

ILLINOIS POLLUTION CONTROL BOARD

November 7, 2024

DYNEGY MIDWEST GENERATION, LLC,)	
)	
Petitioner,)	
)	
v.)	PCB 25-15
)	(Petition for review – Alternative Source
ILLINOIS ENVIRONMENTAL)	Demonstration)
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by M. Gibson):

On September 30, 2024, Dynegy Midwest Generation, LLC (Dynegy or DMG) timely filed a petition (Pet.) asking the Board to review an alternative source determination (ASD) of the Illinois Environmental Protection Agency (Agency or IEPA) under the coal combustion residual (CCR) surface impoundment rules in Part 845. See 35 Ill. Adm. Code 105.200 *et. seq.* and 845.650(e). The ASD determination concerns a CCR surface impoundment referred to as the New East Ash Pond at Dynegy’s Vermillion Power Plant located approximately four miles northeast of the village of Oakwood in Vermillion County (facility). Additionally, Dynegy’s petition included a motion for a partial stay of Part 845 requirements as they apply to an exceedance of the total dissolved solids (TDS) groundwater protection standards at the New East Ash Pond. For the reasons below, the Board accepts the petition for review and grants the petitioner’s unopposed request for a partial stay.

Under the Board’s rules, persons may petition the Board to review the final decisions of agencies by filing the petition within 35 days after the date of service of the final agency decision. See 35 Ill. Adm. Code 105.206(a). In this case, the Agency issued a non-concurrence with Dynegy’s New East Ash Pond ASD on August 22, 2024. Dynegy reports the determination was served upon it on August 26, 2024. Pet. at 1. The Board’s CCR surface impoundment rules on ASD specify that an owner or operator of a CCR surface impoundment may, within 60 days after the detected exceedance of a groundwater protection standard, submit a demonstration to the Agency that a source other than the CCR surface impoundment caused the contamination. See 35 Ill. Adm. Code 845.650(e). If the Agency does not concur with the ASD, the owner or operator may petition the Board for review of the non-concurrence. See, 35 Ill. Adm. Code 845.650(e)(7). Dynegy’s petition meets the content requirements of 35 Ill. Adm. Code 105.200 *et. seq.* and 845.650(e)(7).

The Board accepts the petition for hearing. Dynegy has the burden of proof. 415 ILCS 5/40(a)(1) (2022); see also 35 Ill. Adm. Code 105.112(a). Hearings will be based exclusively on the record before the Agency at the time the Agency issued its final decision. See 35 Ill. Adm. Code 105.214(a).

Upon its own motion or the motion of any party, the Board or the hearing officer may order that the hearing be held by videoconference. In deciding whether to hold the hearing by videoconference, factors that the Board or the hearing officer will consider include cost-effectiveness, efficiency, facility accommodations, witness availability, public interest, the parties' preferences, and the proceeding's complexity and contentiousness. *See* 35 Ill. Adm. Code 101.600(b), 105.110. Hearings will be scheduled and completed in a timely manner.

Unless the Board or the hearing officer orders otherwise, the Agency must file the entire record of its determination by October 30, 2024, which is the 30th day after the Board received Dynegy's petition. *See* 35 Ill. Adm. Code 105.116(a), 105.212(a). If the Agency wishes to seek additional time to file the record, it must file a request for extension before the date on which the record is due to be filed. *See* 35 Ill. Adm. Code 105.116(a). The record must comply with the Board's requirements for content, organization, and certification. *See* 35 Ill. Adm. Code 101.1030(g), 105.116(b), 105.212(b). In addition, the Agency must file the record electronically instead of in paper. Specifically, the record must be filed through the Clerk's Office On-Line (COOL) or on compact disk or other portable electronic data storage device and, to the extent technically feasible, in text-searchable Adobe PDF. *See* 35 Ill. Adm. Code 101.302(h)(2)(A), 105.116(a).¹

On October 25, 2024, the Agency filed a motion for extension of time to file the record (Mot.). The Agency requests an extension until December 31, 2024 to file the record. The Board grants the Agency's motion.

MOTION FOR PARTIAL STAY

Dynegy's petition for review included a motion for a partial stay of the requirements of 35 Ill. Adm. Code 845.650(d), 845.660, 845.670, and 845.680 as they apply to the TDS exceedance at issue at New East Ash Pond. Pet. at 12. Dynegy asks for a stay, "until the later of (a) the Board's final resolution of this Petition, or (b) if this Petition is granted, IEPA's issuance of a concurrence." *Id.* In its October 25, 2024 motion for an extension of time to file the record, IEPA stated that it does not object to the requested stay. Mot. at 1. Part 845 provides that, "[t]he filing of a petition for review under subsection (e)(7) does not automatically stay any requirements of this Part as to the owner or operator, including the 90-day deadline to initiate an assessment of corrective measures." 35 Ill. Adm. Code 845(e)(7).

Legal Background

The Board has used the following standards to determine whether it is appropriate to grant a discretionary stay:

1. a certain and clearly ascertainable right needs protection;
2. irreparable injury will occur without the injunction;
3. no adequate remedy at law exists; and

¹ Any questions about filing the record in an electronic format should be directed to the Clerk's Office at (312) 814-3620 or (312) 814-3461.

4. there is a probability of success on the merits.

See, Community Landfill Co. and City of Morris v. IEPA, PCB 01-48, 01-49 (consol.), slip op. at 4 (Oct. 19, 2000), *citing Motor Oils Refining Co. v. IEPA*, PCB 89-116, slip op. at 2 (Aug. 31, 1989).

The Board is not required to consider each of these factors in making its determination. *Bridgestone/Firestone Off Road Tire Co. v. IEPA*, PCB 02-31, slip op. at 3 (Nov. 1, 2001). “Although the Board may look to these factors in making its determination of whether to grant a discretionary stay, the likelihood of environmental harm should a stay be granted is of particular concern for the Board.” *Motor Oils Refining Co. v. IEPA*, PCB 89-116, slip op. at 2 (Aug. 31, 1989).

In related case involving an ASD petition for the New East Ash Pond at Dynegy’s Vermillion Power Plant, Dynegy argued that a stay is needed to “protect DMG’s right to appeal the IEPA Denial and to prevent DMG from being unlawfully and unreasonably required to comply with costly and potentially unnecessary corrective measure requirements before it is able to exercise its right to appeal and be heard by the Board.” *Dynegy Midwest Generation, LLC v. IEPA*, PCB 24-53, slip op. at 2 (Apr. 18, 2024).

Further, DMG argues it will suffer irreparable injury if the requirements of Sections 845.650(d), 845.660, 845.670, and 845.680 for the chloride, lithium, sulfate, and TDS exceedances at issue in this petition are not stayed. Pet. at 22-23. The Part 845 corrective action measures triggered by a release of a monitored constituent above the groundwater protection standards follow a step-by-step process starting with characterization of the nature and extent of the release through to the implementation of a corrective action plan. Following the denial of an ASD by IEPA, Part 845 requires the owner/operator to immediately initiate assessment of corrective action measures and complete the assessment within 90 days from the date of initiation. 35 Ill. Adm. Code 845.660(a)(2). Further, owner/operators are required to develop a corrective action plan within one year from the date of completion of assessment of corrective action. 35 Ill. Adm. Code Section 845.670. *Dynegy Midwest Generation, LLC*, PCB 24-53, slip op. at 2.

DMG has estimated that the cost of assessing corrective measures would be \$35,000 and that the cost of selecting an appropriate remedy and developing a corrective action plan would be \$225,000. Pet. at 23. “If DMG complied with the corrective measure requirements for the Vermilion Exceedances at the NEAP and then succeeded on the merits of this Petition, costs, as well as time and other resources, would be lost.” *Id.* *Dynegy Midwest Generation, LLC*, PCB 24-53, slip op. at 2-3.

DMG argues it has “no other adequate remedy at law to prevent these injuries or to contest the IEPA Denial.” Pet. at 23. Additionally, DMG argues it is likely that it will succeed on the merits of the petition. *Id.* *Dynegy Midwest Generation, LLC*, PCB 24-53, slip op. at 3.

Corrective Action Measures From Which a Stay is Requested

In PCB 24-53, Dynegy requested

a stay from the corrective action measures that were triggered by the chloride, lithium, sulfate, and TDS exceedances at two monitoring wells. Pet. at 23. Section 845.650(d) requires DMG to characterize the nature and extent of the release “to support a complete and accurate assessment of the corrective measures necessary to effectively clean up all releases from the CCR surface impoundment under Section 845.660”. 35 Ill. Adm. Code 845.650(d)(1). This characterization, which involves collection of data on the nature and estimated quantity of the chemical released, requires installation of an additional monitoring well or wells, and sampling of groundwater. Dynegy Midwest Generation, LLC, PCB 24-53, slip op. at 3.

Section 845.660 requires DMG to “initiate an assessment of corrective measures to prevent further releases, to remediate any releases, and to restore the affected area.” 35 Ill. Adm. Code 845.660(a). This assessment entails an analysis of the effectiveness of potential corrective measures in meeting the requirements and objectives of the corrective action plan by evaluating the performance, reliability, ease of implementation, and potential impacts of appropriate potential remedies, time required to implement the plan as well as the institutional requirements, including state or local permits. 35 Ill. Adm. Code 845.660(c). As noted by DMG, the estimated cost of the assessment of corrective action measures is \$35,000. Pet. at 23. Dynegy Midwest Generation, LLC, PCB 24-53, slip op. at 3.

Following the assessment of corrective action measures, DMG must develop a corrective action plan identifying the selected remedy under Section 845.670. Additionally, DMG must include corrective action alternatives analysis as well as an implementation schedule for timely completion of the remedial activities. 35 Ill. Adm. Code 845.670 (e) and (f). DMG estimates the cost of developing a corrective action plan in compliance with Section 845.670 would cost about \$225,000. Pet. at 23. Finally, within 90 days after the Agency's approval of the corrective action plan, DMG must initiate corrective action and implement the selected remedy as specified in Section 845.680. Dynegy Midwest Generation, LLC, PCB 24-53, slip op. at 3.

Board Discussion and Findings

In reviewing Dynegy’s unopposed motion for a partial stay, the Board is persuaded that Dynegy has an ascertainable right that requires protection. The appeal of a final agency decision on alternative source demonstrations would be rendered moot if a petitioner was required to comply with the contested sections during the pendency of the appeal. The Board also agrees that this appeal is the remedy at law available to Dynegy to challenge the denial of the ASD.

The Board concludes that a stay of Sections 845.650(d), 845.660, 845.670, and 845.680 will not increase the likelihood of harm to human health or to the environment as

there is not a complete exposure pathway for the NEAP to impact humans. Pet. at 24. DMG reports that it has conducted a human health and risk assessment for the NEAP that demonstrated that the “effect of the NEAP on groundwater quality in the unlithified materials and bedrock is either negligible or not present as a result of limited or no hydraulic connections”. Pet. at 24, *citing* Human Health and Ecological Risk Assessment, Vermilion Generating Station, Oakwood, Illinois at ES-2 (Feb. 27, 2020).² The risk assessment further demonstrated that “[g]roundwater as a source of drinking water and/or irrigation water is not a complete exposure pathway for CCR-related constituents originating from the [Old East Ash Pond] . . . or the NEAP.” Pet. at 24, *citing* Human Health and Ecological Risk Assessment at 8. Dynegy Midwest Generation, LLC, PCB 24-53, slip op. at 4.

However, the Board stresses that the Vermilion Power Plant will continue to be subject to the groundwater monitoring requirements of 35 Ill. Adm. Code 845.650. This will ensure that there will be timely detection of any additional changes in groundwater quality during the stay.

As IEPA does not object to the requested stay, exercising its discretion, the Board grants Dynegy’s unopposed request and stays the applicability of 35 Ill. Adm. Code 845.650(d), 845.660, 845.670, and 845.680 as they apply to the exceedance of the TDS groundwater protection standards at the New East Ash Pond. In doing so, the Board makes no findings on the merits of the petition. The partial stay will remain in effect until the Board takes final action in this matter or until the Board orders otherwise.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 7, 2024, by a vote of 4-0.



Don A. Brown, Clerk
Illinois Pollution Control Board

² The risk assessment can be found at: <https://www.luminant.com/documents/ccr/il-ccr/Vermilion/2022/Vermilion%20NEAP%20Closure%20Construction%20Permit%20Application-W183800002-04%20revised.pdf> (visited April 15, 2024).