

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF: )  
 )  
 )  
STANDARDS FOR THE DISPOSAL OF ) **R20-19**  
COAL COMBUSTION RESIDUALS ) **(Rulemaking – Land)**  
IN SURFACE IMPOUNDMENTS: )  
PROPOSED NEW 35 ILL. ADM. CODE 845 )

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**NOTICE OF FILING**

To: ALL PARTIES ON THE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board **Dynegy's Second Post-Hearing Comment**, copies of which are herewith served upon you.

Respectfully submitted,

/s/ Ryan C. Granholm

Ryan C. Granholm

Dated: November 6, 2020

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**Dynegy’s Second Post-Hearing Comment**

NOW COMES Dynegy Midwest Generation, LLC; Electric Energy Inc.; Illinois Power Generating Company; Illinois Power Resources Generating, LLC; and Kincaid Generation, LLC (collectively, “Dynegy”) by their attorneys, pursuant to 35 Ill. Adm. Code 102.108 and the Hearing Officer’s October 2, 2020 Order, and submits this Second Post-Hearing Comment. On October 30, 2020, Dynegy submitted its First Post-Hearing Comment, which outlined its proposed revisions to Part 845 (the “Dynegy Comment”). Dynegy has reviewed the post-hearing comments submitted by other rulemaking participants and offers this Second Post-Hearing Comment to respond to issues raised in those comments—specifically, issues raised by the Environmental Groups<sup>1</sup> and by the Illinois Environmental Protection Agency (“IEPA” or “Agency”).<sup>2</sup>

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<sup>1</sup> Throughout this comment, the term “Environmental Groups” will be used to refer collectively to the Environmental Law & Policy Center, Prairie Rivers Network, Sierra Club, and the Little Village Environmental Justice Organization.

<sup>2</sup> Dynegy also supports two proposals made by other rulemaking participants in their October 30, 2020 post-hearing comments. First, as noted in Dynegy’s First Post-Hearing Comment, it also supports Ameren’s suggestion that Part 845 specifically exclude units that ceased receiving waste before October 21, 1976—the effective date of the Resource Conservation and Recovery Act (RCRA). Dynegy First Post-Hearing Comment at 9 n.4 (Oct. 30, 2020); *see* Ameren Post-Hearing Brief at 22 (Oct. 30, 2020). Second, Dynegy supports Midwest Generation’s proposal that corrective action be triggered under Part 845 only upon detection of a constituent above an applicable groundwater quality standard in two consecutive quarterly sampling events. Midwest Generation, LLC’s Second Post-Hearing Comments at 6-9 (Oct. 30, 2020).

In Part I, Dynege highlights six categories of revisions recommended by the Environmental Groups in their Final Post-Hearing Comments (Oct. 30, 2020) (the “Environmental Groups Comment”) which the Board should reject for one or more of the following reasons: the change is unnecessary; the change is inconsistent with the Illinois Legislature’s mandate and/or IEPA and Board precedent; the change is unsupported by the record; the change would delay Part 845’s implementation.

In Part II, Dynege responds to certain issues raised by IEPA in its Final Post-Hearing Comments (Oct. 30, 2020) (the “IEPA Comment”). Dynege agrees, broadly, with IEPA’s criticisms of the testimony by the Environmental Groups’ witnesses Mark Hutson, Andrew Rehn, Scott Payne, and Ian Magruder. While Dynege disputes the Agency’s critique of testimony provided by its witnesses Cynthia Vodopivec, Dr. Lisa Bradley, and Dr. Rudy Bonaparte, it does not believe that IEPA’s critique undermines the substance of their opinions or the revisions Dynege proposed in its First Post-Hearing Comment. Therefore, in order to limit the scope and length of this Comment, in Part II, Dynege responds to only four specific issues raised in the Agency’s Final Post-Hearing Comment.

Finally, in Part III, Dynege provides one correction to its First Post-Hearing Comment, to clarify an issue flagged by IEPA in its Response to Final Post Hearing Comments (Nov. 6, 2020).

**I. Response to the Environmental Groups’ Final Post-Hearing Comment.**

**A. Part 845 Should Not Mandate Removal for Any Category of Impoundment.**

In Parts III.A&C of their comment, the Environmental Groups recommend that the closure alternatives analysis in Section 845.710 be short-circuited, mandating closure-by-removal in certain circumstances. This recommendation is contrary to the plain language of the Illinois Environmental Protection Act (the “Act”), U.S. EPA’s CCR Rule (40 C.F.R. §§ 257.50-

.107), IEPA's past practice, and the Board's precedent. Instead, as Dynegy and its expert witnesses have explained, the Section 845.710 closure alternatives analysis will account for all site-specific conditions and ensure that an appropriate closure is selected for each impoundment.

**1. The Illinois Legislature declined to mandate closure by removal.**

Mandating removal for any category of CCR surface impoundments would be contrary to Public Act 101-171. As codified in 415 ILCS 5/22.59(d) ("Section 22.59"), P.A. 101-171 explicitly requires a closure alternatives analysis for each closure conducted under Part 845 to determine what closure method is appropriate. Thus, if removal were mandated for any category of units it would render Section 22.59(d) superfluous in those instances, because the closure method would be pre-ordained before the closure alternatives analysis even begins. *See, e.g., People v. Parvin*, 125 Ill. 2d 519, 525 (Ill. 1988) ("[S]tatutes should be construed so that no word or phrase is rendered superfluous or meaningless.").

As witnesses for the Environmental Groups admitted, the Illinois Legislature considered—and rejected—a proposal ("Amendment 1") that would have required closure by removal under the same circumstances that the Environmental Groups argue should trigger removal under Part 845. Prefiled Answers of Andrew Rehn, Dynegy Qs. 3-4, pp. 7-8 (Sept. 24, 2020), Hrg. Ex. 17. Specifically, Amendment 1 would have required removal, *inter alia*, for all unlined units and all units that fail location restrictions (e.g., those located in floodplains). *Id.* at Dynegy Q. 5, p. 8; Amendment 1 at Section 15, Dynegy's Prefiled Questions for ELPC, PRN, and SC at App'x A (Sept. 10, 2020). The Legislature rejected Amendment 1, instead opting for a program in which closures are based on site-specific analysis. Section 22.59(d). Consistent with the statutory mandate, the Board, therefore, should reject the suggestion that closure-by-removal is automatically required in any circumstance.

Moreover, contrary to the Environmental Groups' suggestion, Illinois is no outlier in allowing site-specific decisions between closure-in-place and closure-by-removal. A number of other states also allow units to be closed-in-place, including Alabama, Georgia, Indiana, North Dakota, Oklahoma, Texas, and Utah.<sup>3</sup>

**2. U.S. EPA, IEPA, and the Board have all declined to require removal for CCR surface impoundments.**

As Dynegy's expert witnesses have noted, U.S. EPA found that closure in place can be as protective as closure-by-removal. 80 Fed. Reg. 21,302, 21,412 (Apr. 17, 2015). Like the Illinois Legislature and proposed Part 845, U.S. EPA opted to allow owners and operators the flexibility to choose the closure alternative best suited for each impoundment.

Both the Board and IEPA have also found that closure-in-place is protective of human health and the environment—including where an impoundment is in contact with groundwater or located in a floodplain. For example, the site-specific rulemaking for Hutsonville Ash Pond D, the Board found that removal was “not a viable option” (R09-21, Final Opinion and Order at 5 (Jan. 20, 2011)), despite the fact that some of the CCR in the impoundment was below the water table and the unit was located in a floodplain. R09-21, Statement of Reasons at 17 (May 19,

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<sup>3</sup> Ala. Admin. Code 335-13-15-.07(3)(a) (“Closure of a . . . CCR surface impoundment . . . must be completed either by leaving the CCR in place and installing a final cover system or through removal . . . .”); Ga. Comp. R. & Regs. 391-3-4-.10(7)(b) (incorporating the CCR Rule’s closure provisions); 329 Ind. Admin. Code 10-9-4(d) (“Coal combustion fly or bottom ash and flue gas desulfurization byproducts may be disposed of at a restricted waste site Type I without characterization testing, or at a restricted waste site Type II, III, or IV, if the following are completed . . . .”) and 329 Ind. Admin. Code 10-30-2 (allowing for closure in place of Type I units); N.D. Admin. Code 33.1-20-08-07(3)(a) (“Closure of a . . . CCR surface impoundment . . . must be completed either by leaving the CCR in place and installing a final cover system or through removal . . . .”); Okla. Admin. Code 252:517-15-7(a) (“Closure of a . . . CCR surface impoundment . . . must be completed either by leaving the CCR in place and installing a final cover system or through removal . . . .”); 30 Tex. Admin. Code § 352.1221(a) (incorporating the CCR Rule’s closure provisions); Utah Admin. Code R315-319-102(a) (“Closure of a . . . CCR surface impoundment . . . shall be completed either by leaving the CCR in place and installing a final cover system or through removal of the CCR. . . .”).

2009) (noting the presence of “saturated ash below the water table”); Rehn Prefiled Testimony at Attachment 37 (Aug. 27, 2020), Hrg. Ex. 16 (showing the unit located in the 100-yr flood zone). IEPA has also approved of closure-in-place for units with CCR in contact with groundwater and located in a floodplain—the Havana South Ash Pond and the Hennepin West Ash Pond system. IEPA Response to Board Questions for Second Hearing, Board Q.6, p. 4 (Sept. 24, 2020) (noting that Havana South Ash Pond contains CCR “constantly in contact with groundwater”); Hagen Prefiled Testimony at 16 (Aug. 27, 2020), Hrg. Ex. 34 (noting that CCR in Hennepin West Pond 3 is “typically saturated”); Rehn Prefiled Testimony at Attach. 36 (showing the Hennepin West Ash Pond to be in the 1% Annual Flood Hazard zone).

**3. Closure by removal is not always necessary when ash is in contact with groundwater or located in a floodplain.**

Part 845 is a rule of general applicability, which will apply to all “CCR surface impoundments” in Illinois. It would be inappropriate for such a general rule to mandate closure by removal where certain conditions exist, unless a demonstration is made that removal is always necessary in those circumstances to protect human health and the environment. No such demonstration has been made. Instead, even the Environmental Groups’ witnesses admit that closure by removal is not the only closure method that can be protective of human health and the environment where CCR is in contact with groundwater, a unit fails a location restriction, or a unit is located in a floodplain.

As proposed Part 845.710 recognizes, there are a range of possible closure options for CCR surface impoundments. Mr. Hutson agrees, acknowledging that site-specific conditions and characteristics must inform which remedial actions will be effective at each site. Hutson Prefiled Answers, Dynegy Q.7, p. 15 (Sept. 24, 2020), Hrg. Ex. 14 (“Site specific conditions are critical to successful remedial actions, especially if waste is proposed to be left buried in place

below the water table.”). These options are not limited to merely capping or removal. Instead, closure-in-place may be supplemented with a number of additional engineering measures, such as slurry walls, reactive barriers, and groundwater extraction systems. IEPA Second Supplement to Prefiled Answers, Dynegy Q. 88, p. 6 (Aug. 6, 2020), Hrg. Ex. 4.<sup>4</sup>

Partly as a result of these additional engineering measures, the Environmental Groups’ witnesses agreed that CCR in contact with groundwater, units failing a location restriction, and units located in a floodplain will not always pose a threat to human health or the environment:

- “Techniques such as construction of slurry walls to restrict interaction between groundwater and waste, or installation of wells or drains to lower groundwater levels could be effective, depending on site-specific conditions.” Hutson Prefiled Answers, Dynegy Q. 9, p. 15.
- “I assume that one could think of some scenario where leaving CCR in an unlined impoundment would be protective of groundwater quality.” *Id.* at Dynegy Q. 11, p.15. *See also id.* at Dynegy Qs. 15, 17, pp. 17 (agreeing that it is possible for some units located in floodplains and unstable areas to be capped in a way that is protective of human health and the environment).
- “I would therefore not say that coal ash in an unlined impoundment will always be in contact with groundwater within a floodplain.” *Id.* at Dynegy Q. 32, p. 21. *See also id.* at Dynegy Qs. 33-34, 64, pp. 22, 31 (agreeing that CCR in an unlined impoundment will not always come in contact with groundwater where it is located within five feet of the uppermost aquifer or perched groundwater zone).
- “I would therefore not say that coal ash in constant contact with groundwater will always result in an exceedance of a GWPS.” *Id.* at Dynegy Q. 38, p. 24. *See also id.* at Dynegy Qs. 35-37, pp. 23-24 (agreeing that groundwater protection standards will not always be exceeded where CCR is located in a floodplain or in intermittent or reoccurring, or constant contact with groundwater).

As Dynegy’s expert witness Andrew Bittner testified, modeling shows that “[e]ven for [impoundments] with intersecting groundwater conditions, [closure-in-place] can be more

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<sup>4</sup> Additionally, Dynegy’s expert witnesses Dr. Rudy Bonaparte and David Hagen both testified regarding additional engineering measures that may be used as part of closure. Bonaparte Prefiled Testimony at 6-7 (Aug. 27, 2020), Hrg. Ex. 31; Hagen Prefiled Testimony at 9-10 (Aug. 27, 2020), Hrg. Ex. 35.

protective of groundwater than [removal] because of the shorter time required to construct a cap as compared to the lengthier time required to excavate.” Bittner Prefiled Testimony at 20-22 (Aug. 27, 2022), Hrg. Ex. 37.

Illinois data confirms Mr. Bittner’s modeling. For example, using data from Dynegy’s Hennepin East and West Ash Pond systems, Mr. Hagen shows that simply removing CCR surface impoundments from service often substantially reduces constituent concentrations in groundwater, even for units in floodplains or in contact with groundwater. Hagen Prefiled Testimony at 15-21. Further, as IEPA has acknowledged, closure-in-place of the Havana South Ash Pond has achieved the existing Illinois groundwater quality standards, despite the unit’s contact with groundwater. IEPA Response to Board Questions for Second Hearing, Q.6, p. 4.

#### **4. Closure-by-removal has significant downsides.**

As all sides admit, removal carries real downsides, and therefore should not be mandated where it is not necessary to meet the closure performance standards. First, as the Environmental Groups have acknowledged, removal has potential health and safety risks. Transcript 65:11-12 (Sept. 29, 2020) (Rehn: “I also recognize that removing coal ash has its own risks.”). At a minimum, removal requires substantially more handling of CCR than closure-in-place, including excavating the CCR, de-watering it, transporting it to a landfill, and then transferring it to the landfill for disposal. This means additional exposure to workers, additional equipment, and additional vehicle air emissions. *See* Bittner Prefiled Testimony at 22-23.

Second, due to lack of onsite landfill capacity, removed CCR will often be transported offsite, creating potential safety hazards for the surrounding community. As Mr. Bittner explained, each excavation and transportation process could take more than a decade. *Id.* IEPA has also noted that “[t]he public has expressed concern about large amounts of CCR being transported through their communities and about the dangers associated with inhalation and

contact with CCR during transport.” IEPA First Supplement to Prefiled Answers, MWG Q. 81, p. 31 (Aug. 5, 2020), Hrg. Ex. 3. In fact, local officials provided a number of public comments encouraging the Board not to mandate removal, to avoid exposing their communities to the resulting huge volume of truck traffic. Public Comment Nos. 10, 11, 12, 30, 31, 32, & 53; Transcript 25:1-26:4 (Oct. 1, 2020).

The use of barges and trucks—as recommended by the Environmental Groups—is not a proven solution to the problem of CCR transportation, because the Environmental Groups have not provided information demonstrating which CCR surface impoundments and which landfills are accessible by rail and barge. *See, e.g.*, Prefiled Answers of Andrew Rehn, IEPA Q. 2(i), p. 5 (stating that Mr. Rehn “do[es] not know” whether there are available landfills near railways and navigable rivers). Even where barge or train access is available, these transportation methods would likely require significantly more handling of CCR to transfer the material into and out of the trains/barges. Shealey Prefiled Responses, ELPC, PRN, SC Q. 9(b), pp. 9-10 (Sept. 24, 2020), Hrg. Ex. 50. This would further expose workers to CCR and risk releases of CCR to air, land, and water.

Third, as U.S. EPA has recognized, removal is often significantly more expensive than other closure options. 80 C.F.R. 21,412 (Apr. 17, 2015). To avoid unnecessary costs and ensure that Part 845 is economically reasonable, the Board should not mandate removal in any particular scenario.

Finally, it should also be noted that the Environmental Groups’ arguments in favor of closure-by-removal are inconsistent with their critiques of the durability of final cover systems. The Environmental Groups argue at length that caps used to close CCR surface impoundments may degrade over time, due to natural forces and human activity. Environmental Groups

Comment at 9-10. But landfills use the same types of final cover systems as CCR surface impoundments. IEPA First Supplement to Prefiled Answers, Dynegy Q. 77, p. 54 (admitting that its proposed final cover system standards were based on regulations for landfills). Thus, if caps for CCR surface impoundments are prone to degrading, so are caps for landfills.<sup>5</sup> In fact, Mr. Hutson explicitly points to anecdotal evidence of human activity damaging landfill final covers. Environmental Groups Comment at 9-10. If cover deterioration is inevitable, as the Environmental Groups claim, there is no reason to excavate CCR from an impoundment and truck it across the state, only so it can be placed beneath a landfill cap that will degrade over time. Similarly, as IEPA notes, landfills are not prohibited from floodplains, so CCR removed from a surface impoundment in a floodplain “may very well” be placed in a landfill that is located in a floodplain. IEPA Final Comment at 11.

To avoid the worker safety, community exposure, and financial costs associated with closure-by-removal and the lack of additional environmental or health benefits, closure-by-removal in this rulemaking for any particular circumstance. Closure-by-removal is only appropriate where it is the method selected following the Section 845.710 closure alternatives analysis.

**5. Section 845.710 will ensure that closures are protective of human health and the environment.**

Finally, mandating removal is not required, because both IEPA and Dynegy’s expert witnesses agree that the closure alternatives analysis in proposed Section 845.710 will ensure that closures are protective of human health and the environment and will address the concerns raised by the Environmental Groups. IEPA First Supplement to Prefiled Answers, Dynegy Q.

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<sup>5</sup> However, IEPA has described final cover systems used on CCR surface impoundments as likely more stable than those used on landfills, with less post-closure settling. IEPA Prefiled Answers, CWLP Q. 18(b), pp. 133-34 (Aug. 3, 2020), Hrg. Ex. 2.

71, p. 53; Bittner Prefiled Testimony at 9-12. This site-specific process “closely parallel[s]” a number of other state and federal regulatory programs: the CCR Rule, RCRA Part 258 Subpart E (municipal solid waste landfills), and CERCLA. Bittner Prefiled Testimony at 7-8. As IEPA explained in its Post-Hearing Comment, Section 845.710 requires that all closures achieve the groundwater protection standards set forth in Section 845.600. IEPA Comment at 12. Because those groundwater protection standards are protective of human health and the environment, Section 845.710 ensures that closures will also be protective. *Id.*

The Agency has repeatedly noted that the Section 845.710 analysis is better suited than bright-line rules to determine the appropriate closure method for each site. *Id.*; Transcript, 123:10-124:5 (Aug. 12, 2020). IEPA has explained that many of the concerns raised by the Environmental Groups will be addressed in the Section 845.710 analysis, including:

Contact with groundwater	IEPA Pre-filed Answers, Response to ELPC, PRN, SC Q.3 to M. Shaw, p. 16 (Aug. 3, 2020).
Location in/near wetland	<i>Id.</i> , Response to ELPC, PRN, SC Q.6 to Melinda Shaw, p. 18 (Aug. 3, 2020).
Location in an unstable area	Transcript, 129:5-18 (Aug. 12, 2020).
Failure to meet structural stability requirements	<i>Id.</i> at 123:10-124:5; IEPA Pre-filed Answers, Response to ELPC, PRN, SC Q. 20 to Melinda Shaw, p. 23.
Location near a fault	IEPA Pre-filed Answers, Response to ELPC, PRN, SC Q.9 to Melinda Shaw, p. 19.
Seasonal variations in groundwater conditions	<i>Id.</i> , Response to ELPC, PRN, SC Q. 16(b) to D. LeCrone, p. 80.
Community concerns	Transcript, 25:7-16 (Aug. 12, 2020).
Time required to achieve the groundwater protection standards	IEPA Pre-filed Answers, Response to ELPC, PRN, SC Q.14(e) to A. Zimmer, p. 60 (Aug. 3, 2020).
Availability of transportation for removed CCR	Transcript, 229:20-230:4 (Aug. 13, 2020).

Therefore, to avoid a conflict with Section 22.59(d), ensure consistency with U.S. EPA and IEPA past practice and Board precedent, and avoid the costs associated with closure-by-

removal, the Board should rely on Section 845.710 to ensure that the appropriate closure is selected for each site, rather than mandating removal for any particular category of units.

**B. Dynegy Agrees with IEPA that Part 845's Modeling Provisions Should Not Be Revised.**

Relying on a post-hoc critique of IEPA-approved modeling for the closure of three CCR surface impoundments, the Environmental Groups argue that Part 845's modeling provisions should be revised. Dynegy agrees with the Agency that these revisions—including the development of a modeling guidance policy—would reduce the Agency's ability to adapt modeling to new developments, like additional site data or new modeling techniques. IEPA Final Post-Hearing Comment at 16. Further, as described below, the Environmental Groups' critique of prior modeling efforts were purely theoretical and the changes they recommend threaten Part 845's permit application deadlines.

In addition to the issues noted by the Agency, it is important to note that the review by the Environmental Groups' witnesses was limited in scope and did not demonstrate any clear harms. First, for Hennepin East, the witnesses admitted that they did not review all of the materials that were submitted to the Agency before the closure plan was approved. Payne and Magruder Prefiled Responses, Dynegy Q. 21, p. 25 (Sept. 24, 2020), Hrg. Ex. 20. Second, the witnesses did not review the available post-closure monitoring data when preparing their testimony. Payne and Magruder Prefiled Answers, Dynegy Q. 16, pp. 22-23. Therefore, they have not shown whether the alleged deficiencies have actually undermined the real-world effectiveness of the IEPA-approved closure plans in any meaningful way. Thus, their opinions are only theoretical critiques of IEPA's past practice in requesting and reviewing groundwater models.

Further, as with a number of their proposed revisions to Part 845, the Environmental Groups have not accounted for the timing implications of their proposals. Their witnesses admitted that they did not consider how their suggested modeling revisions would impact Part 845's timing and also agreed that implementing their suggestions could require Part 845's permit deadlines to be extended. Transcript 114:7-115:9 (Sept. 29, 2020). For example, it is not clear that IEPA will have time to develop modeling guidance or that owners and operators will have time to implement that guidance before making the first round of closure deadlines on January 1, 2022. Similarly, the additional modeling and modeling inputs could also slow the assessment process, threatening Part 845's permit application deadlines. For example, the Environmental Groups' witnesses admitted that their recommended revisions to the model calibration requirements to account for transient groundwater conditions "could make it take longer to calibrate [the model]." *Id.* at 100:4-9. They also conceded that the additional site characterization data they recommend be requested to support the model could take "one to two years" to collect. *Id.* 109:15-21 (Sept. 29, 2020). Therefore, to avoid delaying Part 845's implementation, Dynegy agrees with IEPA that the Board should reject the Environmental Groups' proposed revised modeling requirements.

**C. Existing Regulations Will Ensure Protection of Workers and the Community.**

The Environmental Groups claim that proposed Part 845 fails to adequately protect workers and communities, arguing that minimum site controls and air monitoring are required. But the prescriptive "solutions" suggested by the Environmental Groups are divorced from the site-specific features of each CCR surface impoundment and fail to account for the existing regulatory mechanisms that protect both workers and the surrounding communities.

First, the Environmental Groups argue that Part 845 should "specify minimum dust control measures to be required of all sites." Environmental Groups Comment at 62. But the

Environmental Groups have failed to present any testimony regarding exactly which control measures should be used, how effective those control measures are, or how much they cost. As a result, there is insufficient evidence in the record for the Board to develop new requirements on this issue. *Greer v. Illinois Hous. Dev. Auth.*, 524 N.E.2d 561, 581 (Ill. 1988). Further, the Environmental Groups' recommendation fails to account for the widely varying circumstances of each CCR surface impoundment and the variety of closure methods that will be used. For example, where closing-in-place, handling and transport of CCR will be substantially less, resulting in a lower risk of fugitive dust emissions. It is therefore inappropriate to impose prescriptive measures that may not be required for every site.

Second, the Environmental Groups fail to account for the numerous existing state and federal regulations that control the release of fugitive emissions and protect both workers and communities from exposure to CCR. The CCR Rule already requires fugitive dust plans for CCR surface impoundments—a requirement which proposed Part 845 mirrors. 40 C.F.R. § 257.80; 845.500. IEPA explains in its Post-Hearing Comment that OSHA also protects workers at all industrial facilities as well as corrective action and closure activities. IEPA Comment at 22. OSHA's regulations are comprehensive and specifically tailored to protecting workers from the risks present at a given site. As IEPA noted, by protecting workers, these OSHA rules “prevent[] the hazardous materials from traveling offsite in quantities that could impact the . . . surrounding community.” Prefiled Testimony of Lauren Martin at 2.

The Board is not in a position to provide a legal interpretation of the applicability or the scope of the OSHA regulations, which it did not promulgate. Nor is IEPA well-suited to administer those requirements. First Supplement to IEPA's Prefiled Answers, Dynege Q. 33(b), p. 44 (noting that IEPA does not currently administer any worker safety programs). Therefore,

the Board should reject the Environmental Groups' invitation to interfere in the existing OSHA regulatory scheme. Further, other state and federal programs regulate fugitive emissions, including Clean Air Act requirements and Illinois regulations. *See, e.g.*, 35 Ill. Adm. Code §§ 212.301-316.

Finally, as noted above, risks to workers are already implicitly included in the proposed Section 845.710 closure analysis—which Dynegy has recommended be made explicit in the final rule. Dynegy Comment at 10-11. Because the existing regulatory schemes are sufficient to protect workers and the community, the Board should not supplement Part 845's proposed worker protection measures with additional prescriptive requirements.

**D. Permitting Requirements and Public Comment Periods Cannot be Expanded without Extending Part 845's Deadlines.**

The Environmental Groups also argue for a substantial expansion of the permitting process, suggesting that many additional documents be submitted and public participation be expanded. These changes are not only unnecessary, but they will actually undermine Part 845 by slowing down the permit review process and delaying closures.

**1. The permit process should not incorporate all assessments, certifications, and plans.**

Substantively, the Environmental Groups ask for an expansion of the permit process by requiring owners and operators to submit seven additional assessments, certifications, and plans—as well as all “supporting documentation”—which IEPA would then be required to review and incorporate as enforceable conditions of Part 845 permits. Environmental Groups Comment at 74-76. IEPA notes that at least one category of assessments—structural stability assessments—will have regulatory oversight, as IDNR regulates dam safety. IEPA Comment at 9. If IEPA believed that its review was required for other plans and assessments, it would have proposed that they be submitted during the permit process. Instead, IEPA reasonably chose to

rely on the signed certification of state-licensed professional engineers. *See, e.g.*, 845.440(a)(2). This is the same mechanism that was selected by U.S. EPA for analogous provisions of the CCR Rule. *See, e.g.*, 40 C.F.R. § 257.73(a)(2)(ii). Dynegy agrees with IEPA and U.S. EPA that these certifications are sufficient.

Requiring IEPA to review, assess, and incorporate each of these assessments, certifications, and plans—as well as all “supporting documentation”—would require significant time and effort from the Agency and would slow down the permit process. As drafted, operating permit applications for impoundments that have not completed closure are due on September 30, 2021, just three months before the first round of closure applications are due on January 1, 2022. 845.230(d)(1); 845.700(h)(1). Therefore, causing a delay to the operating permit schedule by requiring IEPA to review additional materials could slow down the entire Part 845 permitting and closure process.

**2. Part 845’s public participation requirements are robust and should not be extended.**

Similarly, the Environmental Groups suggest myriad changes to Part 845’s public participation procedures, which would also require additional time to complete and are not necessary given all of the other measures in Part 845 that ensure robust and meaningful participation in the permit process. For example, they request that documentation supporting a tentative construction permit application be made available 30 days, instead of 14 days, before a public meeting is held. Environmental Groups Comment at 100. As a result, owners/operators would have to substantially complete their construction permit analysis two months before the permit deadline. Similarly, they request a fifteen-day extension to the public comment period once a draft permit has been issued. *Id.* at 94. As a final example, the Environmental Groups also request public comment on Alternative Source Demonstrations (ASDs). Comment at 89-91.

The same sort of timing concerns apply to these changes as the changes described in Part I.D.1 above. Moving up the pre-application public meeting will reduce owners/operators already limited time to complete permit applications. Increasing the post-application comment period will delay IEPA's permitting decision—threatening the timeline for decisions on subsequent applications.

Finally, allowing public comment on ASDs would require, at best, an extension of the Agency's time to respond to an ASD (845.650(d)(4)(A)) and the deadline to initiate corrective action. 845.660(a). The witnesses for the Environmental Groups have described this delay as “probably a month or two.” Transcript 41:5-9 (Sept. 29, 2020). Dynegy agrees with IEPA that, at worst, the delay associated with pausing for public comment on ASDs would be a deviation from the deadlines established in the CCR Rule. IEPA Comment at 13. At worst, this could result in U.S. EPA determining that Part 845 is “less protective” than the CCR Rule, meaning that it will not approve the program in full—a result which is “unacceptable” to the Agency and to the entities, like Dynegy, that will have to comply with both the CCR Rule and Part 845. *Id.*

**E. Proposed Part 845 Does Not Include Any Federal “Rollbacks.”**

Finally, the Environmental Groups argue that two key provisions—allowing consolidation of CCR during closure and allowing the use of temporary storage piles—represent federal “rollbacks,” which should not be included in the Illinois rules. Environmental Groups Comment at 106-109. But both of these provisions are appropriate elements of the proposed rule. First, consolidation enhances the protectiveness of Part 845 because it can be used to reduce the footprint of ash that is closed in place. Bittner Prefiled Testimony at 28; Bonaparte Prefiled Testimony at 13-15. There is no risk associated with consolidating CCR during closure where the added CCR is placed above the water table. Bittner Prefiled Testimony at 27-31 (Aug.

27, 2020); Bonaparte Prefiled Testimony at 13-15 (Aug. 27, 2020); Transcript 296:6-20 (Sept. 29, 2020).

Second, it is appropriate to allow for CCR storage piles to be included in the rule because storage piles are required for closure-by-removal. When CCR is excavated from an impoundment, it must be placed somewhere. To ensure the ash is appropriately de-watered or simply for logistical reasons, whether CCR is transported on-site or off-site, it will almost certainly need to be temporarily stockpiled rather than placed directly into a truck or other mode of transport. The use of temporary storage piles will therefore be described in the closure plan and/or the construction permit application materials for the impoundment. Transcript at 83:20-84:2 (Aug. 25, 2020). As a result, the use of temporary storage piles—including the projected time period over which they will be used—will be subject to Agency approval. *Id.* at 84:3-6. The Agency stated at hearing that it would not allow for the use of piles where they would allow an indefinite accumulation of CCR or where they would threaten human health and the environment. *Id.* at 84:7-15. The concerns expressed by the Environmental Groups are therefore unfounded.

**F. The Board Should Not Add CCR Landfills and Fill Areas to Part 845.**

The Environmental Groups also argue for the inclusion of CCR landfills and unconsolidated CCR deposits within Part 845. Environmental Groups' Final Post-Hearing Comment at 50-61. These areas, however, are outside the scope of the Legislature's mandate for this rulemaking, IEPA's proposal, and the evidence before the Board. Therefore, Dynegy agrees with IEPA that it is "necessary and appropriate" for Part 845 to regulate only CCR surface impoundments. IEPA Final Post-Hearing Comment at 9-10.

Public Act 101-171 created a new section of the Act, Section 22.59, titled "CCR surface impoundments." The Legislature considered—but rejected—a broader program ("Amendment

1”) which would have also regulated CCR landfills and fill areas. Prefiled Answers of Andrew Rehn, Dynege Qs. 4-5, pp. 7-8; Amendment 1 at Sections 5 & 15, Dynege’s Prefiled Questions for ELPC, PRN, and SC at App’x A (Sept. 10, 2020).

Instead, as IEPA has explained, the Legislature enacted Section 22.59(g), which “direct[s] the Board to adopt rules ‘establishing construction permit requirements, operating permit requirements, design standards, reporting, financial assurance, and closure and post-closure care requirements *for CCR surface impoundments.*’” Statement of Reasons at 7-8 (Mar. 30, 2020) (quoting Section 5/22.59(g)) (emphasis added). Section 5/22.59(g) includes eleven subparts that outline the required elements of Part 845—each of which relate *only* to CCR surface impoundments. Section 5/22.59(g)(1)-(11). Consistent with the statutory mandate, IEPA’s proposal applies only to CCR surface impoundments, not CCR landfills or beneficial use. Section 845.100(f)&(h). Nor does IEPA’s proposal regulate unconsolidated CCR fill areas. IEPA Response to Pre-Filed Questions, Board Q.2, p. 150. It would be inappropriate for the Board to expand Part 845 beyond the statutory mandate—particularly at this late stage in the rulemaking process.

As a result of the statutory mandate and the limited scope of IEPA’s proposal, the record before the Board lacks sufficient evidence for the regulation of landfills or CCR fill areas. IEPA does not appear to have assessed the risks, if any, associated with CCR landfills or fill areas. Nor did the Environmental Groups’ witnesses provide such a risk assessment. Tellingly, in arguing that additional regulation of landfills and fill areas is required, the Environmental Groups’ Comment relies heavily on newly-submitted documents that were not introduced as

testimony or exhibits in this proceeding.<sup>6</sup> In fact, during the hearings, the Hearing Officer repeatedly precluded the introduction of information outside the scope of IEPA's Part 845 proposal—including landfill regulations. Transcript 46:15-48:10 (Aug. 11, 2020) (sustaining objection to question about CCR surface impoundment fees as “outside of the 845 context”); Transcript 91:14-23 (Aug. 25, 2020) (sustaining objection to question about coal combustion byproducts); *id.* at 108:9-109:3 (sustaining objection to question about the slope of landfill cover systems).<sup>7</sup> Finally, as the Environmental Groups note, their proposal could implicate owners and operators of landfills, fill areas, and other CCR users who are not on notice of potential new rules and have not had an opportunity to submit evidence.<sup>8</sup> As a result of the lack of evidence regarding CCR landfills and fill and the lack of notice to potentially affected parties, the Board runs the risk of “entirely fail[ing] to consider an important aspect of the problem,” should it accept the Environmental Groups' invitation to regulate CCR landfills and fill areas in this rulemaking. *Greer v. Illinois Hous. Dev. Auth.*, 524 N.E.2d 561, 581 (Ill. 1988).

The Environmental Groups have not even provided specific proposed rule language for the Board to consider. *See* Environmental Groups Comment at 60-61. For that reason it is also inappropriate for the Board to open a sub-docket to address CCR landfills and fill. The Board decisions cited by the Environmental Groups in support of severing the docket do not support

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<sup>6</sup> *See* Environmental Groups Comment at 50-53 (citing primarily to new attachments and records from PCB 13-15).

<sup>7</sup> The Hearing Officer also precluded questioning into topics at issue in PCB 13-15, which the Environmental Groups cite in support of their fill argument. Transcript 135:10-137:16 (Aug. 13, 2020) (“I’ll sustain Ms. Gale’s objection just on the basis that this is pending – a pending matter before the Board. . . . Ms. Cassel, I believe you can ask this question in a more general manner and not related specifically to this case 13-15.”).

<sup>8</sup> The alleged “damage cases” the Environmental Groups cite include two facilities that are not located at or related to power plant operations. Environmental Groups Comment at 50; Attachment 2 at 39-41 (describing U.S. Minerals and Bunge Corp. sites).

their position because in each, actual rule language was presented to the Board. R08-09; *In the Matter of Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and the Lower Desplaines River*, Opinion and Order at 18 (Mar. 18, 2010) (noting that the initial proposal by IEPA contained the language that would become the basis of the sub-docket proposal); R99-18, *In the Matter of: Nonhazardous Special Waste Hauling and the Uniform Program*, Opinion and Order at 2 (Jan. 21, 1999) (noting that IEPA proposed rule language as part of its motion to sever the docket from R98-29). In fact, the Board's rules require that rulemaking proposals "must include . . . the language of the proposed rule" and a "statement of reasons supporting the proposal" before they can be accepted for hearing. 35 Ill. Adm. Code 100.202(a)&(b). With no such language or statement of reasons in the record here, it would be inappropriate to open a sub-docket at this time.

## **II. Response to IEPA's Final Post-Hearing Comment.**

While, as noted above, Dynege agrees with many of the critiques of the Environmental Groups' testimony in IEPA's Comment, Dynege disagrees with some of the statements in that comment, four of which are outlined below.

### **A. The Definition of "Inactive CCR Surface Impoundments" Should Be Corrected to Match the CCR Rule.**

As described in Dynege's Comment, the definition of "inactive CCR surface impoundment" should be revised to conform to the CCR Rule and ensure that "inactive CCR surface impoundments" do not include units that the Illinois Legislature did not intend to be regulated by Part 845. Dynege's Comment at 7-9. Both U.S. EPA and the Illinois Legislature chose to regulate inactive units only if they contain both CCR and liquids, and IEPA therefore erred by deleting the phrase "and liquids" from the definition of "Inactive CCR surface impoundment" in Part 845. *Id.*

IEPA's argument against this revision in its post-hearing comment misinterprets the preamble to U.S. EPA's CCR Rule. IEPA recognizes that CCR surface impoundment regulation under Public Act 101-171 is tied to regulation under the CCR Rule and it implicitly concedes that the federal definition of "inactive CCR surface impoundment" applies only to units that contain liquids. IEPA Comment at 31-32. But it relies upon a quote from the CCR Rule preamble to argue that U.S. EPA really meant to cover within that definition units that did not close "in accordance with" the CCR Rule, regardless of whether the unit still contained CCR and liquids as of October 2015. IEPA Comment at 34.

Aside from disregarding the definition of "inactive CCR surface impoundment" in the CCR Rule, IEPA also ignores key context for its quote from the CCR Rule preamble. The quote is from a paragraph in which U.S. EPA identified a subset of units that qualified as "inactive CCR surface impoundments" but nonetheless are not subject to all CCR Rule requirements because they were capped and dewatered "in accordance" with the CCR Rule "*within three years of the publication of this rule.*" 80 Fed. Reg. at 21,342 (emphasis added); *see also id.* at 21,489 (showing the rule language for 40 C.F.R. § 257.100(b)).<sup>9</sup> When the missing phrase is included in the quote and Section 257.100(b) is considered, it is clear that U.S. EPA was addressing an *exception* from the applicable requirements for units that would otherwise fit the definition of "inactive CCR surface impoundment." In other words, the preamble did not, as IEPA suggests, broaden the definition of "inactive CCR surface impoundment" to include units that do not

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<sup>9</sup> This rule provision was the subject of an appeal challenge, but as adopted in 2015 it provided an exception from many CCR Rule requirements for "inactive CCR surface impoundments" that "completed closure" and met certain other requirements before April 17, 2018. 80 Fed. Reg. 21,302, 21,489 ("An owner or operator of an inactive CCR surface impoundment that completes closure of such CCR unit, and meets all of the requirements of either paragraphs (b)(1) through (4) of this section or paragraph (b)(5) of this section no later than April 17, 2018, is exempt from all other requirements of this subpart.").

contain liquids and therefore do not meet the plain language of the definition. If anything, it narrowed that definition by creating an exception.

Further, IEPA's proposed reading creates an impossible scenario. To close "in accordance" with the CCR Rule, the rule requirements must exist and be known. Closure "in accordance" with the CCR Rule makes sense for closures after, but "within three years of publication of" the rule. But it was impossible to know of and comply with CCR Rule requirements before they were promulgated, which in this case occurred in October 2015. Thus, IEPA's flawed interpretation seems to mean that all units from which liquids and/or CCR were removed before October 2015 are covered units, even though they fail to satisfy the definition of "inactive CCR surface impoundment" because they did not still contain CCR and liquids. This cannot be.

Furthermore, the Agency's deviation from the CCR Rule (by changing the definition of "inactive CCR surface impoundment") could put Part 845 at risk for not being "as protective" as the CCR Rule. Forcing an old, former pond area to unnecessarily re-cap (or close by removal) could be less environmentally friendly as leaving the long inactive impoundment as is, especially if re-capping would require removing a forest. In other words, changing the CCR Rule's definitions might cause unintended environmental consequences, leading Part 845 to be less protective than the CCR Rule. Recognizing this precise concern, the Agency has already explained that it "has made as few changes to the language of Part 257 as possible, *especially pertaining to definitions . . .*" IEPA Comment at 10 (emphasis added). The Agency has further explained, it "has been frequently reminded to keep the language and function of Part 257 as similar as possible." *Id.* In defining "inactive CCR surface impoundment," the Agency and this Board should stick with the CCR Rule's definition.

**B. The Default Final Cover System Standards Should Be Reduced.**

As shown in Dynegy's Comment, the default final cover system standards in proposed Part 845 can and should be reduced, without reducing their effectiveness or protectiveness. Dynegy Comment at 4-7. IEPA has still offered no evidence to support its proposed default final cover system standards or to rebut Dynegy's proposed revisions. Dynegy Comment at 5-6. As Dynegy's witnesses have explained, IEPA's proposed requirements greatly (and needlessly) exceed those of the CCR Rule and caps that IEPA has previously approved and would impose substantial financial costs on owners and operators, with no environmental benefit. *Id.* at 5-7. Further, the excavation, transport, and placement of additional cover materials could create additional worker safety hazards and environmental harms. *Id.* at 7. Therefore, the un rebutted record overwhelmingly demonstrates that adopting IEPA's proposed default final cover system standards would "run[] counter to the evidence before the [Board]" and would be arbitrary and capricious. *Greer v. Ill. Hous. Dev. Auth.*, 524 N.E.2d 561, 581 (Ill. 1988).

Perhaps recognizing the weakness of its original arguments, IEPA's Comment responds to Dynegy's proposed revisions with a new "argument"—the use of landfill final cover system standards is "appropriate because a landfill has an engineered liner and a leachate collection and removal system." IEPA Comment at 36. Again, IEPA does not offer any support or evidence for this statement. Nor does it explain how this statement fits with its prior acknowledgment that landfills and CCR surface impoundments behave differently following closure (*compare* Dynegy's Comment at 4 *with* IEPA Comment at 35-36), or explain why the types of covers allowed by U.S. EPA in the CCR Rule (40 C.F.R. § 257.102(d)(3)), or by the Board and IEPA for the closure of CCR surface impoundments in the past (*see* 35 Ill. Adm. Code 840.126) should not also be allowed under Part 845.

IEPA's Response to Final Post-Hearing Comments (Nov. 6, 2020) also misses the mark. The Agency now suggests that Dynegey's proposal would allow owners and operators to install inadequate caps, but then supplement those caps with other engineering measures in order to achieve the groundwater protection standards. *See* IEPA Response to Final Post-Hearing Comments at 35. That is not what Dynegey proposed at all. Instead, Dynegey's proposed revisions would reduce the *minimum* final cover requirements to levels that are consistent with IEPA's past practice and far more stringent than those required by the CCR Rule. Dynegey Comment at 5-6. As Dr. Bonaparte notes, should site-specific factors suggest that a thicker cover than Dynegey's proposed minimum standards are required, that will be decided by the Section 845.710 closure alternatives analysis. Bonaparte Prefiled Testimony at 7-8. IEPA's latest argument also ignores the unrebutted modeling performed by Dynegey's expert David Hagen, which showed that reducing the final cover system requirements—*without* installing any additional engineering measures--would have no meaningful impacts on the amount of precipitation entering an impoundment after closure or the time required to achieve the groundwater protection standards. Dynegey Comment at 5.

Therefore, for the reasons stated here and in Dynegey's First Post-Hearing Comment, Dynegey's proposed revisions to the final cover standards are supported by the record, protective of human health and the environment, and will reduce the financial and other costs associated with final cover systems installed under Part 845.

**C. IEPA's New Surface Impoundment Water Elevation Monitoring Should Be Revised to Account for Dynegey's Proposed Daily Elevation Monitoring Requirement.**

In response to questions raised during the hearings, the Agency has offered suggested language in Section 845.650(b) regarding measurement of liquid elevations within each CCR surface impoundment. IEPA Comment at 78. While Dynegey, like the Agency, believes that

existing Section 845.620(b)(18) provides the Agency with the authority to request elevation data, if it is required, Dynegy recommends one revision to IEPA's proposed language, to better align with the recommendation in Dynegy's First Post-Hearing Comment that groundwater elevation data be collected daily from one up gradient and one downgradient well. *See* Dynegy Comment at 18-20. Collection of daily groundwater data from one up gradient and one downgradient well can be performed using a transducer, the data can then be downloaded when constituent sampling is collected (e.g., quarterly). *Id.* at 12-14. If the Board believes daily groundwater elevation data and a specific requirement to collect surface water elevation data from impoundments is appropriate, then Dynegy recommends revising IEPA's proposed language to account for the difficulties in collecting daily surface water elevation data from an impoundment. Dynegy, recommends that surface water elevation data from an impoundment should be collected at the same frequency constituent sampling is performed.

**Section 845.650(b):**

3) Measurement of water elevation within the CCR surface impoundment shall be conducted each time the groundwater elevations are measured pursuant to Section ~~845.650(b)(2)~~ 640(c) prior to dewatering for closure.

**D. Timeframes for Closure Should Be Revised to Better Align with the CCR Rule.**

IEPA's review of the language in U.S. EPA's recent final rule, 85 Fed. Reg. 53,516 (Aug. 28, 2020), led the Agency to conclude that additional revisions to Section 845.700(d)(2) are needed in order to better align it with Part 257 (as it exists at the time the record closes in this rulemaking). IEPA Comment at 79-83. Dynegy agrees that additional revisions are necessary and supports IEPA's proposal. To add clarity, Dynegy recommends the below revisions to IEPA's proposed language.

IEPA's proposed Section 845.700(d)(2)(B) states that "[i]f on or before November 30, 2020, the owner or operator of a CCR surface impoundment has submitted a *complete*

demonstration to U.S. EPA seeking an alternative deadline to cease receipt of waste and complete closure pursuant to 40 C.F.R. § 257.103(f), the deadline to cease receipt of waste shall be tolled until U.S. EPA issues a decision.” IEPA Final Post-Hearing Comment at 82 (emphasis added). For that language to be consistent with 40 C.F.R. 257.103(f) a “complete” demonstration must mean a demonstration that meets all of the regulatory requirements, not that U.S. EPA has issued a completeness finding by November 30, 2020.

Section 257.103(f) does not require a “complete” demonstration be submitted before November 30, 2020, nor does it provide that U.S. EPA would make a “completeness” determination by that date. Instead, it sets forth a four-step process for evaluating the completeness of a demonstration and obtaining authorization to extend the deadline to initiate closure.

Step 1: An owner/operator must submit a demonstration to U.S. EPA by November 30, 2020. 40 C.F.R. § 257.103(f)(3)(i).

Step 2: U.S. EPA evaluates the demonstration and may request additional information. *Id.* § 257.103(f)(3)(ii).

Step 3: U.S. EPA will either post a finding that the demonstration is incomplete on U.S. EPA’s website or publish a proposed decision to grant or to deny the request in whole or in part and a public comment period begins. *Id.* § 257.103(f)(3)(iii).

Step 4: U.S. EPA issues its decision on the alternative deadline to initiate closure. *Id.* § 257.103(f)(3)(vi).

40 C.F.R. § 257.103(f) does not specifically require U.S. EPA to issue a “completeness” finding, nor does it specify a date by which such a finding will or will not occur. To require such a finding by November 30, 2020 to toll the Part 845 cease receipt deadline could mean that a unit must cease receipt pursuant to Part 845 *before* U.S. EPA has even made a decision on the demonstration. Because no such deadline exists in 40 C.F.R. § 257.103(f), the lack of such a finding by U.S. EPA by November 30, 2020 could result in an impoundment being subject to the

Part 845 cease receipt date despite a completeness finding by U.S. EPA *after* November 30 (or the demonstration otherwise being complete). There is no reason to force an impoundment to cease receipt per Part 845 *before* U.S. EPA has even made a decision on the 40 C.F.R § 257.103(f) demonstration. As such, to add clarity, Dynege recommends “complete” be stricken from IEPA’s proposed Section 845.700(d)(2)(B).

Furthermore, IEPA’s proposal in Section 845.700(d)(2)(B) and (C) to require an impoundment to immediately cease receipt of waste is inconsistent with 40 C.F.R. 257.103(f) and results in conflicting deadlines. Section 257.103(f)(3)(ii) notes that all decisions (which would include an incomplete determination and demonstration denial) will specify a cease receipt date. IEPA has provided no rationale for why it would impose a different deadline than that required by U.S. EPA.

To add clarity and conformity with 40 C.F.R. § 257.103(f), Dynege recommends IEPA’s proposed Section 845.700(d)(2)(B) and (C) be revised as follows:

**Section 845.700(d)(2)(B)**

If on or before November 30, 2020, the owner or operator of a CCR surface impoundment has submitted a ~~complete~~ demonstration to USEPA seeking an alternative deadline to cease receipt of waste and complete closure pursuant to 40 CFR 257.103(f), the deadline to cease receipt of waste shall be tolled until USEPA issues a decision. If USEPA determines that a submission is incomplete, an owner or operator must ~~immediately~~ cease receipt of waste in accordance with the deadline set forth in USEPA’s determination and comply with all applicable deadlines of Section 845.700(d)(1).

**Section 845.700(d)(2)(C)**

If USEPA disapproves the requested alternative deadline to cease receipt of waste and complete closure, the owner or operator of the CCR surface impoundment shall ~~immediately~~ cease the receipt of waste in accordance with the deadline set forth in USEPA’s determination and initiate closure within six months of the USEPA denial of the extension and shall be subject to Section 845.760(a).

To add clarity, Dynege also proposes revisions to Section 845.700(d)(2)(H) to align with the Agency’s stated objective of exempting certain impoundments from the requirements of

Sections 845.700(g) and (h). As IEPA acknowledges, a 40 C.F.R. § 257.103(f) demonstration will include a detailed schedule describing all activities which must be completed, including the date the impoundment is expected to cease receiving waste and initiate closure. IEPA Comment at 80-81. As such, U.S. EPA's approval will include a schedule for closure, exempting the impoundment from Section 22.59(g)(9) of the Act and in turn the requirements of Section 845.700(g) and (h) *See* IEPA Comment at 81. Dynegy recommends revisions to IEPA's proposed Section 845.700(d)(2)(H) to clearly incorporate IEPA's stated intent that owners/operators granted extensions under Part 257.103(f) are not subject to Section 845.700(g) and (h). *Id.*

**Section 845.700(d)(2):**

(H) The owner or operator of the CCR surface impoundment with a USEPA-approved extension is not subject to Sections 845.700(g) or (h) and will not be given extensions of the timeframes for completion of closure under Section 845.760(c).

**III. Correction to Dynegy's First-Post Hearing Comment.**

Finally, Dynegy appreciates that the Agency identified a typo in Dynegy's First Post-Hearing Comment. IEPA Response to Post-Hearing Comments at 25 (Nov. 6, 2020). To clarify, the revisions that Dynegy recommends to Section 845.650(b) are listed below.

a) Monitoring Frequency

- 1) The monitoring frequency for all constituents with a groundwater protection standard in Section 845.600 and Calcium shall be at least quarterly during the active life of the CCR surface impoundment and the post-closure care period or period specified in Section 845.740(b) when closure is by removal, unless such frequency has been reduced pursuant to subsection 3.
  - A) For existing CCR surface impoundments, a minimum of eight independent samples from each background and downgradient well must be collected and analyzed for all constituents with a groundwater protection standard listed in Section 845.600(a) and Calcium no later than 180 days after the effective date of this Part.

- B) For new CCR surface impoundments, and all lateral expansions of CCR surface impoundments, a minimum of eight independent samples for each background well and downgradient well must be collected and analyzed for all constituents with a groundwater protection standard listed in Section 845.600(a) and Calcium during the first 180 days of sampling.
- 2) The groundwater elevation monitoring frequency shall be monthly. In addition to collecting groundwater elevation data in accordance with Section 845.640(c), daily groundwater elevation data must be collected from one monitoring well located upgradient and one well located downgradient of the CCR surface impoundment.
- 3) Five years after the completion of closure activities, the owner or operator of a CCR surface impoundment may request for approval a modification of the post-closure care plan to reduce the frequency of groundwater monitoring during the post-closure care period or period specified in Section 845.740(b) to semi-annual sampling by demonstrating all of the following:
  - A) That monitoring effectiveness will not be compromised by the reduced frequency of monitoring;
  - B) That sufficient data has been collected to characterize groundwater; and
  - C) That concentrations of constituents monitored pursuant to Section 845.650(a) at the down-gradient monitoring well(s) show no statistically significant increasing trends that can be attributed to the CCR surface impoundment.
- 4) If, after revising the post-closure care plan pursuant to subsection 3, a statistically significant increasing trend is detected, monitoring shall revert to a quarterly frequency.

#### **IV. Conclusion.**

Dynergy appreciates the Board's careful review of the voluminous record submitted in this rulemaking. For the reasons stated in its First Post-Hearing Comment and this Second Post-Hearing Comment, Dynergy requests that the Board approve its proposed modifications to Part 845 and reject the changes listed in this Second Post-Hearing Comment.

Respectfully submitted,

*/s/ Joshua R. More*

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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on this 6th day of November, 2020, I have served electronically the attached **Dynegy's Second Post-Hearing Comment**, upon the individuals on the attached service list. I further certify that my email address is rgranholm@schiffhardin.com; the number of pages in the email transmission is 34; and the email transmission took place today before 5:00 p.m.

Respectfully submitted,

*/s/ Ryan C. Granholm*

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