

ILLINOIS POLLUTION CONTROL BOARD
January 20, 2017

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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)

STATE OF ILLINOIS
Pollution Control Board

HEARING OFFICER ORDER

The Illinois Environmental Protection Agency (IEPA) initiated this rulemaking, and the Board conducted hearings and accepted post-hearing comments. The United States Environmental Protection Agency (USEPA) subsequently adopted rules to regulate disposal of coal combustion residuals. On December 16, 2016, the President signed into law the Water Infrastructure Improvements for the Nation (WIIN) Act providing for USEPA approval of state programs for control of coal combustion residuals.

IEPA moves to amend its rulemaking proposal. Prairie Rivers Network, Environmental Law & Policy Center, Eco-Justice Collaborative, and the Illinois chapter of Sierra Club (collectively, Environmental Groups) oppose IEPA's motion to amend. Environmental Groups request that the Board proceed to first-notice publication of the alternate rules they proposed on September 15, 2015. The Board did not receive any other response to IEPA's motion.

Rather than testimony and hearing, IEPA and the Environmental Groups agree that the Board may proceed by requesting comments. Mot. Amend at 17; *see* IEPA Rpt. at 7, Groups' Resp. at 11. The Groups added that, if the Board has questions for the participants, it could request written responses. Groups' Resp. at 12.

The Board reviewed filings including status reports, the motion to amend, and the response and also considered Federal litigation and legislation addressing this issue. Significant and ongoing changes to Federal legislation and regulation prompt the Board to pose the questions in Attachment A. IEPA is directed to respond to these questions within 45 days, on or before March 6, 2017. The Board welcomes responses to any of the questions from any other participant by the same deadline.

Participants are encouraged to consent in this proceeding to e-mail service of documents as provided by the Board's procedural rules at 35 Ill. Adm. Code 101.1070.

IT IS SO ORDERED.



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ATTACHMENT A to January 20, 2017 Hearing Officer Order

- 1) On December 16, 2016, the President signed into law the Water Infrastructure Improvements for the Nation (WIIN) Act, Title II of which is designated as the Water and Waste Act of 2016. P.L. No. 114-322. Section 2301 specifically addresses USEPA approval of state programs for control of coal combustion residuals. *Id.* (amending Section 4005 of the Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6901 *et seq.*).

Is IEPA aware whether USEPA intends to propose rules to implement review and approval of state CCR programs? If USEPA intends to propose such rules, is it appropriate for the Board to consider CCR rules pending final adoption of those rules?

Has IEPA discussed with USEPA whether its amended proposal is approvable under the revised Section 4005(d)(1) of the SWDA? If so, please comment on the results of those discussions.

Revised Section 4005(d)(6) of the SWDA considers coal combustion residuals units to be sanitary landfills under specified conditions. Please comment on IEPA's rationale for proposing permitting requirements under Part 309 rather than the solid waste disposal permit requirements under Part 807 or 813.

What does IEPA consider the potential advantages and potential disadvantages of creating a state permit program addressing coal combustion residual units?

How does this legislation and potential approval of an Illinois state program affect IEPA's view of the nature of the regulations appropriate for controlling coal combustion residuals?

- 2) In its motion to amend its rulemaking proposal, IEPA identifies six Illinois facilities with surface impoundments that are exempt from USEPA rules: Vermilion; Meredosia; Crawford; Pearl; Venice; and Hutsonville. Mot. Amend at 5. IEPA proposes to exempt the last four of those six facilities from its amended rules. IEPA states that "[t]hese sites should be treated differently because they already have an Agency approved closure plan. . . ." *Id.* at 6; *see id.* at 5, n.1-4.

Please clarify whether these six facilities are exempt from USEPA rules under 40 C.F.R. § 257.50(d) or (e).

IEPA does not propose to exempt Vermilion or Meredosia from its amended rules. *See* Mot. at 5. Please explain why IEPA's amended proposal does not exempt these two facilities from the proposed rules. Please provide the status of any remedial action or closure activities at any impoundments at Vermilion and Meredosia.

- 3) Since IEPA filed its original rulemaking proposal, the electric generating industry and its facilities have undergone changes in ownership, ownership structure, and financial condition including bankruptcy. Several entities that own or control CCR units in Illinois

have been subject to voluntary bankruptcy proceedings, including at least one current proceeding. Some entities that own or control CCR units have financial structures that appear to insulate parent corporate entities from financial responsibility in certain instances. Environmental Groups and the Office of the Attorney General have favored rules requiring financial assurance for CCR units, particularly as the CCR units may exist after the electric generating stations they serve cease operations.

How does IEPA understand its ability to require entities that own or operate a CCR unit to meet financial obligations concerning the closure and post-closure care of CCR units?

If the entity that owns or operates a CCR unit is unable to meet its financial obligations concerning closure and post-closure care of one or more CCR units, what steps can IEPA now take to require corporate parents to meet those financial obligations?

- 4) IEPA met with participants on May 3, 2016 and asked participants whether state rules should require financial assurance. IEPA received comments and made minor changes to its proposed rules but maintained its position that state rules should not require financial assurance. Please summarize participants' comments and positions on this issue and elaborate on IEPA's position that state rules should not require financial assurance.

If state rules do not require financial assurance, do local governments such as counties, municipalities, and townships have the authority to impose such a requirement? If so, please elaborate on that authority.

- 5) As IEPA knows, on December 19, 2014, USEPA finalized rules for disposal of CCR from electric utilities. The rules were published in the *Federal Register* (80 Fed. Reg. 21302-21501 (Apr. 17, 2015)) and became effective on October 19, 2015 (80 Fed. Reg. 37988-89 (July 2, 2015)). While USEPA "strongly encourages the states to adopt at least the federal minimum criteria into their regulations" (80 Fed. Reg. 21430 (Apr. 17, 2015)), IEPA recommends that the Board should not incorporate the federal rules into its proposed Part 841. IEPA Rpt. at 2, 7. What were the chief factors leading IEPA to this recommendation?
- 6) IEPA's motion to amend notes that USEPA has established self-implementing requirements "that owners or operators of regulated units can implement without any interaction with regulatory officials." 80 Fed. Reg. 21330 (Apr. 17, 2015); *see* Mot. Amend at 4. Please clarify whether USEPA has authority or mechanisms with which to enforce its CCR rules.
- 7) In their response to IEPA's motion to amend, Environmental Groups state that IEPA's proposal does not include federal reporting requirements and suggest that incorporating those requirements into Board rules will strengthen their enforcement. Please explain why IEPA has not proposed reporting requirements in its amended proposal.
- 8) In their response to IEPA's motion to amend, Environmental Groups note that IEPA's July 2014 proposal required that corrective action plans include an alternative impact

analysis. Groups' Resp. at 4. Proposed Section 841.125(d)(9) of IEPA's proposal requires that a groundwater management zone application contain a "[d]escription of selected remedy *and why it was chosen*" (emphasis added).

Does IEPA intend that describing the choice of a remedy encompasses assessing alternatives to the proposed remedy? If so, would IEPA consider amending its proposed Section 841.125(d)(9) to include the elements of this assessment? If not, please explain why IEPA has not proposed to require this assessment in a groundwater management zone application.

- 9) In their response to IEPA's motion to amend, Environmental Groups note that IEPA's July 2014 proposal at Section 841.500(c)(3) includes 11 factors for reviewing plans for corrective action, closure, and post-closure care.

Does IEPA intend to consider these factors when reviewing proposed plans under the permit provisions at Part 309? If so, please identify the authority or authorities under which it can evaluate these factors. If not, please explain why IEPA has not proposed to require consideration of these factors in its review of these plans.

- 10) In their response to IEPA's motion to amend, Environmental Groups note IEPA's statement that state operating permits will include the minimum USEPA requirements, but they assert that the rule does not include these requirements. IEPA's stated purpose in Section 841.100 is that "[c]onstruction permits, operating permits, and groundwater management zones issued pursuant to this Part must be at least as stringent as the federal requirements found in 'Standards for the Disposal of Coal Combustion Residuals in Landfills and Surface Impoundments,' 40 C.F.R. Part 257, Subpart D." Please indicate how IEPA's amended proposal incorporates minimum USEPA requirements into a state permit.

- 11) In their response to IEPA's motion to amend, Environmental Groups acknowledge that IEPA's amended proposal provides for public comment on an application for a groundwater management zone but state that "not every site will necessarily have a GMZ." Groups' Resp. at 8. IEPA anticipates that facilities will seek a groundwater management zone to obtain an alternative groundwater quality standard during corrective action and to avoid enforcement. Mot. Amend at 6-7, citing 35 Ill. Adm. Code 620.450.

Please comment on any opportunities for public participation in the permitting process under IEPA's amended proposal for any facility that pursues corrective action without seeking a groundwater management zone.

- 12) Please comment on how existing authorities on appealing IEPA permit determinations apply to groundwater management zone applications and construction and operating permit applications under IEPA's amended proposal.
- 13) In its motion to amend, IEPA states that, to align existing state standards with the USEPA rule, it proposes "changing the Class IV groundwater quality standards to match the

standards in the federal rule and moving the point of compliance to the edge of the waste boundary.” Mot. Amend at 10.

Executive Order 16-13 (Oct. 17, 2016) directs State agencies to ensure that new and existing regulations are up to date and coordinated to avoid conflict. Has IEPA determined when it intends to file a rulemaking proposal to amend these rules? If so, when does it intend to do so?

Section 620.250(e) refers specifically to groundwater management zones established under the Site Remediation Program at Part 740. Please comment on whether any proposed amendments to the Class IV groundwater quality standards would similarly recognize groundwater management zones approved under Part 841.

- 14) Please provide any updated information on the current status of the consolidated appeals of the USEPA rules, Utility Solid Waste Activities Group, et al. v. USEPA, No. 15-1219 *et al.* (cons.) (D.C. Cir.).
- 15) IEPA reported that settlement resulted in remanding for further proceedings specific provisions of USEPA rules known as the “Extension Rule” and “Remand Rule.” IEPA Rpt. at 4-6. Please also provide the Board with any updated information on the current status of these further rulemaking proceedings. Does IEPA now expect that this settlement concerning the “Extension Rule” and the “Remand Rule” will cause IEPA to revise its amended proposal? If so, what revisions does IEPA expect to propose?
- 16) Please provide any updated information on any pending federal or Illinois legislation addressing control of coal combustion residuals.
- 17) In the course of this proceeding, the Board has received detailed information on CCR facilities in Illinois, including Hearing Exhibit 14 admitted on February 27, 2014. Please provide a thorough and complete updated inventory of CCR facilities in Illinois: location including GPS and links to Google Earth; owner; entity responsible for site operation if different from owner; number of CCR surface impoundments at each facility; current and maximum volume of CCR in each CCR surface impoundment; and current status regarding corrective action or closure of each CCR surface impoundment.