

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)	
)	
)	
STANDARDS FOR THE DISPOSAL OF)	R2020-19(A)
COAL COMBUSTION RESIDUALS)	(Rulemaking – Land)
IN SURFACE IMPOUNDMENTS:)	
PROPOSED NEW 35 ILL. ADM.)	
CODE 845)	
)	
)	
)	

NOTICE OF ELECTRONIC FILING

To: Attached Service List

PLEASE TAKE NOTICE that on September 23, 2022, I electronically filed with the Clerk of the Illinois Pollution Control Board the Environmental Groups’ **MOTION FOR LEAVE TO FILE A SINGLE REPLY** and **RESPONSE TO IEPA’S MOTION FOR AN EXTENSION**, copies of which are served on you along with this notice.

Dated: Sept. 23, 2022

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MOTION FOR LEAVE TO FILE A SINGLE REPLY
and RESPONSE TO IEPA’S MOTION FOR AN EXTENSION

Pursuant to 35 Ill. Adm. Code 102.402, 101.500(d) and 101.500(e), the Environmental Law & Policy Center (“ELPC”), Little Village Environmental Justice Organization (“LVEJO”), Prairie Rivers Network (“PRN”), and Sierra Club (collectively, “Environmental Groups” or “Commenters”), hereby submit this Motion for Leave to File a Single Reply and Response to Illinois EPA’s (“IEPA” or “the Agency”) Motion for an Extension. We appreciate the Illinois Pollution Control Board’s (“the Board” or “PCB”) consideration of these important matters.

I. Environmental Groups’ Response to IEPA’s Motion for an Extension

Environmental Groups have chosen not, in this specific instance, to oppose IEPA’s request for an extension of the deadline to respond to our Motion to Amend Part 845.¹ Our position is based entirely on the representation of IEPA counsel that IEPA staff is “working diligently and aggressively to complete” the Agency’s recommendation in the Adjusted Standard proceeding for Waukegan, AS 2021-03,² by the October 31, 2022 deadline, as well as her statement that the Agency is “swamped,” with “very little staff to address this and work on the Waukegan Adjusted Standard that is due October 31. It is all the same limited staff that is being asked to do this and other work as well.”³

IEPA counsel’s statements underscore a major concern that is manifesting in multiple, repeated delays in implementation of the Coal Ash Pollution Prevention Act (“CAPPA”) and the Board’s Part 845 rules, both of which establish critical protections against pollution from the many coal ash impoundments in Illinois. In May 2021, coal combustion residuals (“CCR” or “coal ash”) surface impoundment owners filed eight petitions for adjusted standards⁴ and three variance requests.⁵ Only two of the adjusted standard petitions, nearly all of which seek full exemption from the Part 845 rules, have been resolved.⁶ The Agency has sought extensions to their recommendation deadline in two of the three

¹ IEPA, Mot. for an Extension of Time to File the Agency’s Response to the Env’t Group’s [sic] Mot. to Modify Certain Provisions of Part 845, R2020-19(A) (Sept. 16, 2022) (“IEPA Motion for Extension”).

² E-mail from Stefanie Diers, IEPA counsel, to Jennifer Cassel, Earthjustice attorney (Sept. 15, 2022, 2:59 PM CST) (on file with author).

³ E-mail from Stefanie Diers, IEPA counsel, to Jennifer Cassel, Earthjustice attorney (Sept. 14, 2022, 10:06 AM CST) (on file with author).

⁴ See AS 2021-01, AS 2021-02, AS 2021-03, AS 2021-04, AS 2021-05, AS 2021-06, AS 2021-07, and AS 2021-08.

⁵ See PCB 2021-108, PCB 2021-109, and PCB 2021-110.

⁶ Op. and Order of the Bd., AS 2021-02 (Feb. 17, 2022); Op. and Order of the Bd., AS 2021-04 (Feb. 17, 2022).

variance proceedings⁷ and in every one of the adjusted standard proceedings. In the Waukegan proceeding alone, IEPA has filed six such motions notwithstanding its recognition that the site is within a statutorily prioritized area of environmental concern⁸ and repeated comments⁹ from local community organizations and the City of Waukegan exhorting IEPA to move quickly to ensure protections are implemented at the site.

The delays are similarly unfettered with respect to the permitting process for CCR surface impoundments under Part 845. Operating permit applications were due, and submitted by most owners and operators of CCR surface impoundments, by October 31, 2021.¹⁰ Operating permit applications contain proposed groundwater monitoring programs as well as proposed closure prioritization categories which determine when closure construction permit applications are to be submitted.¹¹ The deadline for submission of closure construction permit applications for high-priority impoundments—those in areas of environmental justice concern, those that pose an imminent risk of harm, and certain polluting impoundments—passed months ago, in February 2022.¹²

Yet the Agency has yet to issue any draft operating permits or permit denials, let alone final operating permits. Nor has IEPA issued any permits or permit denials—in either draft or final form—in response to the closure permit applications for high-priority sites submitted in February of this year. And without a formally-approved groundwater monitoring program, some owners—including owners of CCR impoundments with long-established and acknowledged groundwater pollution¹³—have delayed submission of corrective action permit applications that would set the process in motion for cleanup.

These delays take a toll on Illinois' waters and communities. Ongoing monitoring at many Illinois CCR surface impoundments reveals continuing contamination of groundwater.¹⁴ This continuing release of dangerous pollutants into our waters should come as no surprise; indeed, this spring, the United States Environmental Protection Agency (“USEPA”) identified two dozen CCR surface

⁷ Mot. for Extension of Time to Submit Recommendation, PCB 2021-108 (June 24, 2021); Agreed Mot. for Extension, PCB 2021-110 (June 7, 2021).

⁸ See IEPA Pre-filed Answers at 182, R2020-19 (Aug. 3, 2020).

⁹ See Public Comments submitted on behalf of Clean Power Lake County, AS 2021-03 (Aug. 27, 2021); *Id.*, Comments submitted by Clean Power Lake County, AS 2021-03 (May 23, 2022); Comments submitted on behalf of the City of Waukegan by Ann B. Taylor, AS 2021-03 (May 25, 2022).

¹⁰ See 35 Ill. Adm. Code. 845.230(d)(1) (reporting date of receipt of operating permit applications for CCR surface impoundments).

¹¹ *Id.* 845.230(d)(2)(T).

¹² *Id.* 845.700(g)(1)(A)-(D), (h)(1).

¹³ *E.g.*, Lincoln Stone Quarry. See KPRG, Federal CCR Compliance Annual Groundwater Monitoring and Corrective Action Report – 2021, Midwest Generation, LLC Joliet #9 Generating Station at 1-2 (Jan. 31, 2022) (“LSQ 2021 Groundwater Monitoring Report”), http://3659839d00eefa48ab17-3929cea8f28e01ec3cb6bbf40cac69f0.r20.cf1.rackcdn.com/LSQ_LSQ1_GMI22.pdf (reporting exceedances of federal groundwater protection standards for arsenic, cobalt, lithium, and molybdenum, as well as exceedances over background for boron, fluoride, sulfate, TDS and other constituents); Public Comments and Request for Public Hearing in IPCB, AS 2019-01 (May 7, 2019) (discussing longstanding exceedances of arsenic, boron, lithium and molybdenum in groundwater adjacent to Lincoln Stone Quarry).

¹⁴ See, *e.g.*, LSQ 2021 Groundwater Monitoring Report at 1-2; City Water, Light and Power, Notification of Groundwater Protection Standards Exceedance at 1-2 (Apr. 18, 2022), <https://www.cwlp.com/ILCCRHandler.aspx?imgID=82>; Illinois Power Resource Generating, LLC, Construction Permit Application, Edwards Power Plant Ash Pond at 904 of 1949 (Jun. 29, 2022), <https://www.luminant.com/documents/ccr/Illinois/Edwards/2022/Edwards%20AP%20Construction%20Permit%20Application-W1438050005-01.pdf> (discussing exceedances of boron, sulfate, and total dissolved solids, as well as three other constituents—barium, chloride, and lithium—that Illinois Power Resource Generating claims are caused by other sources).

impoundments in Illinois as likely containing coal ash in contact with groundwater,¹⁵ and Environmental Groups and allies have been highlighting ongoing pollution from CCR surface impoundments for years.¹⁶ Until the Agency reviews and issues operating and, in particular, closure and corrective action permits, this pollution is certain to continue.

CAPPA was drafted to protect our communities. One way it does so is through supporting the Agency with funds to ensure that the Agency can adequately administer and enforce the new statutory provisions and regulations.¹⁷ Clearly, IEPA has not been able to do so.

The State of Illinois, including the Governor's Office and the General Assembly, must provide more support to IEPA to hire, train, and retain qualified staff to address adjusted standard and variance proceedings associated with CCR units and to implement Part 845 so that the critical protections required by CAPPA and the Board's rules are not further delayed.

A. Environmental Groups' Motion for Leave to File a Single Reply to Other Participants' Responses

On Friday, September 16, Midwest Generation, LLC ("Midwest Generation") and Dynegy Midwest Generation, LLC ("Dynegy") filed responses to Environmental Groups' Motion to Amend Part 845.¹⁸ On the same date, both the Agency and the Illinois Environmental Regulatory Group ("IERG") filed motions for extension of time to respond to Environmental Groups' Motion to Amend Part 845.¹⁹ If those motions are granted, IEPA and IERG will have until Nov. 4, 2022, to submit their responses.

Environmental Groups will be materially prejudiced if we are not permitted to respond to Dynegy's and Midwest Generation's arguments, as those arguments allege deficiencies that could result in denial of the modifications we seek. Under 35 Ill. Adm. Code 101.500(e), Environmental Groups must seek leave to file a reply to Dynegy's and Midwest Generation's responses within fourteen days of their filing. However, if IEPA's and IERG's motions are granted, Environmental Groups will not be able to review the responses from those entities until November 4, 2022. We submit that it will save this Board time and resources if Environmental Groups are permitted to file a single reply to all participants' responses, while protecting against material prejudice that would result if no reply were permitted.

Accordingly, if the Board grants the motions of IEPA and/or IERG for an extension of time to file a response, Environmental Groups respectfully request that the Board grant us leave to file a single reply to all participants' responses within 14 days after Nov. 4, 2022.

¹⁵ See USEPA, CCR Surface Impoundments Potentially with Waste Below the Water Table, <https://s3.documentcloud.org/documents/22062310/=epa-water-doc.pdf>; Hannah Northey, Leaked list: EPA eyes closure plans for 160 coal ash ponds, *E&E News* (June 14, 2022), <https://www.eenews.net/articles/leaked-list-epa-eyes-closure-plans-for-160-coal-ash-ponds/>.

¹⁶ See Earthjustice et al., *Cap and Run: Toxic Coal Ash Left Behind by Big Polluters Threatens Illinois Water* at 6 (Nov. 2018), https://illinoiscoalash.files.wordpress.com/2018/11/capandrun-ilcoalash_web.pdf; Michael Hawthorne, As coal plant pollution seeps into Illinois' only national scenic river, advocates sue for feds to take action, *Chicago Tribune* (May 30, 2018), <https://www.chicagotribune.com/news/ct-met-illinois-scenic-river-coal-ash-lawsuit-20180424-story.html>.

¹⁷ See 415 ILCS 22.59(j)-(k).

¹⁸ Dynegy, Dynegy's Response in Opp'n to Env't Groups' Mot. to Modify, R2020-19(A) (Sept. 16, 2022); Midwest Generation, Obj. to Env't Groups' Mot. to Modify Certain Provisions of Part 845, R2020-19(A) (Sept. 16, 2022).

¹⁹ IEPA Motion for Extension.

Dated: Sept. 23, 2022

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CERTIFICATE OF SERVICE

The undersigned, Jennifer Cassel, an attorney, certifies that I have served by email the Clerk and by email the individuals with email addresses named on the Service List provided on the Board's website, *available at* <https://pcb.illinois.gov/Cases/GetCaseDetailsById?caseId=16975>, a true and correct copy of the Environmental Groups' **MOTION FOR LEAVE TO FILE A SINGLE REPLY** and **RESPONSE TO IEPA'S MOTION FOR AN EXTENSION**, before 5 p.m. Central Time on Sept. 23, 2022. The number of pages in the email transmission is 11 pages.

Dated: Sept. 23, 2022

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