

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

**NOTICE OF FILING**

TO: Mr. John T. Therriault	Timothy J. Fox
Assistant Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
100 W. Randolph Street	100 W. Randolph Street,
Suite 11-500	Suite 11-500
Chicago, Illinois 60601	Chicago, Illinois 60601
<b>(VIA ELECTRONIC MAIL)</b>	<b>(VIA U.S. MAIL)</b>

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board the **RESPONSE OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP TO THE ENVIRONMENTAL GROUPS' MOTION TO REOPEN PROCEEDING** copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
REGULATORY GROUP.,

Dated: October 2, 2015

By: /s/ Jennifer M. Martin  
Jennifer M. Martin

Jennifer M. Martin  
HODGE DWYER & DRIVER  
3150 Roland Avenue  
Post Office Box 5776  
Springfield, Illinois 62705-5776  
(217) 523-4900

**CERTIFICATE OF SERVICE**

I, Jennifer M. Martin, the undersigned, hereby certify that I have served the attached **RESPONSE OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP TO THE ENVIRONMENTAL GROUPS' MOTION TO REOPEN**

**PROCEEDING** upon:

Mr. John T. Therriault  
Assistant Clerk of the Board  
Illinois Pollution Control Board  
100 West Randolph Street, Suite 11-500  
Chicago, Illinois 60601

via electronic mail on October 2, 2015; and upon:

Stephen Sylvester, Esq.  
Assistant Attorney General  
Office of the Attorney General  
69 West Washington Street  
Suite 1800  
Chicago, Illinois 60602

Joanne M. Olson, Esq.  
Assistant Counsel  
James Jennings, Esq.  
Assistant Counsel  
Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, Illinois 62794-9276

David Rieser  
Much Shelist PC  
191 North Wacker Drive  
Suite 1800  
Chicago, Illinois 60606

Mark A. Bilut  
McDermott, Will & Emery  
227 West Monroe  
Chicago, Illinois 60606-5096

Christine G. Zeman, Esq.  
City of Springfield  
Office of Public Utilities  
800 East Monroe  
4<sup>th</sup> Floor  
Municipal Bldg. East  
Springfield, Illinois 62757-0001

Amy Antonioli  
Schiff Hardin, LLP  
6600 Willis Tower  
233 South Wacker Drive  
Chicago, Illinois 60606-6473

Jessica Dexter  
Jennifer L. Cassel  
Josh Zaharoff  
Environmental Law and Policy Center  
35 E. Wacker Drive  
Suite 1600  
Chicago, Illinois 60601

Jack Darin  
Faith Bugel  
Sierra Club  
70 E. Lake Street  
Suite 1500  
Chicago, Illinois 60601-7447

Ameren Services  
One Ameren Plaza  
P.O. Box 66149  
St. Louis, Missouri 63166

Robert Mool, Esq.  
Office of General Counsel  
Illinois Department of Natural Resources  
One Natural Resources Way  
Springfield, Illinois 62702-1271

Jason McLaurin  
Southern Illinois Power Cooperative  
11543 Lake of Egypt Road  
Marion, Illinois 62959-8500

Exelon Law Department  
10 South Dearborn  
49<sup>th</sup> Floor  
Chicago, Illinois 60603

Traci Barkley  
Prairie Rivers Network  
1902 Fox Drive  
Suite 6  
Champaign, Illinois 61820

Susan M. Franzetti  
Nijman Franzetti LLP  
10 South LaSalle Street  
Suite 3600  
Chicago, Illinois 60603

Rick Diericx  
Senior Director  
Dynergy Midwest Generation, Inc.  
1500 Eastport Plaza Dr.  
Collinsville, Illinois 62234-6135

Michael Smallwood  
Consulting Engineer  
Ameren  
1901 Chouteau Avenue  
St. Louis, Missouri 63103

Abel Russ, Esq.  
Environmental Integrity Project  
1000 Vermont Avenue NW  
Suite 1100  
Washington, DC 20005

Electric Energy, Inc.  
2100 Portland Road  
P.O. Box 165  
Joppa, Illinois 62953

Kincaid Generation LLC  
P.O. Box 260  
Kincaid, Illinois 62540

Prairie State Generating Company  
3872 County Highway 12  
Marissa, Illinois 62257

Elizabeth Quirk-Hendry, Esq.  
General Counsel East Region  
Keith Schmidt  
Director of Environment  
NRG Energy, Inc.  
211 Carnrgie Center  
Princeton, New Jersey 08540

Walter Stone  
Vice President  
NRG Energy, Inc.  
8301 Professional Place  
Suite 230  
Landover, Maryland 20785

by depositing said documents in the United States Mail, postage prepaid, in Springfield,  
Illinois, on October 2, 2015.

/s/ Jennifer M. Martin  
Jennifer M. Martin

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

**ENTRY OF APPEARANCE OF JENNIFER M. MARTIN**

NOW COMES Jennifer M. Martin, of the law firm HODGE DWYER & DRIVER, and hereby enters her appearance in this matter on behalf of the ILLINOIS ENVIRONMENTAL REGULATORY GROUP.

Respectfully submitted,

DATE: October 2, 2015

By: /s/ Jennifer M. Martin  
Jennifer M. Martin

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**RESPONSE OF THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP  
TO THE ENVIRONMENTAL GROUPS' MOTION TO REOPEN PROCEEDING**

NOW COMES the ILLINOIS ENVIRONMENTAL REGULATORY GROUP (“IERG”), by and through its attorney, HODGE DWYER & DRIVER, and pursuant to 35 Ill. Admin. Code § 101.500(d) and the September 18, 2015 Hearing Officer Order, hereby responds to the Motion to Reopen Proceeding filed by the Sierra Club, Prairie River’s Network, and Environmental Law and Policy Center (collectively “Environmental Groups”) on September 15, 2015. *See* Environmental Groups’ Amended Proposal and Motion to Reopen Proceeding, *In the Matter of: Coal Combustion Waste (CCW) Ash Ponds and Surface Impoundments at Power Generating Facilities: Proposed New 35 Ill. Adm. Code 841*, R2014-10, (Ill.Pol.Control.Bd. Sept. 15, 2015), (hereafter “Environmental Groups’ Motion”) (rulemaking hereafter referred to as “Part 841 Rulemaking”).

IERG is a not-for-profit Illinois corporation affiliated with the Illinois Chamber of Commerce. IERG is composed of fifty-three (53) member companies that are regulated by governmental agencies that promulgate, administer or enforce environmental laws, regulations, rules or other policies. Among the IERG membership are all of the facilities expected to be subject to this proposed rule. As such, IERG was active in the pre-proposal stakeholder process and many of its member companies have participated throughout this rulemaking.

IERG opposes the Environmental Groups' Motion, in that it effectively asks the Board to deny the Illinois EPA's Motion to Extend Stay, which IERG supports, and asks the Board to adopt a regulatory proposal based solely on comments, rather than a record based on sworn testimony; and would have the Board ignore the significant change to the regulatory landscape brought about by federal rules dealing with the same subject as this matter. In support of its proposal, the Environmental Groups offer only that their members "feel strongly" that rules are "necessary to protect the water we all depend on in Illinois." Environmental Groups' Motion, at 3.

**I. BACKGROUND**

As described at the outset of this rulemaking, the regulatory proposal filed by the Illinois Environmental Protection Agency ("Illinois EPA") is intended to fill a "regulatory gap" in the Board's rules governing coal combustion waste ("CCW") surface impoundments at power generating facilities by providing a process by which CCW surface impoundments in Illinois can be closed or groundwater contamination remediated. Statement of Reasons at 8-9. On December 19, 2014, the United States Environmental Protection Agency ("USEPA") finalized rules for disposal of coal combustion residuals ("CCR") from electric utilities (hereinafter referred to as "the federal rules"). Illinois Environmental Protection Agency's Motion to Stay ("Illinois EPA Motion to Stay"), at 1. Among the requirements of the federal rules are groundwater monitoring, corrective action, and closure for surface impoundments. *Id.* at 2. The federal rules were published in the *Federal Register* on April 17, 2015, and will be effective on October 19, 2015. 80 Fed. Reg. 21302 (Apr. 17, 2015) and 80 Fed. Reg. 37988 (July 2, 2015).

**II. ILLINOIS EPA'S MOTIONS TO STAY**

On January 20, 2015, the Illinois EPA filed a motion to stay this proceeding for 90 days. Illinois EPA Motion to Stay, at 2. In its motion, the Illinois EPA indicated that the “scope and criteria of the federal rule is similar to the rules proposed by the Agency and other participants, but is not identical.” *Id.* The motion requested a 90-day stay “while the Agency evaluates whether changes to the Agency’s proposal are necessary as a result of the newly adopted minimum federal criteria.” *Id.* On May 7, 2015, the Board granted the stay, and in doing so, directed the Illinois EPA to file a status report on or before Wednesday, August 5, 2015. Order of the Board, dated May 7, 2015, at 2. The Board’s May 7, 2015 Order clearly contemplated that the Illinois EPA’s August 5 filing would request that the stay be extended, stating “if the status report includes comment beyond a request to extend the stay of these proceedings, the Board’s hearing officer will set a deadline to file a response.” *Id.*

On August 5, 2015, the Illinois EPA filed a motion to extend the stay of proceedings indefinitely. Illinois Environmental Protection Agency’s Motion to Extend Stay (“Motion to Extend Stay”), at 1-5. In its Motion to Extend Stay, the Illinois EPA described ongoing litigation and federal legislation that could potentially impact the scope and contents of the proposed rules being considered in this matter significantly. *Id.* at 2-4. The Illinois EPA’s motion indicated that the indefinite stay will “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.* at 4. The Board has not yet ruled on the Illinois EPA’s Motion to Extend Stay. IERG is unaware of the results of any evaluation having been completed to determine whether and to what extent changes to the rulemaking proposal being considered by the Board might be needed as a result of either the finalization of the federal rules, or the pending

litigation and federal legislation described by the Illinois EPA. Without such an evaluation, IERG is concerned that any rule adopted by the Board might impose duplicative and possibly inconsistent regulatory requirements on facilities in Illinois, and result in increased costs and administrative burdens with little consideration of any environmental benefit. IERG believes the Board's granting of the Illinois EPA's Motion to Extend Stay is prudent.

### **III. ENVIRONMENTAL GROUPS' MOTION**

The Environmental Groups' Motion presupposes that the Board will not grant the Illinois EPA's Motion to Extend Stay. As described above, IERG supports the Board granting the Illinois EPA's Motion to Extend Stay, and concurs that any consideration of how this matter should proceed would necessarily be addressed at the conclusion of the stay. In the event that the Board declines to grant the stay, IERG opposes the Environmental Groups' Motion, and would encourage the Board to deny it.

With their Motion, the Environmental Groups have filed an Amended Proposal which proposes substantive changes to the rulemaking proposals submitted by the Illinois EPA and Environmental Groups which are currently pending before the Board. Specifically, the Environmental Groups ask that the Board reopen the docket for the sole purpose of accepting comments on the Environmental Groups' Amended Proposal, at which point the Environmental Groups presumably feel that the Board would have enough information in the record to adopt their proposal. Without commenting on the substance of the Amended Proposal itself, IERG offers the following concerns with the Board granting the Environmental Groups' Motion.

The "regulatory gap" identified as the primary basis for this rulemaking may have been significantly reduced or no longer exist, as a result of the adoption of the federal rules, and absent any information regarding the programmatic purpose of the regulations under

consideration, the Board is in no position to determine whether a particular provision is necessary or appropriate.

Section 27 of the Illinois Environmental Protection Act (“Act”) (415 ILCS 5/27) requires that “[a]ny person filing with the Board a written proposal for the adoption, amendment, or repeal of regulations shall provide information supporting the requested change . . . [and] describe, to the extent reasonably practicable, the universe of affected sources and facilities and the economic impact of the proposed rule.” 415 ILCS 5/27(a). Moreover, Section 27 of the Act requires the Board, in promulgating regulations, to “take into account the existing physical conditions, the character of the area involved, including the character of surrounding land uses, zoning classifications, the nature of the existing air quality, or receiving body of water, as the case may be, and the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution.” *Id. See Commonwealth Edison Co. v. Pollution Control Board*, 25 Ill. App. 3d 271, 288, 323 N.E.2d 84, 95-96 (1<sup>st</sup> Dist. 1974) (Board regulations invalidated where record did not reflect that the Board took into account the technical feasibility or economic reasonableness of proposed rules for a substantial number of affected facilities in the state); *In the Matter of: Proposed Amendments to Title 35, Subtitle C (Toxics Control)*, PCB No. R88-21 Docket B, 1990 Ill. ENV. LEXIS 459, \*5 (April 26, 1990) (Board could not proceed with dissolved iron standard due to lack of technical support for proposed standard).

*In In the Matter of: Nitrogen Oxide (NO[x]) Trading Program Sunset Provisions for Electric Generating Units (EGUs): New 35 Ill. Adm. Code 217.751*, PCB No. R9-20, 2009 Ill. ENV LEXIS 376 (October 15, 2009), the Board addressed a post-hearing comment which proposed substantive changes to Illinois EPA’s rulemaking proposal. In rejecting the proposed substantive changes, the Board noted that the “regulated community and members of the public

have had no meaningful opportunity to comment” on the proposed changes, and the proponent of the substantive changes had “failed to support its proposed additional language with convincing evidence and argument.” *Id.* at \*35. Similarly, the Environmental Groups’ Motion asks the Board to reopen this proceeding and address the substantive changes in the Amended Proposal without providing any technical support for the Amended Proposal or evidence demonstrating how the changes would affect regulated industries in Illinois. IERG does not believe that the support provided by the Environmental Groups, namely that they and their members “feel strongly” that the rules “are still necessary,” is an adequate basis for a rulemaking.

IERG does not believe that it is appropriate to wait until the last minute in a years-long rulemaking process to submit major substantive changes to a proposal, and demand that no further testimony be heard. As described above, the federal rules were signed as final, and widely available on December 19, 2014, and revised regulatory language based on the federal rules could have been submitted at any time since then. The Board should not allow the Environmental Groups to avoid subjecting their proposal to the same degree of scrutiny as earlier-filed regulatory proposals by waiting until the end of the process to submit it.

For the reasons outlined in the Illinois EPA’s Motion to Extend Stay, IERG believes that granting an indefinite stay to allow Illinois EPA and other parties to assess the impact of the federal rules and pending legal and legislative actions on the Part 841 Rulemaking will avoid the imposition of duplicative and inconsistent regulatory requirements and increased costs on Illinois facilities. However, if the Board denies the Illinois EPA’s Motion to Extend Stay, and plans on considering the Environmental Groups’ Amended Proposal, it should require the Environmental Groups to provide the requisite technical support and evidence for the Amended Proposal, and should take sworn testimony on that proposal.

**IV. CONCLUSION**

IERG would like to thank the Board for providing the opportunity to present this response to the Environmental Group's Motion. IERG is supportive of the Board granting the Stay, as requested by the Agency. In the event that the Board declines to grant the Agency's Motion to Extend Stay, IERG believes it would be inappropriate for the Board to grant the Environmental Groups' Motion, or if the Board elects to do so, that it require the Environmental Groups to provide adequate testimonial support and evidence and answer questions related to its Amended Proposal.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
REGULATORY GROUP

Dated: October 2, 2015

By: /s/ Jennifer M. Martin  
Jennifer M. Martin

Jennifer M. Martin  
HODGE DWYER & DRIVER  
3150 Roland Avenue  
Post Office Box 5776  
Springfield, Illinois 62705-5776  
(217) 523-4900