

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**NOTICE OF FILING**

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have electronically filed today with the Illinois Pollution Control Board the Reply Comments of the Illinois Attorney General's Office to the Environmental Groups' Motion to Reopen Rulemaking, a copy of which is hereby served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,  
by LISA MADIGAN, Attorney  
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BY:



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Dated: October 9, 2015

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**CERTIFICATE OF SERVICE**

I, STEPHEN J. SYLVESTER, an Assistant Attorney General in this case, do certify that I caused to be served this 9th day of October, 2015, the foregoing the Post-Hearing Comments of the Illinois Attorney General's Office and Notice of Filing upon the persons listed on the Service List by depositing same in an envelope, first class postage prepaid, with the United States Postal Service at 100 West Randolph Street, Chicago, Illinois, at or before the hour of 5:00 p.m.

  
STEPHEN J. SYLVESTER

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841 )

**REPLY COMMENTS OF THE ILLINOIS ATTORNEY GENERAL’S OFFICE  
TO THE ENVIRONMENTAL GROUPS’ MOTION TO REOPEN RULEMAKING**

Pursuant to 35 Ill. Adm. Code § 102, and the Hearing Officer’s Order of September 18, 2015, the Illinois Attorney General’s Office, on behalf of the People of the State of Illinois (the “People”), hereby submits its reply comments to the Environmental Groups’ motion to reopen the rulemaking.

**I. INTRODUCTION**

The People have reviewed the Illinois Environmental Protection Agency’s (“Illinois EPA” or “IEPA”) motion for an indefinite stay, the Environmental Groups’<sup>1</sup> motion to reopen the docket, and the responses to both motions filed by various parties and stakeholders. The People urge the Board, as the state agency responsible for developing and promulgating environmental regulations, to grant the motion to reopen. Further, in granting the motion, the Board should establish a new schedule in this docket so that stakeholders and the public may participate in (1) ensuring consistency with the federal minimum criteria and (2) considering additional requirements beyond those criteria. Illinois EPA’s motion for an indefinite stay is predicated on the introduction of a coal ash bill in Congress and court challenges filed in the D.C. Circuit Court of Appeals. But these types of legislative and legal reactions are completely normal when federal environmental rules are finalized and do not and should not cause agencies

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<sup>1</sup> The “Environmental Groups” include Prairie Rivers Network, Sierra Club, and the Environmental Law & Policy Center.

to stop and wait for a certainty that is unlikely to ever be fully achieved. There are almost always bills proposed or litigation pending that *could* affect virtually *any* environmental regulations at one time or another. Such is likely to be the case for coal ash. Therefore, the Board should not stay these proceedings indefinitely. Rather, the Board should reopen the docket and establish a process for Illinois to ensure compliance with the federal minimum criteria and to consider additional requirements as may be appropriate for our state.

## II. DISCUSSION

The United States Environmental Protection Agency (“USEPA”) is strongly encouraging states to incorporate the minimum federal criteria into their regulations and has provided several reasons why states should do this.<sup>2</sup> First, as stated in the regulatory preamble, the process of ensuring consistency with the minimum federal criteria also allows for consideration of “state regulations [that] are more stringent than or otherwise go beyond the federal minimum criteria.” 80 Fed. Reg. 21,431 (April 17, 2015). Second, the process “can greatly assist the regulated community to understand the regulatory structure under which they will be [or are] operating.” *Id.* Third, the process can “assist the general public in understanding the regulations and thereby their ability to monitor industry’s compliance with the rule.” *Id.*

According to IEPA, there are at least 91 coal ash impoundments at 24 operating and closed power plants in Illinois.<sup>3</sup> Given the number of applicable facilities and units in the state, it seems that Illinois should be a prime candidate to move ahead with a state implementation process to ensure consistency with the federal minimum criteria and to evaluate what additional

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<sup>2</sup> See, e.g., USEPA, *Frequent Questions About the Coal Ash Rule, No. 22*, available at <http://www2.epa.gov/coalash/frequent-questions-about-coal-ash-disposal-rule#22> (“EPA is strongly encouraging States to adopt at least the federal minimum criteria into their regulations. EPA recognizes that some States have already adopted requirements that go beyond the minimum federal requirements. This rule will not affect these State requirements; moreover, the final rule does not preclude a State from adopting more stringent requirements where they deem that appropriate.”).

<sup>3</sup> Ex. 5, IEPA’s Pre-filed Answers (Feb. 26, 2014), at PDF page 2, 42.

measures should be required. This seems especially true in light of IEPA's self-described proactive approach to regulating coal ash<sup>4</sup> and the fact that the Board, IEPA, and many other stakeholders already have an extensive record to draw from in the form of the current rulemaking docket.

Accordingly, the Board should not accept IEPA's suggested approach to indefinitely stay these proceedings. Instead, it should reopen the proceedings to: (1) build on the record in this docket; (2) prevent the information and the stakeholders' familiarity with the issues from growing cold and stale after what could be many years of litigation delays and stalled federal legislative proposals; and (3) avoid wasting the extensive time and resources already committed to the rulemaking by numerous stakeholders and members of the public.

While Illinois EPA is tasked with making recommendations to the Board, it is the Board that "determine[s], define[s] and implement[s] the environmental control standards applicable in the State of Illinois," and it is the Board who "adopt[s] rules and regulations" in Illinois. 415 ILCS 5/4(i) and 5/5(b). The Board has the authority and the discretion to decide how rulemakings shall proceed, and it should do so here by reopening the proceedings and by charting a path forward to ensure consistency with the federal minimum criteria and the consideration of any additional requirements that should be added in Illinois.

Even though Illinois is not *required* to proceed with an implementation process on coal ash, moving forward would be consistent with the General Assembly's strong, long-standing interest in environmental protection. *See, e.g.*, 415 ILCS 5/2(b) (purpose of the Illinois

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<sup>4</sup> *See, e.g.*, IEPA, *Coal Combustion Residue Management in Illinois*, available at <http://www.epa.illinois.gov/Assets/iepa/water-quality/watershed-management/ash-impoundment/coal-ash-fact-sheet.pdf> ("Long before the TVA ash pond failure in 2008 in Tennessee, the Illinois EPA recognized that coal combustion residue, often referred to as coal ash, might be an environmental concern. The Illinois EPA has taken a proactive approach in regulating coal ash. Since the early 1990s, new ash ponds (surface impoundments) have been required to be lined and groundwater monitoring wells have been installed at many of these new ash impoundments.").

Environmental Protection Act is “to restore, protect and enhance the quality of the environment”); 415 ILCS 5/11(b) (emphasizing need to “restore, maintain and enhance the purity of the waters of this State in order to protect health, welfare, property, and the quality of life”); 415 ILCS 55/2(b) (“[I]t is the policy of the State of Illinois to restore, protect, and enhance the groundwaters of the State, as a natural and public resource”). Regarding groundwater specifically, “[t]he State recognizes the essential and pervasive role of groundwater in the social and economic well-being of the people of Illinois, and its vital importance to the general health, safety, and welfare.” *Id.*

Illinois EPA opened this proceeding in 2013 “to fill a regulatory gap in the Board’s rules governing [coal combustion waste] surface impoundments,” noting that the Board’s regulations “do not provide a method for closure or corrective action at these facilities.” Statement of Reasons at 8. Two years later, a regulatory gap remains, as there are yet no federal standards applicable to coal ash impoundments at power plants that have ceased producing electricity. 80 Fed. Reg. 21,303 (April 17, 2015). Reopening the proceedings and directing this docket to proceed is consistent with the goal of restoring, protecting, and enhancing the quality of our environment and is the path that the Board should take here.

### **III. CONCLUSION**

For the reasons set forth above, the People respectfully request that the Board: (1) deny IEPA’s motion for an indefinite stay; (2) grant the Environmental Groups’ motion to reopen the docket; and (3) establish a schedule for public and stakeholder involvement in state implementation of the federal minimum criteria and adoption of any additional requirements that may be necessary and appropriate.



Dated: October 9, 2015

Respectfully submitted,

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