

ILLINOIS POLLUTION CONTROL BOARD

March 17, 2016

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 J.D. O’Leary)<sup>1</sup>:

The Illinois Environmental Protection Agency requests that the Board extend a stay of this proceeding for an additional 90 days. During an extended stay, the Agency intends to meet with the participants in this rulemaking to determine how to proceed most effectively. The Agency reports that the regulated entities and environmental groups it has contacted do not object to the requested 90-day extension.

As directed by the Board, Environmental Groups timely filed testimony in support of their revised proposal filed September 15, 2015. The Groups supplement this testimony with a status report stating that they “do not object to the limited stay that Illinois EPA is requesting. . . .”

As discussed below, the Board grants the Agency’s unopposed motion and extends the stay by 90 days to Wednesday, June 15, 2016. At the conclusion of the extended stay, the Board directs the Agency to file a status report.

**ABBREVIATED PROCEDURAL BACKGROUND**

On October 28, 2013, the Illinois Environmental Protection Agency (Agency) filed a proposal to add to the Board’s waste disposal regulations a Part 841 entitled “Coal Combustion Waste Surface Impoundments at Power Generating Facilities.” The Board held four hearings but has not adopted a first-notice proposal.

On December 19, 2014, the United States Environmental Protection Agency (USEPA) made available an unofficial pre-publication version of regulations addressing coal combustion residuals (CCR) from electric utilities. On January 20, 2015, the Agency filed a motion to stay for 90 days to evaluate whether its proposal required changes as a result of USEPA action. On April 17, 2015, USEPA published CCR rules (80 Fed. Reg. 21302-21501 (Apr. 17, 2015)), which became effective on October 19, 2015 (80 Fed Reg. 37988-89 (July 2, 2015)). On May 7, 2015, the Board granted the Agency’s unopposed motion for a 90-day stay and directed the Agency to file a status report on or before August 5, 2015.

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<sup>1</sup> Chad Kruse, who worked for the Illinois Environmental Protection Agency prior to joining the Board as an attorney assistant on March 19, 2013, took no part in the Board’s drafting or deliberation of any order or issue in this matter.

On August 5, 2015, the Agency filed a motion to extend the stay indefinitely. On September 15, 2015, the Environmental Groups filed a motion to reopen the proceeding to consider their proposal for amended rules, which was attached to the motion.

On November 5, 2015, the Board denied the Agency's motion to the extent that it requested an indefinite extension of the stay but extended the stay by 120 days. The Board directed the Agency to file a status report addressing various issues at the conclusion of the extension. The Board reserved ruling on the Environmental Groups' motion to re-open and directed the Groups to pre-file testimony supporting their revised proposal by the conclusion of the extended stay.

On March 4, 2016, the Agency filed a status report and motion to extend the stay (Mot.). Also on March 4, 2016, the Environmental Groups filed a status report (Env. Rpt.) and the testimony of Jessica Dexter. On March 16, 2016, the Illinois Environmental Regulatory Group (IERG) responded to the motion.

### **SUMMARY OF PUBLIC COMMENTS**

Since its November 5, 2015 order extending the stay, the Board has received 25 comments from members of the public: on December 7, 2015 from Sharon DeCelle (PC 3915); on February 26, 2015, from Christopher Krusa (PC 3916); on March 1, 2016, from Michael and Kristin Camp (PC 3917), Sandy Crawford (PC 3918), and Catherine O'Keefe (PC 3919); on March 2, 2016, from Celeste Flores (PC 3920), Douglas Ower (PC 3921), and Dannel McCollum (PC 3922); on March 4, 2016, from Peggy Jones (PC 3923), MaryFran Troha (PC 3924), Karen Long McLeod (PC 3925), Rev. Eileen M. Shanley-Roberts (PC 3926), Julio Cesar Guzman (PC 3927), League of Women Voters – Lake County (PC 3928), Alexander Morgan (PC 3929), Clark Bullard (PC 3930), Joyce Blumenshine (PC 3931), Tod Satterthwaite (PC 3932), Verena Owen (PC 3933), David Villalobos (PC 3934), Robin Garlish (PC 3935), and Kelly Nichols (PC 3936); and on March 10, 2016, from Alexandra Cope (PC 3937), Susan H. Murray (PC 3938), and Kevin Green (PC 3939).

A number of the comments were filed by persons residing near active or inactive electric generating stations including Waukegan (*e.g.* PC 3926), Vermilion (PC 3939), Newton (PC 3917), Wood River (PC 3916), and Edwards (PC 3935). The comments state that coal ash impoundments may be subject to flooding (*e.g.* PC 3938), may pose risks to water supply wells (PC 3917), and may threaten the Middle Fork of the Vermilion River, a National Scenic River (*e.g.* PC 3932). With few exceptions, these comments request prompt adoption of state standards. *E.g.*, PC 3929. A number of the comments favor requiring compliance with Illinois water quality standards (*e.g.* PC 3921) and recommend that the Board adopt requirements for financial assurance (*e.g.* PC 3925).

The Board has reviewed and considered these comments. The Board recognizes the efforts made to prepare and submit them and appreciates receiving each of them.

The public comments received in this proceeding can be viewed through the Clerk's Office On Line on the Board's Web site ([www.ipcb.state.il.us](http://www.ipcb.state.il.us)). The Board has established a docket R14-10 PC specifically to make comments easier to locate and review.

### **BOARD DISCUSSION**

The Agency notes that environmental and industry petitioners sought review of different elements of the federal rule. Mot. at 4, citing Utility Solid Waste Activities Group, et al. v. USEPA, D.C. Cir. 15-1219 (Nov. 17, 2015). Petitioners request that provisions be vacated or remanded for additional consideration. Mot. at 4, 5 The final deadline in the briefing schedule is now July 6, 2016. *Id.* at 4. The Agency stresses, however, that the federal rule has taken effect and will continue to apply to CCW surface impoundments. *Id.* at 9. Congress continues to consider legislation on this issue, including H.R. 1734, the Improving Coal Combustion Residual Regulation Act. *Id.* at 3, n.2. While the Environmental Groups acknowledge that the federal rule "does provide needed protections that did not previously exist" and express "confidence that the rule will remain in effect," they argue that this litigation and legislation "emphasize the need to adopt a state-based rule as quickly as possible." Env. Rpt. at 1, 3.

The Agency lists "significant" differences between its proposal and the federal rules. Mot. at 6-8. These differences include groundwater quality standards, design criteria, and the duration of post-closure care. *Id.* The Agency states that addressing these differences "may necessitate revising" its proposal. *Id.* at 6. In their status report, Environmental Groups argue that closure plans under the federal rule do not adequately protect Illinois water and that inspection reports do not consistently generate sufficient information. Env. Rpt. at 4-9.

The Agency has identified different paths it may follow in this docket and "conducted preliminary outreach on these possible paths forward." Mot. at 6. The Agency concludes "that additional time is necessary to determine the best means for addressing the interplay between the federal rules and applicable Illinois law." *Id.* The Agency asserts that proceeding without this outreach "would likely result in a long, contentious proceeding before the Board" and may not result in "clear, appropriate, and protective regulation." *Id.* at 8, 9.

The Agency requests that the Board extend the stay by 90 days. During that time, the Agency "will expand its outreach and convene a stakeholders' meeting with interested parties to identify the most effective way of proceeding." Mot. at 9. Environmental Groups indicate that allowing 90 days for the participants to do so "is likely to be more efficient" than adversarial filings. Env. Rpt. at 1. IERG supports the Agency's requests and indicates its willingness to meet with the Agency and other participants. The Agency states that the requested extension allows participants "to confer on the benefits of forging a proposal that weaves the federal rule into the Board's regulations or, if that is not a viable option, to determine the most appropriate regulatory mechanism to address any Illinois-specific concerns. . . ." Mot. at 10. At the conclusion of an extended stay, the Agency will identify its "preferred path. . . ." *Id.*

Motions to stay require sufficient information describing the need for a stay and must include a report on the proceeding's status. 35 Ill. Adm. Code 101.514(a). The decision to grant or deny a motion for stay is "vested in the sound discretion of the Board." See People v. State

*Oil Co., et al.*, PCB 97-103, slip op. at 2 (May 15, 2003), *aff'd sub nom. State Oil Co. v. PCB*, 822 N.E.2d 876, 291 Ill. Dec. 1 (2nd Dist. 2004).

Although the Board's procedural rules generally allow 14 days to respond to a motion, the Board may grant a motion before the 14-day period expires if undue delay would result. 35 Ill. Adm. Code 101.500(d). Since publication of the federal rule nearly one year ago, the Board stayed this proceeding for 90 days and then extended the stay by 120 days. The Board has noted that the federal rules and the proposed state rules are similar but not identical. If the federal rule does not address sites or issues, an extended stay would mean that those sites and issues would also not be addressed in a state rule. The Board finds that allowing the 14-day response deadline would result in these circumstances in undue delay and proceeds to decide the Agency's motion.

In deciding this motion, the Board places particular stress on three factors. First, the Agency has committed to use the extended stay to meet with participants and determine the most effective course in this proceeding. At the conclusion of the extended stay, the Agency commits to recommend its preferred course. These are constructive steps, and a 90-day extension should be sufficient to take them. Second, the Board notes that, although it differs from the proposed state rules, the federal rule has taken effect and protects groundwater that may be impacted by CCW surface impoundments. Third, the Agency communicated with regulated entities and environmental groups and determined that they do not object to the requested extension. The responses received support the Agency's request.

Accordingly, the Board grants the Agency's motion and extends the stay for 90 days to Wednesday, June 15, 2016. During the meetings the Agency has committed to hold, the Board anticipates that participants will address issues including:

USEPA's position that, "[i]n order to ease implementation [of] the regulatory requirements for CCR landfills and CCR surface impoundments, [US]EPA strongly encourages the states to adopt at least the federal minimum criteria into their regulations." 80 Fed. Reg. 21430 (Apr. 17, 2015);

Whether state rules should require financial assurance; and

Whether state rules should address CCW surface impoundments located at inactive generating facilities.

At the conclusion of the extended stay, the Board directs the Agency to file a status report addressing in detail matters including the following:

the current status of litigation and legislation addressing the federal rule;

the general outcome of the meeting or meetings with participants;

the status of the preparation of any revised proposal and any anticipated date of filing it with the Board; and

the Agency's recommendation on how the Board should proceed in this docket.

Having granted the Agency's unopposed motion, the Board continues to reserve ruling on the Environmental Groups' September 15, 2015 motion to re-open.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 17, 2016, by a vote of 5-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish extending to the right.

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John T. Therriault, Clerk  
Illinois Pollution Control Board