

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
) AS 2021-003
PETITION OF MIDWEST)
GENERATION, LLC FOR AN)
ADJUSTED STANDARD FROM) (Adjusted Standard)
845.740(a) AND FINDING OF)
INAPPLICABILITY OF PART 845 FOR)
THE WAUKEGAN STATION)

NOTICE OF FILING

To: See attached Service List

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board Midwest Generation, LLC's Motion for Leave to File *Instanter* a Response to Comment Opposing its Motion and Midwest Generation, LLC's Response to Public Comment Opposing Its Motion to Stay, copies of which are herewith served upon you.

Dated: September 20, 2023

MIDWEST GENERATION, LLC

By: /s/Kristen L. Gale

Kristen L. Gale
Susan M. Franzetti
Genevieve J. Essig
NIJMAN FRANZETTI LLP
10 South LaSalle Street Suite 3400
Chicago, IL 60603
(312) 251-5590
kg@nijmanfranzetti.com
sf@nijmanfranzetti.com
ge@nijmanfranzetti.com

SERVICE LIST

Don Brown, Clerk of the Board
Brad Halloran, Hearing Officer
Illinois Pollution Control Board
60 E. Van Buren Street, Suite 630
Chicago, IL 60605
don.brown@illinois.gov
Brad.Halloran@illinois.gov

Stefanie Diers
Sara Terranova
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
Stefanie.Diers@illinois.gov
Sara.terranova@illinois.gov

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing and Midwest Generation, LLC's Motion for Leave to File *Instantly* a Response to Comment Opposing its Motion and Midwest Generation, LLC's Response to Public Comment Opposing Its Motion to Stay were electronically filed on September 20, 2023 with the following:

Don Brown, Clerk of the Board
Illinois Pollution Control Board
60 E. Van Buren Street, Suite 630
Chicago, IL 60605
don.brown@illinois.gov

and that copies were sent via e-mail on September 20, 2023 to the parties on the service list pursuant to Section 101.304(b) of the Board rules. 35 Ill. Adm. Code 101.304(b). As a courtesy, a copy was also emailed to Lauren Piette at lpiette@earthjustice.org, Jennifer Cassel, jcassel@earthjustice.org, Mychal Ozaeta, mozaeta@earthjustice.org, Faith E. Bugel, FBugel@gmail.com, and Andrew Rehn, arehn@prairierivers.org.

Dated: September 20, 2023

/s/Kristen L. Gale

Kristen L Gale
Susan M. Franzetti
Genevieve J. Essig
Nijman Franzetti LLP
10 S. LaSalle Street, Suite 3400
Chicago, IL 60603
(312) 251-5590
kg@nijmanfranzetti.com
sf@nijmanfranzetti.com
ge@nijmanfranzetti.com

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
Petition of Midwest Generation, LLC)
for an Adjusted Standard from 845.740(a))
and Finding of Inapplicability of Part 845) PCB AS 2021-003
for the Waukegan Station)
)
)

**MIDWEST GENERATION, LLC’S MOTION FOR LEAVE TO FILE *INSTANTER* A
RESPONSE TO COMMENT OPPOSING ITS MOTION**

Midwest Generation, LLC (“MWG”), requests that the Illinois Pollution Control Board (“Board”) grant this Motion for Leave to File, *Instanter*, a response to Clean Power Lake County, Earthjustice, Prairie Rivers Network, and Sierra Club’s (“Environmental Groups”) comment opposing MWG’s Motion to Stay, pursuant to Section 101.500 Board’s Procedural Rules. 35 Ill. Adm. Code 101.500. A response is warranted because the Environmental Groups’ comment is far beyond the boundaries established by the Board for participants in an adjudicatory proceeding and also incorrectly claims that the Grassy Field is a coal combustion residual (“CCR”) surface impoundment contrary to their own arguments to the Board in other proceedings. In support of its motion seeking leave to file, *instanter*, MWG submits its Response and states:

- 1) On May 11, 2021, MWG filed a Petition for Adjusted Standard for the Waukegan Station, which is an adjudicatory proceeding. 35 Ill. Adm. Code 101.202.
- 2) On October 31, 2022, Illinois EPA filed its Recommendation on MWG’s Petition.
- 3) Both MWG and Illinois are “parties” to the adjusted standard as that term is defined in Section 101.202 of the Board rules. 35 Ill. Adm. Code 101.202, 104.416.

4) The Environmental Groups are “participants” in this proceeding, because they are persons who are taking part in an adjudicatory proceeding but are not one of the parties. 35 Ill. Adm. Code 101.202. Under the Board rules, participants only have the rights specifically provided in the rules. 35 Ill. Adm. Code 101.110(b). As participants, the Environmental Groups have filed at least two requests for public hearings, as allowed under Section 104.420 of the Board Rules. 35 Ill. Adm. Code 104.420. MWG has not objected to the participants’ request for a hearing.

5) On July 28, 2023, along with its Response to Illinois EPA’s Recommendation on MWG’s Petition, MWG filed a Motion to Stay Proceedings because of the potential conflict with the U.S. Environmental Protection Agency (“USEPA”) proposed Legacy Coal Combustion Residual Surface Impoundment rulemaking, Docket No. EPA–HQ–OLEM–2020–0107, “Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments,” 88 Fed. Reg. 31982, (May 18, 2023) (“Proposed Rule”). In the Proposed Rule, the USEPA created a new category of CCR units called CCR management units (“CCRMUs”), and identified the Grassy Field as a potential CCRMU. *See* Exhibit 1 to MWG’s Motion to Stay, “Potential CCR Management Unit Universe”, EPA-HQ-OLEM-2020-0107-0155.

6) On September 6, 2023, the Environmental Groups filed a “comment” opposing MWG’s Motion to Stay Proceedings. The “comment” is far beyond the scope allowed under the Board rules for a participant in an adjudicatory proceeding. Their comment goes into great detail not only opposing MWG’s motion, but also disputing in detail MWG’s statements in its Response to the Illinois EPA’s Recommendation and including facts and arguments that are not based on evidence in the record.

7) Because their comment is far beyond the boundaries allowed under the Board rules, the Board should not consider the comment. At the very least, as a comment by a participant, the Board should give it little weight and the facts and arguments not based on evidence in the record should be ignored.

8) While the Board should not consider the Environmental Groups' objection, if the Board were to consider it, there is one issue that requires MWG's response at this time. The Environmental Groups' claim that the Grassy Field is a CCR surface impoundment regulated by Part 257 is belied by the USEPA's own conclusion that it is not. Moreover, the Environmental Groups have consistently stated that the Grassy Field is not a CCR surface impoundment and is not regulated by Part 257 or Illinois Part 845. In fact, the Board opened its subdocket in the CCR rulemaking primarily because of the Environmental Groups' claims that the historic fill areas, including the Grassy Field, are not regulated by Part 257 or Part 845. *In the matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845*, PCB20-19, Order (Feb. 4, 2021), pp. 11-12, *citing* Environmental Groups' Post-Hearing Comments, *In the matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845*, PCB20-19, P.C. #124. The Environmental Groups' inconsistent classification of the Grassy Field demonstrates why a stay is warranted - so that the Board and parties may avoid confusion and inconsistent decisions.

7. MWG has prepared its Response which is attached hereto. MWG respectfully submits that the filing of the attached Response will prevent material prejudice and injustice by allowing MWG an opportunity to identify the Environmental Groups' violation of the Board's rules for participants, and misrepresentation of USEPA's and their own contentions on the classification of the Grassy Field that it could not have anticipated when drafting its motion to stay.

8. This Motion is timely filed on September 20, 2023, within fourteen (14) days after service of Complainants' Response on MWG, in accordance with 35 Ill. Admin. Code §101.500(d).

WHEREFORE, MWG respectfully requests that the Board grant its Motion for Leave to File Instantly, its Response to the Environmental Groups' Comment Opposing its Motion to Stay, and accept the attached Response as filed on this date.

Respectfully submitted,

MIDWEST GENERATION, LLC

By: /s/ Kristen L. Gale
One of Its Attorneys

Kristen L. Gale
Susan M. Franzetti
Genevieve Essig
Nijman Franzetti, LLP
10 S. LaSalle Street, Suite 3400
Chicago, IL 60603
312-251-5255

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
Petition of Midwest Generation, LLC)
for an Adjusted Standard from 845.740(a))
and Finding of Inapplicability of Part 845) PCB AS 2021-003
for the Waukegan Station)
)
)

**MIDWEST GENERATION, LLC’S RESPONSE TO PUBLIC COMMENT
OPPOSING ITS MOTION TO STAY**

Midwest Generation, LLC (“MWG”) submits this response to Clean Power Lake County, Earthjustice, Prairie Rivers Network, and Sierra Club’s (“Environmental Groups”) comment opposing MWG’s motion to stay pursuant to Sections 101.500 of the Illinois Pollution Control Board’s (“Board”) Procedural Rules. 35 Ill. Adm. Code 101.500. Because the Environmental Groups’ comment is far outside the boundaries allowed for participants in an adjudicatory proceeding, the Board should acknowledge receipt but not consider the merits, or at the very least give the comment little weight. Even if the Board were to consider the comment, the Environmental Groups’ claim that the Grassy Field is a CCR surface impoundment is belied by the USEPA’s proposed conclusion *and their own filings with the Board*.

In any case, the Environmental Groups’ inconsistent classification of the Grassy Field demonstrates a stay is warranted because not even the Environmental Groups can decide how the area should be classified. The Board should stay this adjusted standard s to avoid potentially significant confusion and inconsistency with the pending Federal Regulations that could materially prejudice MWG.

I. The Environmental Groups' "Comment" is Beyond the Rights Afforded Participants and Should be Disregarded or, at least, Give it Little Weight

The Board rules clearly define the rules of parties and non-party participants, and the Environmental Group's objection to the stay is outside the scope of the rules. Section 101.110 of the Board Rules states that while the Board encourages public participation, the extent of participation varies depending on the proceeding, the status of the person, and the rules governing that proceeding. 35 Ill. Adm. Code 101.110(a). In an adjudicatory proceeding, such as an adjusted standard, a person who wishes to participate and is not a party (*i.e.* a "participant") only has the rights specifically provided for in the rules. 35 Ill. Adm. Code 101.110(b).¹ Participants may serve comments on the parties, which the Board will consider as time and the law allow. 35 Ill. Adm. Code 101.304(f). Participants may also file amicus briefs, as allowed by the Board, which the Board may consider as times allows, but the briefs are limited "to argument only and must not raise facts that are not in evidence in the relevant proceeding." 35 Ill. Adm. Code 101.110(c). Participants may provide written or oral statements, which subject them to cross-examination, or provide oral or written comments. 35 Ill. Adm. Code 101.628. The oral or written comments must present arguments or comments based on evidence in the record. 35 Ill. Adm. Code 101.628(c)(2). In an adjusted standard proceeding, in addition to filing a comment, a participant may request a hearing, but nothing more. 35 Ill. Adm. Code 104.420(b).² In comparison, in a variance proceeding, a participant may file an objection to the variance and request a hearing in addition to filing a comment. 35 Ill. Adm. Code 104.224(a).

¹ The Board Rules states that a "Participant" means any person, not including the Board or its staff, who takes part in an adjudicatory proceeding but is not a party, or who takes part in a regulatory or other quasi-legislative proceeding or a time-limited water quality standard proceeding before the Board." 35 Ill. Adm. Code 101.202.

² The Environmental Groups have filed at least two requests for hearing with the Board pursuant to Section 104(b), and MWG has not objected to the requests.

The Board gives less weight to oral and written comments that are not subject to cross-examination. 35 Ill. Adm. Code 101.628(b), *James Fiser v. James Meador and Henry's Double K, LLC*, PCB 18-084 (Jan. 21, 2021), FN 2. When a participant has filed a document outside the boundaries provided in the Rules, the Board does not address or consider the merits of the arguments and strikes the facts and arguments that are not based on the record. *Wesley Brazas, Jr. v. Mr. Jeff Magnussen, Village of Hampshire, and Illinois EPA*, PCB 06-131 (Aug. 17, 2006) (Board acknowledged receipt of an objection from a participant, but did not consider the arguments); *Sierra Club et al. v. Midwest Generation LLC*, PCB13-15 (Feb. 20, 2020), p. 4 (Board struck facts in amicus brief that were not based on evidence in the record).

Here, despite entitling it as a “comment,” the Environmental Groups’ filing is an objection to MWG’s motion in which they request that the Board deny MWG’s motion. The Environmental Groups’ objection not only opposes MWG’s motion, but also specifically challenges MWG’s claims in its Response to Illinois EPA’s Recommendation and includes arguments and facts that are not in the record. For example, Environmental Groups discuss and rely upon Attachment B, a USEPA letter that has nothing to do with this matter – it is about a station in a different state addressed to a company that is not a party. Because the Environmental Groups’ objection is far beyond what is allowed under the Board rules for a participant in an adjusted standard proceeding, the Board should merely acknowledge receipt and not consider the arguments or the facts raised. Even if the Board were to consider the arguments, the Board should give their arguments little weight and disregard the arguments and facts that are not based on evidence in the record, including but not limited Attachments A, B, and C of their objection.

II. The USEPA, Board, and the Environmental Groups Have Clearly Stated the Grassy Area is not a CCR Surface Impoundment

Even though the Board should not consider the Environmental Groups' "comment in opposition," there is at least one issue that merits a response at this time if the Board were to consider the objection. The Environmental Groups' claim that the Grassy Area is regulated by Part 257 is contrary to U.S. Environmental Protection Agency's ("USEPA") own proposed finding, the Board findings, and their own arguments to the Board. They ignore the USEPA's list of Potential CCR Management Units ("CCRMUs") that identifies two areas at the Waukegan Station: the "Historic Fill" and the "Old Pond." *See* Exhibit 1 to MWG's Motion to Stay, "Potential CCR Management Unit Universe", EPA-HQ-OLEM-2020-0107-0155. The very fact that the USEPA, which is administering Part 257, considers the Grassy Field a CCRMU, demonstrates that it is not a CCR surface impoundment regulated by Part 257.

Not only has the USEPA concluded that the Grassy Field is not a CCR surface impoundment, the Environmental Groups have also consistently stated that the Grassy Field is a landfilled area, distinct from the two CCR surface impoundments at the Waukegan Station. In fact, the Board identified that the Grassy Field as one of the historic, unconsolidated coal ash fills outside the scope of the rulemaking in its Part 845 order, **primarily based upon the Environmental Groups' comment in the rulemaking.** *In the matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, PCB20-19, Order (Feb. 4, 2021), p. 11-12.* In its 2021 Order, the Board repeatedly cited the Environmental Groups' comment describing the CCR landfills and piles in Illinois that were outside the scope of Part 845. *Id.* The Board noted that the Environmental Groups urged the Board to either broaden the scope of the rule to include those areas, or open a subdocket. *Id.* In their comment on the rulemaking, the Environmental Groups specifically identified "the historic coal ash areas and coal

ash in the fill areas at the Waukegan Station are contributing to exceedances of groundwater quality standards at the Station.” Environmental Groups’ Post-Hearing Comments, *In the matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845*, PCB20-19, P.C. #124, p. 51. In support of this statement, the Environmental Groups cited the Board’s *Sierra Club v. Midwest Generation, LLC* 2019 interim opinion, in which it had described the Grassy Field and distinguished it from the Waukegan CCR surface impoundments. *Id*, citing *Sierra Club et. al. v. Midwest Generation, LLC*, PCB 13-15 (June 20, 2019), pp. 66-68. The Board’s description of the Grassy Field in its 2019 order was based upon the arguments presented by Sierra Club and Prairie Rivers Network in that proceeding. *See* Environmental Groups Post-Hearing Brief, *Sierra Club et. al. v. Midwest Generation, LLC*, PCB13-15 (July 20, 2018), pp. 54. The Environmental Groups’ recent claim that the Grassy Field is somehow a CCR surface impoundment is contrary to their consistent argument it is not. An argument they advanced to such an extent that they convinced the Board to open a subdocket to investigate areas like the Grassy Field.

III. CONCLUSION

For the reasons stated herein, Midwest Generation, LLC, respectfully requests that the Board not consider the Environmental Groups’ comment in opposition to its motion to stay because it is outside the boundaries established for participants in an adjudicatory proceeding. Even if the Board were to consider the comment, the Board should give it little weight and acknowledge that the Environmental Groups have consistently stated the Grassy Field is *not* a CCR surface impoundment regulated under Federal Rule Part 257 and Illinois Rule Part 845. Ultimately, the Environmental Groups’ inconsistent characterization of the Grassy Field demonstrates why a stay is needed in this proceeding. Clarification and consistency on how the

area is classified and regulated by briefly pausing this matter now, will avoid confusion and duplicity that will likely be caused if the Federal Rule on CCRMUs is finalized.

Respectfully submitted,

MIDWEST GENERATION, LLC

By: /s/ Kristen L. Gale
One of Its Attorneys

Kristen L. Gale
Susan M. Franzetti
Genevieve Essig
Nijman Franzetti, LLP
10 S. LaSalle Street, Suite 3400
Chicago, IL 60603
312-251-5255