

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

To: See attached service list.

**NOTICE OF ELECTRONIC FILING**

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the Illinois EPA’s Response to Board’s March 28, 2019, Order on behalf of the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

Respectfully submitted,

Dated: April 25, 2019

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,

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Petitioner,

BY: /s/Rex L. Gradeless  
Rex L. Gradeless

**THIS FILING IS SUBMITTED ELECTRONICALLY AND SERVED ON RECYCLED PAPER**

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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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**ILLINOIS EPA’S RESPONSE TO BOARD’S MARCH 28, 2019, ORDER**

NOW COMES the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, (“Illinois EPA”) by and through its counsel, and for its Response to the Illinois Pollution Control Board’s (“Board”) March 28, 2019, Order, states as follows:

On March 28, 2019, the Board entered an order discussing the reasons the Board believes this proceeding should be dismissed. *Id.* at p. 1. The order indicates the Board will not dismiss this proceeding if doing so would cause actual prejudice to the Illinois EPA or other participants. *Id.* at p. 3. Further, the Board directed the Illinois EPA to show cause why this proceeding should not be dismissed. *Id.*

The Illinois EPA requests this proceeding remain open because pending legislation before the 101st Illinois General Assembly (“General Assembly”) could impact the outcome. Therefore, the Illinois EPA requests that this proceeding remain open until after the close of the 101st legislative session, on or about May 31, 2019, and the Illinois EPA requests 30 days thereafter, until July 1, 2019, to provide a recommendation to the Board on how to proceed. Further, good cause exists to keep this proceeding open.

**REGULATORY BACKGROUND SUMMARY**

On October 28, 2013, the Illinois EPA filed this proceeding proposing rules of general applicability for all coal ash ponds located at Illinois power plants. *See* R14-10 (hereafter referred to as “State Rulemaking”). The hearings for the State Rulemaking concluded on July 24,

2014, and participants finished post-hearing comments on October 20, 2014. The Board did not proceed to first notice on the State Rulemaking.

In 2015, USEPA published proposed federal regulations regulating the disposal of coal combustion residuals (“CCR”). As a result, the Illinois EPA moved to stay the State Rulemaking to evaluate and consider any potential impact the federal regulations could have on the State Rulemaking. On July 15, 2016, the Illinois EPA amended the State Rulemaking proposal to create a permitting program. Rather than soliciting additional testimony and having another hearing in the State Rulemaking, the Illinois EPA and the Environmental Groups agreed that the Board should proceed with the State Rulemaking and make requests for further comments, if needed, within the State Rulemaking.

On January 20, 2017, the Board reviewed the filings, including the status reports, the motion to amend, the responses, and considered Federal litigation and legislation addressing CCR. After that review, the Board directed participants in the State Rulemaking to respond to additional questions within 45 days and welcomed responses to any of the questions from any other participant by the same deadline. Responses to the Board’s questions were submitted early March of 2017. Since responses were given, the State Rulemaking has been idle, and the Board has taken no action since January 20, 2017.

**I. THE ILLINOIS EPA NEED NOT SHOW ACTUAL PREJUDICE FOR THE STATE RULEMAKING TO REMAIN OPEN.**

Requiring the demonstration of actual prejudice to sustain a rulemaking proceeding is not founded under Illinois law. The Board’s March 28, 2019, order indicated that the Board would not dismiss this matter if doing so would cause actual prejudice to the Illinois EPA or other participants. *Id.* at p. 3. This places a burden on the Illinois EPA to show actual prejudice where no such legal requirement exists.

After a rulemaking proposal has been submitted by the Illinois EPA, the Board may revise the proposed regulations before adoption upon its own motion or in response to suggestions made at hearing and in written comments made prior to second notice. 35 Ill. Adm. Code § 102.600(a). No additional hearing on the revisions need be held. *Id.* The Board may dismiss a rulemaking proposal for the failure of the proponent to pursue disposition of the proposal in a timely manner. *Id.* at § 102.212 (b). In making this determination, the Board will consider factors including the history of the proceeding and the proponent's compliance with any Board or hearing officer orders. *Id.*

There is no basis for dismissal in this case. Here, the hearings for the State Rulemaking concluded on July 24, 2014, and participants finished post-hearing comments on October 20, 2014. After the amended proposal in 2016, answers to the Board's outstanding questions were submitted in March of 2017. Sometime after October 20, 2014, or after March of 2017, the State Rulemaking could have proceeded to first notice. The Illinois EPA, and all participants, have responded to all the Board's questions. The demonstration of actual prejudice is not a legal requirement for the Illinois EPA and the facts of this case do not demonstrate that the Illinois EPA failed to pursue the disposition of the proposal in a timely manner.

**II. THIS STATE RULEMAKING SHOULD REMAIN OPEN BECAUSE ILLINOIS LEGISLATION MAY IMPACT THE OUTCOME.**

The State Rulemaking should remain open because the General Assembly may pass legislation that could impact the State Rulemaking. On January 9, 2019, legislation was filed to establish the Coal Ash Cleanup and Storage Act. *See* S.B. 0009, 101st Gen. Assem., Reg. Sess. (Ill. 2019) (hereafter "SB9"). SB9 was later amended on March 15, 2019, and generally proposed creating a program that would require closure of all coal ash units within Illinois and the removal of all the coal ash within them. *Id.* at Amendment 1.

If SB9, or another form of this legislation, passes in the General Assembly, the State Rulemaking may or may not be necessary. For example, if legislation passes, the Illinois EPA may receive a new mandate to create rules. In that case, the State Rulemaking may need to be dismissed and reopened considering potentially new statutory authority. However, if legislation fails, the State Rulemaking may be necessary to maintain so that rules governing CCR are in place to protect the health and welfare of the public and the environment. Under that scenario, Illinois EPA anticipates the evidence previously submitted to the Board, and the issues contained therein, already sufficiently exists within the record of the State Rulemaking. Therefore, this proceeding could pick up where it left off. Due to pending legislation, the State Rulemaking should remain open until the after the close of the 101st General Assembly's legislative session and the Illinois EPA should be given until July 1, 2019, to provide the Board with a recommendation on how to proceed in this rulemaking.

WHEREFORE, the Illinois EPA respectfully requests this rulemaking remain open until at least July 1, 2019.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,

Petitioner,

BY: /s/Rex L. Gradeless  
Rex L. Gradeless

Dated: April 25, 2019

Rex L. Gradeless, #6303411  
Division of Legal Counsel  
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**CERTIFICATE OF SERVICE**

I, the undersigned, on affirmation state the following:

That I have served the attached **ILLINOIS EPA'S RESPONSE TO BOARD'S MARCH 28, 2019, ORDER** by e-mail upon Stephen Sylvester at the e-mail address of [ssylvester@atg.state.il.us](mailto:ssylvester@atg.state.il.us), Gabe Neibergall at the email address of [Gabriel.Neibergall@illinois.gov](mailto:Gabriel.Neibergall@illinois.gov), Joanne M. Olson at the email address of [joanne.olson@illinois.gov](mailto:joanne.olson@illinois.gov), Mark A. Bilut at the email address of [mbilut@mwe.com](mailto:mbilut@mwe.com), Deborah J. Williams at the email address of [Deborah.Williams@cwlp.com](mailto:Deborah.Williams@cwlp.com), Michael Smallwood at the email address of [msmallwood@ameren.com](mailto:msmallwood@ameren.com), Eric Lohrenz at the email address of [eric.lohrenz@illinois.gov](mailto:eric.lohrenz@illinois.gov), Jeffrey Hammons at the email address of [jhammons@elpc.org](mailto:jhammons@elpc.org), Kim Knowles at the email address of [kknowles@prairierivers.org](mailto:kknowles@prairierivers.org), Andrew Rehn at the email address of [arehn@prairierivers.org](mailto:arehn@prairierivers.org), Jack Darin at the email address of [Jack.Darin@sierraclub.org](mailto:Jack.Darin@sierraclub.org), Amy Antonioli at the email address of [aantonioli@schiffhardin.com](mailto:aantonioli@schiffhardin.com), Elizabeth Quirk at the email address of [Elizabeth.quirk-hendry@nrgenergy.com](mailto:Elizabeth.quirk-hendry@nrgenergy.com), Keith Schmidt at the email address of [Keith.schmidt@nrgenergy.com](mailto:Keith.schmidt@nrgenergy.com), Walter Stone at the email address of [Water.stone@nrgenergy.com](mailto:Water.stone@nrgenergy.com), Faith Bungel at the email address of [fbugel@gmail.com](mailto:fbugel@gmail.com), Paul Mauer at the email address of [Paul.Mauer@illinois.gov](mailto:Paul.Mauer@illinois.gov), Robert G. Mool at the email address of [Robert.Mool@illinois.gov](mailto:Robert.Mool@illinois.gov), David L. Rieser at the email address of [David.Rieser@klgates.com](mailto:David.Rieser@klgates.com), Susan M. Franzetti at the email address of [sf@nijmanfranzetti.com](mailto:sf@nijmanfranzetti.com), Vincent R. Angermeier at the email address of [va@nijmanfranzetti.com](mailto:va@nijmanfranzetti.com), Abel Russ at the email address of [aruss@environmentalintegrity.org](mailto:aruss@environmentalintegrity.org), Jennifer M. Martin at the email address of [Jennifer.Martin@heplerbroom.com](mailto:Jennifer.Martin@heplerbroom.com), Katherine D. Hodge at the email address of [Katherine.Hodge@heplerbroom.com](mailto:Katherine.Hodge@heplerbroom.com), LaDonna Driver at the email address of [LaDonna.Driver@heplerbroom.com](mailto:LaDonna.Driver@heplerbroom.com), Mark Powell at the email address of [Mark.Powell@Illinois.gov](mailto:Mark.Powell@Illinois.gov), Don Brown at the email address of [don.brown@illinois.gov](mailto:don.brown@illinois.gov), and upon Hearing Officer Timothy J. Fox at the e-mail address of [Tim.Fox@Illinois.gov](mailto:Tim.Fox@Illinois.gov).

That I have served the attached **ILLINOIS EPA'S RESPONSE TO BOARD'S MARCH 28, 2019, ORDER** upon all other persons listed on the Service List, by placing a true copy in an envelope duly address bearing proper first class postage in the United States mail at Springfield, Illinois on April 25, 2019.

That my e-mail address is [Rex.Gradeless@Illinois.gov](mailto:Rex.Gradeless@Illinois.gov).

That the number of pages in the e-mail transmission is eight (8).

That the e-mail transmission took place before 5:00 p.m. on the date of April 25, 2019.

/s/Rex L. Gradeless  
April 25, 2019