BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
COAL COMBUSTION WASTE	)	
(CCW) 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 a Dynegy Response to January 20, 2017 Hearing Officer Order, copies of which are herewith served upon you.

Dated: March 6, 2017

DYNEGY MIDWEST GENERATION, LLC
ILLINOIS POWER GENERATING COMPANY
ILLINOIS POWER RESOURCES GENERATING, LLC
ELECTRIC ENERGY, INC.

By: /s/ David L. Rieser
One of Its Attorneys

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COAL COMBUSTION WASTE	)	
(CCW) SURFACE IMPOUNDMENTS AT	)	**R14-10**
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PROPOSED NEW 35 ILL. ADM. CODE 841	)	

DYNEGY RESPONSE TO JANUARY 20, 2017 HEARING OFFICER ORDER

DYNEGY MIDWEST GENERATION, LLC, ILLINOIS POWER GENERATING COMPANY, ILLINOIS POWER RESOURCES GENERATING, LLC, KINCAID GENERATION, L.L.C. and ELECTRIC ENERGY, INC. (collectively, "Dynegy"), by and through their attorneys, K&L Gates LLP, submit these responses to the seventeen numbered questions attached to the Hearing Officer's Order of January 20, 2017. The numbered questions to which Dynegy responds are identified by number below.

1. Dynegy believes that the Agency's amended proposal is an advantageous approach that is straightforward and properly relies on existing programs and regulations to implement the federal 40 CFR Part 257, Subpart D, CCR rule ("Part 257 CCR Rule") without creating duplicative regulations, conflicting requirements or an unnecessary additional bureaucratic process. We support the Agency's intent to integrate state regulations and the Part 257 CCR Rule, codify existing Agency practices, provide certainty to the regulated entities and ease implementation of the Part 257 CCR Rule to prevent the need for a federal CCR Permit Program. In addition, consistent with the WIIN Act, we believe the Agency's approach will allow for the use of risk-based approaches which USEPA determines to be at least as protective as the criteria in the Part 257 CCR Rule. Assuming the Agency's amended proposal is adopted,

we believe the Agency should, as provided in the WIIN Act, apply to USEPA requesting approval to administer the Part 257 CCR Rule through the Agency's CCR permit program.

It is critical that a Part 841 permit program for CCR surface impoundments be implemented consistent with the requirements of the Part 257 CCR Rule. As the owner and operator of over 30 CCR surface impoundments in Illinois, Dynegy needs certainty to move forward with the complex, integrated compliance planning decisions and implementation actions involving substantial capital expenses needed to comply with the Part 257 CCR Rule in a timely manner. The Part 257 CCR Rule imposes significant obligations on the owners and operators of CCR surface impoundments that have already required the expenditure of substantial effort and resources and will require even greater compliance expenditures in the next several years, including closure of CCR surface impoundments. Dynegy has already provided notices of intent to close a number of impoundments and under the Part 257 CCR Rule has only three and one half years remaining to complete closure for several of those impoundments. Given the integrated compliance planning needed to evaluate and address the complex technical compliance determinations and different compliance paths available under the Part 257 CCR Rule -- as well as the implications of other federal environmental rules affecting surface impoundments at power generating facilities, such as the effluent limitations guidelines (ELG) rule -- the state program must facilitate and not interfere with implementation efforts to meet the Part 257 CCR Rule.

Ultimately, our ability to comply with the Part 257 CCR Rule will, in large part, be dependent on Agency implementation of Part 841 in a manner that is consistent with the Part 257 CCR Rule requirements. Additional onerous state program requirements, including needless duplicative requirements and/conflicting standards, will only interfere with development and

implementation of Part 257 CCR Rule compliance plans, jeopardize the ability to timely comply with the Part 257 CCR Rule requirements for CCR surface impoundment closure, and potentially cause lengthy delays in action concerning CCR surface impoundments in Illinois.

Finally, as the Board notes, there are a number of ongoing legal actions and administrative activities which place into question the future scope and shape of the Part 257 Rule. The Agency's proposal will provide flexibility and allow IEPA to adapt to changing conditions and requirements while still providing the necessary structure to allow companies to comply timely with the Part 257 CCR Rule, including completion of their already initiated closures. As a result, Dynegy urges the Board to adopt the Agency's proposal.

Dynegy also agrees with the Agency's suggestions that the permit program be adopted pursuant to Part 309 rather than Parts 807 or 813. Part 309 provides the necessary flexibility to integrate the requirements of the Part 257 CCR Rule quickly, whereas significant modifications would have to be made to the other parts to accommodate the different scope and structure of Part 257 decision-making. In addition, as has been stated repeatedly, CCW impoundments are not landfills and should not be regulated under the same rules. Indeed, the initial purpose of this process was to move the management and closure of CCW impoundments out of the scope of the landfill regulations where the Agency had originally and mistakenly placed them. It would be inconsistent with this purpose to place impoundments back in the landfill regulatory realm.

2. Dynegy's Vermilion facility is exempt from the Part 257 CCR Rule standards pursuant to 40 C.F.R. § 257.50(e), which states, "[t]his Subpart does not apply to electric utilities or independent power producers that have ceased producing electricity prior to October 19, 2015." *See also* 80 Fed. Reg. 21,302, 21,303 (April 17, 2014) (EPA final rule preamble stating

that "[t]he requirements of [Subpart D of 40 CFR Part 257] do not apply to: … (2) CCR units at facilities that have ceased producing electricity (or electricity and other thermal energy) prior to the effective date of the rule[.]") The Vermilion facility ceased producing electricity in November 2011.

Dynegy believes a Part 841 rule should apply only to CCR surface impoundments that are subject to the Part 257 CCR Rule. CCR surface impoundments not covered by the Part 257 CCR Rule are being addressed by the IEPA consistent with the Agency's priorities. Since the purpose of the Part 841 rule is to clarify the process that applies to the Part 257 CCR Rule impoundments and the process for state evaluation and approval of CCR surface impoundment closures, there is no need for a broader application of Part 841. We support IEPA addressing CCR surface impoundments not covered by the Part 257 CCR Rule on an as needed basis consistent with the Agency's priorities.

Although our Vermilion facility is exempt from the Part 257 CCR Rule, Dynegy continues to maintain the Vermilion facility's impoundments in a safe and structurally secure manner while we actively pursue opportunities for beneficial reuse of CCR from the facility's impoundments. Beneficial reuse of the Vermilion facility's CCR, such as mine reclamation in Illinois or use by a manufacturer as a raw material in production of bricks or concrete, offers the potential for multiple benefits. To the extent the beneficial use opportunities do not come to fruition or CCR would remain in any of the impoundments after beneficial use is exhausted, the impoundments would be closed in place with an impervious cap, consistent with proposed corrective action plans (CAPS) that we previously submitted to the Agency for the Vermillion facility's North and Old East impoundments in response to an Agency-issued violation notice. In addition, in response to a request by the Agency, we also performed a geotechnical study of

the embankments of the Vermilion facility's North and Old East impoundments, the results of which, as submitted to the Agency, demonstrate that the embankments meet or exceed Illinois Department of Natural Resources requirements for slope stability of dams and that the embankments were, in their present condition without additional armoring, in no danger of failure due to riverbank erosion for 80 to 100 years. Moreover, Dynegy continues to maintain the structural integrity of Vermilion facility's CCR impoundments, including performing annual inspections by registered professional engineers and routine visual checks of site conditions, and recently completing a riverbank stabilization project along a portion of the New East impoundment embankment. In February 2017, we received a request from the Agency to submit closure plan options for the North and Old East impoundments and additional riverbank stabilization options.

3. As a matter of law, the Board and IEPA only have that authority provided to it by the General Assembly. As we discussed in our Post-Hearing Comments dated October 20, 2014, pp. 11-12, the Illinois Environmental Protection Act ("Act") does not authorize either the Board or the Agency to require financial assurance for CCR facilities. It should also be noted that, other than its permitting authority, state law limits IEPA's ability to force companies to take certain actions. As the Board is well aware, only the Attorney General or the State's Attorneys can bring an action to require compliance with environmental requirements. This is also true regarding IEPA's ability to require corporate parents to meet the obligations of their subsidiaries, a result which is strongly disfavored in Illinois.

4. We support the Agency's previously stated position that the Part 841 rules do not require financial assurance. As explained previously, the Act does not authorize either the Board or the Agency to require financial assurance for CCR facilities.

While it is extremely unlikely that counties or municipalities possess the authority to require financial assurance to secure compliance with state regulatory requirements, proposing such an approach would be extraordinarily inconsistent with the stated goal of the Environmental Protection Act to "establish a unified state-wide program for environmental protection…." (415 ILCS 5/2(ii). Even assuming that the local authorities had such authority, ensuring that it was applied uniformly and providing a uniform system of review of local decisions would be in itself a herculean task. More than thirty years ago the General Assembly resolved the difficult debate regarding local control of landfill siting and requirements by revising the Act to create the current process of Board review of local siting decisions. Absent the level of contention associated with that debate, it is unlikely that the General Assembly or any of the participants would want to reopen that discussion to address financial assurance for CCR surface impoundments. In addition, cash strapped local authorities would not willingly accept this responsibility without additional funding, which is not likely to be forthcoming. As a result, relying on local authorities to require financial assurance appears not to be a positive approach to the issue.

5. We support the Agency's decision not to incorporate the Part 257 CCR Rule into the rulemaking. The work of conforming the federal rule to state rulemaking requirements would be an unnecessary and time consuming exercise with little benefit.

6. The WIIN Act cited by the Board specifically provides authority to USEPA to bring actions against facilities that do not comply with the Part 257 CCR Rule. Section 3 of the WIIN Act states that Part 257 applies to each CCR unit in a state unless they are subject to a state permit issued pursuant to a USEPA approved permit program. Section 4 authorizes USEPA to bring enforcement actions against non-complying CCR units to the extent that the non-

compliance amounts to "open dumping" under RCRA. Prior to the WIIN Act, RCRA had only allowed citizen suits (including by a State) to enforce the Part 257 CCR Rule, but the WIIN Act specifically authorizes USEPA to use enforcement authorities previously reserved for hazardous waste facilities. In addition, USEPA retains enforcement authority under RCRA section 7003 to abate conditions that may present an imminent and substantial endangerment to health or the environment.

7. Under 35 Ill. Adm. Code 309.241(a), IEPA has broad authority to require periodic reporting to document permit compliance. The Part 257 CCR Rule also requires owners/operators of CCR units to make publicly available, via posting on a company web page, large amounts of Part 257 CCR Rule compliance data. The Board should avoid imposing duplicative, needless and potentially confusing reporting requirements.

8. In responding to the Hearing Officer's question, we assume that it intended to reference Section 841.120(d)(9) of the IEPA July 15, 2016 Motion to Amend. It is not clear why a requirement to explain why a given remedy was chosen requires more details in order to get at the question of why a remedy was chosen. The question itself implies a discussion of the basis for a choice among options, such that further wording might be redundant. The rest of the section requires the submission of data documenting that the chosen remedy would achieve compliance with the standards. As a result, the Agency should be in a position to determine that the choice will result in regulatory and legal compliance.

9. Dynegy notes that these eleven factors included in section 841.500(c)(3) of the Agency's initial July 2014 proposal were proposed in the context of the Agency administering a stand-alone permit program independent of the then not final federal CCR rules. Dynegy

addressed this section specifically in its Post Hearing Comments (pp. 24 - 26) as both overbroad, and not compliant with Act requirements to address technical feasibility and economic reasonableness. Under the Agency's current proposal, facilities are still required to meet the now final Part 257 CCR Rule, while the Agency administers a permit program under existing rules to continue to implement impoundment closure and groundwater remedies consistent with the current GMZ program. In that light, we do not believe a long laundry list of factors need be expressly identified for the Agency to continue to implement a successful program.

10. No response provided.

11. IEPA has encouraged and most companies have performed groundwater monitoring around their impoundments for several years. Those facilities with identified groundwater issues that do not obtain GMZs are subject to enforcement actions and may have corrective action imposed on them, by the Board or a court. Those facilities without identified groundwater problems are unlikely to pursue corrective action.

12. Section 40 of the Act authorizes appeals of IEPA permit decisions only by applicants, except for RCRA permits for hazardous waste disposal sites, and NPDES and CAA permits. Allowing third party appeals of decisions involving CCR surface impoundments would require amending the Act.

13. No response provided.

14. Dynegy understands that briefing in *Utility Solid Waste Activities Group, et al. v. USEPA,* No. 15-1219, *et al.* (consolidated) (D.C. Circuit), has been completed and that the Court has not yet scheduled oral argument.

15. No response provided.

16. No response provided.

17. Prior to the Agency's submittal of its response to Hearing Officer's question #17, the Agency provided Dynegy an opportunity to review the Agency's draft list of CCR surface impoundments at Dynegy facilities in Illinois. We note that the Agency's draft list included surface impoundments that, in accordance with the Part 257 CCR Rule, we have determined are not subject to the Part 257 CCR Rule. Further, based on our review of the Agency's draft list, we note that it did not identify those of our CCR surface impoundments subject to the Part 257 CCR Rule at which we have initiated closure of the impoundment in accordance with the Part 257 CCR Rule. For the Board's information, since the Part 257 CCR Rule took effect in October 2015, Dynegy has provided notices of intent to close the following thirteen CCR surface impoundments in Illinois: Baldwin West Fly Ash Pond, Old East Fly Ash Pond and East Fly Ash Pond; Coffeen Ash Pond 2; Duck Creek Ash Ponds 1 and 2; Hennepin Ash Pond 2, Old West Ash Pond (Ponds 1 & 3) and Old West Polishing Pond; and Wood River Primary East Ash Pond, West Ash Pond 1, West Ash Pond 2E and West Ash Pond 2W. We continue to move forward in closing these CCR surface impoundments, which in accordance with the Part 257 CCR Rule must be completed within five years.

DYNEGY MIDWEST GENERATION, LLC
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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, Dynegy Response to January 20, 2017 Hearing Officer Order, copies of which are herewith served upon you, was filed electronically on March 6, 2017 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 March 7, 2017 to the parties listed on the foregoing Service List.

/s/ David L. Rieser