

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
COAL COMBUSTION ASH PONDS) R14-10
AND SURFACE IMPOUNDMENTS AT)
POWER GENERATING FACILITIES:) (Rulemaking – Water)
PROPOSED 35 ILL. ADM. CODE 841)

NOTICE OF FILING

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board the Motion to Sever and Open Subdocket by the Illinois Environmental Protection Agency, a copy of each of which is herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: 

James Jennings
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DATED: June 11, 2014

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

Motion to Sever and Open Subdocket

NOW COMES the Illinois Environmental Protection Agency (“Agency”) by one of its attorneys, James Jennings, and pursuant to 35 Ill. Admin. Code 101.408 moves the Illinois Pollution Control Board (“Board”) for an order severing and opening a subdocket in this proceeding. Specifically, the Agency requests the creation of a subdocket concerning the following elements of the rule proposal submitted by the Environmental Law and Policy Center (“Environmental Groups”) on May 13, 2014:

1. The surface impoundment design criteria set forth in Section 841.450 of Environmental Groups’ proposal;
2. The financial assurance requirements set forth in Subpart F of Environmental Groups’ proposal; and
3. The requirement that all closure plans and post-closure care plans, which includes an evaluation of the financial obligations relating to the selected plan, be submitted during the compliance period, set forth in Section 841.130(b) of Environmental Groups’ proposal.

A separate subdocket is clearly appropriate given the substantial time and resources necessary for the Agency and other interested parties to investigate, conduct outreach, and

develop a counterproposal that adequately addresses the technical and legal issues implicated by those provisions.

In support therefore, the following statements are made:

I. Background and Procedural History

1. In April 2013, the Agency convened an internal workgroup to develop a rulemaking for coal combustion waste ("CCW") surface impoundments at power generating facilities. The workgroup was tasked with developing an environmentally, technically, and economically justified proposal that addressed the groundwater contamination caused by CCW surface impoundments in Illinois.

2. Between April and October 2013, the Agency conducted outreach with interested parties regarding the Agency's proposal, including members of the industrial community and the Environmental Groups.

3. On October 28, 2013, the Agency filed its proposed rulemaking. The Agency's proposal did not include proposed rules relating to surface impoundment design criteria or financial assurance.

4. In accordance with 35 Ill. Admin. Code 102.202(b), the Agency included with its proposal a Statement of Reasons and Technical Support Document, which set forth the purpose and effect of the rule, as well as the environmental, technical, and economic justification supporting the proposal.

5. On February 26-27, 2014, the Board held its first set of hearings. These hearings included questions and responses related to the Agency's proposal.

6. On March 3, 2014, the Board Hearing Officer issued an order that directed participants wishing to prefile testimony for the second hearing to do so on or before April 9,

2014. The Order also directed participants wishing to prefile questions on any prefiled testimony to do so on or before April 30, 2014.

7. On April 9, 2014, the Environmental Groups filed the prefiled testimony of Dr. Keir Soderberg and Traci Barkley with the Board. Neither prefiled testimony included discussion of financial assurance. Ms. Barkley's prefiled testimony did not include discussion of surface impoundment design criteria. Dr. Soderberg's prefiled testimony included the recommendation that the proposed rules "include provisions specifying adequate design criteria for impoundments." Soderberg prefiled testimony at 11. Dr. Soderberg also recommended that the proposed rules adopt the design criteria set forth in the United States Environmental Protection Agency's ("USEPA") June 2010 CCW landfill and surface impoundment proposal. Id. Dr. Soderberg's prefiled testimony did not include an evaluation of the environmental, technical, or economic justification supporting the inclusion of surface impoundment design criteria.

8. On May 13, 2014, the day before the then-last scheduled hearing in this proceeding, the Environmental Groups filed their counterproposal, which included proposed rules relating to surface impoundment design criteria and financial assurance.

9. The Environmental Groups did not include with their proposal a Statement of Reasons, Technical Support Document, or any other item that set forth the purpose and effect of its proposal or the environmental, technical, and economic justification supporting their proposal.

10. On May 14-15, 2014, the Board held its second set of hearings.

11. During the May 14-15, 2014 hearings, the Environmental Groups did not provide witness testimony or other evidence that set forth the environmental, technical, and economic

justification supporting the surface impoundment design criteria or financial assurance provisions of their proposal.

12. On May 21, 2014, the Board Hearing Officer issued an order that scheduled a third set of hearings for June 18-19, 2014. The Order “strongly encourage[d]” participants that wished to ask questions regarding the Environmental Groups’ proposal to prefile those questions by June 11, 2014.

13. On June 9, 2014, the Environmental Groups filed with the Board post-hearing comments that contained commentary regarding their May 13, 2014 proposal, including the surface impoundment design criteria and financial assurance requirements.

II. Basis for Motion

1. The Board may sever claims involving any number of parties, “[u]pon the motion of any party or on the Board’s own motion, in the interest of convenient, expeditious, and complete determination of claims, and where no material prejudice will be caused...” 35 Ill. Admin. Code 101.408.

2. The Agency believes that the various environmental, technical, and economic impacts inherent in establishing rules governing surface impoundment design criteria should be thoroughly examined.

3. The Agency believes that the various environmental, technical, economic, and legal impacts inherent in establishing financial assurance rules should also be thoroughly examined.

4. The Agency reached out to the participants in this matter regarding this motion before the filing date.

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5. The Agency and other interested parties are unable to evaluate the efficacy of the proposed design criteria and financial assurance rules during the brief period between the Environmental Groups' May 13, 2014 filing and the June 18-19, 2014 hearings.

6. The Agency does not believe that the Environmental Groups' June 9, 2014 post-hearing comments sufficiently address the environmental, technical, economic, and legal impacts of the proposed surface impoundment design criteria and financial assurance.

7. The best mechanism by which the Agency or other interested parties can examine the impacts of the Environmental Groups' proposal is through the formation of a workgroup, investigation, outreach with other interested parties, preparation of a technical support document, and, if necessary, developing a counterproposal.

8. The five weeks between the Environmental Groups filing their proposal and the June 18-19, 2014 hearings is insufficient time for the Agency or other interested parties to thoroughly investigate or conduct meaningful outreach regarding surface impoundment design criteria or financial assurance.

9. The ten calendar days between the Environmental Groups filing their post-hearing comments and the June 18-19, 2014 hearings is also insufficient time for the Agency and other interested parties to thoroughly investigate or conduct meaningful outreach regarding the Environmental Groups' bases for their surface impoundment design criteria or financial assurance.

10. The Agency has been unable to develop a counterproposal that addresses surface impoundment design or financial assurance because of the insufficient time to investigate or conduct outreach.

11. The Agency does not believe that the in adequate amount of time to evaluate the Environmental Groups' proposed surface impoundment design criteria and financial assurance rules justify delaying the adoption of the remaining provisions of Part 841.

12. Severing this proceeding provides several benefits that are in the interest the convenient, expeditious, and complete determination of this rulemaking.

13. First, severing this proceeding will enable the Agency and other interested parties sufficient time to fully evaluate the purpose and effect of the proposed surface impoundment design criteria and financial assurance rules, as well as the environmental, technical, and economic justification for those rules. This evaluation will enable the Agency or any other interested party, if it so chooses, to submit to the Board a Statement of Reasons supporting the inclusion of surface impoundment design criteria and financial assurance rules in this Part, in accordance with 35 Ill. Admin. Code 102.202(b). In addition, any response that the Agency or any other interested party developed in the time period between the Environmental Groups filing their proposal and the June 18-19, 2014 hearings would be obviously incomplete because five weeks is wholly insufficient to thoroughly investigate and conduct outreach regarding the complex issues raised by surface impoundment design criteria and financial assurance. In absence of this information, the Board would not have the information necessary to completely evaluate the implications of including surface impoundment design criteria or financial assurance in these rules.

14. Second, severing this proceeding will enable the Board to narrow the scope of any remaining hearings to the matters raised in the April 30, 2014 prefiled questions and the other issues raised by the Environmental Groups' proposal that was filed less than 24 hours before the hearings. Limiting the scope of any forthcoming hearings will enable the Board to efficiently

address the remaining issues and will facilitate an expeditious adoption of this rule. Indeed, examining surface impoundment design criteria and financial assurance with the other outstanding issues would likely require additional hearings on the entire rule, which would unnecessarily delay the Board's adoption of the rule.

15. Third, severing this proceeding and facilitating an expeditious adoption of the rule will allow owners and operators of CCW surface impoundments to proceed with the corrective action and closure at their existing units.

16. Severing this proceeding would not materially prejudice any interested party. In fact, proceeding as a single docket would materially prejudice the Agency and possibly other interested parties.

17. First, as noted above, proceeding as a single docket would burden the Agency and other interested parties with the unreasonable expectation of fully investigating and evaluating the sufficiency the proposed surface impoundment design criteria and financial assurance rules without the benefit of sufficient time to conduct outreach with other interested parties or to review the testimony or documents, if any, on which Environmental Groups relied in developing those rules. Indeed, such a proceeding would hinder the Agency's ability to facilitate the dialogue between interested groups that is required to develop a rule that takes into account the environmental, technical, and economic realities of the circumstances.

18. Second, proceeding as a single docket will certainly delay the adoption of the proposed rule. This may have the effect of delaying corrective action and closure at surface impoundments that may be subject to the proposed rule whose owners or operators are awaiting a final rule.

19. In the alternative, the Agency requests the Board hold additional hearings in this proceeding after the Agency and other interested parties have had sufficient time to evaluate the proposed surface impoundment design criteria and financial assurance rules.

III. Conclusion

For the foregoing reasons, the Agency moves that the Board issue an order severing this proceeding and open a subdocket concerning the surface impoundment design criteria and financial assurance issues included in Environmental Groups' proposal.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: 

James Jennings
Assistant Counsel
Division of Legal Counsel

DATED: June 11, 2014

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CERTIFICATE OF SERVICE

James Jennings, Assistant Counsel for the Illinois EPA, herein certifies that she has served a copy of the foregoing NOTICE OF FILING and MOTION TO SEVER AND OPEN SUBDOCKET upon persons listed on the Service List by mailing, unless otherwise noted on the Service List, a true copy thereof in an envelope duly addressed bearing proper first class postage and deposited in the United States mail at Springfield, Illinois on June 11, 2014.

By: 

James Jennings
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