

**BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF:

DYNEGY MIDWEST GENERATION, LLC

Petitioners,

v.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

PCB 2024-053

(Petition for review – Alternative
Source Demonstration)

NOTICE OF FILING

To:

Don Brown
Carol Webb
Pollution Control Board
100 West Randolph Street
James R. Thompson Center
Suite 11-500
Chicago, Illinois 60601-3218
Don.brown@illinois.gov
Carol.webb@illinois.gov

Mallory Meade
Samuel Henderson
Assistant Attorneys General
Environmental Bureau
500 South Second Street
Springfield, Illinois 62706
mallory.meade@ilag.gov
samuel.henderson@ilag.gov

PLEASE TAKE NOTICE that today I have electronically filed with the Office of the Clerk of the Illinois Pollution Control Board the **JOINT MOTION TO STAY PROCEEDINGS** and a **CERTIFICATE OF SERVICE**, which are attached and copies of which are herewith served upon you.

Dated: April 19, 2024

Respectfully submitted,

/s/ Samuel A. Rasche

ARENTFOX SCHIFF LLP
Samuel A. Rasche
233 South Wacker Drive, Suite 7100
Sam.rasche@afslaw.com

*Attorney for Dynegy Midwest Generation,
LLC*

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 19th day of April, 2024:

I have electronically served true and correct copies of the Joint Motion to Stay Proceedings by electronically filing with the Clerk of the Illinois Pollution Control Board and by e-mail upon the following persons:

Don Brown
Carol Webb
Pollution Control Board
100 West Randolph Street
James R. Thompson Center
Suite 11-500
Chicago, Illinois 60601-3218
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Carol.webb@illinois.gov

Mallory Meade
Samuel Henderson
Assistant Attorneys General
Environmental Bureau
500 South Second Street
Springfield, Illinois 62706
mallory.meade@ilag.gov
samuel.henderson@ilag.gov

My e-mail address is Sam.Rasche@afslaw.com.

The number of pages in the e-mail transmission is 8.

The e-mail transmission took place before 5:00 p.m.

/s/ Samuel A. Rasche

Samuel A. Rasche

Dated: April 19, 2024

Samuel A. Rasche
ARENTFOX SCHIFF LLP
233 South Wacker Drive, Suite 7100
Chicago, Illinois 60606
(312) 258-5500
Sam.Rasche@afslaw.com

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JOINT MOTION TO STAY PROCEEDINGS

Petitioner Dynegy Midwest Generation, LLC (“DMG”) and Respondent Illinois Environmental Protection Agency (“IEPA” or “Respondent”) (together, the “Parties”), by their attorneys and pursuant to 35 Ill. Adm. Code § 101.514, respectfully jointly request that the Board enter an order staying the above captioned proceeding until 30 days after the Board rules on a motion for summary judgment in the related case involving IEPA’s nonconcurrence with an Alternative Source Demonstration for the Newton Primary Ash Pond, *Illinois Power Generating Company v. Illinois Environmental Protection Agency*, Docket no. PCB 2024-043. In support of this motion, the Parties state as follows:

I. BACKGROUND AND STATUS REPORT

1. On December 15, 2023, Illinois Power Generating Company (“IPGC”) filed a Petition For Review of Illinois Environmental Protection Agency’s Non-Concurrence with Alternative Source Demonstration Under 35 Ill. Admin. Code Part 845. PCB 24-043, Petition (December 15, 2021) (the “Newton Appeal”). Petitioner filed a similar Petition for Review on

February 2, 2024 (PCB 24-53) (the “Vermilion Appeal”) (together the “Appeals” and each an “Appeal”).

2. Each of the Appeals involve IEPA’s nonconcurrence with Alternative Source Demonstrations (“ASD”s) submitted by Petitioners to IEPA pursuant to 35 Ill. Admin. Code Part 845. The purpose of an ASD is to demonstrate that a source other than a particular CCR surface impoundment caused the contamination (as demonstrated by an exceedance of applicable groundwater protection standards set forth in 35 Ill. Adm. Code 845.600(a)) and that CCR surface impoundment did not contribute to the contamination. In the Appeals, Petitioners challenge the legal and factual sufficiency of IEPA’s nonconcurrences.

3. Each Appeal also included a request for a partial stay of certain requirements of Part 845 that would otherwise result from IEPA’s nonconcurrences. Respondent did not object to Petitioners requests for partial stay of certain requirements of Part 845, and the Board granted the requested stays. Order, PCB 24-43 (Jan. 18, 2024); Order, PCB 24-53 (Apr. 18, 2024).

4. Respondent requested, and Petitioners did not object to, extensions of time to file the administrative record for each Appeal. The Hearing Officer granted Respondent’s motions for extension of time to file the administrative record. Hearing Officer Order, PCB 23-43 (Jan. 22, 2024); Hearing Officer Order, PCB 23-53 (Feb. 26, 2024).

5. The parties have conferred multiple times via telephone and email regarding scheduling and case management issues for the appeals. The parties have also discussed the possibility of settlement in some or all of the Appeals. The parties are in agreement that given common subject matter and legal issues among the appeals, the most efficient path forward is to proceed on the Newton Appeal (PCB 24-043) while holding the Vermilion Appeal in abeyance

until after the Board issues a ruling on motions for summary judgment in the Newton Appeal or the Newton Appeal is otherwise resolved through settlement.

6. At a status conference on April 15, 2024, the hearing officer set a 60-day discovery period for the Newton Appeal to close on June 17, 2024, at which time the Hearing Officer will set a schedule for summary judgment briefing.

7. On April 15, 2024, the Parties filed a Joint Consolidated Motion to Stay Proceedings in the Vermilion Appeal as well as four related ASD Appeals (PCB 24-45, PCB 24-48, PCB 24-55, and PCB 24-56) until 30 days after a ruling on summary judgment in the Newton Appeal. Upon the Hearing Officer's advice, the Parties hereby withdraw the Joint Consolidated Motion and file individual motions to stay in each proceeding.

II. REQUEST FOR STAY

8. Motions to stay a proceeding “must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed . . .” 35 Ill. Admin Code § 101.514(a). The decision to grant or deny a motion for stay is “vested in the sound discretion of the Board.” *People v. State Oil Co.*, PCB 97-103 (May 15, 2003).

9. The Parties' requested stay would promote efficiency and judicial economy. Although each Appeal involves unique facts that would make consolidation impractical, the Appeals present common questions of law. In particular, the Appeals each turn in part on disagreements regarding the burden of proof that must be met by an owner or operator submitting an ASD under Part 845, the kinds of evidence that may be used to support an ASD, what facts IEPA may use to justify a non-concurrence with an ASD, and the depth of justification IEPA must provide when issuing a non-concurrence.

10. Because the Appeals are the first of their kind before the Board pursuant to the recently promulgated ASD provisions of 35 Ill. Admin. Code Part 845, some of these legal issues present matters of first impression before the Board. Accordingly, resolving these disputes in the context of the Newton Appeal will provide clarity and narrow the issues in Vermilion Appeal. A resolution in the Newton Appeal may, depending on the outcome, moot some or all of the disputed issues in the Vermilion Appeal. At minimum, a resolution in the Newton Appeal will provide clarity on the specific facts that will be material to the remaining Appeals.

11. A stay will not result in environmental harm. As noted above, the Board has already stayed the requirements of Part 845 that are at issue. In granting these stays, the Board has concluded that the stays “will not increase the likelihood of harm to human health or to the environment.” Order at 3-4, PCB 24-43 (Jan. 18, 2024); Order at 3-4, PCB 24-53 (Apr. 18, 2024). Significantly, each of the CCR surface impoundments at issue will remain subject to groundwater monitoring requirements of 35 Ill. Adm. Code § 845.650(d) throughout the duration of any stay. *Id.*

12. Nor will the requested stays result in prejudice to any party. The parties are in agreement that the stays will serve to increase the efficiency with which the Appeals may be brought to final resolution and decrease the burden on the Parties and on the Board.

13. The requested stay will not impact the Agency filing the records for each of the matters as required by 35 Ill. Adm. Code § 105.116. The stay will also not impede the parties from engaging in settlement discussions, including with respect to the stayed matters, during the course of the stay. The Board has routinely stayed proceedings to allow parties to seek settlement. *See, e.g., Arnold Magnetic Technologies v. IEPA*, Hearing Officer Order, PCB 16-97 (Aug. 9, 2016).

14. To avoid the considerable expenditure of time and resources of the Parties and the Board to brief the same or similar issues simultaneously in multiple separate proceedings, the Parties request to proceed on the Newton appeal alone and to hold the Vermilion Appeal in abeyance until after the Board rules on a motion for summary judgment. Doing so could provide precedent or guidance for the Vermilion Appeal and allow the Parties to narrow the scope of issues before the Board, allowing the Vermilion Appeal to be more efficiently resolved.

15. The Parties will provide a status report as required by 35 Ill. Admin. Code § 101.514 at the close of the stay.

WHEREFORE, the Parties respectfully withdraw their April 15, 2024 Joint Consolidated Motion to Stay Proceedings and request that the Board stay proceedings in Case No. PCB 2024-053 until 30 days after the Board issues a ruling on summary judgment in Case No. PCB 2024-043.

Respectfully Submitted,

/s/ Samuel A. Rasche

/s/ Mallory Meade

/s/ Samuel Henderson

ARENTFOX SCHIFF LLP
Joshua R. More
Bina Joshi
Samuel A. Rasche
233 South Wacker Drive, Suite 7100
Joshua.more@afslaw.com
Bina.joshi@afslaw.com
Sam.rasche@afslaw.com

*Attorneys for Dynegy Midwest Generation,
LLC*

Mallory Meade
Samuel Henderson
Assistant Attorneys General
Environmental Bureau
500 South Second Street
Springfield, Illinois 62706
(217) 720-9820
mallory.meade@ilag.gov
samuel.henderson@ilag.gov

*Attorneys for Illinois Environmental
Protection Agency*