

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
PETITION OF MIDWEST)
GENERATION, LLC FOR AN)
ADJUSTED STANDARD FROM) AS 2021-003
35 ILL. ADM. CODE 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 the Illinois EPA's Response to Petitioner's Motion to Stay Pending Appeal.

Respectfully submitted,

Date: May 07, 2025

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Illinois Environmental Protection Agency
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Sara Terranova

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**ILLINOIS ENVIRONMENTAL PROTECTION AGENCY’S RESPONSE
TO MIDWEST GENERATION, LLC’S MOTION TO STAY PENDING
APPEAL**

The Illinois Environmental Protection Agency (“Illinois EPA or Agency”), by one of its attorneys, provides this Response to Midwest Generation, LLC’s (“MWG” or “Petitioner”) Motion to Stay Pending Appeal and requests that the Illinois Pollution Control Board (“Board”) DENY Petitioner’s motion. In support, Illinois EPA states as follows:

I. INTRODUCTION

1. MWG requests a stay pending appeal of the Board’s March 20, 2025 final order denying its third amended adjusted-standard petition for the Grassy Field or Former Slag/Fly Ash Storage (“FSFS”) area at Waukegan Station. The motion fails because the key equitable factors weigh against a stay. MWG also seeks to suspend its statutory obligation to pay Coal Combustion Residual (“CCR”) program fees – relief the Board lacks authority to grant. For these reasons, the motion should be denied.

II. PROCEDURAL HISTORY

2. On May 11, 2021, MWG filed its original adjusted-standard petition. This petition triggered the Section 28.1(e) automatic stay under the Illinois Environmental Protection Act (“Act”) (415 ILCS 5/28.1(e)).

3. MWG subsequently filed three amended petitions on September 17, 2021, July 28, 2023 and February 7, 2024.

4. A public hearing was conducted on February 13 and 14, 2024. The parties completed their post-hearing briefing on June 27, 2024.

5. On March 20, 2025, the Board denied the third amended petition and thereby lifted the statutory stay.

6. On April 23, 2025, MWG moved for a stay pending appeal.

III. LEGAL STANDARD FOR STAY PENDING APPEAL

7. Pursuant to Supreme Court Rule 335 and 35 Ill. Adm. Code 101.906(c), the Board may stay a final order pending appeal.

8. Furthermore, under *Stacke v. Bates*, 138 Ill. 2d 295, 304-306 (1990) (cited by the Board in *People v. AET Environmental, Inc.*, PCB 07-95, slip op. at 4 (June 20, 2013), and *Brickyard Disposal & Recycling, Inc. v. IEPA*, PCB 16-66, slip op. at 2-3 (Apr. 12, 2017)), the Board considers four equitable factors when deciding whether to grant a stay pending appeal:

- (1) necessity to secure the fruits of the appeal;
- (2) preservation of the status quo;
- (3) the respective rights of the litigants; and
- (4) hardship on other parties.

9. The Illinois Supreme Court rejected any “ritualistic formula” requiring each factor to be met in isolation, holding instead that a movant must “present a substantial case on the merits and show that the balance of the equitable factors weighs in favor of granting the stay.” *See Stacke*, 138 Ill. 2d at 308-309.

10. As the moving party, MWG bears the burden to show the balance of these of these factors “weighs in favor” of a stay. *See id.* at 309.

IV. STAY-PENDING-APPEAL FACTORS WEIGH AGAINST RELIEF

A. *A Stay is Not Necessary to Secure the Fruits of the Appeal*

15. MWG asserts that, without a stay, it will suffer unrecoverable harm because it will be required to pay the \$200,000 CCR program fee under Section 22.59(j) of the Act, 415 ILCS 5/22.59(j), and initiate engineering and permitting work under 35 Ill. Adm. Code 845 (“Part 845”). *See* MWG Mot. pp. 5–6. MWG contends that these costs cannot be reversed or undone on appeal, and therefore a stay is necessary to preserve the meaningful “fruits” of its challenge. *See Id.* at 5.

16. Under the first factor of the *Stacke* test, a stay is warranted only if, absent that relief, the petitioner’s ability to obtain effective appellate review would be lost or rendered meaningless. *See Stacke*, 138 Ill. 2d at 302.

18. That standard is not met here. As discussed in more detail below, fees are a statutory—not a regulatory—requirement, for which the Board cannot grant an adjusted standard.

19. Additionally, MWG’s payment—or non-payment—of statutorily required fees is a matter for the enforcement process, not this proceeding for regulatory relief.

20. As to compliance costs, MWG concedes that the FSFS area is, at a minimum, a CCR management unit (“CCRMU”) regulated under federal rules. *See* MWG Mot. p. 6. MWG does not explain in any particularity the supposed “expensive and burdensome engineering projects” necessary to prepare permit applications under Part 845, in light of the fact that, just like Part 845, federal rules require groundwater monitoring, corrective action, and closure of CCRMUs just as they do for CCR surface impoundments. *See* 40 C.F.R. 257.90(a); 257.101(f). MWG has not demonstrated that a stay is necessary to secure the fruits of MWG’s appeal, and this factor weighs against granting the stay.

B. *Preservation of the Status Quo*

21. Under the second *Stacke* factor—which asks whether a stay is necessary to preserve the status quo during appellate review—MWG argues that “status quo” means deferring Part 845 obligations until after its appeal is resolved. See MWG Mot. pp. 1, 4, 7–8.

22. In reality, it was MWG’s initial petition that triggered an automatic stay of Part 845’s operation under Section 28.1(e) of the Act, 415 ILCS 5/28.1(e), from May 11, 2021, until the Board’s Opinion and Order in *In re Petition of Midwest Generation LLC for a Finding of Inapplicability of 35 Ill. Adm. Code 845*, AS 21-3, slip op. at 15 (Ill. Pollution Control Bd. Mar. 20, 2025), which lifted that stay and reinstated Part 845 obligations (including permitting requirements) as the governing regulatory baseline for the FSFS area.

23. Denying MWG’s stay motion does not impose any new or different obligations; it merely returns MWG to the same Part 845 requirements that applied immediately after the Section 28.1(e) stay expired – i.e., the default CCR rule framework that governs all similarly situated surface impoundments.

24. Because denial of the stay simply restores the pre-existing Part 845 obligations, rather than delaying or altering MWG’s regulatory responsibilities, denying the stay maintains the regulatory status quo and thus weighs against granting the stay. MWG has not met its burden to justify a stay.

C. *Balance of Equities (Respective Rights of the Litigants)*

25. MWG claims that, without a stay, it will incur significant costs including engineered permit studies, application fees, and parallel federal CCRMU compliance. MWG Mot. at 5-6.

26. The Supreme Court in *Stacke v. Bates*, 138 Ill. 2d 295, 307–08 (1990), directs the Board to weigh the movant’s hardship against the rights of the opposing party. The Board must consider whether the asserted costs justify delaying enforcement of a duly issued final order.

27. The Illinois EPA has a statutory right and duty to immediately enforce Part 845. Under Section 22.59 of the Act, 415 ILCS 5/22.59, the Agency is required to collect CCR program fees and oversee compliance with surface impoundment rules statewide. Delaying MWG's obligations directly undermines the Agency's ability to carry out that mandate.

28. Moreover, MWG has been on notice since at least 2021 that compliance with Part 845 could ultimately be required. When Part 845 took effect, MWG elected to seek an adjusted standard. Although MWG's obligations under Part 845 were temporarily stayed pursuant to Section 28.1(e) of the Act, 415 ILCS 5/28.1(e), the Board retained full discretion to deny the petition. By proceeding without preparing for the possibility of an unfavorable outcome, MWG accepted the risk that its petition might be denied. Its current regulatory obligations are the foreseeable result of that strategic decision.

29. Granting a stay would result in inconsistent regulatory treatment by allowing MWG to delay compliance while similarly situated entities must continue complying with Part 845. This disparity would undermine the uniform application of the law and diminish the credibility of the CCR regulatory program.

30. MWG's burden stems from its own litigation strategy, and any financial or operational costs it faces are self-imposed and subject to ordinary appellate relief. In contrast, the Agency's interests include prompt enforcement of the Board's final order and the uninterrupted administration of the CCR program. Because the Agency's statutory enforcement responsibilities outweigh MWG's avoidable and remediable costs, the balance of equities does not support a stay.

D. *Hardship on Other Parties / Public Interest*

31. MWG offers no evidence that deferring Part 845 compliance benefits the public. To the contrary, postponement undermines the Agency's ability to oversee the CCR program and protect water resources in real time.

32. Under *Stacke*, the Board “must balance the equities, comparing the harm to the movant if the stay is denied against the harm to other parties if the stay is granted.” 138 Ill. 2d 295, 304–05 (1990).

33. The Board has already found that granting an adjusted standard for the FSFS area would “result in environmental and health effects substantially and significantly more adverse than the effects considered by the Board when adopting Part 845.” AS 21-3, slip op. at 14 (Ill. Pollution Control Bd. Mar. 20, 2025). Granting a stay would be inconsistent with that finding.

34. Indeed, when MWG previously attempt to stay these proceedings, the Board similarly found that the proposed delay posed a threat to the environment and human health – based in part on documents filed by MWG. AS 21-3, slip op. 4 (Ill. Pollution Control Bd. Oct. 5, 2023). Those same public health concerns remain today.

35. Continued noncompliance risks harm to individuals who rely on the Agency’s ability to safeguard drinking water and other vital water resources.

36. Therefore, because granting a stay would impose greater environmental and public health risks outbalancing any identified cost to MWG, and would hinder the Agency’s ability to enforce protections in real time, the hardship to others and the public interest weighs strongly against granting the stay.

V. MWG’s ALTERNATIVE REQUEST TO STAY FEE PAYMENT

37. In the alternative, MWG asks the Board to stay only the \$200,000 CCR program fee under Section 22.59(j) of the Act, 415 ILCS 5/22.59(j), pending appeal, arguing that the fee obligation is severable from the rest of the Order and that deferring payment poses no environmental risk. MWG Mot. p. 6. and MWG Memo. p. 10.

38. Section 22.59(j) of the Act unambiguously requires owners or operators of CCR surface impoundments to pay the prescribed program fee. Neither the Act nor Part 845 grants the Board discretion to waive or defer a statutorily mandated fee.

39. To the contrary, Section 28.1 of the Act, 415 ILCS 5/28.1, grants authority to the Board to grant an adjusted standard from a “regulation of general applicability.” The Board’s decision—and ultimately the Appellate Court’s decision—on MWG’s requested adjusted standard could have a bearing on whether the FSFS area is a CCR surface impoundment, and therefore whether the Agency is entitled to fees under Section 22.59(j) of the Act, 415 ILCS 5/22.59(j). But that does not mean that the Board has the authority to stay the statutory requirement, MWG having failed to justify an adjusted standard before the Board.

40. While 35 Ill. Adm. Code 101.906(c) and Supreme Court Rule 335(g) authorize the Board to stay its final orders pending appeal, that authority cannot conflict with clear statutory mandates. The Board may stay its Order, but it may not suspend independent statutory obligations.

41. Because the Board lacks authority to postpone statutorily required fees in isolation, MWG’s request to stay the \$200,000 payment must be denied.

VI. SUMMARY AND CONCLUSION

42. MWG has failed to present a substantial case on the merits or show that the balance of equitable factors favors staying the Board’s final order: its asserted potential losses are ill-defined, in the case compliance costs, and not the subject of this adjusted standard proceeding, in the case of statutory fees; its regulatory obligations simply revert to the pre-existing baseline; and the public interest in timely CCR enforcement and protection of groundwater and Lake Michigan far outweighs any self-inflicted costs. Nor may the Board sever and defer the statutorily mandated \$200,000 program fee in isolation. Accordingly, both the stay pending appeal request and the alternative fee-payment stay must be denied.

WHEREFORE, Illinois EPA respectfully requests that the Board DENY Petitioner's Motion to Stay Pending Appeal.

Respectfully Submitted,

Date: May 07, 2025

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BY: /s/Sara Terranova
Sara Terranova

THIS FILING IS SUBMITTED ELECTRONICALLY

CERTIFICATE OF SERVICE

I, the undersigned, on affirmation state the following:

That I have served the attached ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO MIDWEST GENERATION, LLC'S MOTION TO STAY PROCEEDINGS by e-mail upon Susan M. Franzetti, sf@nijmanfranzetti.com; Kristen Laughridge Gale, kg@nijmanfranzetti.com; and Genevieve J. Essig, ge@nijmanfranzetti.com.

That my e-mail address is: sara.terranoa@illinois.gov

That the e-mail transmission took place before 4:30 p.m. on the date of May 07, 2023.

/s/Sara Terranova