

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
)
STANDARDS FOR THE DISPOSAL OF) **R2020-019 (A)**
COAL COMBUSTION RESIDUALS) **(Rulemaking – Land)**
IN SURFACE IMPOUNDMENTS:)
PROPOSED NEW 35 ILL. ADM. CODE 845)

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 the **Dynegy and SIPC Joint Public Comment in Response to the Board's March 3, 2022 Order**, copies of which are herewith served upon you.

Respectfully submitted,

Bina Joshi

BINA JOSHI

Dated: June 3, 2022

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**Dynergy and SIPC’s Joint Public Comment in
Response to the Board’s March 3, 2022 Order**

NOW COME Dynergy Midwest Generation, LLC; Electric Energy Inc.; Illinois Power Generating Company; Illinois Power Resources Generating, LLC; and Kincaid Generation, LLC (collectively, “Dynergy”) and Southern Illinois Power Cooperative (“SIPC”), by their attorneys ArentFox Schiff LLP and pursuant to the Illinois Pollution Control Board’s (“Board’s”) March 3, 2022, order and proposal for public comment, and submit this Joint Public Comment in response to recommended rules that would modify 35 Ill. Adm. Code Part 845 and add a new Part 846 (the “Proposal”) submitted by the Environmental Law & Policy Center, Sierra Club, Prairie Rivers Network, and Little Village Environmental Justice Organization (collectively, the “Commenters”). Initial Comments and Recommended Rules, *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845 (Sub Docket A)*, R2020-019 (A) (Aug. 6, 2021) (hereinafter cited and referred to as “PC#10”). The Commenters’ proposed rule language is unnecessary because (1) Part 845 and other applicable Illinois regulations are protective of human health and the environment related to the four distinct issues presented for comment, and (2) the Commenters’ Proposal is wholly unsupported by environmental, technical, or economic information that would justify adoption of the proposed costly and burdensome requirements. For the reasons set forth more fully below, Dynergy and

SIPC do not support the Proposal and believe it does not merit further consideration or hearing. Accordingly, Dynegey and SIPC recommend that the Board dismiss the Proposal and close this Sub-docket R20-19A.

I. Introduction

a. Background

On February 4, 2021, the Board opened this sub-docket to the rulemaking proceeding establishing Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments, 35 Ill. Admin. Code Part 845 (“Part 845”) and identified “four distinct issues that merited further exploration:”

- (1) Historic, unconsolidated coal ash fill in the State;
- (2) The use of temporary storage piles of coal ash, including time and volume limits;
- (3) Fugitive dust monitoring plans for areas neighboring coal combustion residuals (“CCR”) surface impoundments; and
- (4) The use of environmental justice (“EJ”) screening tools.

Second Notice Order and Opinion at 2, *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845*, R2020-019 (Feb. 4, 2021) (hereinafter cited as “Second Notice Opinion”).

On May 6, 2021, the Hearing Officer entered an order stating that the Board sought “comments, information, and specific proposals on rule language from any interested party on these four issues.” Hearing Officer Order at 1, *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845 (Sub Docket A)*, R2020-019 (A) (May 6, 2021). The Order stated that upon receiving comments and related exhibits, the Board would “determine whether to proceed to first notice.” *Id.*

On August 6, 2021, Commenters submitted a filing consisting of some comments and language for “recommended rules.” *See* PC#10. PC#10 largely repeats information provided and

arguments made by Commenters in the initial Part 845 rulemaking,¹ while failing to meet the minimum statutory and regulatory requirements for a rulemaking proposal. Other comments were also submitted in the sub-docket, including comments opposing any rule additions or amendments. See Comment of Illinois Environmental Regulatory Group (P.C. #9), *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845 (Sub Docket A)*, R2020-019 (A) (Aug. 6, 2021); Comment of the American Coal Ash Association (P.C. #11), *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845 (Sub Docket A)*, R2020-019 (A) (Aug. 6, 2021).

On March 3, 2022, the Board presented the Proposal for comment during a 90-day period and indicated that at the close of the comment period, it would “reexamine the issues and determine whether to proceed to hearing.” Order of the Board, *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845 (Sub Docket A)*, R2020-019 (A) (Mar. 3, 2022).

On April 5, 2022, the Commenters filed a motion requesting that the Board allow for an additional 60-day window following the June 3, 2022 deadline to allow for responsive comments from participants. Dynegy and SIPC filed a joint response opposing the motion as untimely, unnecessary, and unduly burdensome on April 19, 2022.

On May 26, 2022 the Board granted the Commenters’ motion and set August 2, 2022 as the deadline for responsive public comments.

¹ While not a complete list of the rehashed information provided by Commenters, by way of example, see PC#10, fns. 24–29, 47, 48, 66–68, 70, 98, 118, 123, 129, 148–150, 153, and 155–158.

b. Summary of These Joint Comments

The Board should not proceed to hearing on or engage in further consideration of the Proposal. First, the Proposal is unnecessary because Commenters have not identified any environmental concerns addressed by the Proposal that are not already adequately addressed under Part 845 and other existing legal frameworks. Thus there is no need to proceed to hearing on, or otherwise further consider the proposed rule language.

Second, the Proposal does not meet the threshold procedural or substantive requirements for a hearing, including, significantly, the requirement for an adequate statement of reasons setting forth environmental, technical, and economic justification for the Proposal. Due to this lack of justification, the Proposal is both procedurally and substantively deficient. Stakeholders and other interested parties should not have to spend resources responding to a deficient rule proposal. This is particularly true given the heft of the Part 845 proceedings, which included six days of hearings where Commenters and others already presented testimony and evidence on the four subjects in question. There is no need for redundant proceedings. Proceeding further on a deficient proposal would place the burden on the Board, the Illinois Environmental Protection Agency (“IEPA” or the “Agency”), and stakeholders to do Commenters’ work for them, even though the Board’s rules places the burden squarely on the proponent of a rule to support its own proposed rule language. *See* 35 Ill. Admin. Code § 102.202.

In this filing, Dynegy and SIPC explain why the Board should not further consider the Proposal. Given the Proposal’s significant deficiencies, Dynegy and SIPC have not provided a full substantive response to the Commenters’ Proposal. Accordingly, Dynegy and SIPC reserve the right to provide additional, substantive comments on all relevant topics should a sufficient rulemaking proposal be submitted at a later date or additional proceedings on the Proposal

otherwise occur.

II. The Proposal is Unnecessary Because the Concerns it Seeks to Address Are Already Comprehensively Addressed Under Part 845 and Other Existing Legal Regimes

The Proposal is unnecessary because Section 22.59 of the Act, Part 845 of the Board's regulations and other existing laws provide comprehensive protection and regulation of the areas covered by the Proposal. Section 22.59 of the Act and Part 845 ensure that CCR surface impoundments will be closed, and CCR managed, responsibly and in a manner that is protective of workers, surrounding communities, and the environment. The Proposal sets out burdensome requirements that do not provide meaningful protection beyond that provided under existing law and may conflict with existing programs.²

a. Unconsolidated, Historic Coal Ash Fill is Regulated Under Existing Law

Unconsolidated, historic coal ash fill and any impact it may have on groundwater is already regulated under Illinois' water quality regulations, open dumping laws, site remediation program, and landfill regulations. *See e.g.*, 415 Ill. Comp. Stat. 5/21 (prohibiting open dumping of waste and placing limits on the storage and disposal of coal combustion waste); 35 Ill. Admin. Code Part 620 (setting groundwater quality standards ("GQS") that apply throughout Illinois; prohibiting causing, threatening, or allowing a release resulting in a violation of those standards; providing for groundwater monitoring zones and corrective action in the event in the event a source does cause an exceedance of GQS); 35 Ill Admin. Code Parts 740 & 742 (establishing a program to investigate

² While providing no evidence that existing law, including current Part 845, is not adequately protective, Commenters present a Proposal that will be disruptive to a process that is already underway under Part 845. Part 845 has been effective for more than a year, and there is no indication it is not protecting against the issues raised in the Proposal. Part 845 is even more stringent than the federal CCR rule. *See, e.g.* Second Notice Opinion at 5, 9. Potentially impacted facilities have already submitted operating permit applications and have submitted or will soon submit closure construction permit applications and final closure plans under Part 845. It makes little sense to disrupt the Part 845 process with a Proposal that will provide little to no environmental benefit and, as discussed below is not environmentally, technically or economically justified.

and remediate when there is a release, threatened release, or suspected release of hazardous substances); 35 Ill. Admin. Code Parts 810-815 (regulating development, operation, permitting, and closure of solid waste landfills).

Part 845 also provides protections. The unconsolidated, historic coal ash fill Commenters seek to discover and regulate through their Proposal is, by their admission, likely to be found (if at all) at the same properties containing CCR surface impoundments regulated under Part 845 and 40 C.F.R. Part 257 (the “federal CCR rule”). These properties have extensive groundwater monitoring systems in place to discover any exceedances of the Groundwater Protection Standards in 845.600. If exceedances are detected and the CCR surface impoundments are not the source, owners and operators are required to complete an alternative source determination (“ASD”), which is subject to IEPA review and approval and is placed on the facility’s public website for review and comment by members of the public. 35 Ill. Admin. Code § 845.650(e); IEPA Answers to Pre-Filed Questions at 38, *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845*, R2020-019 (Aug. 3, 2020) (noting information regarding other sources of CCR contaminants near CCR surface impoundments “could be part of the [ASD]” and whether such information were included “would be site specific”). Additionally, groundwater monitoring information under Part 845 and the federal CCR rule is publicly available. *See, e.g.*, 35 Ill. Admin. Code §§ 845.800(d)(14)–(16), 845.810(e). So, owners and operators have existing incentives to determine whether unconsolidated, historic fill is the cause of any exceedances and to engage in any necessary corrective action.

Thus, unconsolidated, historic coal ash is already regulated in Illinois.³ The Proposal seeks

³ Here, Dynegey and SIPC focus on Illinois requirements, but there are also a variety of federal laws focused on investigating and cleaning up unconsolidated, historic coal ash fill if it is posing a threat to the

to create a new program that would compete and overlap with these approved programs or render them obsolete. *See, e.g.*, PC#10 at 4, 7 (second guessing IEPA's Voluntary Remediation Program decision for Crawford). While Commenters may wish that IEPA did things differently, they ultimately do not show that any groundwater quality issues posed by unconsolidated, historic coal ash are not and could not be addressed under existing law. They further do not demonstrate how their proposal will not conflict with existing programs.

b. Part 845 Already Protects Against Potential Air, Groundwater, and Surface Water Impacts From Temporary CCR Storage Piles

Part 845 already has measures in place to ensure CCR storage piles are temporary and subject to control measures that protect against CCR releases into the air, groundwater, or surface water. First, by definition "CCR storage piles" may have only a "temporary accumulation" of CCR, and owners and operators must prove the accumulation is temporary through a record "such as a contract, purchase order, facility operation and maintenance plan, or fugitive dust control plan, documenting that all the CCR in the pile will be completely removed according to a specific timeline." 35 Ill. Admin. Code § 845.120.

Second, Part 845 already has control requirements to prevent a release of CCR from storage piles. For example, a CCR storage pile must be "designed and managed to control releases of CCR to the environment."⁴ *Id.* A variety of control measures are required during closure by removal, including, but not limited to, tarp, dust suppression measures like wetting, storage on a pad or liner meeting specific specifications, construction with "berms, where appropriate, to reduce run-on and

environment, such as the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*

⁴ Section 845.120 even provides examples of control measures, including "periodic wetting, application of surfactants, tarps, or wind barriers to suppress dust; tarps or berms for preventing contact with precipitation and controlling run-on/run-off; and impervious storage pads or geomembrane liners for soil and groundwater protection." 35 Ill. Admin. Code § 845.120.

runoff of stormwater to and from the storage pile, and minimize stormwater-CCR contact,” and groundwater monitoring “consistent with . . . Section 845.630 and approved by the Agency.” *Id.* § 845.740(c)(4)(B).

These requirements provide temporal limitations, controls, and oversight for CCR storage piles, making Commenters’ temporary storage pile proposal unnecessary.

c. Existing Regulations Protect Surrounding Communities From CCR Fugitive Dust

Several lines of protection under existing regulation ensure that communities surrounding CCR surface impoundments will not be adversely impacted by CCR fugitive dust. First, Part 845 already imposes comprehensive protections. This includes requiring fugitive dust plans, certified by a qualified professional engineer, with measures providing for the control of fugitive dust. 35 Ill. Admin. Code § 845.500(b). Several lines of oversight are also included to make sure the plan is effective. *Id.* § 845.500(b)(3) (“The CCR fugitive dust control plan must include a description of the procedures the owner or operator will follow to periodically assess the effectiveness of the control plan.”); IEPA Answers to Pre-filed Questions at 76–77, R2020-019 (Aug. 3, 2020) (noting the plans will be part of a facility’s operating record and reviewed by IEPA technical staff). Part 845 also requires that any risks associated with CCR fugitive dust at closure be considered during the closure alternatives analysis and, as noted above, requires additional control measures for CCR fugitive dust during closure by removal. 35 Ill. Admin. Code § 845.710(b)(1)(D) (requiring consideration of impact to the community, human health, and the environment from CCR fugitive dust in closure analysis); *id.* § 845.740(c)(1)(B) (requiring onsite CCR fugitive dust controls, as well as transportation controls to “minimize . . . safety concerns caused by the transportation of the CCR” and “limit fugitive dust from any transportation of CCR,” such as vehicle washing stations, covering CCR during transportation, and special waste hauler permits for CCR transportation).

Methods to ensure compliance and accountability are also built in to Part 845. *See, e.g.*, 35 Ill. Admin. Code § 845.500(b)(2)(A) (requiring fugitive dust complaints to be logged and submitted on a quarterly and annual basis, and requiring that log to include “all actions taken to assess and resolve the complaint”); 35 Ill Admin. Code § 845.740(d) (requiring a monthly report during closure by removal with information about CCR fugitive dust, including weather impacts, dust control measures and worker safety measures); Second Notice Opinion at 58 (finding the quarterly logs and annual report “will advance the purpose of Section 22.59 of the Act: ‘to promote a healthful environment, including clean water, air, and land, meaningful public involvement, and the responsible disposal and storage of coal combustion residuals, so as to protect public health and to prevent pollution of the environment of this State’”). As IEPA explained, an owner or operator who does not comply with Part 845’s CCR fugitive dust control measures could be subject to a violation notice and subsequent enforcement under 415 Ill. Comp. Stat. 5/31. IEPA Answers to Pre-Filed Questions at 111, R2020-019 (Aug. 3, 2020); Hearing Transcript at 190–91, *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845*, R2020-019 (Aug. 12, 2020).

Second, as explained in the Part 845 rulemaking, the Occupational Safety and Health Administration (“OSHA”) regulates the monitoring and mitigation of CCR fugitive dust. *See* 29 C.F.R. Part 1910, Subpart Z; IEPA Pre-Filed Testimony at 57–59, *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845*, R2020-019 (June 1, 2020) (describing substance evaluation, monitoring, hazard mitigation and other OSHA requirements relating to arsenic, beryllium, lead, cadmium and silica, as applicable to CCR fugitive dust). As IEPA explained, OSHA’s regulations to protect workers from CCR fugitive dust necessarily results in protection to surrounding communities.

Because the owners and operators are required by OSHA regulations to protect their site workers from air or dust hazards, after worker safety and health protective measures have been implemented, there should not be an exposure to the public or surrounding community. In other words, if the dust is controlled, it will not impact workers or the public.

IEPA Answers to Pre-Filed Questions at 106, R2020-019 (Aug. 3, 2020); *see also* IEPA Pre-Filed Testimony at 57, R2020-019 (June 1, 2020) (“Worker safety protections on site, by extension, prevents the hazardous materials from traveling offsite in quantities that could impact the health and wellbeing of the surrounding community”). Accordingly, the protection of workers under OSHA is indicative of the protection of the surrounding community.⁵

Finally, Illinois’ air regulations also protect surrounding communities from CCR fugitive dust. 35 Ill. Admin. Code Part 212 (setting visible emission and particulate matter emission requirements). These regulations prohibit causing or allowing emissions of fugitive particulate matter at an opacity greater than 30 percent, prohibit any visible emission of fugitive particulate matter from crossing the fence-line of a property, and prohibit transporting CCR without sufficient covering to prevent the release of particulate matter into the atmosphere. 35 Ill. Admin. Code §§ 212.123, 212.301, 212.315. Thus, safeguards are in place to ensure surrounding communities are not impacted by CCR fugitive dust.

d. EJ Areas Are Comprehensively Captured Using the Existing Delineation Process

The current Part 845 delineation of areas of EJ concern fulsomely captures potential EJ communities. Hearing Transcript at 189–90, R2020-019 (Aug. 13, 2020) (stating that IEPA’s

⁵ Notably, in PC#10, Commenters say the focus of their fugitive dust proposal is workers and surrounding communities. The State is limited in its ability to pass laws on an area of worker safety that is also governed by OSHA, even if it has the dual purpose of protecting the community. *See Gade v. National Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 102 (1992) (rejecting a pair of Illinois statutes setting licensing requirements for hazardous waste equipment operators for the stated purpose of protecting workers and the general public when OSHA had regulations covering training for workers and supervisors that may be exposed to hazardous waste).

method for delineating areas of EJ concern is “more inclusive” “in terms of the number of communities that are counted” than the Illinois Solar for All Program). Commenters claim only two examples, without evidence, of facilities that *may* not be appropriately captured as Category 3 under the current Part 845 area of EJ concern delineation process, but contrary to their statements, those facilities—located at Wood River and Waukegan—*have been designated as Category 3*. CTI Development, *IEPA Form CCR 2E: CCR Surface Impoundment Permit Application* at 95–97, https://illinois.ccrwoodriver.com/wp-content/uploads/sites/8/2022/01/CCR_Form_2E.pdf (CTI Development’s Operating Permit expressly classifying the ponds at Wood River as Category 3); Midwest Generation, LLC, *IEPA Form CCR 1: CCR Surface Impoundment Permit Application* at 7, 12, 32 http://3659839d00eefa48ab17-3929cea8f28e01ec3cb6bbf40cac69f0.r20.cf1.rackcdn.com/WAU_APE_IPIV.pdf (Midwest Generation’s Construction Permit application classifying both Waukegan’s East Ash Pond and West Ash Pond as Category 3). The one-mile buffer in the current delineation process helps ensure EJ communities are satisfactorily captured. *See* IEPA’s Answers to Prefiled Questions at 89–90, R2020-019 (Aug. 3, 2020) (IEPA “adds a one-mile buffer to each census block ground that meets the criteria for an area of EJ concern, *which minimized the chance of failing to identify communities that are close to meeting the screening criteria but do not*” (emphasis added).); Hearing Transcript at 195, R2020-019, (Aug. 13, 2020) (“[O]ne of the functions of that buffer is to provide a margin for error . . .”). Commenters provide no evidence that the Proposal would change the scope of facilities identified as Category 3 and, therefore, have any real impact. Finally, the federal government and other parts of the state government are working on comprehensive EJ strategies.⁶ The Board should avoid further action in this sub-docket

⁶ *See e.g.*, U.S. EPA, *EPA Administrator Regan Announces Bold Actions to Protect Communities Following the Journey to Justice Tour* (Jan. 26, 2022), <https://www.epa.gov/newsreleases/epa-administrator-regan-announces-bold-actions-protect-communities-following-journey>; U.S. DOJ, *Justice Department Launches Comprehensive Environmental Justice Strategy* (May 5, 2022), <https://www.justice.gov/opa/pr/justice->

that could end up conflicting with EJ law and policy that is being established under these federal- and state-level initiatives. Further action on the delineation of areas of EJ concern as part of this sub-docket is unnecessary and could cause duplication and confusion.

III. The Commenters' Deficient Rule Proposal Does Not Merit Further Consideration

a. Legal Background

The Illinois Environmental Protection Act (the "Act") and the Board's administrative rules prescribe prerequisites that must be met before a rule proposal can proceed to hearing. Under the Act, the Board must schedule a public hearing for consideration of a rule proposal "[i]f the Board finds that any such proposal is supported by an *adequate statement of reasons*." 415 Ill. Comp. Stat. 5/28(a) (emphasis added).⁷ A statement of the reasons supporting the proposal must include

a statement of the facts that support the proposal, and a statement of the purpose and effect of the proposal, including environmental, technical, and economic justification. The statement must discuss the applicable factors listed in Section 27(a) of the Act. The statement must include, to the extent reasonably practicable, all affected sources and facilities and the economic impact of the proposed rule.

35 Ill. Admin. Code § 102.202(b).⁸ The Section 27(a) factors that must be discussed in a statement of reasons, as applicable, include "existing physical conditions, the character of the area involved, including the character of surrounding land uses, zoning classifications, the nature of the existing air quality, or receiving body of water . . . and the technical feasibility and economic

department-launches-comprehensive-environmental-justice-strategy; IEPA, *Environmental Justice (EJ) Policy*, <https://www2.illinois.gov/epa/topics/environmental-justice/Pages/ej-policy.aspx>; Illinois State Legislature, HB4093, <https://www.ilga.gov/legislation/102/HB/PDF/10200HB4093lv.pdf>.

⁷ Section 28(a) includes other prerequisites to a hearing, as well, including a petition signed by at least 200 persons, a proposal that is not plainly devoid of merit, and a requirement that the proposal does not deal with a subject on which a hearing has been held within the preceding six months.

⁸ Section 102.202 includes a host of other requirements that are also not contained with the Proposal, including, but not necessarily limited to, (1) a synopsis of all testimony to be presented by the proponent at hearing; (2) a petition signed by at least 200 persons; (3) a written statement or certification that the proposal amends the most recent version of the rule; (4) an electronic version of the rule in Microsoft Word; (4) when any information required under Section 102.202 is not available, a complete justification for the inapplicability or unavailability. 35 Ill. Admin. Code § 102.202.

reasonableness of measuring or reducing the particular type of pollution.” 415 Ill. Comp. Stat. 5/27(a).

A deficient rule proposal is subject to dismissal. 35 Ill. Admin. Code § 102.212(a) (“Failure of the proponent to satisfy the content requirements for proposals under this Subpart or failure to respond to Board requests for additional information will render a proposal subject to dismissal for inadequacy.”); *see* Order of the Board at 2, *In the Matter of: Amendments to 35 Ill Adm. Code Subtitle C*, R1992-008 (Aug. 13, 1992) (refusing to proceed on a rule proposal for failure to provide all information required by Section 102.202); Order of the Board, *In the Matter of: Proposed Amendments to Chapter 4: Mine Related Pollution*, R1980-003 (Feb. 21, 1980) (refusing to authorize hearing on rule proposal that did not include, among other requirements, a “statement of reasons, facts, purpose and effect as required by Section 28”); *see also* Order of the Board, *In the Matter of: Chemung Site-Specific Rule Amendments to Water Regulation Part 304 by Dean Foods*, R1982-025 (Oct. 14, 1982) (finding petition for site-specific rulemaking—which must include Section 102.202 requirements—inadequate because statement of reasons did not address all necessary information); Order of the Board, *In the Matter of: Petition of Amerock Corporation, Rockford Facility, for Site-Specific Rulemaking Petition for Amendment to 35 Ill. Adm. Code 304.303*, R2001-015 (Feb. 21, 2002) (dismissing site-specific rulemaking petition due to deficiencies in proposal).

While the Board has the authority to conduct inquiry hearings, it would be inappropriate and unprecedented to hold an inquiry hearing on the merits of proposed rule language submitted to the Board without an adequate statement of reasons. Inquiry hearings are held to “gather information on any subject the Board is authorized to regulate” (35 Ill. Admin. Code § 102.112) and are meant to “provide a public forum where scientific, technical, and regulatory testimony and

other informational on a given subject can be presented on the record before the Board,” not to discuss the merits of a rule proposal.⁹ Order of the Board at 2, *In the Matter of: Natural Gas-Fired, Peak Load Electrical Power Generating Facilities (Peaker Plants)*, R2001-010 (July 13, 2000). Typically, inquiry hearings are held and then, when appropriate, *followed* by the submittal of an administratively sufficient rule proposal, including an adequate statement of reasons. *See, e.g., In the Matter of: Potentially Infections Medical Waste (PIMW): Treatment, Storage, and Transfer Facilities and Transportation, Packaging and Labeling (35 Ill. Adm. Code 1420, 1421, and 1422)*, R1991-20 (IEPA submitting proposed rule with full statement of reasons, economic impact study and meeting other administrative requirements *after* inquiry hearings); *In the Matter of: Diesel Vehicle Exhaust Opacity Limits*, R1990-020 (inquiry hearings held, after which the Board proposed a rule for First Notice); *In the Matter of: Emission Reduction Banking, Chapter 2: Air Pollution*, R1982-015 (inquiry hearing held on eight topics with the Board ultimately dismissing the docket when no regulatory proposal resulted from the hearings). The rare instances inquiry hearings were held on draft rule language are easily distinguishable.¹⁰

⁹ Significantly, the Part 845 rulemaking included six hearings, portions of which included scientific, technical, and regulatory testimony on the four issues that are the subject of the Proposal.

¹⁰ Dynegy and SIPC have found only three instances of the Board initiating an inquiry hearing on a rule language proposal without an adequate statement of reasons, and all are distinguishable from the Proposal here. Each instance related to language proposed by the Board or Agency, not a member of the public. One instance related to an identical-in-kind rulemaking, which is not subject to the rulemaking requirements of Title VII of the Act, including Section 28. Order of the Board, *In the Matter of: Illinois Contingency Plan*, R1984-005 (Mar. 21, 1984); *see also* 415 Ill. Comp. Stat. 5/13.3. In the second instance, the Board initiated inquiry hearings on six topics and had already promulgated regulatory language from California, noting that its intention was for the California regulatory language to “raise issues for discussion and comment, rather than constitute a formal proposal for rulemaking.” Order of the Board, *In the Matter of: Stage II Vapor Recovery Controls at Gasoline Dispensing Stations*, R1983-017 (Sept. 8, 1983). Notably, the California regulatory language that was the subject of the inquiry hearing was also less than half a page. *Id.* The third instance related to inquiry hearings held on an IEPA draft proposal, submitted by IEPA after it had withdrawn earlier proposals where “various problems were identified at merits hearings.” First Notice Opinion of the Board at 3–4, *In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills*, R1988-007 (Feb. 25, 1988) (discussing inquiry hearings in R1984-007). IEPA’s draft proposal in R1984-017 is not available on the Board’s electronic docket, and it is unclear whether it was accompanied by a statement of reasons; however, tellingly, subsequent proposals submitted

Holding a hearing on a deficient rule proposal deprives stakeholders and other members of the public of a meaningful opportunity to comment on a proposed rule. Without an adequate statement of reasons, the public does not have the information underlying the proposal that is appropriate and necessary for a response. *See* David P. Currie, *Rulemaking under the Illinois Pollution Law*, 42 U. Chi. L. Rev. 457, 470 (1975), *citing* *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393–34 (D.C. Cir. 1973) (“The essence of a meaningful opportunity to comment upon proposed regulations, as the District of Columbia Circuit held in *Portland Cement Association v. Ruckelshaus*, is to know the basis upon which the rule is proposed. Accordingly, section 28 of the Illinois [Environmental Protection Act] requires the Board in proposing a regulation to make available not only the text of the proposals but also ‘summaries of the reasons supporting their adoption.’”).

b. The Procedural Requirements for a Proposed Rule Have Not Been Met, Including the Requirement For an Adequate Statement of Reasons with Environmental, Technical, and Economic Justification

The Proposal is deficient in several aspects, including because it is not accompanied by “an adequate statement of reasons.”¹¹ Among other missing information and evidence, Commenters have not provided an environmental justification, technical justification (including a discussion of technical feasibility), or economic justification (including a discussion of economic impact or

by members of the public in that proceeding were. *See, e.g.*, Order of the Board, *In the Matter of: Permit Requirement for Owners and Operators of Class I and Class II Landfills and for Generators and Haulers of Special Waste*, R1984-017 (Apr. 18, 1985) (allowing Illinois State Chamber of Commerce submittal of alternative proposal with statement of reasons, waiving Section 28 requirement for 200 signatures).

¹¹ Here, Dynegy and SIPC point out just some of the deficiencies that exist in the Proposal. Ultimately, they should not have the burden of pointing out every flaw in a deficient rulemaking; rather the proponent of the rule should and does have the burden of establishing under the rules that it has submitted a sufficient, justified rule proposal. *See supra* footnote 8 for a discussion of some of the other deficiencies that exist.

reasonableness) for the Proposal. This lack of justification not only makes the Proposal statutorily and administratively deficient, it also highlights its substantive flaws and provides further support for why the Proposal is unnecessary.

i. Commenters Have Not Provided Environmental Justification for the Proposal

Commenters have provided no environmental justification for the Proposal. Most of the examples they provide of environmental concerns are irrelevant, non-existent, and unsupported by evidence. In no instance do they demonstrate a reasonable relationship between the Proposal and a necessary environmental benefit. For example:

- Unconsolidated, Historic CCR Fill: Commenters provide no evidence that proposed Part 846 is necessary to address any environmental risk. The Illinois Legislature raised and rejected the idea for a broader program to regulate CCR landfills and fill areas when adopting the statute directing the regulation of CCR surface impoundments (415 Ill. Comp. Stat. 5/22.59). *See* Amendment to S.B. 9 (Ill., Mar. 15, 2019), <https://www.ilga.gov/legislation/101/SB/10100SB0009sam001.htm>. The United States Environmental Protection Agency (“U.S. EPA”) also rejected the regulation of historic CCR landfills, which by definition includes unconsolidated, historic coal ash fill, under the federal CCR rule, finding there was no evidence they pose a risk or require further regulation. *See Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities*, 80 Fed. Reg. 21302, 21342 (Oct. 14, 2015) (“[T]he requirements of this rule do not apply to inactive CCR landfills—which are CCR landfills that do not accept waste after the effective date of the regulations. The Agency is not aware of any damage cases associated with inactive CCR landfills, and as noted, the risks of release from such units are significantly lower than CCR surface impoundments or active CCR landfills.”). The unconsolidated, historic coal ash examples Commenters cite to in PC#10 are irrelevant and do not provide an environmental justification for their Proposal because they relate to situations of alleged contamination that are speculative or have already been dealt with voluntarily or through enforcement under existing programs.^{12,13} PC#10 at 2–7. They also largely rely upon information from U.S. EPA’s

¹² *See supra* Section II for discussion of existing legal regimes governing risks from unconsolidated, historic coal ash fill.

¹³ For example, the Midwest Generation coal plants were subject to enforcement for claimed violation of Part 620 and existing prohibitions on pollution under Illinois law; Crawford was subject to clean up under the Illinois Site Remediation Program and ongoing IEPA oversight; no evidence is presented that potential groundwater contamination at Hennepin was caused by unconsolidated, historic coal ash fill (or that GQS continue to be exceeded); Ameren Coffeen/White & Brewer has been subject to IEPA oversight, county health inspector oversight, and a federal lawsuit; and Commenters also fail to mention that the coal ash landfill at the Marion Plant is subject to regulation under 35 Ill. Admin. Code Part 811 and that a closure plan for the landfill under Part 811 has already been prepared and submitted to IEPA.

compendium of damage cases compiled for the federal CCR rule (*see* PC#10 at 5–7), but that is the very information U.S. EPA relied upon in its federal CCR rulemaking to conclude that there were not any “damage cases associated with inactive landfills” and that such sources, including unconsolidated, historic coal ash fill, pose minimal risk. *See* 80 Fed. Reg. 21302, 21342.

- Temporary Storage Piles: Commenters cite to no examples or other evidence of temporary CCR storage piles in Illinois actually causing a detrimental impact to air quality, groundwater, or surface waters. As described above, Part 845 already provides temporal limitations, control measures, and oversight of CCR storage piles, and Commenters provide no evidence of how the current requirements are deficient in protecting against air, groundwater, and surface water impacts. Instead, they rely on examples of piles located on unlined surfaces and not subject to the requirements in Part 845.¹⁴ Commenters also do not take into account potential negative environmental impacts from their Proposal, such as the fugitive dust that may be created from moving CCR in storage piles to conduct their proposed quarterly liner and pad inspections. PC#10 at 14.
- CCR Fugitive Dust: Commenters provide no evidence of environmental risks or concerns related to fugitive dust from a CCR surface impoundment operating or closing under Part 845 or the federal CCR rule. They point to no evidence demonstrating offsite impacts of CCR fugitive dust from Part 845 facilities. Examples of risk from fugitive dust provided in PC#10 relate to (1) uncontrolled CCR fugitive dust (*i.e.* CCR not subject to a fugitive dust plan and other requirements under Part 845) and (2) incidents that occurred before the effective date of the federal CCR rule or Part 845.¹⁵ The examples provided also relate to worker exposure to CCR fugitive dust—an area governed exclusively by OSHA—and do not relate to or provide evidence of risks posed to surrounding communities. *See* PC#10 at 17–19.
- EJ Delineation: Commenters provide no evidence that additional facilities would be included as Category 3 based on their proposed revisions to the area of EJ concern delineation process.

¹⁴ The Commenters misleadingly cite to determinations about unlined and unregulated short-term piles of coal cinders to argue that existing Part 845 requirements for CCR storage piles are inadequate. Their reliance, for example, on the Interim Opinion and Order of the Board in PCB 2013-015 (“Interim Order”) is misplaced. First, the Interim Order did not conclude that CCR pollutants were carried from any of the sites at issue through cracks in liners to surface waters. *See generally* Interim Opinion and Order of the Board, *Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment v. Midwest Generation*, PCB 2013-015 (June 20, 2019). Second, the Interim Order discussion Commenters cite relates to ash cinders stored directly on land, not on a storage pad or liner regulated by Part 845 and, therefore, does not support a conclusion that temporary CCR storage piles regulated by Part 845 would have an adverse impact on groundwater. *Id.* at 42.

¹⁵ For example, the U.S. EPA Fugitive Dust Screening Assessment and 2014 Risk Assessment the Commenters cite in support of the idea that CCR fugitive dust could lead to exceedances of the national ambient air quality standards rely on modeling from uncontrolled CCR fugitive dust. None of the other examples cited by Commenters—U.S. Minerals, AES, and Kingston TVA—relate to CCR fugitive dust from operating or closing CCR surface impoundment subject to the requirements of Part 845 or even the federal CCR rule (which imposes fugitive dust control plan requirements under 40 C.F.R. § 257.80 similar to that of Part 845).

Even if additional facilities would be included as Category 3, it would have very little practical impact.¹⁶ Two deadlines for closure construction applications have already passed, including the one for Category 3 sources. 35 Ill. Admin. Code § 845.700(h). The final deadline is coming up next year. *Id.* So, even if additional facilities are identified as Category 3, those facilities have already submitted their applications or will be doing so fairly soon.

ii. Commenters Have Not Provided Technical Justification for the Proposal

The Proposal lacks technical justification and was not accompanied by a discussion of its technical feasibility. For example:

- Unconsolidated, Historic Coal Piles: Commenters have provided no information on the technical feasibility of owners and operators performing the extensive monitoring and closure requirements included in proposed Part 846. As discussed above, they do not provide technical support for why such CCR is not or cannot be addressed under existing laws.
- Temporary Storage Piles: Commenters have provided no technical basis for placing what is an arbitrary three month limitation on CCR storage piles.¹⁷ They also provide no evidence the proposed three month time frame and related volume limitation are technically feasible or will allow for closure of CCR surface impoundments within the timeframes required under Part 845. They additionally provide no evaluation of or evidence related to the feasibility of the quarterly inspection requirements of CCR storage piles they propose. Finally, they provide no technical support for how groundwater, surface water, or air impacts from temporary CCR storage piles are not addressed under existing requirements, as described above.
- CCR Fugitive Dust: Commenters have provided no technical justification for their fugitive dust proposals, including no technical basis for their proposals regarding the number of monitors to be used, the frequency of monitoring, and the parameters to be used for the proposed monitoring. They similarly provide no evidence on the use and effectiveness of the GPS-enabled video cameras they propose be added to vehicles transporting CCR. They also provide no technical information to support their proposed one-size-fits-all monitoring requirement when, as the Board has recognized, fugitive dust concerns at every facility may be different. Second Notice Opinion at 57 (explaining with respect to fugitive dust plans “requiring ‘one-size-fits-all’ dust control measures for every CCR surface impoundment site is not supported by this record. Instead, allowing the owner or operator to tailor the plan’s control measures to facility-specific conditions, including the type of work being done, and

¹⁶ The only Part 845 requirement potentially impacted by the area of EJ concern delineation process is the timing for submittal of closure construction permits, including final closure plans. 35 Ill. Admin. Code § 845.700.

¹⁷ Without citing to a single piece of evidence, Commenters speculatively say “[a] maximum volume equal to the amount of CCR that can reasonably be expected to be excavated from a CCR impoundment over three months is an appropriate, reasonable approach for limiting the volume of temporary CCR piles.” PC#10 at 12. Again, without any evidence they say “[t]hree months’ accumulation reasonably balances industry’s need for flexibility with the public need for effective pollution risk management.” *Id.* Conclusory statements do not establish technical justification.

having that plan [qualified professional engineer] certified as compliant, offers a better way to protect workers and nearby communities.”). They further do not provide technical support demonstrating that any off-site fugitive dust impacts from facilities regulated under Part 845 cannot be addressed under the existing fugitive dust control requirements, described above.

- EJ Delineation: Commenters provide no technical basis for their proposal to use a 3-mile radius around the census block when delineating areas of EJ concern. They further recommend the Board “consult with the EJ Commission on the best methodology and mapping tools to utilize for this rulemaking” and collect input from other stakeholders (PC#10 at 35), acknowledging they do not have a fully justified proposal.

iii. Commenters Have Not Provided Economic Justification for the Proposal

Finally, the Commenters have not provided any economic justification for the Proposal, including information regarding its economic impact or reasonableness. For example:

- Unconsolidated, Historic Coal Ash: Commenters provided no information regarding the costs that may be associated with the extensive monitoring, closure, and permitting requirements in their proposed Part 846 regulations on unconsolidated, historic coal ash. They further provide no information regarding the costs to administer their proposed Part 846 program.
- Temporary Storage Piles: There is no information provided regarding the costs associated with the proposed temporary storage pile rules, including the costs to inspect liners and pads or the costs associated with a three month volume and temporal limitation on CCR storage piles.
- CCR Fugitive Dust: For the proposed fugitive dust rules, Commenters throw out “likely” costs to install, operate, and maintain the monitors they propose but do not provide a single citation or any evidence or basis to support those numbers. PC#10 at 21. Again, a conclusory statement without support does not provide the required justification. No information is provided on the various other costs that would be imposed by the proposed CCR fugitive dust requirements, including, but not limited to, the costs for developing monitoring locations, network systems to record and handle the data, data acquisition and handling, quality assurance and quality control procedures, and video camera installation and monitoring. Similarly, no information is provided on costs for the proposed recordkeeping, reporting, development of mitigation plans, or modeling.
- EJ Delineation: For the EJ portion of the proposal, Commenters have provided no information on how, or if, the Proposal would change the scope of Category 3 facilities, as noted above. They, relatedly, provided no evidence of the economic burden owners or operators of a potentially impacted facility might face as a result of a construction permit deadline change that could result from re-categorization.

c. The Board Should Not Initiate a Hearing, and Should Not Expend Further Resources On the Proposal

The administrative process exists for a reason. Proceeding to a hearing now, on an

inadequate rule proposal, is unfair to stakeholders and other members of the public who may have an interest in the proposed rule. They should have all of the information related to the Proposal required by statute and rules to respond to, rather than spending time and resources guessing about what relevant information might exist and responding to the substance of a deficient and unsupported proposal.

Ultimately, holding a hearing, or engaging in further consideration of the Proposal, would not just be administratively improper, it would also be inefficient and unduly burdensome. Proceeding further now would place the burden upon the Board, IEPA, and stakeholders to do Commenters' work for them. For example, in PC#10, Commenters explicitly ask the Board and others to do the Commenters' job by (1) requiring "parties to file with the Board in the docket for this proceeding, all documents or other information that identify the presence of historic coal ash fill" and (2) asking "EGUs to obtain and file publicly available aerial photographs in five year increments."¹⁸ A hearing on the Proposal will further place burdens on the Board, IEPA, and others who choose to or feel compelled to participate to do the Commenters' job of developing information and evidence to establish whether or not the Proposal can be sufficiently supported, which is particularly inefficient and burdensome given that every indication (as discussed above) is that it is not and cannot be supported.

Further, Commenters had ample opportunity to develop an adequately supported rule

¹⁸ Dynegy and SIPC understand the Board's request for comments may not relate specifically to these requests, which were located in the body of PC#10 and are not part of the rule language; however, Dynegy and SIPC note that the requests are improper because the Board cannot compel members of the public to provide information to help develop a regulatory proposal—that burden is on the rule proponent. Opinion and Order of the Board at 12–13, *In the Matter of: Procedural Rules Revision 35 Ill. Adm. Code 101, 106 (Subpart G), and 107*, R1988-005 (A) (June 8, 1989) (explaining that while the Board has discovery powers in pending Board proceedings, "the Board's discovery authority cannot be used to gather information to be used in developing a regulatory proposal. Without legislative action, the language of Section 5(e) of the Act (that the Board's discovery authority may be used "in connection with any hearing") precludes the use of the Board's discovery powers to gather data for use in developing a regulatory proposal.").

proposal prior to their submittal of the Proposal but failed to do so. The Part 845 rulemaking proceeding included an opportunity to present written questions to IEPA and to provide written testimony. It also included six days of hearings, several of which included testimony on the four topics that are the subject of the Proposal.¹⁹ There is no need for additional hearings to cover the same ground. Commenters were unable to provide adequate support for their proposals during the Part 845 proceeding. An additional six months went by between the creation of this sub-docket and the deadline for comments on the four topics raised by the Board. Commenters had ample time and opportunity to develop evidence in support of the Proposal and to submit an adequate statement of reasons but have not done so. Stakeholders, other members of the public, the Board, and IEPA should not have to go through the effort, burden, and expense of submitting additional comment or testimony or attending hearings on an unsupported proposal that does not satisfy threshold statutory and rule submittal requirements.

IV. Conclusion

For the reasons set forth above, the Board should not hold a hearing on, or further consider the Proposal. Dynegy and SIPC recommend that the Board dismiss the Proposal and close this Sub-docket R20-19A. Dynegy and SIPC reserve the right to provide additional, substantive comments on these topics should the Board choose to proceed.

¹⁹ See, e.g., Hearing Transcript at 69:17-70:13, *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845*, R2020-019 (Aug. 12, 2020) (questioning the Agency regarding the metrics for determining EJ areas of concern); Hearing Transcript at 181:04-193:06, *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845*, R2020-019 (Aug. 13, 2020) (same); Hearing Transcript at 55:20-57:17, *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845*, R2020-019 (Aug. 25, 2020) (questioning the Agency regarding its ability to regulate fugitive dust that could affect surrounding communities); Hearing Transcript 63:03-65:18, *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845*, R2020-019 (Aug. 25, 2020) (questioning the Agency regarding Part 845's regulation of temporary coal ash storage piles).

Dated: June 3, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 3rd day of June, 2022, I have served electronically the attached **Dynergy and SIPC Joint Public Comment**, upon the individuals on the attached service list. I further certify that my email address is bina.joshi@afslaw.com; the number of pages in the email transmission is 27; and the email transmission took place today before 5:00 p.m.

Respectfully submitted,

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