BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

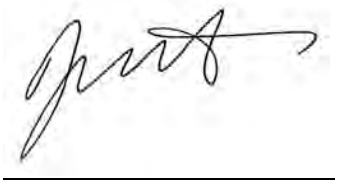
To: John Therriault, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

Tim Fox
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601
Tim.Fox@Illinois.Gov

Persons included on the attached
SERVICE LIST

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **ENVIRONMENTAL GROUPS' RESPONSE TO IEPA'S MOTION TO AMEND** copies of which are served on you along with this notice.

Respectfully submitted,



Jessica Dexter
Staff Attorney
Environmental Law & Policy Center
35 E. Wacker Drive, Suite 1600
Chicago, IL 60601
312-714-2835
jdexter@elpc.org

Dated: July 29, 2016

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

ENVIRONMENTAL GROUPS' RESPONSE TO IEPA'S MOTION TO AMEND

INTRODUCTION

Prairie Rivers Network, Environmental Law & Policy Center, Eco-Justice Collaborative and the Illinois Chapter of the Sierra Club (hereafter "Environmental Groups") offer this response to the Illinois Environmental Protection Agency's ("IEPA" or "Agency") July 15, 2016 Motion to Amend regarding the R14-10 rulemaking In the Matter of: Coal Combustion Waste (CCW) Ash Ponds and Surface Impoundments at Power Generating Facilities: Proposed New 35 Ill. Adm. Code 841. We ask that the Board deny the Agency's motion to amend this proceeding, and proceed to First Notice with the rule proposed by Environmental Groups on September 15, 2015.

Illinois needs its own comprehensive set of rules governing the fate of coal ash in our state. We are very concerned about leaving a legacy of coal ash throughout the state in communities that wish to re-purpose industrial land for new economic development and are worried about the contamination and stigma that leaking coal ash pits inflict on them. Illinois must finalize its own comprehensive rules to fill major gaps in the federal rule in order to best protect people's health, the well-being of numerous communities throughout the state, and the quality of our state's groundwater, lakes and rivers.

The public is very concerned about coal ash pollution in their communities. Over the last two years, over 5900 comments have been received from members of the public in this rulemaking. (See Case No: R2014-010PC, including PC # 4002 which incorporates similar comments received from 1819 individuals.)

As we detail below, Illinois EPA's Amended Proposal removes critical elements from the Agency's own July 2014 draft proposed rule, a proposal that came out of a week's worth of public hearings and testimony before the Board. Input from power companies and the Environmental Groups as well as Board members and staff went into the July 2014 draft. In September 2015 the Environmental Groups provided an Amended Proposal that harmonized the Agency's proposed rule with the 2015 federal rule governing coal combustion residuals and added other critical pieces to the Agency's July 2014 framework. The Environmental Groups' September 2015 proposal is currently the only proposal that meets the Agency's and the Board's responsibility to protect the public and the environment. We request that the Board give full consideration to the Environmental Groups' Amended Proposal alongside the Agency's Amended Proposal as it prepares a First Notice on a comprehensive rule to address coal combustion waste (CCW) ash ponds at power generating facilities in Illinois.

GAPS IN THE AGENCY'S PROPOSAL

The agency claims that the federal rule "encompasses all major substantive components in the Agency's July 2014 draft, and therefore, an independent Board rule covering the same topics is no longer necessary." (Motion at 4). However, there are significant gaps between the federal rule and the Agency's July 2014 proposal. Crucially, the July 2014 proposal contains provisions for a clear alternatives impact assessment and plan review guidelines, neither of

which are present in the federal rule or the current Agency proposal. Accepting the Agency's current proposal to amend the proposed rule would be taking a step back from the protections that the Agency had previously concluded were necessary after many hours of public hearings before the Board with input from both power companies and environmental groups.

The alternatives impact assessment, as proposed in Section 841.310(e)(6) of the Agency's July 2014 proposal, would provide assurance that a proposed remedy is the best means to clean up a coal ash site, considering impacts on both groundwater and surface waters. This language, also found in the Environmental Groups' Sept. 2015 proposal, is a crucial element that the Board should include in its rule. See Section 841.310 Corrective Action Plan found on pages 38-41 of the Sept. 2015 proposal.

Plan review guidelines, like those in Section 841.500 of the July 2014 proposal, provide guidance as to how the Agency should review plans submitted pursuant to this Part. The Illinois EPA proposed a list of 11 factors to guide consideration of corrective action plans, closure plans and post closure plans, including the location of CCW in the water table; the location of the CCW surface impoundment in a wetland, floodplain, fault area, or unstable area; the surface impoundment design; the institutional controls on the use of groundwater; the length of time to complete closure; the reduction of future releases; the potential need to amend or replace the closure plan; the effectiveness of alternatives; the type of long term maintenance; and the availability of treatment, storage and disposal service. Without this guidance, it isn't clear how the Agency will evaluate proposals at each site, which will lead to regulatory uncertainty and a loss of public and environmental safeguards. The Environmental Groups recommended additions to these sections to the IPCB in their July 2014 and Sept. 2015 proposals. We recommend the

language of Section 841.500 Plan Review, Approval, and Modification found at pages 61-64 in our Sept. 2015 proposal be included in the Board's First Notice rule.

CLARITY RE: STATE OPERATING PERMITS

The proposed use of state operating permits in the context is not clear. On page 8 of Illinois EPA's Motion to Amend ("Motion"), the Agency makes a number of promises about the role of the state operating permit: "The state operating permit will incorporate the minimum federal requirements, including groundwater monitoring, inspections, and annual reporting. The groundwater monitoring requirements contained in the operating permit must be at least as stringent as the federal rule." However, none of these requirements are present in the proposed rule. The language of the proposed rule only specifies the conditions for which a person could acquire a state operating permit, not what the content of the state operating permit will be. The rule references 35 Ill. Adm. Code 309, but none of the federal requirements are included in that section either. The proposed rule must specify the how the state operating permit will apply to CCW impoundments, and how the promises on page 8 of the Agency's Motion will be put into practice.

Additionally, the Motion states that "Illinois EPA proposes a state operating permit instead of a National Pollutant Discharge Elimination System Permit because not all CCW surface impoundments, especially ones that have been capped, will have a discharge". (Motion at 8). The language would seem to imply that the state operating permits will replace NPDES permits. State operating permits should not and cannot replace NPDES permits. Instead, both should be used when appropriate.

Lastly, the proposed rule outlines a set of facilities that will be exempt because they already have groundwater management zones and closure plans. However, to our knowledge, these sites do not have state operating permits. The Agency should clarify that these sites will require state operating permits.

IMPLEMENTING THE FEDERATL RULE

Illinois EPA states that they are not required to implement or adopt the federal rule: "Neither the Board nor Illinois EPA is required to implement or adopt the federal rule. *Id*. In the preamble to the federal rule, U.S. EPA states: 'the final rule establishes self-implementing requirements— primarily performance standards—that owners or operators of regulated units can implement without an interaction with regulatory officials.' 80 Fed. Reg. 21330." (Motion at 3-4).

However, the federal rule also states that "[i]n order to ease implementation [of] the regulatory requirements for CCR landfills and CCR surface impoundments, [US]EPA strongly encourages the states to adopt at least the federal minimum criteria into their regulations." 80 Fed. Reg. 21430

Therefore, as the US EPA recommends, the federal rule should be incorporated into the state rule. This provides a number of distinct advantages. First, many of the benefits of the federal rule are in the form of the reporting requirements that make information about the sites available to the public. Without incorporating the requirement of that reporting into the state rule, companies can get away with the bare minimum of reporting, making the entire reporting process useless (see e.g. discussion of Dynegy's reports on pages 6-8 of Environmental Groups' March 4, 2016 status report). Without inclusion of the federal requirements into the state rule, the

only enforcement mechanism present to improve reporting is citizen lawsuits, which is a large burden to attain improvements in relatively small details. Bringing a citizen suit could be cost prohibitive for low income citizens in many communities throughout Illinois where coal ash ponds are located.

Second, incorporating the federal rule into the state rule ensures a uniformity of scope between the two rules. The federal rule does not apply to all impoundments in Illinois, so while the Agency's most recent proposed state rule might make certain closure requirements uniform across all sites, those reporting requirements, and other benefits of the federal rule such as closure requirements, are not uniform (e.g. for impoundments at sites that no longer generate power).

If the Illinois EPA has concluded that their rule should apply to all surface impoundments containing CCW at active and inactive electric utilities, and their rule relies on the federal rule for full protection, then the Board should incorporate the federal rule into the state rule so that the public and the environment at all sites have equal protection. The Environmental Groups have proposed language to meld the federal rule into the draft state rule in our September 2015 proposal.

PUBLIC PARTICIPATION

The public participation opportunities offered in the proposed rule are insufficient. The Agency's latest proposal defines public involvement as posting a groundwater management application online for a minimum of 30 days, accepting public comments for a period of 30 days beginning the day the notice is first posted, then "taking any comments into consideration" with no record of response required. (Motion, Proposed Section 841.125). This is not meaningful

public involvement. For decades, state and federal agencies have established and implemented guidelines for incorporating real public input into important decisions affecting the public. At a minimum, these guidelines should be incorporated into the state rule.

The state operating permits and construction permits proposed in the rule involve no opportunity for public input whatsoever. When construction permits are intended to approve plans that lead to the closure of existing leaking ash pits, the plans approved by the Agency can have direct and significant long-term impacts on local communities. Once those plans are set in motion, any public comment in a subsequent approval process that a different closure or corrective action alternative should have been selected likely comes too late to make a difference. In many cases, massive deposits of toxic coal ash could be left in place, ultimately creating hazards for future generations. Long-term liabilities for maintenance, future clean-up, if required, or disaster response could become the responsibility of the public. For this reason, we believe that local residents and stakeholders have a right to authentic and meaningful public involvement as part of the decision-making process.

Furthermore, although the proposed rules offer an opportunity for public comment on a Groundwater Management Zone (GMZ) proposal, not every site will necessarily have a GMZ. If the public process is only connected to the Groundwater Management Zone application, then sites without a GMZ can establish a permanent coal ash legacy with absolutely no public input.

The Agency justifies the lack of public participation in state and construction permits by stating that “the Agency must take final action...within 90 days; this short time frame is not conducive to meaningful public participation.” (Motion at 8). This is not a valid excuse to exclude public participation, instead it is an indication that the Agency is using the wrong tools to construct this rule. An agency action that leaves millions of cubic yards of toxic material in a

community in perpetuity goes far beyond simply correcting a groundwater quality violation. It constitutes a significant action with the potential for long-term economic and environmental impact on local communities, and therefore needs meaningful public participation.

Conspicuously absent from the proposed rule is the ability for citizens to appeal the groundwater management zones, state construction or operating permit to the IPCB if the provisions are inadequate, or even blatantly inconsistent with applicable regulations.

At a minimum, site closures should require a public hearing process in conjunction with an evaluation of all viable alternatives. This is a reasonable requirement with recent precedent. For example, the North Carolina DEQ recently held a series of public hearings to gather citizens' input pursuant to the rating and closure of 33 coal ash impoundments.[1] The Virginia Department of Environmental Quality is holding hearings for permits addressing the closure of at least six coal ash impoundments owned by Dominion Virginia Power and Appalachian Power.[2]

FINANCIAL ASSURANCES

This latest Agency proposal again fails to include a requirement for financial assurances. As time has gone by, the uncertainties in the power generation market have only increased. IEPA has stated that a financial assurance requirement cannot be included in the Illinois coal ash rule, yet financial assurances are required under the administrative code for solid waste disposal sites. In their Oct. 20, 2014 post-hearing comments, the Illinois Attorney General's Office also provided input on this issue, stating "The People respectfully disagree with

[1] NC DEQ. "DEQ announces 14 public meetings on draft coal ash pond closure deadlines." January 8, 2016, *available at*: https://deq.nc.gov/blog/2016-01-12/deq-announces-14-public-meetings-draft-coal-ash-pond-closure-deadlines.

[2] Virginia DEQ. "Coal ash management in Virginia," *available at*: http://www.deq.virginia.gov/ConnectWithDEQ/EnvironmentalInformation/CoalAshPermits.aspx.

the assertion that there is no authority to require financial assurance. The Board has ample authority to require it, both under its general rulemaking authority and pursuant to Section 21.1 of the Act. It should, therefore, revise the proposed regulations to include the proposal made by the Environmental Groups to add a Subpart F for financial assurance." Again we ask that a financial assurance requirement be included in Illinois rules. The Environmental Groups' Sept. 2015 proposal includes language for a Subpart F: Financial Assurance. (Env. Groups' Sept. 15, 2015 Proposal at 65-66.)

PROMISES IN THE MOTION TO AMEND, NOT IN THE AMENDED PROPOSED RULE

Ultimately, the Agency's Motion to Amend contains several promises that the Agency will, at some future date, propose additional rules or take certain actions that are crucial to make the rule function as stated. These promises include updating the groundwater Class IV standards to match federal standards, changing the compliance point to be the waste boundary, and incorporating the minimum federal requirements into the state operating permit. These changes would improve the rule, but if they are not incorporated into the rulemaking, they are just empty words.

CONCLUSION

The comprehensive draft rule developed in 2014 was the product of untold hours of legal and technical analysis, seven days of formal hearings and carefully considered and debated input from industry representatives and environmental groups. IEPA requested a stay in the rulemaking process in order to assure that an Illinois rule would be in harmony with and

complement the federal rule. The Environmental Groups subsequently offered an approach that would harmonize the 2014 Agency proposal with the federal rule, while providing critical protections currently missing from the federal rule.

The Agency's Amended Proposal does not adequately protect the public or the environment. At a minimum, the state rule should cover pits at closed plants, provide financial assurances by the power companies responsible for creating the leaking coal ash pits found at dozens of sites across the state, require a thorough analysis of the best alternative for coal ash cleanup and closure, and create a full opportunity for citizens to participate in the decision-making on the fate of coal ash contamination in their communities. Additionally, the rule should make the federal rule requirements enforceable under the state rule.

We ask the Board to thoroughly review and consider the Environmental Groups' Amended Proposal of September 2015 alongside the Agency's recent Amended Proposal. The Board should take into account the discussion and input from a week's worth of hearings that went into the Agency's earlier July 2014 proposal upon which our September 2015 proposal is based. We request that the Board consider the issues we have raised now in response to the Agency's Motion to Amend as well as our earlier input, including our October 2015 Reply in Support of Motion to Reopen Proceeding, March 2016 Status Report and Testimony, and our July 2016 Status Report.

We respectfully recommend the Board proceed to First Notice based on the input it has received over the nearly three years that this rulemaking has been before the Board. We agree with the Agency that further testimony or a hearing is not necessary. We disagree that the record supports the Agency's scale-back of its July 2014 proposal. However, as this proceeding has

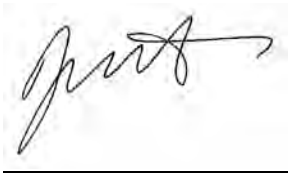
been a complicated one, if the Board has questions that it wants input on from the parties to this proceeding, we respectfully suggest that the Board pose them and request written responses.

Jessica Dexter
Staff Attorney
Environmental Law & Policy Center
35 E. Wacker Dr., Ste. 1600
Chicago, IL 60601
312-714-2835
jdexter@elpc.org

Dated: July 29, 2016

CERTIFICATE OF SERVICE

I, Jessica Dexter, hereby certify that a true copy of the foregoing **ENVIRONMENTAL GROUPS' RESPONSE TO IEPA'S MOTION TO AMEND** was served via email to the parties which have consented to email service and via United States Mail, postage prepaid, in Chicago, Illinois on July 29, 2016 upon the remaining parties on the service list below.



Jessica Dexter
Staff Attorney
Environmental Law & Policy Center
35 E. Wacker Dr., Ste. 1600
Chicago, IL 60601
312-714-2835
jdexter@elpc.org

SERVICE LIST

R14-10

Joanne M. Olson, Assistant Counsel
James Jennings, Assistant Counsel
IEPA
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
joanne.olson@illinois.gov
james.m.jennings@illinois.gov

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

Rick Diericx - Senior Director
Dynegy Midwest Generation, Inc.
1500 Eastport Okaza Dr
Collinsville, IL 62234
Aric.Diericx@dynegy.com

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

Office of General Counsel
Robert G. Mool
Illinois Department of Natural Resources

Walter Stone – Vice President
NRG Energy, Inc.
8301 Professional Place, Suite 230

One Natural Resources Way
Springfield, IL 62702-1271

Landover, MD 20785

Stephen Sylvester - Asst. Attny. Genl.
Office of the Attorney General
69 West Washington Street, Suite 1800
Chicago, IL 60602
ssylvester@atg.state.il.us

Amy Antoniolli
Schiff Hardin, LLP
6600 Willis Tower
233 South Wacker Drive
Chicago, IL 60606-6473
aantoniolli@schiffhardin.com

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

Ameren Services
One Ameren Plaza
P.O. Box 66149
St. Louis, MO 63166

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

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

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

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

Abby Allgire
Jennifer M. Martin
Antonette R. Palumbo
IERG
215 E. Adams St.
Springfield, IL 62701
apalumbo@ierg.org

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

Abel Russ
Environmental Integrity Project
1000 Vermont Avenue NW, Suite 1100
Washington, DC 20005
aruss@environmentalintegrity.org

Alisha Anker – V.P. Re. & Market Affairs
Prairie Power, Inc.
3130 Pleasant Run
Springfield, IL 62711

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

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

David Rieser

Elizabeth Quirk-Hendry – General Counsel

Much Shelist PC
191 North Wacker Drive, Suite 1800
Chicago, IL 60606
drieser@muchshelist.com

Susan M. Franzetti
Vincent R. Angermeier
Nijman Franzetti LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
sf@nijmanfranzetti.com
va@nijmanfranzetti.com

Tim Fox
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601
Tim.Fox@Illinois.Gov

Keith Schmidt – Director of Environment
NRG Energy, Inc.
211 Carnegie Center
Princeton, NJ 08540

N. LaDonna Driver
Jennifer M. Martin
Katherine D. Hodge
Heplerbroom, LLC
3150 Roland Avenue
Springfield, IL 62703
Katherine.Hodge@heplerbroom.com
LaDonna.Driver@heplerbroom.com
Jennifer.Martin@heplerbroom.com