ILLINOIS POLLUTION CONTROL BOARD
November 5, 2015

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)[1]:

On October 28, 2013, the Illinois Environmental Protection Agency (Agency or Illinois EPA or IEPA) 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 on the Agency's proposed regulations and revisions offered by other participants and received numerous post-hearing comments, but it has not adopted a first-notice proposal.

On August 5, 2015, the Agency filed a motion requesting an indefinite extension of a 90-day stay granted by the Board on May 7, 2015. The Board received one response to the motion from Prairie Rivers Network, Sierra Club, and the Environmental Law & Policy Center (collectively, Environmental Groups). On September 15, 2015, before the Board decided the Agency's motion, the Environmental Groups filed a motion to re-open this proceeding to consider their proposal for amended rules. The Board received seven responses to the motion and three replies. Because these two pending motions request actions that conflict with one another, the Board addresses them together in this order.

For the reasons below, to the extent that the Agency's motion requests an indefinite stay of this proceeding, that motion is denied. However, the Board concludes that a 120-day stay is appropriate. At the conclusion of that stay, the Board directs the Agency to file a status report addressing various issues. The Board today reserves ruling on the Environmental Groups' motion to re-open this proceeding but directs the Environmental Groups to pre-file testimony supporting that proposal by the conclusion of the stay.

Below, the Board first provides an abbreviated procedural background of this docket before addressing public comments on the issue of extending the stay. The Board then summarizes the Agency's motion to extend the stay and the Environmental Groups' response. Next, the Board summarizes the Environmental Groups' motion to re-open this proceeding, the seven responses, and the three replies. Finally, the Board discusses the issues presented before deciding the motions.

[1] 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.

ABBREVIATED PROCEDURAL BACKGROUND

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 this proceeding for 90 days to evaluate whether its proposal required changes as a result of USEPA action. USEPA published 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.

On August 5, 2015, the Agency filed a motion to extend the stay indefinitely (Agency Mot.) to allow for resolution of legal and legislative action on the federal rules. Agency Mot. at 4. On August 19, 2015, Environmental Groups filed a response (Env. Resp.).

On September 15, 2015, the Environmental Groups filed a motion to reopen the proceeding (Env. Mot.) for consideration of their proposal for amended rules, which was attached to the motion. On September 18, 2015, a hearing officer order set a deadline of October 2, 2015, to file responses to the Environmental Groups' motion and a deadline of October 9, 2015 to file replies.

On September 30, 2015, the City of Springfield, Office of Public Utilities, d/b/a City Water, Light and Power (CWLP) filed a response to the Environmental Groups' motion (CWLP Resp.). On October 1, 2015, the Board received responses from the Agency (Agency Resp.) and from Ameren Missouri and AmerenEnergy Medina Valley Cogen, LLC (collectively, Ameren) (Ameren Resp.). On October 2, 2015, the Board received responses from Prairie State Generating Company (PSGC) (PSGC Resp.); Dynegy Midwest Generation, LLC, Illinois Power Generating Company, Illinois Power Resources Generating, LLC, and Electric Energy (collectively, Dynegy) (Dynegy Resp.); Midwest Generation, LLC (MG) (MG Resp.); and the Illinois Environmental Regulatory Group (IERG) (IERG Resp.).

On October 8, 2015, Prairie Power, Inc. (PPI) filed a reply to the Agency's response (PPI Reply), the Environmental Groups filed a reply in support of their motion to re-open (Env. Reply), and the Illinois Attorney General's Office filed its reply on behalf of the People (People's Reply).

SUMMARY OF PUBLIC COMMENTS

Since September 11, 2015, the Board has received approximately 800 comments from members of the public opposing the Agency's request to extend the stay. 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). The Board has established a docket R14-10 PC specifically to make these comments easier to locate and review.

Of these comments, approximately 750 are substantially similar to one another. These comments indicate that "[t]he federal coal ash rules do not address compliance with Illinois

groundwater or surface water quality standards. The Board should adopt coal ash rules as soon as possible, to help ensure corrective actions or closures comply with state groundwater and surface water quality standards." *E.g.*, PC 3162. These comments state that "[t]he federal rules do not govern coal ash impoundments at now-shuttered power generating facilities." *E.g.*, PC 3287. The comments argue that "[t]he state rule is an important opportunity to include financial assurance, as recommended by the Illinois Attorney General's Office, to ensure the state isn't left to cover cleanup and closure costs." *E.g.*, PC 3525. The comments conclude by requesting that the Board decline to stay this proceeding. *E.g.*, PC 3695. A number of these comments include additional remarks. *E.g.*, PC 3055, 3789.

Approximately 75 other comments were substantially similar to one another. These comments indicate that "Illinois has the second highest number of contaminated coal ash dump sites in the nation." *E.g.*, PC 3770. The comments argue that "[f]ederal rules adopted this year fall short of addressing the problem in that they are self implementing by industry, require costly legal proceedings for enforcement; do not meet Illinois surface and groundwater standards; and do not address the many coal ash pits left behind by shuttered power plants." *E.g.*, PC 3783. The comments further argue that the federal rules do not include provisions for financial assurance. *E.g.*, PC 3773. These comments request that the Board "move expeditiously forward with its rule-making proceedings and deny recent requests for a stay in the process." *E.g.*, PC 3901.

Because of the large number of comments that were substantially similar to one another, the Board will not individually summarize them or list each person who filed one of them. This does not mean that the Board has not reviewed the comments or that the Board did not consider them. The Board recognizes the efforts made to prepare and submit these public comments and appreciates receiving each of them.

In addition to those comments summarized above, the Board on October 5, 2015, received a comment from Representative Carol Ammons (PC 3904). Rep. Ammons states that "[t]he threat from leaking and unstable coal ash pits is particularly severe in Illinois, which is home to 91 coal ash pits." PC 3904 at 1. She adds that, although federal rules have been adopted, "our state faces pollution issues that illustrate the need for additional Illinois-specific safeguards." *Id.* Rep. Ammons urges the Board not to stay this proceeding and encourages the Board to "adopt state rules in this matter as soon as possible." *Id.* at 2.

On October 19, 2015, the Board received a comment from Representative Brandon W. Phelps (PC 3913). Rep. Phelps requests that the Board grant the Agency's motion for an indefinite stay, citing "the need for additional clarity regarding the federal rule, the State's existing ability to appropriately regulate existing coal combustion waste sites, and the potential cost implications to coal fired-power plant operators and ultimately consumers." PC 3913 at 1. He comments that, if the Board grants the Environmental Groups' motion to re-open, it should require testimony and hold hearings on their amended proposal. . . ." *Id.* at 2, citing 415 ILCS 5/27 (2014).

On October 21, 2015, the Board received a comment from Representative Patrick J. Verschoore (PC 3914). Rep. Verschoore supports an indefinite stay, noting the Agency's

position that extending the stay would allow review of pending litigation and legislation that could affect the Agency's proposal. PC 3914 at 1. He comments that "[t]he worst possible outcome would be the creation of either duplicative or inconsistent requirements on the affected facilities in Illinois. . . ." *Id*. at 2. If the Board grants the Environmental Groups' motion to re-open the proceeding, Rep. Verschoore requests that the Board require testimony and schedule hearings. *Id*.

MOTION TO EXTEND STAY

Summary of Agency's Motion

The Agency notes that USEPA's rule governs CCR under Subtitle D of the Resource Conservation and Recovery Act (RCRA) and includes "minimum criteria for existing and new CCR surface impoundments and CCR landfills." Agency Mot. at 2. The Agency states that "[t]he regulation is self-implementing, with no direct federal oversight." *Id*. The Agency adds that USEPA's rule includes provisions addressing "design and operating criteria, groundwater monitoring, corrective action, closure requirements, post closure care, recordkeeping, and notification requirements." *Id*. The Agency asserts that the scope and criteria of the federal rule are "similar to the rules proposed by Illinois EPA and other participants, but not identical to any of the proposals in this rulemaking." *Id*.

The Agency states that a number of entities recently filed petitions for review of USEPA's CCR rule in the U.S. Court of Appeals. Agency Mot. at 2, citing Util. Solid Waste Activities Group v. EPA, No. 15-1219 (D.C. Cir. filed July 15, 2015); Beneficial Reuse Mgmt. v. EPA,. No. 15-1221 (D.C. Cir. filed July 15, 2015); Lafarge N. Am. v. EPA, No. 15-1222 (D.C. Cir. field July 15, 2015); Assoc. Elec. Coop. v. EPA, No. 15-1223 (D.C. Cir. filed July 15, 2015). The Agency argues that "[t]he scope of these legal challenges is presently unclear, but could significantly impact the extent to which the Illinois EPA's proposed rules should be revised in order to be consistent with, or avoid conflicting, with applicable federal law." Agency Mot. at 3.

The Agency adds that recent Congressional action addressed CCR. Agency Mot. at 3. The Agency cites the April 13, 2015 introduction of H.R. 1734, which would bar USEPA from regulating CCR as hazardous waste under Subtitle C of RCRA. *Id*., citing Improving Coal Combustion Residuals Regulation Act, H.R. 1734, 114th Cong. (2015). The Agency states that H.R 1734 also incorporates standards from USEPA's rule and allows states to enforce those standards directly. Agency Mot. at 3. The Agency argues that enactment of this bill would alter USEPA's approach to regulation of CCR. *Id*. While the U.S. House of Representative passed H.R. 1734 on July 22, 2015, and it was introduced in the U.S. Senate on July 23, 2015, "[a]s of July 28, 2015, the Senate had not taken any action on H.R. 1734." *Id*.

The Agency also cites the July 16, 2015 introduction of S. 1803, which would bar USEPA from regulating CCR as hazardous waste under Subtitle C of RCRA. Agency Mot. at 3-4, citing Improving Coal Combustion Residuals Regulation Act, S. 1803, 114th Cong. (2015). The Agency states that S. 1803 incorporates standards from USEPA's rule "while allowing states to craft their own implementation regulations." Agency Mot. at 4. The Agency argues that, in

scope and substance, both H.R. 1734 and S. 1803 are similar but not identical to the USEPA rule and the Agency's own proposal. *Id*.

The Agency argues that these bills and pending litigation "raise significant questions regarding the necessary scope and contents of the Illinois EPA's proposed rules." Agency Mot. at 4. In light of these questions, the Agency "seeks to indefinitely stay any action by the Board in this proceeding to enable the Illinois EPA and other interested parties to comprehensively evaluate the impact of the relevant legal and legislative actions on the proposed rulemaking, once those matters are resolved." *Id*.

Summary of Environmental Groups' Response

The Environmental Groups "strongly urge the Board not to stay this proceeding." Env. Resp. at 1. They argue that "there are several important reasons to adopt state rules in this matter as soon as possible." *Id*.

The Environmental Groups state that, when the Agency filed its rulemaking proposal, USEPA was considering different approaches to CCR under RCRA. Env. Resp. at 1. They assert that, at that time, "there was much less certainty about what the federal coal ash rules would look like." *Id*. The Environmental Groups argue that, "[t]oday the federal coal ash rules are clear, legally effective, and in force" (*id*. at 2), providing "as much certainty as one can ever have about another jurisdiction's regulations" (*id*. at 3).

The Environmental Groups question the Agency's arguments. They argue that litigation challenging the federal rules does "not mean that Illinois cannot proceed with its own rules." Env. Resp. at 3. They add that "[t]he threat of legislation is ever-present on any of the issues the Pollution Control Board deals with, and cannot be used as an excuse to shy away from necessary rulemaking." *Id*.

The Environmental Groups acknowledge similarities between the federal rules and the Agency's proposal. Env. Resp. at 3. However, they argue that the federal rules "do not address compliance with Illinois groundwater or surface water standards." *Id*. They state that adoption of state rules would "help ensure that when an owner or operator undertakes corrective action or closure of a coal ash impoundment, it does not risk duplicating either planning efforts or the remediation work itself in order to comply with state groundwater or surface water quality standards." *Id*. The Environmental Groups also argue that the Agency proposal includes provisions that the federal rule does not. As one example, they state that "the federal rules do not govern coal ash impoundments located at now-shuttered power generating facilities." *Id*. They add that state rules could address the issue of financial assurance for costs of corrective action and closure. *Id*.

The Environmental Groups state that they are developing a proposal reconciling the federal rules with the proposal in this docket. Env. Resp. at 1. They further state that their proposal "harmonizes the two rule systems for the sake of efficiency, but does not make the state rule dependent on the federal rule." *Id*. at 3-4. They argue that that implementation of their intended rule would not be affected if the federal rule is amended or struck down. *Id*. at 4. The

Environmental Groups state that they "intend to submit our proposal to the Board within a month, after some further refining." *Id*. at 1.

The Environmental Groups conclude that the Agency has not advanced a compelling reason to stay this docket and requests "that the Board decline to stay this proceeding, at least until Environmental Groups have an opportunity to present the solution we have developed." Env. Resp. at 4.

MOTION TO LIFT STAY

Summary of Environmental Groups' Motion

The Environmental Groups state that they have amended their proposal submitted to the Board on July 21, 2014, to reflect rules adopted by USEPA. Env. Mot. at 1. The Groups state that they intend to harmonize proposed state rules with federal requirements. *Id*.

The Environmental Groups request that the Board "reopen the docket to accept one more round of comments" addressing their amended proposal. Env. Mot. at 1. The Groups state that they do not believe it is necessary to hold additional hearings "because witness testimony is not necessary to present to the Board the language of the new federal rules." *Id*. They add that, if the Board wishes to pose questions, it can do so in writing. *Id*. at 1-2.

The Environmental Groups state that they and their members "feel strongly that the state rules are still necessary. . . ." Env .Mot. at 2. They request that the Board "move forward with those rules regardless of what may or may not change with the federal rules." *Id*.

Summary of Responses

CWLP

CWLP notes that the federal CCR rule takes effect on October 19, 2015. CWLP states that the federal rule and the Agency's proposal address the same subject but are not identical to one another. CWLP Resp. at 1. CWLP further states that the Board stayed this proceeding so that participants could review the Agency's proposal in light of the federal rule. *Id*. CWLP adds that the stay also allowed it to prepare to comply with the federal rule. *Id*.

CWLP argues that pending appeals of the federal rule and Congressional action on CCR could significantly affect the federal rule. CWLP Resp. at 1-2. CWLP asserts that proceeding before resolution of these matters "would waste valuable administrative resources." *Id*. at 2. CWLP adds that it would be a more productive use of those resources for it to evaluate expected effluent limitations under the Clean Water Act for electric generating units. *Id*.

CWLP states that, although the federal rule is self-implementing, the Environmental Groups' alternate proposal requires Agency involvement. CWLP Resp. at 1. CWLP asserts that the Agency and affected entities should be able to address this difference through a hearing. *Id*.

CWLP argues that the Environmental Groups' proposal to proceed solely through written comments "would cause material prejudice to CWLP." *Id*. at 2.

CWLP "respectfully requests that the Board deny the Motion to Reopen" and "supports the Agency's Motion to Extend Stay." CWLP Resp. at 2.

Agency

The Agency states that its 2013 rulemaking proposal intended to fill a regulatory gap that then existed regarding corrective action and closure at CCW surface impoundments. Agency Resp. at 5. The Agency further states that "adoption of USEPA's CCR rule may have altered that regulatory gap." *Id*. The Agency argues that it is not possible to determine the extent of any remaining gap "until there is certainty regarding the legal challenges and the Congressional action relating to USEPA's CCR rule." *Id*. The Agency further argues that this uncertainty necessitates "affording interested parties sufficient additional time to evaluate the appropriate manner in which to proceed." *Id*. at 1.

The Agency discounts the Environmental Groups' argument that there is more certainty about USEPA's rule now than in 2013 when the Agency filed its original rulemaking proposal. Agency Resp. at 6. The Agency responds that, while the various proposals were developed before it was clear what USEPA would do, that does not obviate the need for certainty about the extent of any remaining regulatory gap. *Id*.

The Agency also discounts the Environmental Groups' arguments that their amended proposal is necessary to protect water. Agency Resp. at 4. The Agency states that "[o]wners and operators of CCW surface impoundments are subject to the Illinois Groundwater Protection Act, the standards applicable to National Pollutant Discharge Elimination Systems permits, and the Illinois Groundwater Quality Standards, including the relevant monitoring and corrective action requirements." *Id*, citing 415 ILCS 55 (2014); 35 Ill. Adm. Code 309, 620. The Agency argues that these authorities will provide oversight of groundwater during a stay. Agency Resp. at 5.

The Agency argues that the Environmental Groups relied on USEPA's 2010 proposal to support sections of its proposal that differed from the Agency's. Agency Resp. at 7. The Agency also notes the Groups' statement that their amended proposal responds to USEPA's rule. *Id*., citing Env. Mot. at 1. The Agency suggests that the Environmental Groups' amended proposal would lack support "if the legal challenges to USEPA's CCR rule are successful, or Congressional action alters USEPA's CCR rule." Agency Resp. at 7. The Agency states that the results of these pending actions "will determine whether the Environmental Groups' reliance was misplaced." *Id*. at 8.

The Agency acknowledges that it "has not had sufficient time to comprehensively review the Environmental Groups' most recent proposal." Agency Resp. at 8. The Agency attributes this to the absence of "a statement of reasons or any other sufficient justification explaining the purpose and effect of their proposal or the environmental, technical, and economic justification for their proposal, as required by the Board's procedural rules. *Id*., citing 35 Ill. Adm. Code 102.202(b). The Agency argues that, without this information, "it is impossible to determine

how, if at all, the Environmental Groups' proposal actually addresses differences with USEPA's CCR rules beyond token cross references, how a regulated entity should address potentially conflicting components of the rules, or the environmental, technical, or economic impact of the proposal." Agency Resp. at 9.

The Agency stresses its role as the entity implementing environmental regulations in the state. Agency Resp. at 9. The Agency states that, in that role, "avoiding duplicative and potentially conflicting rules is critically important. . . ." *Id*. The Agency argues that proceeding before legal challenges and Congressional action have been resolved "does not effectuate that aim." *Id*. The Agency suggests that, if the Board re-opened this docket now, any changes to the federal rule would result in inconsistent rules and additional rulemaking activity. *Id*.

The Agency concludes by requesting that the Board grant its motion to extend the stay. Agency Resp. at 1, 9. The Agency also requests that the Board deny the Environmental Groups' motion to re-open this proceeding. *Id*. If the Board grants the Environmental Groups' motion, the Agency "respectfully requests that the Board direct the Environmental Groups to comply with 35 Ill. Adm. Code 101.202(b) and the Board's other procedural rules applicable to the necessary contents of rulemaking proposals for rules of general applicability before developing a schedule for soliciting written comments and holding hearing necessary to proceed in this matter." *Id*. at 1, 9-10.

Ameren

Ameren notes that USEPA's CCR rule takes effect on October 19, 2015, and regulates many of the same matters as the Agency's proposed rules. Ameren Resp. at 1. Noting seven appeals of USEPA's rule and Congressional legislation introduced to address CCR, Ameren indicates that requirements for the management and disposal of CCR "may further evolve." *Id*. at 2. Ameren argues that it would be inefficient and imprudent to re-open this docket "[u]ntil the pending litigation is fully resolved and until there is certainty regarding Congressional action. . . ." *Id*. (citations omitted).

Ameren argues that the Environmental Groups submitted an amended proposal without "any statement explaining the reasons for the amendments or their effect on the proposed program as required by the Board's procedural rules." Ameren Resp. at 2. If the Board re-opens the docket, Ameren requests that the Board direct the Environmental Groups to comply with those rules before it accepts comment on the amended proposal. *Id*., citing 35 Ill. Adm. Code 102.

Ameren concludes that the Board should deny the Environmental Groups' motion to re-open this proceeding and grant the Agency's motion to extend the stay indefinitely. Ameren Resp. at 2, 3. Ameren adds that it has discussed the Environmental Groups' motion with the Agency and "fully supports" the Agency's response to that motion. *Id*. at 2.

PSGC

PSGC states that, when the Agency filed its original rulemaking proposal on October 28, 2013, USEPA had not finalized a federal CCR rule and had not indicated when it expected to do so. PSGC Resp. at 2. PSGC adds that the Agency's proposal intended to fill a regulatory gap by providing rules for corrective action and closure for CCR surface impoundments at power generating facilities. *Id*. PSGC argues that on April 17, 2015, USEPA published its final CCR rule, which is similar in scope and criteria to the Agency proposal now before the Board. *Id*. PSGC further argues that the federal rule becomes effective on October 19, 2015 and fills any regulatory gap that had existed. *Id*. at 2-3.

PSGC notes pending appeals of the federal rule and pending Congressional bills addressing CCR. PSGC Resp. at 3. PSGC argues that any of these pending actions could significantly change the federal rule. PSGC further argues that any such changes could create conflict between the federal rule and any rules adopted by the Board. PSGC states that this conflict would necessitate additional rulemaking activity. *Id*.

PSGC states that the Agency may wish to implement the federal rule by "modifying existing regulations, proposing new regulations, and as the USEPA anticipates, revising its Solid Waste Management Plan. . . ." PSGC Resp. at 3. PSGC concludes that it would be prudent to adopt state rules only after all pending action on the federal rule has been resolved and the Agency has then assessed how to integrate federal requirements into state programs. *Id*. PSGC suggests that, if the Board re-opens this docket before resolution of those actions, the owners and operators of CCR disposal facilities could face "conflicting parallel or redundant rules." *Id*. at 4.

PSGC requests that the Board deny the motion to re-open this docket. PSGC Resp. at 1.

Dynegy

Dynegy states that USEPA's CCR rule takes effect on October 19, 2015. Dynegy Resp. at 2. Dynegy notes that numerous groups have challenged the rule in federal court and that Congress is considering legislation to modify it. *Id*. at 1. Dynegy argues that it would waste Board resources to continue consideration of the Agency's proposal in light of this uncertainty and the efforts of owners and operators of surface impoundments to comply with the federal rule. *Id*.

Dynegy asserts that it would be difficult to harmonize the Agency's proposal with the federal rule because they are based on different statutory authorities that support different policies. Dynegy Resp. at 2. Dynegy suggests that, if state rules were based on the federal rule, then changes to the federal rule would necessitate additional Board rulemaking. *Id*. Dynegy states that Illinois law does not allow the Board to adopt regulations that incorporate future amendments to the federal rule by reference. *Id*.

Dynegy argues that the Environmental Groups' proposal does not genuinely harmonize the federal rule with the Agency's proposal. Dynegy Resp. at 3. Dynegy further argues that their proposal effectively combines elements of the two so that it has a wider scope than either

one of them. *Id*. Dynegy suggest that this reflects the Environmental Groups' policy preferences and is not a genuine harmonization. *Id*.

Dynegy discounts the Environmental Groups' request that the Board consider their amended proposal solely on the basis of written comments. Dynegy Resp. at 3. Dynegy indicates that the record amassed to date was not addressed to incorporating the federal rule into the Agency's proposal. *Id*. Dynegy argues that considering the amended proposal on the basis of the existing record "would be inconsistent with the Board's obligations to thoroughly evaluate the technical feasibility and economic reasonableness of the proposed regulations." *Id*. at 4, citing 415 ILCS 5/27(a) (2014).

Dynegy argues that implementation of the federal rules has not begun. Dynegy Resp. at 2. Dynegy states that owners and operators of surface impoundments will have to engage in complex technical planning to comply with the federal rule. *Id*. In the meantime, Dynegy adds, nearly all CCR surface impoundments in Illinois are subject to Agency oversight through either enforcement actions or groundwater management zones. *Id*. at 2-3. Dynegy requests that the Board allow regulated entities to implement the federal rule, "to determine the regulatory landscape with respect to those coal combustion residual surface impoundments to which it does not apply, and to determine whether the IEPA's action under its current authority remains sufficient." *Id*. at 4.

Dynegy concludes that the Board should deny the Environmental Groups' motion to re-open this proceeding. Dynegy Resp. at 1, 4. If the Board grants the motion, Dynegy requests that the Board schedule hearing on the Environmental Groups' amended proposal. *Id*. at 4.

MG

MG argues that the Board should re-open this proceeding "when the Agency, who initiated this rulemaking, is prepared to present its position regarding how the federal CCR Rule affects its prior rulemaking proposal." MG Resp. at 1. MG states that the Agency makes a well-founded request for "additional time to establish whether the rules it initially proposed remain necessary in light of the completion of the federal CCR rule." *Id*. at 2. MG further states that pending legal challenges and Congressional legislation may change the substance of the federal rule, making it prudent to extend the stay. *Id*. MG argues that granting the Environmental Groups' motion to re-open would require the Board "to take aim at a moving target." *Id*. at 7.

MG indicates that the Agency filed its 2013 rulemaking proposal to fill a regulatory gap regarding CCR surface impoundments in Illinois. MG Resp. at 4. MG states that both the federal rules and the Agency's proposal address groundwater monitoring, corrective action, and closure at those facilities. *Id*. at 6-7. MG argues that "the regulatory gap identified by the Agency has already been filled by a rule that in all key respects provides the same level of protection as the Agency's proposal." *Id*. at 7. MG stresses that the federal rule is due to take effect on October 19, 2015, "ensuring that Illinois residents and the environment are protected until this rulemaking is reopened." *Id*. at 2.

MG discounts the Environmental Groups' position that their amended proposal seeks to harmonize federal and state rules. MG Resp. at 9. MG argues that "[t]he Environmental Groups have not made any effort to compare the respective requirements of the Agency's proposal and the federal CCR Rule, much less seriously try to minimize the burden an owner/operator would face by being regulated under two sets of laws." *Id*. at 9-10. MG argues that the federal rule and the amended proposal differ from one another and create redundant or inconsistent requirements. *Id* at 9-10. MG indicates that the federal rule does not address inactive impoundments at closed plants or financial assurance. *Id*. at 8. MG suggests that, instead of adopting overlapping rules, "the Board could simply create regulations that pertain to CCR impoundments at closed electrical plants and financial assurances, while allowing the remainder of the CCR rule to be enforced through Subtitle D of RCRA." *Id*. at 9.

MG states that it and other owners and operators have begun to comply with the federal rule. MG Resp. at 11. MG argues that this compliance provides the Board and the Agency "with an excellent opportunity to observe how these new regulations work in practice and evaluate whether they adequately protect public safety and the environment." *Id*. at 11-12. MG suggests that state rulemaking should be based on this experience "rather than mere speculation." *Id*. at 12.

MG states that it did respond to the Agency's motion to extend the stay because it did not object to the motion and "believes that an extension of the stay is appropriate." MG Resp. at 1. MG asserts that "more effort will be needed to address how to move forward in light of the federal CCR rule." *Id*. at 12. MG requests that the Board grant the Agency's motion to extend the stay and deny the Environmental Groups' motion to re-open the proceeding. *Id*. at 13.

IERG

IERG notes that the Agency's motion to extend the stay cites ongoing federal litigation and Congressional action that could have a significant effect on the substance of the Agency's original rulemaking proposal. IERG Resp. at 3, citing Agency Mot. at 2-4. IERG stresses that the Agency requested an extended stay so that the Agency and the other participants could "comprehensively evaluate the impact of the relevant legal and legislative actions on the proposed rulemaking once those matters are resolved." IERG Resp. at 3, citing Agency Mot. at 4. IERG states that it is not aware that this evaluation has been completed. IERG Resp. at 3. IERG argues that any rulemaking conducted without the results of that evaluation "might impose duplicative and possibly inconsistent regulatory requirements on facilities in Illinois. . . ." *Id*. at 4. IERG concludes that it is prudent to grant the Agency's motion to extend the stay. *Id*.

If the Board declines to extend the stay, IERG requests that the Board deny the Environmental Groups' motion to re-open the proceeding. IERG Resp. at 4. IERG states that the Environmental Groups request that the Board re-open the docket to accept only written comments on their amended proposal. *Id*. IERG asserts that the Environmental Groups make this request "without providing any technical support for the Amended Proposal or evidence demonstrating how the changes would affect regulated industries in Illinois." *Id*. at 6. IERG suggests that this information is required by the Act and the Board's caselaw. *Id*. at 5-6, citing 415 ILCS 5/27(a) (2014); Commonwealth Edison Co. v. PCB, 25 Ill. App. 3d 271, 288, 323

N.E.2d 84, 95-96 (1st Dist. 1974); Nitrogen Oxide (NO_x Trading Program Sunset Provisions for Electric Generating Units (EGUs): New 35 Ill. Adm. Code 217.751, R9-20 (Oct. 15, 2009); Proposed Amendments to Title 35, Subtitle C (Toxics Control), PCB 88-21(B) (Apr. 26, 1990). IERG argues that the adoption of federal rules may have either closed or significantly reduced the regulatory gap cited as the basis for the Agency's original rulemaking proposal. IERG Resp. at 4. In light of these factors, IERG concludes that "the Board is in no position to determine whether a particular provision is necessary or appropriate." *Id*. at 5. IERG submits that, if the Board intends to consider the Environmental Groups' proposal, it should require evidence in support of that proposal and conduct a hearing on it. *Id*. at 6.

Summary of Replies

PPI

PPI states that the responses to the motion to re-open show that re-opening this proceeding to consider the Environmental Groups' amended proposal "will not promote efficiency." PPI Reply at 3. PPI argues that considering the alternate proposal "will result in piecemeal and fragmented consideration of rulemaking proposals which are likely to be amended in the future, and will significantly increase the cost and difficulty of participating in this proceeding for all parties." *Id*.

PPI concludes that it joins the Agency's response to the motion to re-open, as well as responses filed by Dynegy, MG, PSGC, Ameren, CWLP, and IERG. PPI Reply at 3. PPI requests that the Board grant the Agency's motion to extend the stay and that it deny the Environmental Groups' motion to re-open the proceeding. *Id*.

Environmental Group' Reply

The Environmental Groups state that the Agency's January 20, 2015 motion for a 90-day stay sought time to evaluate whether federal rules necessitated any changes to its own proposal. Env. Reply at 1. The Groups argue that, while the Board granted that motion, "it appears the Agency still has not conducted the evaluation it promised to the Board." *Id*. at 1-2.

The Environmental Groups argue that any environmental rule at any time may be subject to one challenge or another. Env. Reply at 3. The Groups further argue that pending litigation and legislation cited by the Agency in support of an indefinite stay instead provide "the very reasons the Board should move forward with the state rule." *Id*. The Environmental Groups assert that these challenges mostly seek to weaken or eliminate the federal rule, making the state rules "an important backstop if the federal rules do fall apart in the end." *Id*. The Groups argue that the proposed state rule either addresses or provides an opportunity to address regulatory gaps remaining in the federal rule. *Id*. at 2-3. The Groups state that resolution of these challenges, which may take years, would risk experiencing "the hazards of toxic coal ash pollution or a catastrophic coal ash spill." *Id*. at 3.

The Environmental Groups note that owners and operators indicate that they are beginning implementation of the federal rules. Env. Reply at 3. The Groups assert that

"[m]oving forward with the state rules now provides an opportunity for those owner/operators to consider the requirements of both the state and federal rules simultaneously. . . ." *Id*. The Groups add that delaying adoption of state rules would make it more difficult to reconcile state and federal requirements. *Id*. The Groups suggest that, if the Board delays adoption of state rules, owners and operators may cite compliance with federal rules in requesting an exemption from any future state rules. *Id*. at 4.

The Environmental Groups state that the Board now faces the issue of deciding "whether and how to reconcile the state rule with the now-final federal rule." Env. Reply at 4. The Groups argue that their amended proposal "changed few, if any, substantive provisions of the proposals as they stood when the Board accepted post-hearing comments in October 2014." *Id*. The Environmental Groups surmise that the Agency opposes the motion to re-open because it opposes amendments the Groups previously proposed to the Board. The Groups argue that the record addresses those proposals, and the Board "will decide them in whatever way it sees fit. . . ." *Id*.

The Environmental Groups note complaints that their amended proposal did not include a Statement of Reasons but argue that their proposal is based on the Agency's language. Env. Reply at 5, citing 35 Ill. Adm. Code 102.202(b). The Groups state that "there is no question that IEPA is the 'proponent' that initiated this rulemaking. . . ." Env. Reply at 5. Although the Groups acknowledge that "participants in a rulemaking proceeding should expect to present the Board with the basis to support whatever rule that party favors," they argue that "[i]t does not follow that any participant who wishes to suggest to the Board regulatory language that differs from the initial proposal must submit that proposal with all the trimmings required of the initial proposal." *Id*.

The Environmental Groups also note opposition to their "suggestion that hearings are not necessary to resolve the remaining procedural issues in this rulemaking." Env. Reply at 5. The Groups state that this suggestion seeks to avoid "wasting the Board's resources holding hearings on an issue for which witness testimony is not necessary or helpful." *Id*. The Environmental Groups characterize their proposed amendments as "legal mechanics of the rule, not substantive changes that require additional expert testimony." *Id*. Although the Groups believe that written comments are sufficient to address those issues, they state that "of course it is within the Board's discretion to hold additional hearings." *Id*.

People's Reply

The People argue that the Board should not grant the Agency's motion for an indefinite stay. The People report that USEPA "is strongly encouraging states to incorporate the minimum federal criteria into their regulations and has provided several reasons why states should do this." People's Reply at 2, citing 80 Fed. Reg. 21431 (Apr. 17, 2015). The People argue that adopting state rules is appropriate based on the number of coal ash impoundments in Illinois and on the Agency's history of regulating them. People's Reply at 2-3. The People suggest that the Board has developed a fresh and extensive record in support of state rules. *Id*. at 3. The People argue that, while no authority requires the Board to proceed, doing so is consistent with legislative purposes and policies. *Id*. at 3-4, citing 415 ILCS 5/2(b), 5/11(b), 55/2(b) (2014).

The People assert that the Agency submitted its 2013 proposal to fill a regulatory gap. People's Reply at 4. The People argue that a gap remains because "there are yet no federal standards applicable to coal ash impoundments at power plants that have ceased producing electricity." *Id*., citing 80 Fed. Reg. 21303 (Apr. 17, 2015).

While the Agency's motion for an indefinite stay emphasizes pending litigation and legislation, the People discount this emphasis. The People argue that

> these types of legislative and legal reactions are completely normal when federal environmental rules are finalized and do not cause agencies to stop and wait for a certainty that is unlikely ever to 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. People's Reply at 1-2 (emphasis in original).

The People conclude that the Board should deny the Agency's motion and grant the Environmental Groups' motion to re-open this docket in order to "to ensure compliance with the federal standard and to consider additional requirements as may be appropriate for our state. *Id*. at 2.

BOARD DISCUSSION

The Board's procedural rules provide that "[m]otions to stay a proceeding must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed. . . . A status report detailing the progress of the proceeding must be included in the motion." 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).

In support of its motion, the Agency cites pending Congressional legislation and recently-filed appeals of the federal CCR rule. The Agency suggests that these actions may have a significant effect on the scope and contents of the proposed state rules under consideration in this docket. The Agency requests an indefinite stay so that, once litigation and legislation have been resolved, participants in this rulemaking can then evaluate any effect of the resolution on the Agency's proposal. The request for an indefinite stay suggests that the Agency expects this resolution and evaluation to require a considerable amount of time.

The Environmental Groups acknowledge the litigation and legislation cited by the Agency. However, they argue that any uncertainty resulting from them militates in favor of prompt adoption of state rules. They argue that Congress is always free to act on issues such as these and suggest that Congressional action to date does not prevent the Board from considering and adopting state rules. The Groups further argue that adoption of state rules does not hinge on the federal rule and that state rules could address a number of issues. As one example, they indicate that state rules addressing Illinois water quality standards would clarify corrective action

and closure for owners and operators. They also argue that the federal rules do not address CCR at facilities that are no longer generating power.

The motion to extend the stay indicates that the Agency, the original proponent of the proposal before the Board, is of the view that the Board should not be proceeding in this docket until the uncertainties described above are resolved. The Board recognizes that litigation or legislation could significantly change or even invalidate the federal rule. The Board recognizes that these changes may require revision of the Agency's proposal so that it is not inconsistent with the federal rule. The Board acknowledges these uncertainties.

However, both the motion and response acknowledge that, although the federal rule and the proposals in this rulemaking are similar to one another, they are not identical. The Environmental Groups identify sites and matters that are not addressed in the federal rule. If the Board stays this proceeding indefinitely, those sites and matters would also not be addressed in state rules.

The Board now has before it a proposal for site-specific rules for the closure of coal combustion waste surface impoundments at eight power generating facilities. Site-Specific Rule for the Closure of Ameren Energy Resources Ash Ponds: Proposed New 35 Ill. Adm. Code 840, Subpart B, R13-19 (Apr. 9, 2013). The proponent of that rule noted that there were at that time no applicable federal regulations and stated that its proposal sought to "close the regulatory gap" and allow various impoundments to be closed. *Id*., slip op at 2-5 (Statement of Reasons). The Agency subsequently proposed these generally-applicable rules, and the Board has since granted and extended a stay of the site-specific rule to allow monitoring of this docket.

The Board does not favor indefinite stays. Site-Specific Rule for the Closure of Ameren Energy Resources Ash Ponds: Proposed New 35 Ill. Adm. Code 840, Subpart B, R13-19, slip op. at 2 (July 25, 2013). As noted above, the Board has held four days of hearings and received numerous post-hearing comments. The next step in this rulemaking would generally be to proceed to publication of a first-notice proposal. To the extent that the Agency's motion requests an indefinite stay of this proceeding, that motion is denied. However, taking into account all of these factors above, the Board concludes that a limited extension of the stay is appropriate. The Board stays this proceeding for 120 days and directs the Agency to file a status report on or before Friday, March 4, 2016, 120 days from the date of this order. If the Agency's status report requests any further extension of the stay, the Board directs the Agency to support that request in detail by addressing matters including the following:

> an updated status of the federal litigation and Congressional legislation addressing the federal rule;
>
> the Agency's response to 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);

analysis of whether the minimum criteria established in the federal rule require changes to the Agency's proposal;

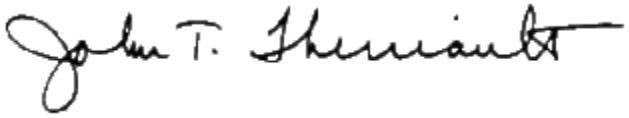
the uncertainty resulting from pending federal litigation or legislation and why that uncertainty requires an extension of the stay; and

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

Having denied the Agency's motion for an indefinite extension of the stay and extended the stay for 120 days, the Board today reserves ruling on the Environmental Groups' motion to re-open this proceeding to consider their proposed amended rules. In order to develop the record and proceed efficiently in the event that the Board determines to re-open this proceeding to consider their amended proposal, the Board directs the Environmental Groups to pre-file testimony supporting that proposal. This pre-filed testimony is due on or before Friday, March 4, 2016, 120 days from the date of this order.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 5, 2015, by a vote of 5-0.



John T. Therriault, Clerk
Illinois Pollution Control Board