BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	R 2020-019
STANDARDS FOR THE DISPOSAL	)	
OF COAL COMBUSTION RESIDUALS	)	(Rulemaking - Land)
IN SURFACE IMPOUNDMENTS:	)	
PROPOSED NEW 35 ILL. ADM.	)	
CODE 845	)	

NOTICE OF FILING

TO: Persons identified on Board's CCR service list on its website: https://pcb.illinois.gov/Cases/GetCaseDetailsById?caseId=16858.

PLEASE TAKE NOTICE that today I have filed with the Illinois Pollution Control Board the attached Public Comment of the Illinois Attorney General's Office's a true and correct copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
By KWAME RAOUL,
Attorney General of the State of Illinois

BY: /s/ *Stephen J. Sylvester*

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CERTIFICATE OF SERVICE

I, STEPHEN J. SYLVESTER, an attorney, do certify that on January 14, 2021, I caused true and correct copies of the Notice of Filing and the Public Comment of the Illinois Attorney General's Office's served via email upon the persons with email addresses named on the Service List provided on the Board's website, available at:

https://pcb.illinois.gov/Cases/GetCaseDetailsById?caseId=16858.

/s/ *Stephen J. Sylvester*
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PUBLIC COMMENT OF
THE ILLINOIS ATTORNEY GENERAL'S OFFICE

The Illinois Attorney General's Office, on behalf of the People of the State of Illinois ("People"), hereby submits this late-filed public comment pursuant to Section 102.108(d) of the Board's procedural rules, 35 Ill. Adm. Code 102.108(d), to advise the Board of a recent development:

1. The People and other participants in this rulemaking have referred in public comments to an action for declaratory judgment filed by AmerenEnergy Medina Valley Cogen, LLC and Union Electric Company, d/b/a Ameren Missouri (collectively, "Ameren") in Sangamon County Circuit Court against the Illinois Environmental Protection Agency, concerning several of Ameren's CCR surface impoundments.

2. Ameren's Pre-Hearing Comment (P.C. #18) incorporated by reference the complaint for declaratory judgment.

3. Attached hereto as Exhibit A is the January 11, 2021 order of the Sangamon County Circuit Court dismissing Ameren's complaint with prejudice, for lack of ripeness and failure to state a claim.

4. The People submit this comment to inform the Board of a relevant recent development and to ensure that the record in this proceeding is complete and accurate, thereby avoiding prejudice to any party.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
by KWAME RAOUL,

By: /s/ *Andrew Armstrong*

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DATE: January 14, 2021

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PUBLIC COMMENT OF
THE ILLINOIS ATTORNEY GENERAL'S OFFICE

EXHIBIT A

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, STATE OF ILLINOIS

AMERENENERGY MEDINA VALLEY COGEN, an Illinois limited liability company, and UNION ELECTRIC COMPANY d/b/a AMEREN MISSOURI, a Missouri corporation,	)	
Plaintiffs/Petitioners,	)	
v.	)	2020-MR-615
THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, JOHN J. KIM, Director of the Illinois Environmental Protection Agency, WILLIAM E. BUSCHER, P.G., Manager of the Hydrogeology and Compliance Unit in the Illinois Environmental Protection Agency's Bureau of Water, Division of Public Water Supplies, each in an Official Capacity,	)	
Defendants/Respondents.	)	

OPINION AND ORDER

THIS COURT, having considered Defendants Illinois Environmental Protection Agency, John J. Kim, and William E. Buscher's Section 2-619.1 Motion to Dismiss Pursuant to Sections 2-619(a)(1) and 2-615 ("Motion to Dismiss"), FINDS that Plaintiffs' Verified Complaint for Declaratory Relief and Petition for Writ of Certiorari ("Complaint") is unripe. In addition, this Court FINDS that Counts I and II of the Complaint fail to sufficiently plead a cause of action, and that Count III of the Complaint improperly petitions for issuance of a writ of *certiorari*. Accordingly, Defendants' Motion to Dismiss is GRANTED, and the Complaint is DISMISSED WITH PREJUDICE in its entirety.

BACKGROUND AND PROCEDURAL HISTORY

On July 27, 2020, Plaintiffs filed a three-count Complaint seeking review of an Illinois Environmental Protection Agency ("Illinois EPA") administrative action. Plaintiffs seek judicial

review of a June 12, 2020 Illinois EPA letter to Plaintiffs' affiliate Ameren Energy Generating Company ("Final Determination Letter"), in which Illinois EPA stated that it had made a "final determination" that certain ash ponds located on Plaintiffs' properties are "CCR surface impoundments," as defined in Section 3.143 of the Illinois Environmental Protection Act ("Act"), and therefore are subject to fees under Section 22.59(j) of the Act. (Compl., Ex. 16) (citing 415 ILCS 5/3.143 & 22.59(j)). Illinois EPA stated that initial fees under Section 22.59(j) of the Act were due, and that "[f]ailure to pay the initial fees may result in issuance of a Violation Notice pursuant to Section 31(a) of the Illinois Environmental Protection Act, 415 ILCS 5/31(a)." (*Id.*)

Count I of the Complaint alleges that the Final Determination Letter is an *ultra vires* application of the Act and seeks a declaratory judgment that Sections 3.143 and 22.59(j) of the Act are inapplicable to four of the ash ponds identified in the Final Determination Letter. *See* 735 ILCS 5/2-701. Count II of the Complaint alleges that the issuance of the Final Determination Letter constituted an improperly promulgated "rule" under the Illinois Administrative Procedure Act ("APA"), 5 ILCS 100/1-1 *et seq*. Count III of the Complaint petitions for the issuance of a writ of *certiorari* directing Illinois EPA to withdraw, revoke, and/or disclaim the Final Determination Letter.

On September 9, 2020, Plaintiffs filed a Motion for a Preliminary Injunction, but have not to date noticed it for hearing. On September 18, 2020, Defendants filed their Motion to Dismiss arguing, *inter alia*, that the Complaint did not present a ripe controversy and otherwise failed to state a claim. Plaintiffs filed their response brief on November 13, 2020, as well as a purported "withdrawal" of claims by Plaintiff Union Electric Company. Defendants filed their

reply brief on December 15, 2020, and this Court heard oral argument on the Motion to Dismiss on December 17, 2020.

LEGAL STANDARD

"A motion under section 2-619.1 allows a party to combine a section 2-615 motion to dismiss based on insufficient pleadings with a section 2-619 motion to dismiss based on certain defects or defenses." *Atlas v. Mayer Hoffman McCann, P.C.*, 2019 IL App (1st) 180939, ¶ 25; *see also Schloss v. Jumper*, 2014 IL App (4th) 121086, ¶ 15. Section 2-619(a)(1) of the Code of Civil Procedure authorizes involuntary dismissal of cases in which "the court does not have jurisdiction of the subject matter of the action." 735 ILCS 5/2-619(a)(1).

"A section 2-615 motion to dismiss attacks the legal sufficiency of a complaint by alleging defects on the face of the complaint." *Trilisky v. City of Chicago*, 2019 IL App (1st) 182189, ¶ 28. "When deciding a motion to dismiss, the trial court is to consider only the allegations in the pleadings." *Henby v. White*, 2016 IL App (5th) 140407, ¶ 20. "When ruling on a section 2–615 motion, a court must accept as true all well-pleaded facts in the complaint, as well as any reasonable inferences that may be drawn from those facts." *Tyrka v. Glenview Ridge Condominium Ass'n*, 2014 IL App (1st) 132762, ¶ 33. "A complaint should be dismissed with prejudice under section 2–615 only if it is clearly apparent that no set of facts can be proven that will entitle the plaintiff to recover." *Cowper v. Nyberg*, 2015 IL 117811, ¶ 22.

ANALYSIS

The Court finds that Defendants' Motion to Dismiss comports with the requirements of Section 2-619.1 and justifies dismissal of the Complaint under both Section 2-619(a)(1) and 2-615. The Court concludes that Plaintiffs' Complaint fails to allege a ripe controversy, such that the Complaint should be dismissed with prejudice under Section 2-619(a)(1) for lack of

jurisdiction. The Court additionally concludes that Plaintiffs fail to set out a cognizable cause of action in any of the Complaint's three counts, warranting dismissal with prejudice under Section 2-615.

1. The Complaint fails to allege a ripe controversy fit for judicial decision.

The purpose of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *National Marine, Inc. v. Illinois EPA*, 159 Ill. 2d 381, 388 (1994) (quoting *Bio-Medical Laboratories, Inc. v. Trainor*, 68 Ill. 2d 540, 546 (1977)). Ripeness requires an evaluation of "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 389 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967)). The Complaint fails to present an issue fit for judicial decision and fails to allege sufficient hardship of withholding judicial consideration.

Regarding the first ripeness factor, "the fitness of the issues for judicial decision," the issues presented by the Complaint are not fit for judicial decision at this time. *Id.* Like the unsuccessful plaintiff in *National Marine*, Plaintiffs seek judicial review of "a preliminary notice of potential liability." *Id.* The Final Determination Letter was not a binding order or adjudication affecting Plaintiffs' rights or obligations. *See People v. Lincoln, Ltd.*, 2016 IL App (1st) 143487, ¶ 37 ("IEPA has the burden of proving violations of the Act before the Pollution Control Board or the circuit court, and IEPA does not adjudicate matters."). Rather, the Final Determination Letter informed Plaintiffs that Illinois EPA viewed its ash ponds as subject to regulation and notified Plaintiffs that continued non-compliance could result in Illinois EPA

initiating the enforcement process set out in Section 31(a) of the Act, 415 ILCS 5/31(a). Such a notice "is preliminary to any final determination of liability by an adjudicative body and neither disposes of the proceedings nor adjudicates legal duties or rights." *National Marine*, 159 Ill. 2d at 389. After Illinois EPA sent the Final Determination Letter, Plaintiffs were free to "undertake the response action requested," "meet and attempt to settle with the Agency," or "choose to ignore the notice entirely." *Id.*

In order for the Final Determination Letter's demand for payment of fees to become legally binding, Plaintiffs would first be provided "with the opportunity of *de novo* review of the Agency's actions when and if the Agency brings a[n] . . . enforcement proceeding before the Board or circuit court to determine whether [Plaintiffs are] legally liable for any violations of the Act." *Id.* at 391; *see also* 415 ILCS 5/41 (providing for judicial review of adverse Board decisions). Moreover, as Defendants pointed out in their reply brief, Plaintiffs have requested that the Illinois Pollution Control Board in a pending rulemaking proceeding separately decide whether the disputed ash ponds constitute "CCR surface impoundments" under the Act, further underscoring that the Final Determination Letter did not adjudicate Plaintiffs' "legal duties or rights." (Def. Reply, Ex. A at 5, 21-28); *National Marine*, 159 Ill. 2d at 389. Thus, Illinois EPA's issuance of the Final Determination Letter did not "create[] an actual controversy capable of judicial resolution or review," and the issues raised by Plaintiffs are unfit for judicial decision at this time. *National Marine*, 159 Ill. 2d at 390. For the same reason, Count I of the Complaint fails to state a cause of action for a declaratory judgment, because it does not set out an "actual controversy." *See Beahringer v. Page*, 204 Ill. 2d 363, 372 (2003).

Regarding the second ripeness factor, "the hardship to the parties of withholding court consideration," Plaintiffs fail to allege sufficient hardship to render judicial review appropriate at

this preliminary stage. *National Marine*, 159 Ill. 2d at 389. As the Final Determination Letter was not a binding order or adjudication, Plaintiffs are not required to perform or refrain from any action, including payment of the demanded fees. Plaintiffs have not alleged any hardship or harm resulting from issuance of the Final Determination Letter other than possible future State enforcement pursuant to Section 31(a) of the Act, 415 ILCS 5/31(a)—a process that itself ultimately would provide *de novo* review of the applicability of the Act to Plaintiffs' coal ash ponds. Simply being subject to a State agency's statutorily-prescribed enforcement process is not a hardship or harm sufficient to support judicial review of the agency's actions. *See Dock Club, Inc. v. Illinois Liquor Control Comm'n*, 83 Ill. App. 3d 1034, 1038-39 (4th Dist. 1980) (ordering that declaratory judgment action based on plaintiff's pre-enforcement disagreement with agency's legal interpretation be dismissed as premature).

Plaintiffs attempt to distinguish *National Marine* and contend, instead, that the Final Determination Letter is ripe for review under *Alternate Fuels, Inc. v. Director of Illinois EPA*, 215 Ill. 2d 219 (2004). Plaintiffs asserted at oral argument that *Alternate Fuels*, decided ten years after *National Marine*, superseded *National Marine*. That is not accurate. In *Alternate Fuels*, the Illinois Supreme Court cited *National Marine*, but distinguished its earlier decision on a number of grounds, none of which are present in this case. *See id.* at 233-37. In contrast to *Alternate Fuels*, Illinois EPA in this case has not obtained compliance with the Act that would obviate any need for enforcement under Section 31 of the Act. *Id.* at 232. On the contrary, Plaintiffs' petition for writ of *certiorari* and Motion for a Preliminary Injunction explicitly seek to impede further administrative proceedings prior to their completion. Moreover, unlike the plaintiff in *Alternate Fuels*, Plaintiffs have not alleged that issuance of the Final Determination Letter caused a loss of financing, a loss of suppliers, a cessation of business operations, or any

other present injury to their pecuniary interests. *Id.* at 233. The unique circumstances that the Court found justified judicial review in *Alternate Fuels* are not present in this case.

Because the Complaint neither presents an issue fit for judicial decision nor alleges sufficient hardship of withholding court consideration, the Complaint fails to establish the existence of an actual controversy ripe for judicial determination. Accordingly, the Complaint is dismissed with prejudice in its entirety pursuant to Section 2-619(a)(1). *See Schwanke, Schwanke & Associates v. Martin*, 241 Ill. App. 3d 738, 748 (1st Dist. 1992) ("If the complaint does not state facts sufficient to show ripeness, dismissal is proper."). Count I additionally is dismissed with prejudice pursuant to Section 2-615 because Plaintiffs are unable to allege an actual controversy based on the Final Determination Letter, and therefore are unable to state a claim for a declaratory judgment. *See Cowper*, 2015 IL 117811, ¶ 22.

2. Count II of the Complaint fails to plead a cause of action.

Count II of the Complaint alleges that Illinois EPA's issuance of the Final Determination Letter constituted improper rulemaking in violation of the APA. (Compl. ¶¶ 77-79). "To state a cause of action adequately, the claim must be both legally and factually sufficient, setting forth a legally recognized claim as its basis, as well as pleading facts which are cognizable legally." *RBC Mortgage Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 349 Ill. App. 3d 706, 711 (1st Dist. 2004); *see also* 735 ILCS 5/2-603(a).

Plaintiffs fail to identify a cognizable legal claim or basis for their requested relief. Plaintiffs in Count II do not plead Section 2-701 of the Code of Civil Procedure as a basis for relief and do not request a declaration of rights. 735 ILCS 5/2-701; *see Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 23 ("To successfully allege a cause of action for declaratory judgment, the complaint must sufficiently state an actual and legal controversy and a request for

declaration of rights"). In their response brief, Plaintiffs identified Section 10-55(c) of the APA, 5 ILCS 100/10-55(c), as the basis for Count II. (Pl. Resp. at 13). However, Section 10-55(c) of the APA, which provides for the award of costs and attorney's fees, "does not create a separate cause of action." *Illinois Dep't of Financial and Professional Regulation v. Rodriquez*, 2012 IL 113706, ¶¶ 18, 37. Plaintiffs proffer no other legal basis for Count II. The ambiguities in the legal basis for Count II of the Complaint do not amount to "a plain and concise statement of the pleader's cause of action." 735 ILCS 5/2-603(a); *see also Cable America, Inc. v. Pace Electronics, Inc.*, 396 Ill. App. 3d 15, 19 (1st Dist. 2009) ("The purpose of Section 2-603 'is to give notice to the court and to the parties of the claims being presented'.") (quoting *Smith v. Heissinger*, 319 Ill. App. 3d 150, 154 (4th Dist. 2001)).

Notwithstanding Plaintiffs' failure to identify a cause of action, Plaintiffs also fail to sufficiently plead that the challenged agency action is a "rule" under the APA. The APA defines a "rule" as "each agency statement *of general applicability* that implements, applies, interprets, or prescribes law or policy." 5 ILCS 100/1-70 (emphasis added). The Complaint fails to allege that Illinois EPA implemented, applied, or interpreted law or policy with regard to any person or party other than Plaintiff AmerenEnergy Medina Valley Cogen. "An agency's erroneous interpretation of statutory language as it applies in a particular case does not constitute improper rulemaking." *Van Dyke v. White*, 2019 IL 121452, ¶ 91; *see also Alternate Fuels*, 215 Ill. 2d at 247-48. The authority cited by Plaintiffs is immaterial. *See Citizens Org. Project v. Dep't of Nat. Res.*, 189 Ill. 2d 593 (2000). In that case, the challenged "rule" was a regulation published in the Illinois Administrative Code, so the parties were not litigating whether an administrative "rule" was at issue, but rather whether such rule had been invalidated by the lower court. *See id.* at 597-98.

Because Plaintiffs fail to identify a cause of action or plead sufficient facts identifying a "rule" promulgated in violation of the APA, Count II of the Complaint is legally and factually insufficient. Illinois EPA's "interpretation of statutory language as it applies in a particular case does not constitute improper rulemaking," *Van Dyke*, 2019 IL 121452, ¶ 91, so no set of facts can be plead that would establish a claim of improper rulemaking. *See Cowper*, 2015 IL 117811, ¶ 22. Accordingly, in addition to dismissal pursuant to Section 2-619(a)(1), Count II is dismissed with prejudice pursuant to Section 2-615.

3. Plaintiffs' petition for a writ of *certiorari* is improper.

Count III of the Complaint petitions for issuance of a writ of *certiorari* "directing the IEPA to withdraw, revoke, and/or disclaim the Final Determination Letter." (Compl. at 21, ¶ B). The writ of certiorari "provides a means whereby a party who has no avenue of appeal or direct review may obtain limited review over action by a court or other tribunal exercising quasi-judicial functions." *Hastings v. State*, 2015 IL App (5th) 130527, ¶ 17 (quoting *Reichert v. Court of Claims*, 203 Ill. 2d 257, 260 (2003)).

Issuance of a writ of *certiorari* is improper because Illinois EPA's issuance of the Final Determination Letter was not an exercise of a quasi-judicial function. The Final Determination Letter was not a binding order or adjudication affecting Plaintiffs' rights or liabilities. *See Lincoln, Ltd.*, 2016 IL App (1st) 143487, ¶ 37. Nor was the Final Determination Letter "a legal determination" of the status of Plaintiffs' properties with "strong elements of permanence and finality." *See States Land Improvement Corp. v. EPA*, 231 Ill. App. 3d 842, 847-48 (4th Dist. 1992).

Plaintiffs' petition for issuance of a writ of certiorari seeks review of agency action not reviewable through that means. Illinois EPA's issuance of the Final Determination Letter was

not an exercise of a quasi-judicial function, and no set of facts can be plead whereby Plaintiffs' petition would be appropriate. *See Cowper*, 2015 IL 117811, ¶ 22. Accordingly, in addition to dismissal pursuant to Section 2-619(a)(1), Count III of the Complaint is dismissed with prejudice pursuant to Section 2-615.

IT IS HEREBY ORDERED:

Defendants' Motion to Dismiss is hereby GRANTED.

The Complaint is DISMISSED WITH PREJUDICE in its entirety.

Date: 1-11-2021

JUDGE GIGANTI