

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

TO: Don A. Brown, Clerk
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601-3218

See attached Service List

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board NOTICE OF FILING and ILLINOIS EPA’S RESPONSE TO THE ENVIRONMENTAL GROUPS’ MOTION TO MODIFY CERTAIN PROVISIONS OF PART 845, copies of which are herewith served upon you along with this notice.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ Stefanie N. Diers
Stefanie N. Diers
Deputy General Counsel
Division of Legal Counsel

DATED: November 4, 2022

1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
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STANDARDS FOR THE DISPOSAL OF)	R20-19(A)
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**THE AGENCY’S RESPONSE TO THE ENVIROMENTAL GROUPS’ MOTION TO
MODIFY CERTAIN PROVISIONS OF PART 845**

The Illinois Environmental Protection Agency (“Illinois EPA” or “Agency”), by and through its attorney, hereby submits its Response to the Environmental Group’s Motion to Modify.

The Agency states as follows:

1. On March 3, 2022, the Board presented the Environmental Groups’ proposed rule text for public comment and ordered those comments be filed June 3, 2022. The Board further specified that, at the close of this public comment period, the Board will reexamine the issues and determine whether to proceed to hearing.

2. By Order on May 26, 2022, the Board extended the public comment period by allowing participants to respond to the filed public comments by August 3, 2022.

3. On or before June 3, 2022, the Agency, Environmental Groups, and other interested parties filed their respective comments on the proposed rule text.

4. On or before August 3, 2022, interested parties filed their respective responses to close out the public comment period set by the Board.

5. On September 2, 2022, the Environmental Groups filed a Motion to ask the Board to amend Part 845 to (1) “remove provisions in Section 845.750(d) that allow CCR to be consolidated in unlined CCR surface impoundments before closure,” (2) “modify Part 845 to ensure that

background wells are not affected by any CCR unit,” and (3) “incorporate additional protections for CCR piles in Part 845.”

6. On September 16, 2022, Dynegy Midwest Generation, LLC; Electric Energy, Inc.; Illinois Power Generating Company; Illinois Power Resources Generating, LLC; and Kincaid Generation, LLC (collectively, “Dynegy”) and Midwest Generation, LLC (“Midwest”) filed their objections to the Environmental Groups’ Motion.

7. The Agency and the Illinois Environmental Group (“IERG”) filed Motions for an Extension of Time to respond to the Motion to Modify on September 16, 2022.

8. The Board granted the Extension on September 22, 2022, and gave the Agency and IERG until November 4, 2022, to file their responses.

9. First, the Agency requests the Board to incorporate the Agency’s previous comments filed on June 2, 2022, that addresses previous arguments raised by the Environmental Groups.

10. When looking at all the filings that have been submitted in this subdocket, this subdocket should be closed. All deadlines established by the Board have passed, making the Environmental Groups’ Motion untimely.

11. Second, the Board should deny the Environmental Groups’ Motion to Modify because it raises issues outside the limited scope of this subdocket, is unsupported by any Board rule or procedure and attempts to circumvent the proper legal mechanisms for proposing revisions to an existing regulation and implemented regulatory scheme.

12. 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 (Feb. 4, 2021), *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845*, R2020-019. 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 (May 6, 2021), *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).

13. The current Motion filed by the Environmental Groups goes beyond the purpose of Subdocket A. Even if it were within the scope of the subdocket, however, an adopted regulation like Part 845 cannot be amended via a motion. 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). At this point, Part 845 may only be amended through a new rulemaking that complies with the requirements set forth in the Environmental Protection Act and the Administrative Procedures Act, as well as those in the Board’s regulations. 35 Ill. Adm. Code Part 102, 415 ILCS 5/27 and 5/28, 5 ILCS 100.

14. Based on the language of the Environmental Groups' Motion, it is not even completely clear as to what the Board's granting of the Motion would even mean.

15. Moreover, the Board has not even proposed a rule. The Motion is premature in that there is nothing to amend at the point in the proceedings.

16. Therefore, the Environmental Groups' Motion should be denied.

WHEREFORE, the Illinois EPA respectfully requests the Illinois Pollution Control Board deny the Environmental Groups' Motion to Modify Certain Provisions of Part 845 and close this Subdocket.

Respectfully submitted,

By: /s/Stefanie N. Diers
Stefanie N. Diers
Deputy General Counsel
Division of Legal Counsel

Date: November 4, 2022

Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
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CERTIFICATE OF SERVICE

I, the undersigned, an attorney, state the following:

I have electronically served the attached RESPONSE TO THE ENVIRONMENTAL GROUPS' MOTION TO MODIFY CERTAIN PROVISIONS OF PART 845 upon the following:

See attached Service List

I affirm that my e-mail address is stefanie.diers@illinois.gov; and the e-mail transmission took place before 5:00 p.m. on November 4, 2022.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ Stefanie N. Diers
Stefanie N. Diers
Deputy General Counsel
Division of Legal Counsel

DATED: November 4, 2022

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SERVICE LIST

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Electronic Filing: Received, Clerk's Office 11/4/2022

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