

ILLINOIS POLLUTION CONTROL BOARD
April 18, 2024

DYNEGY MIDWEST GENERATION, LLC,)
)
Petitioner,)
)
v.)
) PCB 24-53
ILLINOIS ENVIRONMENTAL) (Petition for review – Alternative Source
PROTECTION AGENCY,) Demonstration)
)
Respondent.)
)
)

ORDER OF THE BOARD (by J. Van Wie):

On February 2, 2024, Dynegy Midwest Generation, LLC (DMG) timely filed a petition (Pet.) asking the Board to review an alternative source demonstration determination (ASD) of the Illinois Environmental Protection Agency (Agency) under the coal combustion residual (CCR) surface impoundment rules in Part 845. *See* 35 Ill. Adm. Code 105.200 *et. seq.*, 845.650(e). The ASD determination concerns a CCR surface impoundment referred to as the New East Ash Pond (NEAP) at DMG’s Vermilion Power Plant, located approximately four miles northeast of the Village of Oakwood in Vermilion County (facility). DMG’s petition included a motion for a partial stay of the Part 845 requirements as they apply to exceedances of the groundwater protection standards for chloride, lithium, sulfate, and total dissolved solids (TDS) at multiple wells at the facility. On February 15, 2024, the Board accepted the petition for hearing, but reserved ruling on the motion for partial stay. IEPA stated that it has no objection to the requested stay. For the reasons below, the Board now grants the petitioner’s unopposed request for a partial stay.

MOTION FOR PARTIAL STAY

DMG’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 exceedances of the groundwater protection standards for chloride, lithium, sulfate, and TDS at the facility. Pet. at 21. DMG 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 February 16, 2024 motion for an extension of time to file the record (Mot.), 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
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).

DMG argues 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.” Pet. at 22.

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.

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.*

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.*

Corrective Action Measures From Which a Stay is Requested

DMG requests 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.

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.

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.

Board Discussion and Findings

In reviewing DMG’s unopposed motion for a partial stay, the Board is persuaded that DMG 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 DMG 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).¹ 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. 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 DMG’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 exceedances of the chloride, lithium, sulfate, and TDS groundwater protection standards at the NEAP. 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 April 18, 2024, by a vote of 4-0.



Don A. Brown, Clerk
Illinois Pollution Control Board

¹ The risk assessment can be found at: <https://www.luminant.com/documents/ccr/il-ccr/Vermilion/2022/Vermilion%20NEAP%20Closure%20Construction%20Permit%20Application-W1838000002-04%20revised.pdf> (visited April 15, 2024).