

ILLINOIS POLLUTION CONTROL BOARD
March 28, 2019

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

ORDER OF THE BOARD (by K. Papadimitriou):

The Illinois Environmental Protection Agency (IEPA) proposed a rule of general applicability for coal combustion waste (CCW) surface impoundments at electrical generating stations. IEPA sought to establish a process to monitor CCW surface impoundments and groundwater, and also provided for preventive response, corrective action, and closure of CCW impoundments.

During 2014, the Board held hearings and received more than 3,000 comments before granting motions to stay consideration of IEPA’s proposal. Since then, federal regulation, litigation, and legislation have all addressed regulation of CCW surface impoundments. Given this situation, the Board questions whether moving ahead with its current record, which is outdated, is justified. The Board believes the most appropriate course may be to dismiss this proceeding, close the docket, and allow IEPA and any other participant an opportunity to develop a fresh proposal. Before taking that step, however, the Board provides an opportunity for IEPA, as the rulemaking proponent, as well as any other participants, to explain why dismissal is not desirable. The Board does this through an order to show cause.

Below, the Board first provides an abbreviated procedural and regulatory background, followed by a discussion of the the reasons the Board believes this proceeding should be dismissed. After that, the Board issues its order to show cause.

ABBREVIATED PROCEDURAL AND REGULATORY BACKGROUND

On October 28, 2013, IEPA filed its original rulemaking proposal. Although IEPA noted that the United States Environmental Protection Agency (USEPA) “has proposed rules to govern coal combustion residuals from electric utilities,” it noted that “[t]he federal rule has not been finalized, and USEPA has not indicated when it expects to finalize the rule.” Statement of Reasons at 7, citing 75 Fed. Reg. 35128-35264 (June 21, 2010).

Throughout 2014, the Board conducted hearings and accepted post-hearing comments on IEPA’s proposal. In 2015, USEPA published rules regulating disposal of coal combustion residuals (CCR)—as CCW is termed in federal regulation—under Subtitle D of the federal Resource Conservation and Recovery Act (RCRA) (80 Fed. Reg. 21302-21501 (Apr. 17, 2015)), which became effective October 19, 2015 (80 Fed. Red. 37988-89 (July 2, 2015)). In response to that federal action, the Board on May 7, 2015, granted IEPA’s motion to stay this proceeding

to allow time to review the federal CCR rule and determine whether to revise the original proposal. The Board subsequently granted IEPA's motions to extend the stay.

In the meantime, multiple parties challenged USEPA's CCR rule before the U.S. Court of Appeals for the D.C. Circuit. See Utility Solid Waste Activities Group v. USEPA, No. 15-1219, et al. (consol.). In June 2016, the D.C. Circuit granted USEPA's motion, in response to a partial settlement among the parties to the consolidated appeals, to sever and remand some federal CCR rule provisions. On remand, USEPA adopted amendments effective October 4, 2016, relating to compliance deadlines at inactive coal-fired generating stations.

On July 15, 2016, IEPA moved to amend its rulemaking proposal before the Board. Four environmental organizations opposed IEPA's motion.¹ The Environmental Groups asked that the Board deny the motion and proceed to first-notice publication of alternate rules the Environmental Groups proposed in 2015.

On December 16, 2016, President Obama signed into law the Water Infrastructure Improvements for the Nation (WIIN) Act (P.L. No. 114-322), which allows USEPA to approve state programs controlling CCRs. See 42 U.S.C. § 6945(d). The Board posed questions to the participants in this docket about the implications for this rulemaking of the WIIN Act and other federal developments; IEPA and several other participants filed responses in March 2017.

Meanwhile, a related CCW rulemaking, filed several months before this one, came to a close. Specifically, on August 17, 2017, the Board granted Ameren and Vistra subsidiaries' motion to withdraw their site-specific rulemaking proposal for governing closure of CCW surface impoundments at eight generating stations. Site-Specific Rule for the Closure of Ameren Energy Resources Ash Ponds: Proposed New 35 Ill. Adm. Code 840, Subpart B, R13-19 (Aug. 17, 2017). In support of withdrawal, the proponents cited the federal CCR rule and the WIIN Act, as well as the continuation of this general rulemaking.

The federal CCR rule continued, and still continues, to evolve. On July 30, 2018, USEPA, in amendments that went into effect at the end of August 2018, revised other elements of the remanded CCR rule. 83 Fed. Reg. 36435 (July 30, 2018). These included alternative performance standards that the permitting authority—whether USEPA or a delegated state agency—may apply to CCR impoundments; revised groundwater protection standards for four constituents; and an extended deadline for closing CCR impoundments to cease accepting waste. *Id.* USEPA will act, in a later rulemaking, on proposed provisions that were not included in the 2018 amendments, and expects to finalize by December 2019 modifications to still other CCR rule provisions. *Id.* at 36347.

Around the same time, the D.C. Circuit ruled on the merits of the CCR rule provisions that were not remanded. The court upheld some provisions and vacated others. Utility Solid Waste Activities Group v. USEPA, 901 F.3d 414 (D.C. Cir. 2018). Shortly after that, the 2018 CCR amendments were challenged before the D.C. Circuit. Waterkeeper Alliance, Inc. v.

¹ These are Prairie Rivers Network, Environmental Law & Policy Center, Eco-Justice Collaborative, and the Illinois chapter of Sierra Club (collectively, Environmental Groups).

USEPA, No. 18-1289. In that docket, USEPA recently asked the court to remand the amended rule without vacatur to allow further consideration, a request that the petitioners in that case oppose.

DISCUSSION

This rulemaking has been pending for more than five years. In its first couple of years, before USEPA adopted the CCR rule, this matter proceeded in the ordinary course; the Board scheduled and held several hearings on IEPA's original proposal and other participants' counterproposals. The CCR rule's adoption, however, raised significant questions for this docket, some of which persist. Some responsive activity before the Board ensued: IEPA moved to amend its original proposal; other participants opposed that request and submitted their own rulemaking proposal. But no proposal reached first-notice publication.

At the same time, the regulatory flux at the federal level has only accelerated, and in fact deepened. In particular, in the years since the CCR rule's promulgation, the D.C. Circuit remanded to USEPA, at the parties' request, several discrete provisions. That remand culminated in a decision to modify some of the remanded provisions—a decision that is under pending judicial challenge. USEPA projects that it will finalize other remanded sections by December 2019. And the unremanded CCR rule provisions went to final judgment by the D.C. Circuit; USEPA must now respond to that decision. At the State level, IEPA has not definitively stated whether it intends to seek USEPA approval under the WIIN Act of a State plan to manage CCR, and how, if at all, that decision might affect IEPA's amended proposal in this docket.

Especially given these cascading developments, the Board is concerned that this record has become stale. At this stage, the Board is inclined to dismiss this proceeding and close the docket. Dismissal would in no way impair or limit the opportunity for IEPA or any other stakeholder to initiate a new rulemaking with the Board to control CCW surface impoundments. Indeed, closing this docket should promote a focused evaluation of how Illinois should proceed in regulating CCW, taking account of developments at the federal and state levels. Any up-to-date rulemaking proposal that resulted would get a new docket number and be subject to a new round of Board hearings and review.

The Board will not dismiss this matter, however, if doing so would cause actual prejudice to IEPA or other participants. To afford IEPA, as the proponent, and other participants an opportunity to bring any relevant considerations to the Board's attention, the Board today issues this order to show cause why this docket should not be closed. Specifically, the Board directs IEPA, as the proponent, to respond by Monday, April 29, 2019, which is the first business day following the 30th day after the date of this order. The Board also welcomes other participants' comments by the same deadline.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 28, 2019, by a vote of 5-0.

A handwritten signature in black ink that reads "Don A. Brown". The signature is written in a cursive style with a large, looped initial "D".

Don A. Brown, Clerk
Illinois Pollution Control Board