

Dynergy's Comments to JCAR Regarding Deadlines in the Illinois Coal Ash Rules (PCB R2020-19)

Dynergy Midwest Generation, LLC; Electric Energy Inc.; Illinois Power Generating Company; Illinois Power Resources Generating LLC; and Kincaid Generation, LLC (collectively, "Dynergy") respectfully submit these comments to JCAR regarding the proposed second notice 35 Ill. Adm. Code Part 845 rules currently pending before the Illinois Pollution Control Board ("Board").

The second notice Part 845 Rule was drafted under the assumption that it would be adopted by the end of March 2021. *See* R20-19 Opinion and Order at p. 1-2, 4 (Feb. 4, 2021). Several deadlines in the proposed Rule are tied to that date. The Board's March 13, 2021 Order, noted that JCAR has asked for further time to examine the proposed rule and that "the Board will not adopt final rules until April or May" of 2021. R20-19, Order of the Board (March 18, 2021). Accordingly, permit application and other related deadlines in Part 845 should be extended to correspond to and take into account the new date of adoption.

I. Deadlines in Part 845 Were Set Assuming Adoption By March 2021

Several deadlines included in proposed Part 845 were set based on the assumption that the final rule would be adopted by March 2021. In particular, the proposed Rule includes deadlines related to the submission of permit applications and related documents that are tied to that date and that should, therefore, be extended.

When discussing the September 30, 2021, operating permit deadline in 845.230(d), IEPA noted:

Section 845.200(a)(2) states: "Except as provided in Section 845.230(d), no person shall operate a CCR surface impoundment without an operating permit issued by the Agency pursuant to this Part. For the purposes of this Part, a CCR surface impoundment commences operation upon initial receipt of CCR." Section 845.230(d) defines when applications for such permits are due. Assuming the final rule is not adopted until March 2021, the initial operating permit applications are due no later than September 30, 2021. This provides for a lag time between when the rule becomes final, and when those first operating permit applications are due pursuant to the rule.

R20-19, First Supplement to IEPA's Pre-filed Answers at p. 8 (Aug. 5, 2020) (emphasis added). Accordingly, the operating permit application deadline in 845.230(d) was proposed under the assumption that there would be at least a six month delay between promulgation of Part 845 and the application deadline set forth in section 845.230(d). When discussing the construction permit deadlines in section 845.700, IEPA made a similar statement, noting the earliest construction permit deadline in that section, January 1, 2022, was established anticipating a March 2021 promulgation date. IEPA stated:

The Agency chose a date of January 1, 2022 which would allow nine months for submittal, after the March 31, 2021 promulgation date of the regulation required by the legislature. The Agency acknowledges that some of the timeframes are

tight within the rule. The timeframes placed upon the Agency in parts of the rule are also tight. However, the Agency believes the timeframes laid out in the rule can be managed.

Id. at 9. Not extending the timeframes to correspond to the delay of the rule's promulgation will make those timeframes, between promulgation and Part 845 deadlines, even tighter. Accordingly, the permit application deadlines in sections 845.230(d) and 845.700 should be extended.

It similarly makes sense to extend the September 30, 2021 deadline to prepare an initial CCR fugitive dust plan (proposed section 845.500(b)(4)) and to prepare an initial emergency action plan (proposed section 845.520(c)), which coincides with the operating permit application deadline. Owners and operators should be afforded sufficient time between the promulgation of the rule and submission of those plans so that they can be properly prepared.

Additionally, any deadlines in the rule that pre-date the effective date should be extended, such as the March 30, 2021 deadline to initiate inspections by a qualified person in section 845.540(a). Not doing so would result in imposing affirmative obligations under the Rule before it is finalized and effective, which is contrary to settled precedent. *See Lake Environmental, Inc. v. Illinois*, 54 Ill. Ct. Cl. 408, 416-17 (2001) (“retroactive applications are disfavored in the law, and are not ordinarily allowed in the absence of language explicitly so providing. The authoring agency of administrative regulations is no less subject to these settled principles of statutory construction than any other arm of government.”).

Finally, it would be inappropriate and unfairly burdensome to require a company to initiate obligations to come into compliance with Part 845 before it is promulgated. Whether a company incurs costs to come into compliance with a regulation before or after its final promulgation impacts accounting and disclosure practices. If the regulation has not been enacted, such costs are not considered necessary compliance costs for purposes of asset retirement obligation accounting and public disclosure. Even with every confidence that a provision will not be changed and will be enacted as is, for corporate accounting and disclosure purposes, the asset retirement obligation does not exist until the new regulation is enacted.¹

¹ Additionally, IEPA has not yet issued Part 845 permit application forms, which further supports pushing permit application-related deadlines. During the rulemaking, IEPA was asked “given the relatively short application deadlines for certain facilities under the Agency’s proposal, will the Agency attempt to make permit application forms available before the Board rulemaking is final?” In response, IEPA stated that it would “make every effort to have CCR permit specific application forms available by March 31, 2021.” It is unclear whether IEPA will, in fact, have the relevant permit application forms ready by March 31. However, the issuance date promised for those forms was related to the anticipated final adoption date of Part 845. Extending permit application deadlines will allow IEPA to consider the final rule when issuing its Part 845 permit application forms and help ensure applicants have adequate time to prepare permit applications once they are issued and the final contents of the applications and requirements of the Part 845 are known.

II. Part 845 Should be Revised to Incorporate Deadlines Corresponding to the New Promulgation Date

The JCAR should recommend extending the following deadlines, as well as any other deadlines in proposed Part 845 it deems appropriate, for an amount of time equivalent to the delay in promulgation of Part 845.

Part 845 Provision	Original Proposed Deadline
845.230(d)(1) – Deadline to submit an initial operating permit for existing, inactive or inactive closed CCR impoundment that has not completed post-closure care	September 30, 2021
845.500(b)(4) – Deadline to prepare initial CCR fugitive dust control plan	September 30, 2021
845.520(c) – Deadline to submit initial Emergency Action Plan	September 30, 2021
845.540(a)(3) – Deadline to initiate inspections by a qualified person required by 845.540(a)	March 30, 2021
845.700(h)(1) – Deadline to submit construction permit application containing final closure plan or construction permit application to retrofit for Category 1, 2,3 and 4 CCR surface impoundments	January 1, 2022
845.700(h)(2) – Deadline to submit construction permit application containing final closure plan or construction permit application to retrofit for Category 5 CCR surface impoundment	July 1, 2022
845.700(h)(3) – Deadline to submit construction permit containing final closure plan or construction permit application to retrofit for Category 6 and 7 CCR surface impoundments	July 1, 2023