

MEMORANDUM

DATE: March 30, 2021

TO: Michelle Casey, Executive Ethics Commission, Executive Director

FROM: AJ Johnson, Illinois Environmental Protection Agency, Deputy General Counsel, Ethics Officer

SUBJECT: Potential Ex Parte Communication Related to Illinois Pollution Control Board Proposed Rule for 35 Ill. Adm. Code Part 845, Drafted and Filed with the Pollution Control Board by the Illinois Environmental Protection Agency

This memorandum summarizes a meeting between representatives of the Joint Committee on Administrative Rules (JCAR) and several interested parties related to an Illinois Pollution Control Board rulemaking. As background, the Illinois Environmental Protection Agency (Illinois EPA) has proposed a rulemaking to the Illinois Pollution Control Board (PCB) pursuant to Sections 13, 27 and 28 of the Illinois Environmental Protection Act. 415 ILCS 5/13; 415 ILCS 5/27 and 415 ILCS 5/28. The proposed rulemaking creates a new part 845 in Title 35 of the Illinois Administrative Code. The proposed rules contain standards for the storage and disposal of coal combustion residuals (CCR) in surface impoundments. The Illinois EPA prepared the proposed rules as a result of a statutory mandate found in Public Act 101-171 (commonly referred to as SB 09), which required the Illinois EPA to file the draft rules with the PCB no later than March 30, 2020. 415 ILCS 5/22.59(g). While the Illinois EPA drafted the proposed rule and submitted it to the PCB, the PCB is the rulemaking agency for purposes of the Administrative Procedure Act (APA) and filed first notice and second notice, and received public comments in connection with the rulemaking. The following link contains information about the Part 845 rulemaking, and provides a link to the PCB docket for the rulemaking: <https://www2.illinois.gov/epa/topics/water-quality/watershed-management/ccr-surface-impoundments/Pages/default.aspx>.

While the Illinois EPA is not the rulemaking agency for purposes of the APA, we still believe it is best to report discussions that occurred at a meeting on March 25, 2021. On March 15, 2021, Stefanie Diers, Deputy General Counsel for the Illinois EPA Water Regulatory Unit, was invited to attend a meeting by JCAR “to discuss the practical application of the rulemaking.” In proposing the meeting, JCAR noted that the PCB and the Illinois EPA are charged with different duties under the rules and the authorizing statute and stated it would be helpful to have both government entities in the room. The PCB did not attend the meeting, but Ms. Diers attended on behalf of the Illinois EPA. Although the rulemaking agency (the PCB) did not attend the March 25 meeting, we believe it is appropriate to report the meeting as an ex parte communication in accordance with 5 ILCS 100/5-165, even if it is not technically required.

The participants in the March 25 conference call that the Illinois EPA is aware of, and their titles if known, include:

- Stefanie Diers – Deputy General Counsel, Illinois EPA Water Regulatory Unit
- Christine Zeivel – Assistant Counsel, Illinois EPA Water Regulatory Unit
- Jonathan Eastvold – JCAR, Rules Analyst III
- Kimberly Schultz – JCAR, Executive Director
- Kevin Kulavic, JCAR, Deputy Director
- Andrew Armstrong – Attorney General’s Office, Springfield Environmental Bureau Chief
- Steve Sylvester - Attorney General’s Office, Chicago Environmental Bureau Chief
- Chris Nybo - Ameren Lobbyist
- Claire Manning – Private attorney for Ameren
- Josh Bina – Dynegey
- Josh Moore – Dynegey
- David McEllis – Environmental Law and Policy Center, Government Affairs Representative
- Jeffrey Hammonds – Environmental Law and Policy Center, Staff Attorney
- Senator Bill Cunningham
- Representative Keith Wheeler.

JCAR noted the PCB chose not to participate in the call. A summary of the remaining discussion at the March 25, 2021 meeting is as follows:

- JCAR stated they have been working with the PCB on many technical changes, but a key remaining issue is the potential retroactive application of the rule by utilizing a 2015 date to define and determine CCR surface impoundment’s status.
- Claire Manning for Ameren gave her legal arguments against the 2015 date and the retroactive application and gave factual information about particular ponds and money spent by Ameren to close its ponds under state law existing at the time. Ameren also raised fee issues and concerns with enforcement cases and noted that they want JCAR to advise them what Section 22.59 means and its applicability.
- Andrew Armstrong from the AG’s Office countered by pointing to the case Ameren brought against Illinois EPA concerning fees being dismissed by the circuit court, and reiterating that the arguments were raised before the PCB and the PCB did not accept Ameren’s position. Mr. Armstrong noted that Part 845 contains rules of general applicability, that Ameren can seek regulatory relief and that it is improper to argue this issue again before JCAR.
- Christine Zeivel from the Illinois EPA stated that the Illinois EPA will follow-up with JCAR in writing based on questions JCAR has asked of the Illinois EPA, and she noted the robust record, and that the Illinois EPA did not want site specific determinations in a rule of general applicability. She also noted the importance of using the 2015 date in order to remain as protective and comprehensive as the federal regulations in accordance with SB 09, and to obtain USEPA approval of Illinois EPA’s program, as well as the impact to ponds if the date is changed.

- Jeffery Hammonds from the Environmental Law and Policy Center (ELPC) raised concerns about USEPA approval if the 2015 retroactive date is changed. He noted the PCB agreed with all legal arguments raised by the AG, ELPC and IEPA, not retroactive application as Ameren is arguing.
- JCAR asked what would happen if the retroactive date is changed to 2019, and further asked if the intent is to apply the rule retroactively to ponds already closed, meaning are clean closed surface impoundments impacted? JCAR raised concerns regarding the legislative intent and questioned whether any other ponds would be impacted besides those owned by Ameren and asked about the definition of a CCR surface impoundment.
- Steve Sylvester with the AG's Office noted the definition of disposal provided in the statute.