

**BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF:

PETITION OF SOUTHERN ILLINOIS
POWER COOPERATIVE FOR
AN ADJUSTED STANDARD FROM
35 ILL. ADMIN. CODE PART 845 OR, IN
THE ALTERNATIVE, A FINDING OF
INAPPLICABILITY

AS 2021-006

(Adjusted Standard)

NOTICE OF FILING

To: Don Brown
Carol Webb
Pollution Control Board
100 West Randolph Street
James R. Thompson Center
Suite 11-500
Chicago, Illinois 60601-3218

Stephanie Diers
Sara G. Terranova
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 N. Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the attached Motion for Stay, and a Certificate of Service, copies of which are herewith served upon you.

/s/ Bina Joshi

Dated: July 12, 2023

Stephen Bonebrake
Joshua R. More
Amy Antonioli
Bina Joshi
233 South Wacker Drive, Suite 7100
Chicago, Illinois 60606
(312) 258-5500
Steve.Bonebrake@afslaw.com
Joshua.More@afslaw.com
Amy.Antonioli@afslaw.com
Bina.Joshi@afslaw.com

Attorneys for Southern Illinois Power Cooperative

**BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF:

PETITION OF SOUTHERN ILLINOIS
POWER COOPERATIVE FOR
AN ADJUSTED STANDARD FROM
35 ILL. ADMIN. CODE PART 845 OR, IN
THE ALTERNATIVE, A FINDING OF
INAPPLICABILITY

AS 2021-006

(Adjusted Standard)

**PETITIONER SOUTHERN ILLINOIS POWER COOPERATIVE'S
MOTION TO STAY PROCEEDINGS AND STATUS REPORT**

Petitioner Southern Illinois Power Cooperative (“SIPC”), by its attorneys and pursuant to 35 Ill. Adm. Code § 101.514, respectfully requests that the Board enter an order staying this proceeding until the earlier of May 6, 2024 or U.S. EPA taking final action on its proposed Legacy Coal Combustion Residual Surface Impoundment rulemaking, USEPA Docket No. EPA-HQ-OLEM-2020-0107. In support of its motion, SIPC states as follows:

I. BACKGROUND AND STATUS REPORT

A. Procedural background

1. On May 11, 2021, SIPC filed a Petition for an Adjusted Standard from 35 Ill. Admin. Code Part 845 (“Part 845”) or, in the Alternative, a Finding of Inapplicability. AS 2021-006, *In the Matter of: Petition of Southern Illinois Power Cooperative for an Adjusted Standard from 35 Ill. Admin. Code Part 845 or, in the Alternative, a Finding of Inapplicability*, Petition (May 11, 2021). SIPC amended its Petition on September 2, 2021. AS 2021-006, *In the Matter of: Petition of Southern Illinois Power Cooperative for an Adjusted Standard from 35 Ill. Admin. Code Part 845 or, in the Alternative, a Finding of Inapplicability*, Amended Petition (September 2, 2021). SIPC’s Amended Petition requested that the Board find the newly promulgated Part 845 inapplicable to

eight existing and former surface impoundment units located at its Marion Generating Station (“Marion Station”) in Williams County, Illinois, or, in the alternative, grant an adjusted standard from Part 845 to the extent it might otherwise apply to these Marion Station units. The eight units at issue include: Pond 3 (including Pond 3A), Pond 4, former Pond B-3, South Fly Ash Pond, and Pond 6 (collectively, the “De Minimis Units”), the former Fly Ash Holding Area, the former Replacement Fly Ash Holding Area, and the former Fly Ash Holding Area Extension (collectively, the “Former Fly Ash Holding Units”, and all eight units together, the “Marion Units”). The Former Fly Ash Holding Units are located in (and under) an area later used as a landfill until the landfill ceased accepting CCR and stopped operating prior to October, 2015. The former landfill was therefore exempt from regulation as a landfill under Part 257. The former landfill was regulated under state law by Illinois EPA as a landfill during its operation (the “Former Landfill”).

2. In its Amended Petition, SIPC argued in part that a finding of inapplicability or a grant of adjusted standard was proper because the Marion Units were not subject to the federal CCR rules (40 C.F.R. § 257, Subpart D) upon which the Part 845 rules were based. *Id.*

3. The Illinois Environmental Protection Agency (“IEPA”) requested and was granted (and SIPC did not oppose) extensions of time of more than fourteen months to file its recommendation with the Board. *See* AS 2021-006, Order (June 3, 2021); Hearing Officer Order (October 19, 2021); Hearing Officer Order (February 15, 2022); Hearing Officer Order (June 14, 2022); Hearing Officer Order (September 14, 2022); Hearing Officer Order (December 14, 2022).

4. On January 13, 2023, IEPA filed its Recommendation with the Board, in which it suggested that the Board deny SIPC’s requests for an adjusted standard from Part 845 or finding of inapplicability of Part 845 as to the Marion Units. AS 2021-006, Agency Recommendation

(January 13, 2023). Further, Illinois EPA suggests in its Recommendation that the Former Landfill also should somehow be regulated as a surface impoundment under Part 845. *Id.*

5. On January 17, 2023, SIPC requested time for discovery before filing its response to better understand the Agency's Recommendation and to attempt to narrow the complex issues at play in the proceeding, and the Hearing Officer stayed the response deadline until further notice. AS 2021-006, Hearing Officer Order (January 17, 2023).

6. On May 18, 2023, USEPA promulgated a Proposed Rule in the federal Legacy Coal Combustion Residual ("CCR") Surface Impoundments rulemaking, USEPA Docket No. EPA-HQ-OLEM-2020-0107 (the "Proposed Rule"), in which it proposed to expand the scope of the federal CCR rule "to establish regulatory requirements for inactive surface impoundments at inactive facilities" and "to establish groundwater monitoring, corrective action, closure, and post-closure care requirements for all CCR management units (regardless of how or when that CCR was placed)." 88 FR 31982 (May 18, 2023). As discussed below, this Proposed Rule could significantly impact this proceeding, and moving forward now with this proceeding could lead to inconsistent obligations and waste of party and Board resources.

7. On June 12, 2023, SIPC informed the Hearing Officer that within 30 days it would file a motion to stay this proceeding in light of USEPA's Proposed Rule. The Hearing Officer confirmed that SIPC would file such a motion within that time. AS 2021-006, Hearing Officer Order (June 12, 2023).

B. USEPA's Proposed Rule

8. The Proposed Rule, in part, proposes to "extend a subset of the existing requirements in part 257, subpart D to CCR surface impoundments and landfills that closed prior to the effective date of the 2015 CCR Rule, inactive CCR landfills, and other areas where CCR is managed directly on the land." *Id.*

9. These proposed newly regulated units, referred to as “CCR Management Units” or “CCRMUs,” are defined as “any area of land on which any non-containerized accumulations of CCR are received, placed, or otherwise managed, that is not a CCR unit.” *Id.* at 32017. USEPA clarifies that this definition is intended to include “historical solid waste management units such as CCR landfills (including abandoned piles)” as well as “any other areas where the solid waste management of CCR on the ground has occurred, such as structural fill sites, CCR placed below currently regulated CCR units, evaporation ponds, or secondary or tertiary finishing ponds that have not been properly cleaned up[.]” *Id.*

10. Under the Proposed Rule, CCRMU’s would be required to comply with existing federal CCR requirements in 40 C.F.R. Part 257 for “groundwater monitoring, corrective action, closure, and post-closure care[.]” *Id.*

11. The comment period for the Proposed Rule closes on July 17, 2023. 88 FR 31982. As part of a consent decree, USEPA has committed to promulgating a final rule on or before May 6, 2024. Consent Decree at 2, *Statewide Organizing for Community Empowerment v. U.S. E.P.A.*, No. 22-cv-2526 (D.D.C., May 3, 2023).

II. REQUEST TO STAY THIS PROCEEDING

12. The Proposed Rule, if adopted, could significantly expand Part 257 to apply for the first time to and/or introduce new federal compliance requirements for one or more of the Marion Units, as well as the Former Landfill. These new or expanded federal requirements may conflict with any applicability determination or adjusted standard the Board may grant in this proceeding, and could potentially moot the entire proceeding by federally imposing the same requirements under the Illinois Part 845 rules that SIPC contends in this proceeding are not applicable. In order to avoid potential obligation conflicts and expending unnecessary time and resources of the Board and the

parties, the Board should stay this proceeding until after USEPA promulgates a final Rule on or before May 6, 2024.¹

A. The final rule could moot part or all of this proceeding.

13. One potential outcome of the Proposed Rule, if adopted, is that some or all of the Marion Units could be classified as CCRMUs subject in whole or in part for the first time to the requirements of the federal CCR rule, 40 C.F.R. § 257, Subpart D. However, SIPC seeks in this proceeding a determination that Part 845 is inapplicable to these units, or in the alternative that relief should be granted from Part 845 requirements. Part 845 is based upon the federal CCR rule as earlier adopted. Amended Petition at 1-2, AS 2021-006 (Sept. 2, 2021). As a result, the relief sought in this proceeding could conflict with or be rendered moot by that future USEPA rulemaking action and time, resources and expenses incurred in this proceeding prior to the completion of that USEPA action could be wasted.

14. SIPC's adjusted standard request is based in part upon its position that the Marion Units are *not* regulated by the federal CCR rules upon which Part 845 was based. *Id.* SIPC bases this position on the existing federal definitions of "CCR surface impoundments," "existing CCR surface impoundments," and "inactive surface impoundments." *Id.* at 26-27, 33-39. USEPA is proposing to regulate CCRMUs *in addition to* CCR surface impoundments, and has proposed a

¹ The decision to grant or deny a motion for stay is "vested in the sound discretion of the Board." *See* PCB 97-103, *People v. State Oil Co.*, Board Order (May 15, 2003) *aff'd sub nom State Oil Co. v. PCB*, 822 N.E.2d 876 (2nd Dist. 2004). The Board has granted stays of adjusted standard proceedings in circumstances where regulatory or legislative matters may moot or otherwise impact the adjusted standard proceeding. *See e.g.*, AS 08-1, *In the Matter of Petition of Ill. Dept. of Transportation, District 8, Bowman Avenue Pump Station and Deep Well System, for an Adjusted Standard from 35 Ill. Adm. Code 302.208(G)*, Board Order (December 20, 2007); AS 19-1, *In the matter of Petition of Midwest Generation LLC for an Adjusted Standard from 35 Ill. Adm. Code 811 and 814*, Board Order (Oct. 3, 2019).

broad definition of CCRMUs that could potentially include some or all of the Marion Units, as well as the Former Landfill. 88 FR at 32017.

15. To the extent USEPA's final action on the Proposed Rule (the "Final Rule") expands Part 257 to include some or all of the Marion Units, any exemption the Board might grant SIPC from the Illinois analogues to those rules would not result in avoided efforts and costs and this proceeding could create conflicts or be rendered moot.

B. A stay is necessary to ensure any adjusted standard is in compliance with federal law.

16. Even if the Final Rule does not moot this proceeding (in whole or in part), a stay is still warranted to ensure that any potential relief the Board may grant does not violate federal law. Section 28.1 of the Illinois Environmental Protection Act requires that the Board ensure an adjusted standard is "consistent with any applicable federal law." 415 Ill. Comp. Stat. 5/28.1(c)(4). However, as detailed above, any final rule adopting the Proposed Rule could significantly alter the scope and content of the "applicable federal law."² As a result, any finding the Board might make on applicability or relief that it might grant could, depending on the content of the Final Rule, be valid only until, at the latest, May 6, 2024 (the deadline for USEPA to issue a final rule under the consent decree in *Statewide Organizing for Community Empowerment v. U.S. E.P.A.*, No. 22-cv-2526 (D.D.C., May 3, 2023)).

C. A stay is appropriate to avoid unnecessary cost to the Board and the Parties

17. Because the final USEPA action on the Proposed Rule could potentially conflict with Board action in this proceeding, rendering any such decision by the Board in this proceeding moot,

² In fact, in its Amended Petition SIPC maintains that its requested adjusted standards are consistent with existing federal law because the Marion Units are *not* regulated by the current federal CCR rules. Amended Petition at 47, 59, AS 2021-006 (Sept. 2, 2021). If some or all of the Marion Units are regulated under the federal CCR rules as a result of the finalization of the Proposed Rule, a Board order on SIPC's petition prior to that finalization could be inconsistent with applicable federal law in short order.

invalid, or a combination of the two, a stay is warranted until USEPA promulgates a Final Rule and provides clarity as to the scope and applicability of the federal CCR rules going forward, which should occur on or before May 6, 2024.

18. The requested stay would prevent the waste of considerable time and resources by the Board and by the parties to this proceeding. The issues involved are complex and involve decades of technical data and reports across multiple sites. A hearing has been requested.

19. Additionally, the requested stay would not result in any undue delay or uncertainty as to SIPC's obligations at the Marion Units under Illinois law. The comment period for the Proposed Rule will end within days of the filing of this motion, and USEPA is under court order to issue a Final Rule by May 6, 2024.

III. CONCLUSION

20. For the above reasons, SIPC respectfully requests that the Board issue an order staying this proceeding until the earlier of May 6, 2024 or U.S. EPA taking final action on its proposed Legacy Coal Combustion Residual Surface Impoundment rulemaking, at which time SIPC will file a status report in accordance with 35 Ill. Admin. Code § 101.514(b).

Respectfully submitted,

/s/ Bina Joshi

Bina Joshi

ARENTFOX SCHIFF LLP
Stephen Bonebrake
Joshua R. More
Amy Antonioli
Bina Joshi
233 South Wacker Drive, Suite 7100
Chicago, Illinois 60606
(312) 258-5500
Steve.Bonebrake@afslaw.com
Joshua.More@afslaw.com

Amy.Antoniolli@afslaw.com

Bina.Joshi@afslaw.com

*Attorneys for Southern Illinois Power
Cooperative*

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 12th day of July, 2023:

I have electronically served a true and correct copy of the Motion to Stay Proceedings and Status Report and this Certificate of Service by email upon the following persons and the number of pages in the email transmission is 11:

Stefanie Diers
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Ave. East, PO Box 19276
Springfield, Illinois 62794-9276
Stefanie.Diers@Illinois.Gov

Sara Terranova
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Ave. East, PO Box 19276
Springfield, Illinois 62794-9276
Sara.Terranova@illinois.gov

Pollution Control Board
100 West Randolph Street
James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601-3218
Don.Brown@Illinois.Gov
PCB.Clerks@illinois.gov
Carol.Webb@illinois.gov

My e-mail address is bina.joshi@afslaw.com;

The e-mail transmission took place before 5:00 p.m.

/s/ Bina Joshi
Bina Joshi

ARENTFOX SCHIFF LLP
Stephen Bonebrake
Joshua R. More
Amy Antonioli
Bina Joshi
233 South Wacker Drive, Suite 7100
Chicago, Illinois 60606
(312) 258-5500
Steve.Bonebrake@afslaw.com

Joshua.More@afslaw.com
Amy.Antoniolli@afslaw.com
Bina.Joshi@afslaw.com

Attorneys for Southern Illinois Power Cooperative