

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
)
STANDARDS FOR THE DISPOSAL) R 20-19(A)
OF COAL COMBUSTION RESIDUALS) (Rulemaking - Water)
IN SURFACE IMPOUNDMENTS:)
PROPOSED NEW 35 ILL. ADM.)
CODE 845)

NOTICE OF FILING

To: Mr. Don A. Brown Vanessa Horton
Clerk of the Board Hearing Officer
Illinois Pollution Control Board Illinois Pollution Control Board
60 E. Van Buren Street, Suite 630 60 E. Van Buren Street, Suite 630
Chicago, IL 60605 Chicago, IL 60605

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board Midwest Generation, LLC's Objection to Environmental Group's Motion to Modify Certain Provisions of Part 845, a copy of which is herewith served upon you.

Dated: September 16, 2022

MIDWEST GENERATION, LLC

By: /s/Kristen L. Gale

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CERTIFICATE OF SERVICE

I, the undersigned, on oath state the following:

That I have served the attached MIDWEST GENERATION, LLC'S OBJECTION TO ENVIRONMENTAL GROUP'S MOTION TO MODIFY CERTAIN PROVISIONS OF PART 845 via electronic mail upon:

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

**OBJECTION TO ENVIRONMENTAL GROUPS’ MOTION TO
MODIFY CERTAIN PROVISIONS OF PART 845**

Midwest Generation, LLC objects to Environmental Law & Policy Center, Little Village Environmental Justice Organization, Prairie River Network, and Sierra Club’s (“Environmental Groups”) Motion to Modify Certain Provisions of Part 845 because there is no regulatory or statutory authority that authorizes this motion. Further, its contents are not within the four specific issues the Board requested be addressed in this sub-docket. Even if the Environmental Groups’ motion was viewed as a motion to reconsider or modify the Board’s Order adopting Part 845, the Motion is untimely and the Board is precluded from considering the Motion because the Part 845 rule already has been filed with the Secretary of State.

The Motion is factually and legally baseless. The Environmental Groups’ excuses for why they do not have to follow the Board rules are unavailing, including an unjustified request to waive the signature certification requirements.

If the Environmental Groups are seeking to modify Part 845, then the requirements of Part 102, Subpart B of the Board Rules apply and have not been satisfied. (35 Ill. Adm. Code 102, Subpart B). MWG requests that the Board deny the Environmental Groups’ Motion, and reasserts its request that the Board close the sub-docket because there is no factual or legal basis on which to proceed.

I. Brief Background

On February 4, 2021, the Board issued an Order and Opinion proposing Part 845 for second notice and opened this sub-docket to the rulemaking to evaluate four distinct issues: (1) historic unconsolidated fill areas, (2) use of temporary storage piles, (3) fugitive dust monitoring plans, and (4) environmental justice screening tools. (*In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845*, PCB R20-19 (Feb. 4, 2021), p. 105-106. *See also* PCB R20-19(A), March 3, 2022 Order, p. 1 (“On May 6, 2021, the hearing officer issued an order requesting comments, information, and proposed rule text from any interested person on four distinct issues:...” emphasis added)).

On April 15, 2021, the Board adopted Part 845 and directed the Clerk to submit the adopted rules to the Secretary of State for publication in the *Illinois Register*. (*In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845*, PCB R20-19, Order, (April 15, 2021), p. 9). On May 3, 2021, the Secretary of State notified the Board that Part 845 met its standards and was published in the *Illinois Register* on May 7, 2021. (*Id.*, Secretary of State Notice of Adopted Rules; Published in Ill. Reg. Vol. 45, Issue 19, p 5884 on May 7, 2021: Part 845).

Following adoption of Part 845, the Hearing Officer entered an order requesting comments, information, and specific proposals on rule language on the four issues in the sub-docket. (H.O. Order, PCB R20-19(A), p. 1 (May 6, 2021)). The American Coal Ash Association, the Illinois Environmental Regulatory Group, Clean Power Lake County, the Environmental Groups, and a few individuals timely submitted comments. (PCB R20-19(A), P.C. #1-#14).

On March 3, 2022, the Board presented a proposed rule for public comment regarding the four issues in the sub-docket, and requested interested parties submit comments by June 3, 2022.

(PCB R20-19(A), Mar. 3, 2022, Order). The Board also allowed participants to respond to the comments by August 2, 2022. (PCB R20-19(A), May 26, 2022 Order). On June 3, 2022 and August 2, 2022, participants, including the Environmental Groups, filed comments and responses to comments pursuant to the Board Orders. (PCB R20-19(A), P.C. #15-24).

On September 2, 2022, after all Board deadlines for comments and responses in the sub-docket had passed, the Environmental Groups moved to modify two Part 845 sections wholly unrelated to the four issues in this sub-docket. They requested the Board modify Section 845.630(a)(1), relating to the quality of background groundwater, and delete Section 845.750(d) that addresses placing CCR in surface impoundments for grading and contouring the design and construction of the final cover system.

II. There is No Authority for the Environmental Groups' Motion.

The Environmental Groups do not identify any authority under Board rules or Illinois Civil rules that permits the Motion, because there is none. The Board's rules for Regulatory and Informational Hearings and Proceedings states that Part 101 of the Board Rules governs all motions. (35 Ill. Adm. Code 102.402). Subpart E of Part 101 (Motions) provides that the Board "may entertain any motion the parties wish to file that is permissible under the Act or other applicable law, this Part, or the Code of Civil Procedure." (35 Ill. Adm. Code 101.500). Subpart E also provides for specific motions, but not a motion to modify an adopted Board rule. No other section of Part 101, or any other Illinois civil law, permits a person to move to modify a Board rule. (35 Ill. Adm. Code Part 101, 5 ILCS 100/*et seq.*; 735 ILCS 5/ *et seq.*).

Because no authority permits a party to move to modify an adopted Board rule, the Environmental Groups' motion must be denied.

III. The Environmental Groups' Motion is Beyond the Board's Sub-docket Order

The Board must also reject Environmental Groups' Motion to Modify because they seek to modify two sections of Part 845 unrelated to and beyond the scope of the issues in this sub-docket. As discussed in its February 4, 2021 Order, the Board opened this sub-docket to evaluate four distinct issues, each related to a specific subpart or section of Part 845.

<u>Issue</u>	<u>Related Part 845 Subpart or Section</u>
(1) Historic, unconsolidated coal ash fill in the State	Subpart A: General Provisions, Sections 845.100- 845.170 (Feb. 4, 2021 Order, pp. 10-12)
(2) The use of temporary storage piles of coal ash, including time and volume limits	Section 101.120: Definitions (Feb. 4, 2021 Order, p. 18)
(3) Fugitive dust monitoring plans for areas neighboring coal combustion residuals ("CCR") surface impoundments	Section 845.500: Air Criteria (Feb. 4, 2021 Order, pp. 55-59)
(4) The use of environmental justice ("EJ") screening tools	Section 845.700(g): Closure Prioritization (Feb. 4, 2021 Order, p. 87)

In the Motion, the Environmental Groups seek to modify and delete two new sections unrelated to any of the above four sub-docket issues. They first seek to modify Section 845.630(a)(1) regarding CCR groundwater monitoring systems. They also seek to delete Section 845.750(d) which regulates closure of a CCR surface impoundment with a final cover system. Neither section is related to the four specific issues identified by the Board for consideration in this sub-docket. When discussing both sections in its February 4, 2021 Order, the Board did not mention including either in the sub-docket. (PCB R20-19, Feb. 4, 2021 Order, pp. 66, 96-97). The Board must dismiss the Environmental Groups' Motion because it is outside the scope of this sub-docket.

IV. The Board is Precluded from Considering the Untimely Motion.

It is unclear what legal authority the Environmental Groups are attempting to rely upon in bringing this Motion because they do not cite any rule or other legal authority that would allow it.

Section 102.700 of the Board Rules allows a person to move to reconsider or modify a Board order that took substantive action on a regulatory proposal. (35 Ill. Adm. Code 101.700). However, even if the Environmental Groups' Motion is attempting to move for reconsideration of Part 845, the Board is precluded from allowing the motion and the motion is untimely.

Under the Board rules for regulatory proceedings, a person may move for reconsideration or modification of a Board order that took substantive action on a regulatory proposal. (35 Ill. Adm. Code 102.700). However, Section 102.702 provides:

“An adopted rule becomes effective upon the filing of that rule with the Secretary of State. Therefore, the Board is precluded from allowing a motion for reconsideration of a final order adopting a rule, if that rule has been filed with the Secretary of State.

(35 Ill. Adm. Code 102.702). The Board's rule precluding it from allowing a motion for reconsideration of an order after a rule has been adopted ensures adherence to the Administrative Procedure Act. As the Board has stated:

Once the Board files adopted amendments with the Secretary of State, the Board cannot simply amend those amendments without adherence to one of the rulemaking processes set forth in the APA, i.e., General Rulemaking or Emergency Rulemaking. In fact, once the Board proceeds to second notice in a rulemaking proceeding, the substance of the proposed amendment is established and cannot be amended except as in response to a question or suggestion of the Joint Committee on Administrative Rules.”

In the Matter of: Limits to Volatility of Gasoline, PCB R88-30(A) (March 22, 1990), p. 2. Thus, a person seeking to modify or amend an adopted rule must go through the rigorous requirements under Part 102, Subpart B, including the required proposal contents in Section 102.202.¹ (35 Ill. Adm. Code 102, Subpart B, and 102.202).

¹ For these very reasons, Environmental Groups' claims that they are not beholden to the requirements under Section 102.202 are baseless. As MWG and other participants stated in their comments filed on June 3, 2022 and August 3, 2022, the Environmental Groups' proposed rules are factually and legally deficient. *See* § V, *infra*.

The Board filed Part 845 with the Secretary of State, and the Secretary of State published it as an adopted rule on May 7, 2021 in Volume 45 of the *Illinois Register*. Because Part 845 has been filed with the Secretary of State and is effective, the Board is precluded from allowing the Motion under Section 102.702.

As a motion to reconsider, the Motion is also untimely. A motion for reconsideration or modification of a Board order on a regulatory proposal must be filed in accordance with 35 Ill. Adm. Code 101.902, Motions for Reconsideration of Final Board Orders. Section 101.902 cross references Section 101.520, which requires a motion to reconsider or modification to be filed within 35 days after receipt of the order. (35 Ill. Adm. Code 101.520). The Board issued its final order adopting Part 845 on April 15, 2021, including those sections the Environmental Groups seek to modify. Any timely motion to reconsider had to be filed by May 20, 2021. The Environmental Groups' Motion comes months after this regulatory deadline, and must be denied as untimely.

V. MWG's Incorporates by Reference the Deficiencies it Identified in its Earlier Comments and Objects to the Environmental Groups' Request for Waiver of Signature and Certification Requirements

MWG, along with other participants, discussed in detail how the Environmental Groups' proposed rules for the four issues in this sub-docket were factually and legally deficient because they did not comply with the Illinois Environmental Protection Act or the Board Rules regarding either a proposed new rule or a rule modification. (*See* Midwest Generation, LLC's Comments on the Environmental Group's Initial Comments and Recommended Rules, P.C. #18 (June 3, 2022), and Midwest Generation, LLC's Response to Comments, P.C. #23 (Aug. 8, 2022)). The Environmental Groups' Motion to modify Sections 845.630(a)(1) and 845.750 suffers from the same deficiencies. The Environmental Groups' attempt to gloss over these fatal legal flaws are inherently contradictory. They claim that the statutory and regulatory requirements are somehow

either inapplicable or, simultaneously, satisfied. (Env. Grp. Memo, p. 10). A primary problem with the Motion is that it seeks to rely upon the Illinois EPA's Statement of Reasons to support modifications never proposed by Illinois EPA. (Env. Grp. Memo, p. 11). The Motion has additional legal and factual issues identical to the problems MWG identified in its June 3, 2022 and August 8, 2022 comments. (*See* P.C. #18 and #23). To avoid duplication here, MWG incorporates by reference its description of each of the Environmental Groups' legal and factual shortcomings from its prior comments - - all of which are equally applicable to this Motion. *Id.*

Even if the Illinois EPA's Statement and Reasons satisfied the regulatory requirements, MWG also objects to the Environment Groups' request to waive the signature requirement for its proposed modifications to Sections 845.630(a)(1) and 845.750(d) because they provide no justification for the waiver. "The Board's procedural rules require a rulemaking proponent seeking a waiver to justify the absence of the signatures from its proposal." (*In the Matter of: Proposed Amendments to Dissolved Oxygen Standard 35 Ill. Adm. Code 302.206*, PCB R04-25 (May 6, 2004), 2004 Ill. ENV LEXIS 264, *4, *citing* 35 Ill. Adm. Code 102.202(k)).² Here, the Environmental Groups provide no reason why they cannot collect the statutory minimum of 200 signatures as required by Section 102.202(k). 415 ILCS 5/28(a); 35 Ill. Adm. Code 102.202(k). It would be surprising if the Environmental Groups claimed that collecting these signatures was difficult or overly burdensome as two of the Environmental Groups claim to have a huge number of Illinois members. The Sierra Club purports to have 25,000 members in Illinois.³ The Prairie Rivers Network claims to have over 1,250 members in Illinois.⁴ It is reasonable to expect that

² 35 Ill. Adm. Code 102.202(k) was 35 Ill. Adm. Code 102.202(j) on May 6, 2004. In PCB R04-24, the Board amended 35 Ill. Adm. Code 102.202 by adding additional requirements. *See* 29 Ill. Reg. 8776, effective June 8, 2005.

³ Sierra Club, Illinois Chapter, Shawnee Group, <https://www.sierraclub.org/illinois/shawnee/about-us-contact#:~:text=We%20are%20one%20of%20fifteen,the%20environment%20of%20Southern%20Illinois> .

⁴ Prairie Rivers Network, 2020-2024 Strategic Plan, Part Two: Building Capacity, <https://prairierivers.org/wp-content/uploads/2020/07/PRN-2020-2024-Strategic-Plan-For-Email.pdf>

organizations with over 26,250 members in Illinois could collect signatures from less than 1% of their total membership. The two Board cases the Environmental Groups rely upon in support of their waiver request are inapplicable because both precede the requirement to include a justification for the absence of any required information. (See *In the Matter of: Procedural Rules*, 35 Ill. Adm. Code 101, 102, 106, PCB R88-5(B), Board Order, (Aug. 30, 1989), p. 3 (“New subsection (i) requires that a proponent provide justification for the inapplicability of any information required by Subpart B.”) and Board Order (May 10, 1990) (adopting the new procedural rules for rulemaking proceedings)). Without a justification for the absence of the signatures, the Board must deny the request.

Similarly, the Environmental Groups do not explain why they cannot certify or provide a written statement that their “proposal amends the most recent version of the rule as published on the Board's Web site or as obtained from the Clerk.” (35 Ill. Adm. Code 102.202(i), (k)). None of the Board cases relied upon by the Environmental Groups allowed a waiver of this requirement. The Environmental Groups identify no legal authority which would allow a waiver of the requirement to submit a certification without justification. Therefore, the Board must deny the certification waiver request.

VI. Conclusion

The Environmental Groups are disregarding Board proceedings and rules. Instead, of filing a motion to remedy the numerous factual and legal deficiencies in their proposed rule for the four sub-docket issues identified by participants, the Environmental Groups doubled down and moved to modify two new sections also without meeting the statutory and regulatory requirements. The Board should insist that its rules be followed and respected, because, as the Board stated when it adopted the rules, the “content requirements are reasonable expectations of the vast majority of

proponents, and [...] are necessary to focus and expedite the regulatory process.” (*In the Matter of: Procedural Rules, 35 Ill. Adm. Code 101, 102, 106, PCB R88-5(B), Order, (May 10, 1990), p.*

4). If this motion were granted, it would open the flood-gates to any participant to move to modify other portions of Part 845.

The participants in this rulemaking have had over a year to investigate whether Part 845 required modification or additional rules were required for the four distinct issues. No one has submitted a regulatory proposal that complied with the statutory and regulatory requirements under the Act and Board regulations. Nor has anyone provided a factual basis, including a technical justification, economic justification, or technical feasibility to support modifying Part 845 or adopting additional rules. For the reasons stated herein, MWG respectfully requests that the Board deny the Environmental Groups’ Motion and close the sub-docket.

Respectfully submitted,
Midwest Generation, LLC

By: /s/ Kristen L. Gale
Kristen L. Gale

Dated: September 16, 2022

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