

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
COAL COMBUSTION ASH PONDS)
AND SURFACE IMPOUNDMENTS AT) **R14-10**
POWER GENERATING FACILITIES:) **(Rulemaking – Water)**
PROPOSED 35 ILL.ADM. CODE PART 841:)

NOTICE OF FILING

TO: John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

PLEASE TAKE NOTICE that I have today filed with the Illinois Pollution Control Board Midwest Generation, LLC's Response to Environmental Groups' Motion to Reopen Rulemaking, copies of which are herewith served upon you.

Dated: October 2, 2015

MIDWEST GENERATION, L.L.C.

By: /s/ Susan M. Franzetti
One of Its Attorneys

Susan M. Franzetti
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
(312) 251-5590

SERVICE LIST R14-10

Joanne M. Olson, Assistant Counsel
James Jennings, Assistant Counsel
Illinois Environmental Protection Agency
1021 N. Grand Ave. East
P.O. Box 19276
Springfield, Illinois 62794-9276

Christine G. Zeman
City of Springfield
Office of Public Utilities
800 E. Monroe, 4th Floor, Municipal Bldg. East
Springfield, IL 62757-0001

Robert G. Mool
Office of General Counsel
Illinois Dept. of Natural Resources
One Natural Resources Way
Springfield, Illinois 62702-1271

Timothy J. Fox
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph Street, Suite 11-500
Chicago, Illinois 60601

Jason McLaurin
Southern Illinois Power Cooperative
11543 Lake of Egypt Road
Marion, IL 62959-8500

Amy Antonioli
Schiff Hardin LLP
233 South Wacker Drive
Suite 6600
Chicago, Illinois 60606
Faith Bugel
1004 Mohawk
Wilmette, IL 60091

Stephen Sylvester
Assistant Attorney General
Office of the Attorney General
69 W. Washington Street, Suite 1800
Chicago, Illinois 60602

Jack Darin
Sierra Club
70 E. Lake Street, Suite 1500
Chicago, Illinois 60601-7447

Jessica Dexter
Jennifer L. Cassel
Josh Zaharoff
Environmental Law and Policy Center
35 East Wacker Drive, Suite 1600
Chicago, Illinois 60601
Ameren Services
One Ameren Plaza
P.O. Box 66419
St. Louis, Missouri 63166

Prairie Power, Inc.
P.O. Box 10
Peral, Illinois 62361

Traci Barkley
Prairie Rivers Network
1902 Fox Drive, Suite 6
Champaign, Illinois 61820

Exelon Law Department
10 South Dearborn, 49th Floor
Chicago, Illinois 60603

Michael Smallwood
Consulting Engineer
Ameren
1901 Chouteau Avenue
St. Louis, Missouri 63103

Abby Allgire
IERG
215 E. Adams Street
Springfield, Illinois 62701

Electronic Filing - Received, Clerk's Office : 10/02/2015

Electric Energy, Inc.
2100 Portland Road
P.O. Box 165
Joppa, Illinois 62953

N. LaDonna Driver
Jennifer M. Martin
Hodge Dwyer & Driver
3150 Roland Avenue
P. O. Box 5776
Springfield, Illinois 62705-5776
David Rieser
Much Shelist PC
191 North Wacker Drive, Suite 1800
Chicago, Illinois 60606

Elizabeth Quirk-Hendry, General Counsel East
Region
Keith Schmidt, Director of Environment
NRG Energy, Inc.
211 Carnegie Center
Princeton, New Jersey 08540

Walter Stone, Vice President
NRG Energy, Inc.
8301 Professional Place, Suite 230
Landover, Maryland 20785

Abel Russ
Environmental Integrity Project
1000 Vermont Avenue NW, Suite 1100
Washington, DC 20005

Kincaid Generation LLC
P.O. Box 260
Kincaid, Illinois 62540

Prairie State Generating Company
3872 County Highway 12
Marissa, Illinois 62257

Mark A. Bilut
McDermott, Will & Emery
227 West Monroe Street
Chicago, Illinois 60606

Rick Diericx, Senior Director
Dynergy Midwest Generation, Inc.
1500 Eastport Plaza Drive
Collinsville, Illinois 62234

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing Midwest Generation, L.L.C.'s Response to Environmental Groups' Motion to Reopen Rulemaking was filed electronically on October 2, 2015 with the following:

John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

and that true copies were mailed by First Class Mail, postage prepaid, on October 2, 2015 to the parties listed on the foregoing Service List.

/s/ Susan M. Franzetti

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
COAL COMBUSTION WASTE)
SURFACE IMPOUNDMENTS) R14-10
AT POWER GENERATING) (Rulemaking – Water)
FACILITIES: PROPOSED NEW)
35 ILL. ADM. CODE 841)

**MIDWEST GENERATION’S RESPONSE TO ENVIRONMENTAL
GROUPS’ MOTION TO REOPEN RULEMAKING**

Pursuant to the September 18, 2015 Hearing Officer Order, Midwest Generation, LLC (“MWGen”), by its undersigned counsel, submits this response to Prairie Rivers Network, Sierra Club, and the Environmental Law & Policy Center (collectively, the “Environmental Groups”) motion to re-open the docket in order to accept written comment on their proposal for amended rules, which were attached to their motion. The Illinois Environmental Protection Agency (the “Agency” or “Illinois EPA”) previously filed a motion to extend the stay indefinitely to allow for resolution of legal and legislative action on the federal coal combustion residuals rule (“federal CCR Rule”) which is awaiting decision by the Board. MWGen did not object to the Agency’s motion to extend the stay because it believes that an extension of the stay is appropriate.

MWGen opposes the Environmental Groups’ motion to reopen this rulemaking. When this rulemaking is reopened, it should be when the Agency, who initiated this rulemaking, is prepared to present its position regarding how the federal CCR Rule affects its prior rulemaking proposal. Reopening this rulemaking once a reasonable opportunity has been afforded for all amended rules proposals to be presented to the Board allows each interested party, including MWGen, to compare and evaluate all such proposals and to provide a single comprehensive comment on those proposals to the Board. This approach is both efficient, by avoiding separate, piecemeal comments on each amended proposal, and will provide the Board with more complete and thoughtful comments on which to base its decisions.

Because there are pending legal challenges to the federal CCR Rule as well as proposed federal legislation that may result in substantive changes to that rule, the Agency has requested an extension of the stay so that it can determine with greater certainty whether there are any remaining gaps that should be filled at the state level to address the regulation of CCR surface impoundments. The Agency's approach is prudent, reasonable and minimizes the burden and risk of conflicting or confusing federal and state regulations.

Therefore, MWGen requests that the Board afford the Agency the additional time requested in its motion to extend the stay and postpone the reopening of this rulemaking until such future time when both the Agency's and the Environmental Groups' proposals are ready for comment by the participants. Because compliance by regulated parties with the surface impoundments requirements in the federal CCR Rule begins later this month, there is no risk of harm to either the environment or the public by doing so.

I. Introduction

The Illinois EPA has requested additional time to establish whether the rules it initially proposed remain necessary in light of the completion of the federal CCR rule. Its concern is well-founded: The federal CCR rule was targeted at the same gaps in CCR surface impoundment regulations that the Agency's proposed rules were, and represent the culmination of years of legal and technical comments on a hotly debated subject. Also, compliance deadlines for surface impoundments under the federal CCR rule are now just days away, ensuring that Illinois residents and the environment are protected until this rulemaking is reopened.

It is not surprising that the Agency has requested that the Board extend the initial 90-day stay it granted. The "final" federal CCR Rule could well be modified in the coming months, either as a result of litigation challenging the rule both in whole and in part, or as the result of legislation which has already cleared the House of Representatives. It is reasonable to wait until

the courts and Congress establish exactly what the federal CCR rule does and does not do. In the meantime, the Board's decision-making likely will be aided by the opportunity afforded regulated parties to present further relevant information stemming from their experience in implementing the federal CCR Rule.

The Environmental Groups propose an alternative approach: Move ahead with this rulemaking, but with their proposed amendments that purportedly "harmonize" it with the federal CCR rule. In addition to being a premature request, the motion to reopen does not provide any explanation of what it means to "harmonize" the two nor does it contain any explanation of the reasons for the proposed amendments.¹ The motion to reopen does not identify any substantive deficiencies in the federal CCR Rule that are purportedly addressed by the amended proposal. It also does not describe why certain additional language has been proposed for various sections of the amended rules. Hence, the motion itself is an incomplete effort towards the proper reopening of this rulemaking because it does not provide interested parties with sufficient information on which to submit informed comment to the Board.

Rather than "harmonize" the federal CCR Rule and the proposed Environmental Groups' rule, the proposed amendments seem to largely ignore the existence of the federal CCR Rule. MWGen could not identify any proposed amendments which revise the proposed rules to be consistent with the federal CCR Rule. Instead, the proposed amendments appear to unreasonably burden owner/operators of CCR impoundments with dual regulations that essentially seek to accomplish the same degree of protections, but in different ways, resulting in unnecessary, additional work with its associated added costs.

¹ The Board's procedural rules require a statement of reasons to be included with proposed rules. See 35 Ill. Adm. Code § 102.202(b). The Motion to Reopen does not contain an explanation of the reasons for the proposed amendments to the Environmental Groups' previously filed proposed rules.

II. Procedural History

On October 28, 2013, the Agency proposed a new rule of general applicability for coal combustion residuals (CCR) surface impoundments at electric utilities. (See R14-10, *Statement of Reasons*, (Oct. 28, 2013)). In explaining the need for these new rules, the Agency cited a “regulatory gap” created by this Board’s ruling in *In re Petition of Ameren Energy Generating Company*, AS 09-1 (Mar. 5, 2009), which had noted that Illinois CCR surface impoundments were not subject to the landfill regulations found at 35 Ill. Adm. Code §§ 811-15. (*Statement of Reasons*, at 8). As such, Illinois regulations offered the impoundment owners/operators no guidance on how to close or take corrective action at their facility, requiring the Board and Agency to process numerous site-specific rulemakings. (Id.)

The Agency acknowledged that the USEPA had also initiated a rulemaking covering the same subject matter. (Id. at 7.) In fact, the USEPA had announced that it was considering two different approaches to regulating CCR impoundments: Regulating CCR as a special waste under Subtitle C of the Resource Conservation and Recovery Act or regulating it as a nonhazardous waste under Subtitle D of RCRA. (Id., at Attachment E.) But although the USEPA had proposed these regulations in 2010, by late 2013 the regulations had still not been finalized and the USEPA had not given any indication of when this would happen. Nor had the USEPA chosen between the two different regulatory strategies outlined in its initial proposal. (Id. at 7)

The Board initiated a rulemaking procedure and took testimony over several days in 2014. Following the hearings, several parties, including MWGen, submitted comments on the proposed rule and hearing testimony. The Environmental Groups also recommended several significant changes to the Agency’s proposed rule, submitting an alternate version of the regulation. (See R14-10, *Environmental Groups' Proposed Amendments to Proposed New 35 Ill. Adm. Code Part 841* (July 21, 2014)).

On December 19, 2014, shortly after the filing of post-hearing comments, the USEPA announced that it would be finalizing its CCR rule, and posted an unofficial, prepublication, copy on its website. This prompted the Agency to ask to stay proceedings so that it could evaluate the USEPA's regulations, which at first glance were "similar to the rules proposed by the Agency and other participants, but . . . not identical." (R14-10, *Motion to Stay*, at 2 (Jan. 20, 2015)). The Agency admitted that it was now uncertain "whether changes to the Agency's proposal are necessary as a result of the newly adopted minimum federal minimum criteria" (Id.) On May 7, 2015 (shortly after the USEPA published its final CCR rule in the Federal Register²), the Board granted a 90-day stay. (R14-10, *Order* (May 7, 2015)).

Before the stay expired, the Agency filed a motion to extend it indefinitely. (R14-10, *Motion to Extend Stay* (Aug. 5, 2015)). The Agency noted that even though the USEPA's rule had been finalized, its long-term future was uncertain due to several lawsuits attacking the rule in part and in entirety. (Id. at 2-3.) The CCR rule was also the subject of congressional scrutiny. On July 22, 2014, the United States House of Representatives passed legislation permanently barring the USEPA from regulating CCR as a special waste under Subtitle C of RCRA and allowing the states to directly enforce the standards outlined in the new CCR rule. (Id. 3-4.)

The Environmental Groups opposed the Agency's stay, insisting that the Board should instead adopt the new state regulations "as soon as possible." (R14-10, *Environmental Groups' Response to Agency's Motion to Extend Stay*, at 3 (Aug. 19, 2015)). The Environmental Groups insisted that they had developed an approach to "harmonize" the new federal standards with the Groups' earlier regulatory proposal, although the Groups also maintained that this harmony would not be affected by future modifications to the federal CCR rule. (Id. at 3-4.)

² See 80 Fed. Reg. 37988 (Apr. 17, 2015).

III. Argument

A. The Federal CCR Rule Addresses the Regulatory “Gap” that the Agency’s Rule Proposal Sought to Fix.

The Agency envisioned its proposed rule as having three substantive sections: Monitoring, Corrective Action, and Closure. (See *Agency’s Statement of Reasons*, at 13, 16, 18.) As shown in the table below, the federal CCR Rule addresses all three of these areas:³

| Regulatory “Gap” | Agency’s Proposed Rule | Federal CCR Rule |
|-------------------------|---|--|
| Groundwater Monitoring | Owner/operator must conduct hydrogeologic investigation, install a groundwater monitoring system, develop a groundwater monitoring plan. 35 Ill. Adm. Code §§ 841.200-.210 (proposed). | Owner/operator must install a groundwater monitoring system, 40 C.F.R. § 257.91, and conduct a detection monitoring program, <i>id.</i> § 257.94. The owner/operator must keep records of their monitoring and other documents. <i>Id.</i> § 257.105. The records must be kept on a publicly available website. <i>Id.</i> § 257.107(h). |
| Corrective Action | If groundwater sampling shows contaminants, the water will be resampled, and if the results are positive the owner/operator must submit a corrective plan to the agency. 35 Ill. Adm. Code § 841.300 (proposed). The owner/operator has an opportunity to demonstrate an alternative cause for the exceeded groundwater quality standard. <i>Id.</i> § 841.305. Otherwise, the owner/operator must submit a corrective action plan. <i>Id.</i> § 841.310. The Agency will post the corrective action plan on its website. <i>Id.</i> § 841.165. | Owner/operator must conduct assessment monitoring if contaminants detected, 40 C.F.R. § 257.95, develop a corrective action plan, <i>id.</i> §§ 257.96-97, and implement the plan, <i>id.</i> § 257.98. The owner/operator must place a copy of the plan on a publicly available website. <i>Id.</i> § 257.107(h). |
| Closure | Owner/operators must prepare a written plan for closing a CCR impoundment and submit it to the | Owner/operators must prepare a written plan for closing a CCR impoundment. 40 C.F.R. § 257.101(b)(3). Closure can |

³ In addition, it is also noteworthy that the groundwater standards adopted by the federal CCR Rule (see 40 C.F.R. § 257.95(h)(1), incorporating 40 C.F.R. § 141.62 by reference) are generally consistent with the Illinois Class 1 groundwater standards (35 Ill. Admin. Code § 620.410(a)), thus providing the same level of protection for the state’s highest quality groundwater.

| | | |
|--|--|---|
| | <p>Agency for review and approval. 35 Ill. Adm. Code § 841.410 (proposed). The regulations have technical specifications for the final cover system. <i>Id.</i> § 841.420. The Agency will post the closure plan on its website. <i>Id.</i> § 841.165.</p> | <p>be accomplished by leaving the CCR in place or removing the CCR. <i>Id.</i> § 257.100(b)(1), (5) The regulations have technical requirements for the cover layer. <i>Id.</i> § 257.100(b)(3)(i)-(ii)</p> |
|--|--|---|

The federal CCR rules are enacted under Subsection D of RCRA and allow enforcement suits to be brought by both citizens and state officials. *See* 42 U.S.C. § 6972. Thus, the regulatory gap identified by the Agency has already been filled by a rule that in all key respects provides the same level of protection as the Agency’s proposal.

B. The Environmental Groups’ Motion to Reopen Creates More Conflict than “Harmony.”

The Motion to Reopen does not provide any substantive reasons for why this rulemaking needs to be reopened now. Even if an additional layer of CCR regulations were necessary, which is certainly disputable and at the least, undemonstrated by the pending motion, the Board should not and need not rush to create it. Currently, the Environmental Groups’ demand to reopen and proceed immediately with this rulemaking requires the Board to take aim at a moving target. As the Agency noted in its motion to extend, the federal regulations are currently the subject of several lawsuits, challenging the regulations both in part and in whole. For instance, the Utility Solid Waste Activities Group (“USWAG”) has challenged the rule as being created in excess of the statutory jurisdiction and authority of the USEPA, and argues that several requirements within the new rule are arbitrary and capricious (in violation of the Administrative Procedures Act). *See USWAG v. USEPA*, No. 15-1219 (D.C. Cir.) (USWAG statement of issues), attached as Exhibit A. Several other challenges have been brought by environmental groups. For instance, several groups argue that the regulations arbitrarily exclude certain inactive facilities, and do not monitor for boron contamination in the water. *See USWAG v. USEPA*, No. 15-1228 (D.C. Cir.) (consolidated with 15-1219), attached as Exhibit B. With the changes

that this litigation could bring, the Board and Agency would risk a great deal of wasted effort by attempting to synergize with the federal CCR rule as it currently stands. Indeed, this litigation could expand the CCR rule to cover coal ash impoundments at inactive power generating facilities, which would eliminate what the Environmental Groups contend is a key difference between the CCR rule and the Agency's proposal. (See R14-10, *Environmental Groups' Response to Motion to Extend Stay*, at 3 (Aug. 19, 2015)).

Nor is the litigation the only potential source for alteration of the final CCR rule. The United States House of Representatives has already passed legislation that would not only permanently bar the USEPA from regulating CCR as a hazardous waste under Subtitle C of RCRA, but would allow states to directly enforce the minimum protective standards from the federal CCR rule. *See Improving Coal Combustion Regulation Act*, H.R. 1734, 114th Cong. (2015). This legislation was introduced in the United States Senate in July 2015, and the Senate has already introduced its own reforms, with minor differences from the House bill. *See Improving Coal Combustion Residuals Regulation Act*, S. 1803, 114th Cong. (2015). Although the Senate has not taken additional action on either bill, both were introduced in July 2015, and the Senate has only been in session 33 days since then, due to the summer calendar.

It is especially telling that the only substantive gaps between the Agency's proposal and the federal CCR rule are on matters that the federal CCR rule did not expand its scope to: Regulation of inactive CCR impoundments at nonoperational electrical plants, *see* 40 C.F.R. § 257.50(e), and the creation of financial assurance requirements. With respect to the former, there is no regulatory "gap" under Illinois law that needs to be filled.⁴ With respect to the latter, there has not been a demonstrated need for such financial assurance requirements.⁵

⁴ There is, no enforcement gap to fill with regard to CCR impoundments at nonoperational power plants. The Illinois Environmental Protection Act (the "Act") *currently* gives the Agency and Illinois citizens enforcement authority to pursue injunctive or other relief necessary to address the impacts of historical CCW activity that may cause or contribute to "water pollution" (Section 12(a) of the Act) or "water pollution hazards" (Section 12(d) of the

But even assuming for argument's sake that Illinois regulations should cover these areas, this would not necessitate the creation of two overlapping sets of CCR impoundments regulations; the Board could simply create regulations that pertain to CCR impoundments at closed electrical plants and financial assurances, while allowing the remainder of the CCR rule to be enforced through Subtitle D of RCRA.

The Environmental Groups' choice of the word "harmonize" to describe their amended proposed rules appears to be purposely vague to avoid admitting that no effort was made to streamline them to eliminate inconsistencies or duplicative requirements with the federal CCR Rule. The Environmental Groups' proposal will lead to two redundant sets of regulations, both of which require owner/operators to develop a groundwater monitoring plan, a hydrogeologic site characterization, a closure plan, and a post-closure plan. The Environmental Groups "harmonize" the two by adding new language which allows a plan prepared under the federal CCR Rule to be offered to satisfy the state requirements, but with the express condition that any such plan "may need to be supplemented" to satisfy any additional requirements contained in the state CCR rules. (R14-10, *Environmental Groups' Amended Proposal*, at 12 (Sept. 15, 2015)). The same approach is taken in regards to "harmonizing" the overlapping requirements for creating a corrective action plan. (Id. at 38-39.) The Environmental Groups have not made any effort to compare the respective requirements of the Agency's proposal and the federal CCR

Act). The Illinois Groundwater Protection Act (415 ILCS 55, *et seq.*) and the Illinois Groundwater Quality Standards (35 Ill. Adm. Code Part 309) apply to releases from inactive surface impoundments. Nor does Illinois law currently deprive CCR owner/operators of options for avoiding litigation by pursuing corrective action. In all circumstances of historical groundwater contamination (besides regulated landfills) a current owner/operator of a facility is allowed to utilize the Illinois Tiered Approach to Corrective Action (TACO) regulations, in conjunction with a remediation program, such as the Site Remediation Program, or the RCRA programs, to address groundwater impacts using the TACO risk-based cleanup standards and/or appropriate institutional controls. *See* 35 Ill. Adm. Code §§ 724-25, 732, 742.

⁵ As to the Environmental Groups' specific contention that the federal CCR Rule lacks financial assurance requirements (a provision that the Agency also found unnecessary in its proposed CCR regulations), the Agency has observed, correctly, that there is not currently enough evidence in the record of this docket supporting the need for such provisions. (R14-10, *Environmental Groups' Response to Agency's Motion to Extend Stay*, at 3 (Aug. 19, 2015); R14-10, *Agency's Post-Hearing Comments*, at 77 (Oct. 20, 2014)). Alternatively, the Agency's motion to create a subdocket for the financial assurance issues is a preferable approach. (*See* R14-10, *Agency's Motion to Sever*, (June 11, 2014)).

Rule, much less seriously try to minimize the burden an owner/operator would face by being regulated under two sets of laws.

The problems inherent in the Environmental Groups' "harmonized" approach is illustrated by their proposed requirements for closing a CCR impoundment. First, the owner/operator must draft one or more closure plans within two different deadlines: October 17, 2016 for the federal CCR Rule, 40 C.F.R. § 257.102(b)(2), and one year after the effective date of the Environmental Groups' Rule, *Amended Proposal*, at 48. The two sets of regulations set different requirements for the contents of the plan: The Environmental Groups' proposed rule requires the inclusion of "results of modeling performed to assess how the proposed closure will result in the attainment of [state groundwater standards]," *id.* at 48-49, while the federal CCR Rule requires a "discuss[ion] of how the final cover system will meet" federal performance standards, 40 C.F.R. § 257.102(b)(1)(iii). To design the cover layer, the Environmental Groups would require no less than 1×10^{-7} cm/s, see *Amended Proposal* at 52, but under the federal rule, owner/operators would have to investigate the permeability of the surrounding soils, because if those are less permeable than 1×10^{-7} cm/s, the federal requirements would mandate a matching level of permeability. 40 C.F.R. § 257.100(b)(3)(i)(A).

Further complications will ensue if the owner/operator finds that there is a need to modify the closure plan. While the federal CCR Rule mandates that the owner/operator update its plan within 30 days if an unanticipated event happens during the implementation of a closure plan, 40 C.F.R. § 257.102(b)(3)(iii), the Environmental Groups' proposed rule would require the modification to be reviewed by the Agency prior to implementation, which could take up to 120 days, well after the federal deadline, *Amended Proposal*, at 61. Owner/operators would be caught in yet another Catch 22 if the Agency required design changes that will not be approved by a qualified professional engineer as being in compliance with federal standards. See 40 C.F.R. § 257.102(f)(3).

These proposed layers of regulations simply do not “harmonize.” How can the Environmental Groups genuinely claim to be integrating and streamlining their proposals with the federal CCR Rule when their revisions consist almost entirely of *additions* to the proposed regulations? The Environmental Groups’ failure to identify significant shortcomings in the federal CCR Rule’s approach to the same matters addressed in their amended proposed rules should give the Board confidence in the adequacy of the federal CCR Rule on an interim basis, even if the Board later decides that additional protections are necessary.

C. The Agency’s Request for an Extended Stay is Prudent, Reasonable and Minimizes the Burden and Risk of Conflicting or Confusing Regulations.

The Agency is following a more prudent and rational course of action by requesting an extension of the stay. It is obviously reviewing the federal rule to determine whether and how it should impact how the state proceeds regarding CCR surface impoundments. Before a course of action is presented to the Board in light of the interim adoption of the federal CCR Rule, the Agency reasonably is requesting additional time to consider the outcome of the legal challenges that have been made to the rule and the pending Congressional actions related to it.

There is no significant prejudice caused to either Illinois waters or the public welfare by continuing the stay. Owner/operators, like MWGen, have already and will continue to devote considerable resources to making the changes required by the federal CCR Rule. There is no reasonable basis to rush forward to enact yet another layer of CCR surface impoundment regulations. The USEPA’s determination of the necessary protection of the environment and public welfare related to the design, operation, corrective action, and closure of surface impoundments will be implemented before the end of this month. *See* 80 Fed. Reg. 37988 (July 2, 2015) (setting October 19, 2015, as the effective date of the federal rule). Indeed, in the near future, the Board and the Agency will have an excellent opportunity to observe how these new regulations work in practice and evaluate whether they adequately protect public safety and the

environment. The experience gained from the implementation of the federal CCR Rule will be valuable to informing both the regulatory path the Agency will propose and future decisions by the Board. Such future rulemaking activity are more prudently based on known shortcomings of the federal CCR Rule, if any are actually proven to exist, rather than mere speculation.

The Environmental Groups have not shown any pressing need to move forward with an entirely separate set of CCR impoundment regulations. Conclusory statements in the Motion to Reopen that it is necessary to protect the environment and the public are insufficient evidence of such a need. This is particularly true under the current circumstances where little or no effort has been made to maximize the consistency of the federal and proposed state rules to the extent reasonably possible. Further, the imminent implementation of the federal CCR Rule requirements as to surface impoundments removes any true need for such urgency, particularly when moving ahead now does so with the uncertainty of future litigation and Congressional decisions on key issues.

IV. Conclusion

The Board should allow the Agency the additional time requested in its motion to extend the stay and postpone the reopening of this rulemaking until such future time when both the Agency's and the Environmental Groups' proposals, as well as any other interested parties, are ready for comment by the participants. Considerable effort already has been expended to address both initial and amended proposed rules before this rulemaking was stayed. And more effort will be needed to address how to move forward in light of the federal CCR Rule. But such efforts should not proceed in a piecemeal fashion. If "harmonization" is a worthwhile goal, as the Environmental Groups seem to advocate, then some additional time is necessary to be able to determine what the outcome of the pending litigation and congressional actions is going to be so that everyone knows with greater certainty what constitutes "harmonious" versus "discordant"

regulations. As one of the parties who will have to navigate both the federal and state regulatory approaches, MWGen urges the Board to allow the necessary time to ensure that regulated parties are not unnecessarily burdened by an outcome that risks conflict and confusion. For these reasons, the Board should grant the Agency's motion to extend the stay and deny the Environmental Groups' motion to reopen.

Respectfully submitted,

Midwest Generation, L.L.C.

By: /s/ Susan M. Franzetti

One of its attorneys

Of counsel:

Susan M. Franzetti
Vincent Angermeir
Nijman Franzetti LLP
10 S. LaSalle St., Suite 3600
Chicago, Illinois 60603
(312) 251 - 5590

EXHIBIT A

ORAL ARGUMENT NOT YET SCHEDULED

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

| | | |
|-----------------------------------|---|-----------------------------|
| UTILITY SOLID WASTE |) | |
| ACTIVITIES GROUP, <i>et al.</i> , |) | |
| |) | |
| Petitioners, |) | No. 15-1219 |
| |) | (Consolidated with 15-1221, |
| |) | 15-1222, 15-1223, 15-1227, |
| |) | 15-1228, and 15-1229) |
| |) | |
| v. |) | |
| |) | |
| U.S. ENVIRONMENTAL PROTECTION |) | |
| AGENCY, |) | |
| |) | |
| Respondent. |) | |
| |) | |
| |) | |

**NON-BINDING STATEMENT OF ISSUES FOR PETITIONERS UTILITY
SOLID WASTE ACTIVITIES GROUP, EDISON ELECTRIC INSTITUTE,
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, AND
AMERICAN PUBLIC POWER ASSOCIATION**

Pursuant to this Court’s Order dated July 17, 2015, Petitioners Utility Solid Waste Activities Group (“USWAG”), Edison Electric Institute (“EEI”), National Rural Electric Cooperative Association (“NRECA”), and American Public Power Association (“APPA”) hereby submit their non-binding Statement of Issues to be raised in the above-captioned proceeding. The Statement of Issues is as follows:

- (1) Whether EPA's regulation of inactive coal combustion residuals ("CCR") surface impoundments under the rule is in excess of statutory jurisdiction, authority, or limitations, short of statutory right, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (2) Whether the requirements that owners or operators of CCR units respond to "releases" under 40 C.F.R. §§ 257.90(d), 257.96(a) and 257.97(b)(3)-(4), is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and promulgated without observance of procedure required by law;
- (3) Whether the requirement that owners or operators of existing CCR surface impoundments meet specified safety assessments and complete such assessments by no later than October 17, 2016 or cease operation of such impoundments and commence closure, is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law and promulgated without observance of procedure required by law;
- (4) Whether the inclusion of any and all CCR piles, without any size or temporal limits, within the definition of a "CCR landfill" is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

- (5) Whether the definition of “CCR beneficial use” is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law by including conditions on the beneficial use of CCR in amounts greater than 12,400 tons;
- (6) Whether the omission of any consideration of non-CCR waste streams in evaluating whether a unit can qualify for the rule’s “alternative closure” under 40 C.F.R. § 257.103 is arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law and promulgated without observance of procedure required by law;
- (7) Whether the requirements that CCR surface impoundments be designed, constructed, operated, and maintained with vegetated dikes or slopes not to exceed a height of 6 inches above the slope of the dike is arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law and promulgated without observance of procedure required by law;
- (8) Whether the requirement that existing unlined surface impoundments must cease the receipt of CCR and commence closure within a prescribed period of time upon detection of constituents above a groundwater protection standard is arbitrary, capricious, and abuse of

- discretion, or otherwise not in accordance with law and promulgated without observance of procedure required by law;
- (9) Whether the elimination of the consideration of costs in 40 C.F.R. § 257.96(c) in the assessment of corrective measures is arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law and promulgated without observance of procedure required by law;
- (10) Whether the condition that an increase in costs or the inconvenience of existing capacity cannot be considered in qualifying for the alternative closure provision in 40 C.F.R. § 257.103 is arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; and
- (11) Whether the constituents subject to rule's groundwater monitoring requirements and the mandatory use of background values for purposes of establishing a groundwater protection standard when there is no maximum contaminant level for a constituent is arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law and promulgated without observance of procedure required by law.

USWAG retains the right to raise any additional issue at the time briefs are filed in these consolidated cases.

Respectfully submitted,

/s/ Douglas Green
Douglas Green
VENABLE LLP
575 7th Street NW
Washington, DC 20004
(202) 344-4483
dhgreen@venable.com

Counsel for Petitioners, Utility Solid
Waste Activities Group, *et al.*

Dated: August 17, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August 2015, I will electronically file this Agency Docketing Statement Form and Non-Binding Statement of Issues with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing to those individuals registered with the system. I am also serving, by first class mail, a copy of the foregoing upon any attorneys of record identified as being served by alternative means in the Notice of Docket Activity generated by the Court's CM/ECF system.

Respectfully submitted,

/s/ Douglas H. Green

Douglas H. Green
VENABLE LLP
575 7th Street NW
Washington, DC 20004
(202) 344-4483
dhgreen@venable.com

Counsel for Petitioners, Utility Solid
Waste Activities Group, *et al.*

EXHIBIT B

ORAL ARGUMENT NOT YET SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

| | | |
|---------------------------------|---|-------------------------------------|
| UTILITY SOLID WASTE |) | |
| ACTIVITIES GROUP, <i>et al.</i> |) | |
| |) | |
| <i>Petitioners,</i> |) | |
| |) | |
| v. |) | No. 15-1219 (consolidated with Nos. |
| |) | 15-1221, 15-1222, 15-1223, 15-1227, |
| |) | 15-1228, 15-1229) |
| U.S. ENVIRONMENTAL |) | |
| PROTECTION AGENCY, |) | |
| |) | |
| <i>Respondent.</i> |) | |

**CONSERVATION ORGANIZATION PETITIONERS’
NON-BINDING STATEMENT OF ISSUES**

Pursuant to this Court’s Order of July 17, 2015, Petitioners in Case No. 15-1228, Clean Water Action, Environmental Integrity Project, Hoosier Environmental Council, PennEnvironment, Prairie Rivers Network, Sierra Club, Tennessee Clean Water Network, and Waterkeeper Alliance (collectively “Conservation Organizations”), hereby submit the following non-binding Statement of Issues to be raised:

1. Section 4004 of the Resource Conservation and Recovery Act generally requires the Environmental Protection Agency (“EPA”) to promulgate regulations containing criteria for determining which facilities shall be classified as sanitary

landfills, and therefore are not “open dumps.” At a minimum, the criteria are to ensure that units are classified as sanitary landfills “only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility.” 42 U.S.C. § 6944(a).

(a) Did EPA unlawfully or arbitrarily define existing lined impoundments to include those impoundments that have only the lower of the two liners in a composite liner system (i.e., two feet of compacted soil)?

(b) Did EPA unlawfully or arbitrarily exempt inactive impoundments at inactive facilities from regulation?

(c) Did EPA unlawfully or arbitrarily omit boron from the assessment monitoring list of contaminants that triggers the corrective action requirements?

DATED: August 17, 2015

Respectfully submitted,

/s/ Mary Whittle
Mary Whittle
Earthjustice
1617 JFK Blvd., Suite 1675
Philadelphia, PA 19103
(215) 717-4524
mwhittle@earthjustice.org

Matthew Gerhart
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340
mgerhart@earthjustice.org

Lisa Evans
Earthjustice
21 Ocean Ave.
Marblehead, MA 01945
(781) 631-4119
levans@earthjustice.org

*Counsel for Clean Water Action,
Environmental Integrity Project,
Hoosier Environmental Council,
PennEnvironment, Prairie Rivers
Network, Sierra Club, Tennessee Clean
Water Network, and Waterkeeper
Alliance*

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 2015, I have served the foregoing Conservation Organization Petitioners' Non-binding Statement of Issues on all registered counsel through the court's electronic filing system (ECF).

/s/ Mary Whittle
Mary Whittle