least 2021 that compliance with Part 845 could ultimately be required." Resp. at ¶ 28. IEPA claims that by proceeding to seek an adjusted standard "without preparing for the possibility of an unfavorable outcome," MWG's current situation is "self-imposed" and fails to outweigh IEPA's statutory responsibilities. *Id*. at ¶ 28, 30.

A stay would put the FSFS Area beyond IEPA's Part 845 permitting oversight during Midwest's appeal. The Board's finds that this interference with IEPA's statutory role outweighs Midwest's unsubstantiated claims of hardship absent a stay. This factor therefore weighs against a stay.

Hardship on Other Parties

Midwest does not address whether other parties will suffer hardship if its requested stay is granted. IEPA emphasizes that Midwest offers "no evidence that deferring Part 845 compliance benefits the public." Resp. at ¶ 31. IEPA argues that, on the contrary, a stay would hinder its ability to oversee the CCR program and timely protect the State's water resources. *Id*. at ¶¶ 31, 36. According to IEPA, "[c]ontinued noncompliance risks harm to individuals who rely on [IEPA's] ability to safeguard drinking water and other vital water resources." *Id*. at ¶ 35.

According to IEPA, granting a stay would also be inconsistent with findings made by the Board during this adjusted standard proceeding. Specifically, IEPA points to the Board's 2023 denial of Midwest's motion to stay the proceeding, where the Board found that a delay would pose a threat to the environment and human health. Resp. at ¶ 34. IEPA stresses that "[t]hose same public health concerns remain today." *Id*. IEPA also points to the Board's finding, under Section 28.1(c)(3) of the Act (415 ILCS 5/28.1(c)(3) (2024)), that granting an adjusted standard for the FSFS Area would "'result in environmental and health effects substantially and significantly more adverse than the effects considered by the Board when adopting Part 845.'" ¶ 33, quoting final order at 14.

Staying the Board's final order would mean that the FSFS Area would continue to avoid IEPA permitting oversight under Part 845 despite the FSFS Area being a proven source of groundwater contamination. And the availability of public hearings on IEPA draft permit determinations under Part 845 is especially important in areas of environmental justice concern like Waukegan.[2] The Board agrees with IEPA that because a stay would impose "greater environmental and public health risks," outweighing "any identified cost" to Midwest, and would interfere with IEPA's ability to "enforce protections in real time," the hardship to "others and the public interest weighs strongly against granting the stay." Resp. at ¶ 36. Accordingly, the Board finds that this factor weighs heavily against a stay.

Conclusion on Midwest's Motion to Stay the Board's Final Order

First, Midwest has a substantial case on the merits. This factor weighs in favor of staying the Board's final order. Second, as Midwest has not adequately supported its claim that a stay is needed to secure the fruits of its appeal, this factor weighs neither for nor against a stay. Third, because of the risk of further environmental harm by not immediately subjecting the FSFS Area to IEPA's Part 845 permitting oversight, the status quo should not be preserved during Midwest's appeal. This factor strongly militates against a stay. Fourth, a stay would hinder IEPA's ability to fulfill the General Assembly charge to timely protect the State's water resources by overseeing CCR surface impoundment compliance. This interference outweighs

[2] *See* 415 ILCS 5/22.59(a)(5) (2024) ("The General Assembly finds that: *** meaningful participation of State residents, especially vulnerable populations who may be affected by regulatory actions, is critical to ensure that environmental justice considerations are incorporated in the development of, decision-making related to, and implementation of environmental laws and rulemaking that protects and improves the well-being of communities in this State that bear disproportionate burdens imposed by environmental pollution.").

Midwest's claimed hardship absent a stay; considering the respective rights of the litigants weighs against a stay. And fifth, a stay would impose a considerable hardship on the public because FSFS Area—a demonstrated source of groundwater contamination—would remain outside IEPA's permitting oversight despite Part 845 having taken effect over four years ago. This factor also weighs heavily against a stay.

Balancing the above factors, the Board finds that although Midwest presented a substantial case on the merits, it failed to show that the equitable factors weigh in favor of a stay. In addition, Midwest does not argue, and the Board does not find, that Midwest has a likelihood of success on the merits. *See* Stacke, 138 Ill. 2d at 309 ("If the balance of the equitable factors does not strongly favor movant, then there must be a more substantial showing of a likelihood of success on the merits.") Therefore, the Board denies Midwest's motion to stay the Board's final order.

ALTERNATIVE REQUEST FOR A STAY AS TO STATUTORY FEES ONLY

The Act, which directed the Board to adopt Part 845, sets forth the required program fees for owners or operators of CCR surface impoundments. *See* 415 ILCS 5/22.59(j) (2024). Midwest's unpaid balance of these statutory fees for the FSFS Area is $375,000, according to an invoice issued by IEPA. Reply, Attach. 1. Midwest argues that even if the Board find that "staying the Order in its entirety would threaten environmental harm or public health, a partial stay of the effect of the Order with respect to associated statutory money fees would pose no such threat." Stay Memo at 10.

Midwest cites two Board cases where the Board stayed the requirement to pay civil penalties pending appeal: IEPA v. Northern Illinois Service Company, AC 12-51 (Apr. 2, 2015); and Citizens for a Better Environment v. Stepan Chemical Co., PCB 74-201, 74-270, 74-317 (June 26, 1975). Stay Memo at 10. In the 2015 Northern Illinois Service decision, the Board stated that "[o]ne factor of particular importance to the Board is whether granting a stay during appeal will result in harm to public health or the environment." Northern Illinois Service, AC 12-51, slip op. at 2. In that decision, the Board discussed cases in which it denied a stay pending appeal because of potential harm to the environment or human health: Phillips 66 Co. v. IEPA, PCB 12-101, slip op. at 7 (Aug. 8, 2013); Panhandle Eastern Pipeline Co. v. IEPA, PCB 98-102 (July 8, 1999), *aff'd sub nom* Panhandle Eastern Pipeline Co. v. PCB and IEPA, 314 Ill. App. 3d 296 (4th Dist. 2000). In the 1975 Stepan Chemical decision, the Board stayed the obligation to pay a civil penalty pending appeal, stating that "[p]ayment of monetary penalty can be delayed without prejudice to the public and it has been our practice to allow such motions pending appeal." Stepan Chemical, PCB 74-201, 74-270, 74-317, slip op. at 1. Midwest argues, "[w]hile the Illinois CCR surface impoundment program fees under 415 ILCS 5/22.59(j) are not penalties or hearing costs, the Board's reasoning with respect to absence of prejudice [from delaying payment] is still applicable." Stay Memo at 7-8.

IEPA counters that "Section 22.59(j) of the Act unambiguously requires owners or operators of CCR surface impoundments to pay the prescribed program fee," adding that "[n]either the Act nor Part 845 grants the Board discretion to waive or defer a statutorily mandated fee." Resp. at ¶ 38.

The Board has stayed obligations to pay civil penalties pending appeal, but civil penalties are not at issue in this case. Section 42(a) of the Act sets forth the maximum civil penalties for violations of the Act—$50,000 per violation and $10,000 per day that the violation continues. *See* 415 ILCS 5/42(a) (2024). Section 42(h) authorizes the Board to consider mitigating or aggravating factors when determining the appropriate penalty amount. *See* 415 ILCS 5/42(h) (2024). The statute directs the Board to "ensure, in all cases, that the penalty is at least as great as the economic benefits, if any, accrued by the respondent as a result of the violation, unless the Board finds that imposition of such penalty would result in an arbitrary or unreasonable financial hardship." *Id*.

Thus, the Act grants the Board significant discretion in setting civil penalty amounts. But no discretion is afforded the Board with respect to the program fees under Section 22.59(j) of the Act. Accordingly, even assuming that the Board were inclined to stay the statutory fees and that such a stay would not harm public health or the environment, the Board lacks the authority to stay these statutory fees. The Board therefore denies Midwest's request for a partial stay.

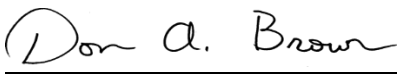
CONCLUSION

The Board finds that although Midwest has a substantial case on the merits, the balance of the equitable factors, especially the continuing threat of further environmental harm, weigh heavily against a stay. Therefore, the Board denies Midwest's motion to stay the Board's final order. The Board also denies Midwest's alternative request to stay its obligation to pay statutory program fees as beyond the Board's authority.

Illinois Supreme Court Rule 335(g) provides that if the administrative agency denies a motion to stay its final order pending direct review by the Appellate Court, the movant may file a motion for stay with the Appellate Court.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on June 26, 2025, by a vote of 5-0.



Don A. Brown, Clerk
Illinois Pollution Control Board