

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 ELECTRONIC FILING

To: Attached Service List

PLEASE TAKE NOTICE that on November 18, 2022, I electronically filed with the Clerk of the Illinois Pollution Control Board the Environmental Groups' **REPLY IN SUPPORT OF MOTION TO MODIFY CERTAIN PROVISIONS OF PART 845**, copies of which are served on you along with this notice.

Dated: Nov. 18, 2022

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ENVIRONMENTAL GROUPS’ REPLY IN SUPPORT OF MOTION TO MODIFY CERTAIN PROVISIONS OF PART 845

Pursuant to the Board’s Order dated October 20, 2022, in this matter, the Environmental Law & Policy Center (“ELPC”), Little Village Environmental Justice Organization (“LVEJO”), Prairie Rivers Network (“PRN”), and Sierra Club (collectively, “Environmental Groups”) hereby submit this Reply in Support of Environmental Groups’ Motion to Modify Certain Provisions of Part 845 (“Environmental Groups’ Motion” or “the Motion”). We appreciate the Board’s consideration of these important matters.

1) The Motion Is Proper and Not an Attempt to Circumvent Requirements for Appeal.

Environmental Groups’ Motion is not, as alleged by some participants,¹ an attempt at an end-run around procedural requirements to appeal Board rules. The modifications we seek are either expressly within the scope of this sub-docket or based on evidence not yet available at the time Part 845 was finalized, which as explained below, renders them appropriate for consideration in the sub-docket.

First, further regulation of coal combustion residual (“coal ash” or “CCR”) piles is expressly contemplated in this sub-docket. In R2020-019, the Board stated that it “shares the Environmental Groups’ concerns about the environmental risks posed by CCR storage piles and temporary accumulation, particularly because the rules do not prescribe any time or volume limits. [But] the Board prefers to develop additional record information in the sub-docket addressing . . . waste piles before

¹ See Dynegy Response in Opposition of Environmental Groups’ Motion to Modify at 7, R2020-019(A) (Sept. 16, 2022) (“Dynegy Response”), Midwest Generation, LLC’s Objection to Environmental Groups’ Motion to Modify Certain Provisions of Part 845 at 5–6, R2020-019(A) (Sept. 16, 2022) (“Midwest Generation Response”).

deciding whether to change the . . . implementing regulations.”² The Hearing Officer’s May 6, 2021 order in this sub-docket reiterated the breadth of the Board’s concern regarding CCR piles, requesting comment not just on the duration and quantity of CCR in storage piles, but also on “*any* additional measures necessary for storage piles to ensure protection against ground and surface water contamination.”³ The protections for CCR piles that Environmental Groups seek fit within that broad scope.⁴

The remainder of the modifications that Environmental Groups request in the Motion pertain to provisions of the rules that were explained by the U.S. Environmental Protection Agency (“USEPA”) in 2022, well after Part 845 was finalized. USEPA provided that explanation in letters to individual facilities and in proposed decisions on applications for an extension of the deadline for CCR surface impoundments to cease receipt of CCR (“Part A decisions”). In those letters and proposed Part A decisions, USEPA applied the federal CCR rule, providing detailed explanations of what certain provisions of the rule require. Among those explanations are: (a) explicit statements, consistent with the comment submitted by Edward Nam, Director of the Land, Chemicals, and Redevelopment Division of USEPA, Region V, to JCAR, that the federal CCR rule does not allow CCR to be moved from one surface impoundment into another surface impoundment during closure;⁵ and (b) explanations elucidating the mandates for background wells, in particular that such wells must not monitor groundwater contaminated by CCR landfills or CCR surface impoundments.⁶

Because no proposed Part A decisions were available while R2020-019 was pending, the Board did not have the benefit of them in evaluating whether Part 845 satisfies the Coal Ash Pollution

² Op. and Order at 18, R2020-019(A) (Feb. 4, 2021).

³ Hr’g Officer Order at 1, R2020-19(A) (May 6, 2021) (emphasis added).

⁴ See Env’t Groups’ Motion to Modify Certain Provisions of Part 845 at 3, R2020-019(A) (Sept. 2, 2022); Env’t Groups’ Comments on Env’t Groups’ Proposed Rules at 13–16, R2020-019(A) (June 3, 2022); Env’t Groups’ Initial Comments and Recommended Rules at 11–15, R2020-019(A) (Aug. 6, 2021); *Id.* at Appendix 2.

⁵ See JCAR, Public Comment #146, R2020-019PC (Mar. 9, 2021) (letter to JCAR from Edward Nam of USEPA, Region V).

⁶ See Env’t Groups’ Memo. In Support of Motion to Modify Certain Provisions of Part 845 at 3–4, 6–9, R2020-19(A) (Sept. 2, 2022) (“Memo in Support”).

Prevention Act (“CAPPA”)’s directive that Illinois’ rules be “at least as protective and comprehensive” as the federal CCR rule.

Board precedent makes clear that the Board may modify previously-finalized rules based on relevant information offered in a sub-docket of that same rulemaking. In PCB R1990-009(A), the Board adopted regulations concerning the processing, storage, transportation, and disposal of used and waste tires which are contained in 35 Ill. Adm. Code Part 848.⁷ At the same time, the Board opened R1990-009(B) (“Waste Tires Rulemaking”) for the purpose of repealing 35 Ill. Adm. Code Part 849, for further consideration of the retreaders/recyclers exemption contained in sub-docket A, and to address pesticide application provisions.⁸ In its February 6, 1992 order in sub-docket R1990-009(B), the Board amended Part 848 as it was adopted in R1990-009(A), by adding sections “848.206 Exemptions for Tire Retreading Facilities,” “848.207 Exemptions for Tire Stamping and Die Cutting Facilities,” and “848.208 Exemptions for Sites With a Tire Removal Agreement.”⁹ In addition to adding sections to the already-finalized rule, the Board modified section “848.101 Applicability” by changing who is subject to Part 848 and the criteria a facility needs to fulfill to be exempt.¹⁰

The change to section 848.101 occurred after Part 848 had already been finalized in R90-9(A). The Illinois Environmental Protection Agency (“Agency”) asserted that the Board should reconsider its previous decision not to exclude small tire chips from the Part 848 management standards, as Illinois was on the verge of establishing good markets for tire-derived fuel (“TDF”).¹¹ With the additional information on the emerging market for TDF, the Board determined that an exemption from the regulations should be

⁷ Op. and Order of the Bd. at 1, Waste Tires Rulemaking (July 11, 1991).

⁸ *Id.*

⁹ Adopted Rule, Final Order, Op. and Order of the Bd., Waste Tires Rulemaking (Feb. 6, 1992).

¹⁰ *Id.* The modified criteria in the “Applicability” section was a result of testimony occurring on September 27, 1991, after Part 848 was finalized on April 25, 1991 in R90-09(A), concerning the marketability of chipped or shredded tires to be used as tire-derived fuel (TDF) and how “reused tire” should be defined.

¹¹ Op. and Order of the Bd. at 3, Waste Tires Rulemaking (Dec. 19, 1991).

given for tires processed into TDF, and utilized the sub-docket to make the change to the previously-finalized regulations on that basis.¹²

Given the similarity of the circumstances in R1990-009(A) and the present sub-docket, the Board should follow its precedent in that docket and propose, in this sub-docket, the limited modifications to Part 845 requested in the Motion.

2) This Sub-docket is an Appropriate Venue for Environmental Groups' Motion to Modify Certain Provisions of Part 845.

Participants opposing Environmental Groups' Motion also argue that the sub-docket was opened to address the four topics about which the Board requested further consideration, excluding all else.¹³ The narrow approach that those participants take is misplaced and negates the Board's authority to consider additional issues that the Environmental Groups have raised concerning Part 845, whose rulemaking docket was fully incorporated into this sub-docket. Contrary to those participants' assertions, the Board has the authority to determine the parameters of the sub-docket, and the four topics already named do not limit what the Board can consider in this sub-docket.

To begin with, as explained above, further regulation of CCR piles is expressly a part of this sub-docket. The protections that Environmental Groups' Motion seeks for storage piles—laid out in specific, clear proposed language¹⁴—fit wholly within the broad scope of issues that the Board stated it seeks to consider in this sub-docket.

Moreover, the Board has ample authority to address issues not initially identified as the focus of a sub-docket. In Rulemaking R2010-008(A): *In the Matter of: Reasonably Available Control Technology*

¹² *Id* at 3-4.

¹³ See Dynege Response at 1, 5; Midwest Generation Response at 4; Ill. Env't Regul. Group's Response In Opposition to the Environmental Groups' Motion to Modify Part 845 at 1-4, R2020-019(A) (Nov. 4, 2022) ("IERG Response"); Agency's Response to the Env't Groups' Motion to Modify Certain Provisions of Part 845 at ¶ 11, R2020-019(A) (Nov. 3, 2022) ("IEPA Response").

¹⁴ See Env't Groups' Motion to Modify Certain Provisions of Part 845 at 3, R2020-19(A) (Sept. 2, 2022); Env't Groups' Comments on Env't Groups' Proposed Rules at 13-16, R2020-19(A) (June 3, 2022); Env't Groups' Initial Comments and Recommended Rules at 11-15, R2020-19(A) (Aug. 6, 2021); *Id.*, Appendix 2.

(RACT) for Volatile Organic Material Emissions From Group II Consumer & Commercial Products: Proposed Amendments to 35 Ill. Adm. Code 211, 218, and 219 (“RACT Proposed Amendments Sub-docket (A)”), the Board opened a sub-docket in response to correspondence they received from Flexible Packaging Association (“FPA”).¹⁵ FPA proposed language that had not been included in the Board’s final opinion and order adopting the proposed rules in R2010-08.¹⁶ The Board opened sub-docket (A) to consider issues raised by FPA and gave FPA forty-five days to submit a rulemaking proposal.¹⁷ FPA did not file anything in sub-docket (A) in response. However, the Agency did file a Motion in that sub-docket requesting the Board to remove language in R2010-008, after it had already been filed with the Secretary of State.¹⁸ The Agency’s motion did not address the specific issues raised by FPA for which the Board opened the sub-docket; nonetheless, the Agency argued that filing the motion in the sub-docket was the most efficient way to achieve the necessary amendment.¹⁹

The Board agreed. It concluded that, for the sake of efficiency, the Agency could move forward with its amendment, even though the sub-docket was opened to address comments made by a completely different participant regarding a different issue. The Board reasoned that, although the Agency had not filed a separate rulemaking proposal, the amendment the Agency sought was specifically described and that sufficed for the Board to proceed to first-notice publication of the proposed amendment.²⁰ Thus, the Board exercised its authority to diverge from the initial focus of the sub-docket to address other issues raised therein.

Likewise here, it is prudent and appropriate for the Board to address Environmental Groups’ Motion in this sub-docket. As explained in Environmental Groups’ Memo in Support, to the extent the

¹⁵ Order of the Bd., RACT Proposed Amendments Sub-docket (A) (Aug. 19, 2010).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Agency’s Motion for Leave to File in Subdocket A, or Alternatively, Motion to Open Subdocket B, RACT Proposed Amendments Sub-docket (A) (July 29, 2010).

¹⁹ *Id.* at 3.

²⁰ Op. and Order of the Bd. at 4, RACT Proposed Amendments Sub-docket (A) (Dec. 16, 2010).

Section 102.202 procedural obligations apply, the Board may conclude that they have been satisfied.²¹

The limited, specific modifications to Part 845 that the Environmental Groups' Motion seeks are needed to ensure that Part 845 is "at least as protective as" the federal CCR rule, as required by CAPP, and for USEPA to authorize Part 845 to operate "in lieu of" the federal CCR rule for CCR surface impoundments.²² Failing to modify Part 845 in the manner requested by Environmental Groups jeopardizes the federal approval that the Agency has long asserted it seeks and leaves Illinois communities at continued risk of greater pollution of their waters and air than communities with CCR surface impoundments meeting the federal standards. Allowing the changes to be made in this sub-docket is the most efficient way to address those pressing concerns, and the Board should move forward with the proposed changes.

3) This Sub-docket Should Remain Open and Proceed to Rulemaking.

The Board should disregard the Agency's flippant proposal to close this sub-docket. The Agency claims that the Board should close this sub-docket because "[a]ll deadlines established by the Board have passed."²³ However, this sub-docket is still very much active.

The Board opened this sub-docket to explore four key issues that it determined warranted further consideration, and that consideration has only just begun.²⁴ Interested parties have submitted "comments, information, and specific proposals on rule language" at the Board's request.²⁵ The Environmental Groups were the only interested parties to submit specific proposals on rule language.²⁶ The Board then opened a ninety-day period for comment on the Environmental Groups' proposed rules,

²¹ See Memo in Support, R2020-019(A) (Sept. 2, 2022) at 10–11. As stated therein, to the extent there are any procedural flaws in the Motion, Environmental Groups request the opportunity to cure any such flaws, consistent with past Board precedent. See *id.* at 11–12, n.38.

²² See 42 U.S.C. § 6945(d)(1)(B)(ii).

²³ IEPA Response at ¶ 10.

²⁴ Second Notice Op. and Order of the Bd. at 2, R2020-019 (Feb. 4, 2021).

²⁵ Hr'g Officer Order at 1, R2020-019(A) (May 6, 2021).

²⁶ See Env't Groups Initial Comments and Recommended Rules, R2020-19(A) (Aug. 6, 2021).

after which the Board specified it would “reexamine the issues and determine whether to proceed to hearing.”²⁷ The Board has yet to make that determination.

The Board must still consider the information submitted in this sub-docket and determine whether to issue for first notice the Environmental Groups’ proposed rules or propose its own rules based on the evidence presented in the Part 845 main docket and this sub-docket. No circumstances have changed that render the concerns the Board raised in opening this sub-docket moot. Historic coal ash fill remains unregulated; no changes have been made to ameliorate the Board’s concerns about the lack of time or volume limits on CCR in CCR piles; and evidence submitted by Environmental Groups shows continuing reason for concern about coal ash dust pollution, particularly from the many soon-to-close CCR surface impoundments in the state. Simply closing the sub-docket, without more, would make a mockery of the serious concerns the Board raised in deciding to open the sub-docket. Rather than close this sub-docket, the Board should evaluate the evidence presented and advance to first notice with the proposal Environmental Groups submitted on August 6, 2021, as modified in Environmental Groups’ Comments submitted on August 2, 2022, and the proposed modifications to Part 845 specified in the Motion.

Conclusion

For the reasons set forth herein, Environmental Groups respectfully request that the Board move to first notice on the specific modifications to Part 845 set out in the Motion and thereafter finalize those modifications.

Dated: Nov. 18, 2022

Respectfully Submitted,

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²⁷ Order of the Bd. at 4, R2020-019(A) (Mar. 3, 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' **REPLY IN SUPPORT OF MOTION TO MODIFY CERTAIN PROVISIONS OF PART 845**, before 5 p.m. Central Time on Nov. 18, 2022. The number of pages in the email transmission is 14 pages.

Dated: Nov. 18, 2022

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