BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
SIERRA CLUB, ENVIRONMENTAL LAW AND POLICY CENTER, PRAIRIE RIVERS NETWORK, and CITIZENS AGAINST RUINING THE ENVIRONMENT	)	
	)	**PCB 2013-015**
Complainants,	)	**(Enforcement – Water)**
	)	
v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

NOTICE OF FILING

TO: Don Brown, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board, Midwest Generation, LLC's Response in Opposition to Complainants' Motion to Incorporate Certain Documents, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: March 4, 2022

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, Certificate of Service and Midwest Generation, LLC's Response in Opposition to Complainants' Motion to Incorporate Certain Documents, a copy of which is hereby served upon you was filed on March 4, 2022 with the following:

Don Brown, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

and that true copies of the Notice of Filing, Certificate of Service and Midwest Generation, LLC's Response in Opposition to Complainants' Motion to Incorporate Certain Documents were emailed on March 4, 2022 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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	)	
Respondent.	)	

MIDWEST GENERATION, LLC'S RESPONSE IN OPPOSITION TO COMPLAINANTS' MOTION TO INCORPORATE CERTAIN DOCUMENTS

The Hearing Officer should deny Complainants' motion to incorporate testimony and documents from the Illinois CCR Rulemaking[1] because the materials are unrelated to the four MWG Stations at issue, raise an entirely new issue never subject to discovery in this matter, and are not relevant. Chris Pressnall's pre-filed testimony and pre-filed answers in the proposed Illinois CCR Rulemaking relate to his ideas for adding environmental justice considerations to the prioritization scheme for closing CCR surface impoundments throughout Illinois. His pre-filed testimony and pre-filed answers to questions have nothing to do MWG's Stations or their CCR surface impoundments,[2] do not relate to the statutes and regulations that are the subject of this matter, and do not relate to the factors in Section 33(c) of the Illinois Environmental Protection Act ("Act").

[1] *In re Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845,* R20-19 ("Illinois CCR Rulemaking").

[2] As discussed below, Illinois EPA, not Mr. Pressnall, prepared the table listing of Illinois CCR surface impoundments in answer to the Board's questions, and there is no indication that the table is a part of Mr. Pressnall's testimony.

Incorporation of the unrelated testimony and answers is contrary to Board rules and procedures and would be highly prejudicial to MWG. Because Complainants failed to comply with the mandates of Board Rule 101.306 (quoted in Complainants' Motion at ¶1) and did not "file the material to be incorporated with the Board," it is impossible to know what testimony or portions of the cited materials Complainants seek to incorporate. Thus, it is impossible for the Hearing Officer to determine how Complainants assert the information is relevant, and impossible for MWG to fully respond to this motion. Moreover, because the Hearing Officer in the Illinois CCR Rulemaking barred any questions about specific facilities, MWG had no opportunity to cross-examine Mr. Pressnall in the rulemaking proceeding, and has no current opportunity to cross-examine.

Complainants' Motion to Incorporate appears to be a last ditch attempt to include in the remedy hearing of this matter a new issue – environmental justice – that has never been the subject of any discovery or expert testimony in this case. In effect, Complainants are attempting to name a new expert, Mr. Pressnall, to "testify" about environmental justice. Complainants had the opportunity to proffer an expert opinion on the issue as it relates to the MWG Stations and impoundments. But they did not; not even after MWG named an expert to opine on the economic value of MWG's Stations. Complainants waived the issue and should not be allowed to circumvent all discovery orders and hearing preparation by inserting new and irrelevant expert testimony now. To do so would mean reopening discovery, allowing MWG to depose Mr. Pressnall, and allowing MWG to submit expert testimony in rebuttal.

A. Chris Pressnall's Pre-filed Testimony and Pre-filed Answers are Unrelated to MWG's Stations and Irrelevant to the Remedy Issues in this Case

Complainants' request to incorporate should be rejected because Mr. Pressnall's pre-filed testimony and pre-filed answers are wholly unrelated to either the MWG Stations or the facts and

issues in this case, and are irrelevant. Although Complainants attempt to argue that the Board has previously incorporated materials from one docket to another, in those cases, the facts and the issues in each proceeding were directly related or almost identical. For instance, in *In the Matter of: Petition of Noveon, Inc. for an Adjusted Standard from 35 Ill. Adm. Code 304.122*, the petitioner was seeking an adjusted standard for its wastewater discharge. *In the Matter of: Petition of Noveon, Inc. for an Adjusted Standard from 35 Ill. Adm. Code 304.122* PCB02-05, 2004 Ill. ENV LEXIS 608 (Nov. 4, 2004). The petition was related to Nuveen's National Pollution Discharge Elimination System (NPDES) permit appeal recently decided by the Board. *Id.* at *1. Noveon requested that the Board incorporate the transcripts and exhibits from its own permit appeal concerning its water discharges, contending that the "burden is more stringent in an NDPES permit appeal than for an adjusted standard, so therefore, the Agency can claim no prejudice from incorporating the transcripts…" *Id.* at *8. The Board granted the motion to incorporate, finding that the transcript was relevant because both proceedings were about "the same facility, discharge, ammonia effluent limits, and NPDES permit." *Id* at *9.

Similarly, in *ExxonMobil Oil Corp. v. Illinois EPA*, the only case cited by Complainants, ExxonMobil was seeking a variance from the compliance date of the NOx RACT Rule. *ExxonMobil Oil Corp. v. Illinois EPA*, PCB11-86, 12-46(cons.), Order, (Sept. 29, 2011). During the pendency of the variance proceedings, the Board held two rulemaking hearings to amend the compliance date of the NOx RACT Rule, the same compliance date that was the subject of ExxonMobil's variance petition. *In the Matter of: Nitrogen Oxides Emissions, Amendments to 35 Ill. Adm. Code Part 217*, (R11-24 & R11-26) (Consolidated) (June 2 and 28, 2011). Accordingly, ExxonMobil sought to incorporate the transcripts of the Board's rulemaking about the compliance date for the NOx RACT Rule into the variance proceeding because the date of compliance directly

related to its request for a new date in the variance petition. *ExxonMobil Oil Corp. v. Illinois EPA*, *slip-op* at *1. The Hearing Officer granted ExxonMobil's request because the transcripts were about the same issues (the date for compliance) and the Agency did not object. *Id.*

The issues in this case – a private enforcement proceeding for remedy for violations of the Act – are entirely different from the issues raised in the rulemaking proceeding in which Mr. Pressnall testified – environmental justice considerations for closure of statewide impoundments in a proposed rule. Simply because both this case and the Illinois CCR Rulemaking concern the overriding and general topic of CCR impoundments does not make Mr. Pressnall's testimony or material relevant. Mr. Pressnall's testimony discusses his view that environmental justice should be a part of the priority of closure schedules for all CCR surface impoundments throughout the State.[3] Mr. Pressnall's testimony and answers to questions are not about and do not even mention MWG's Stations or the cities or locations of the MWG Stations.

The only place the MWG's Stations are even mentioned is in a single table at the end of Illinois EPA's Answers to Pre-Filed Questions. But that table was prepared by Illinois EPA in response to the Board's questions, not by Mr. Pressnall. *See* Illinois EPA Answer to Board Pre-Filed Questions No. 1(l), p. 150. The table lists all of the CCR surface impoundments in Illinois, and includes other information, such as the operating status, closure status and whether the impoundments may be within an environmental justice area.[4] In his answers, Mr. Pressnall merely states that "Illinois EPA provided a list of coal ash impoundments located in areas of EJ concern to the Board question

[3] MWG can only presume Complainants seek to incorporate this particular testimony. As set forth in Section B below, due to Complainants' failure to include the materials as required, it is impossible to tell which part of Mr. Pressnall's testimony and pre-filed answers Complainants actually seek to incorporate.

[4] This list is also not relevant to the extent Complainants seek to add information about CCR surface impoundments owned by other companies.

1(l)", indicating that he did not prepare it.[5] Mr. Pressnall does not provide any context as to how the table applies to MWG's Stations, how it was developed, or whether it was otherwise reliable or trustworthy. In any case, the list is no longer accurate. On Feb. 17, 2022, the Board held that two ponds that are listed on the table are not CCR surface impoundments (the GMF Recycle Pond at the Duck Creek facility and the Service Water Basin at the Powerton Facility).[6]

Moreover, Complainants' suggestion that MWG had the opportunity to cross-examine Mr. Pressnall is misleading, at best. During the rulemaking hearings the Hearing Officer ordered the parties to only speak generally about CCR surface impoundments and to not go into specifics about any particular facility or site. *In re Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845,* R20-19, Tr. 8/13/2020, pp. 17:8-10, 137:10-16; 215:24-216:3 (relevant pages attached as Ex. 1). MWG was not permitted to cross examine Mr. Pressnall about how his testimony might possibly relate to the MWG Stations or the remedy in this case.

The fact that Complainants are asking the Board to incorporate testimony from different types of proceedings − general testimony from a rulemaking into a site-specific private enforcement case − further supports a finding that the testimony and materials are irrelevant. The Board has recognized the differences in quasi-legislative versus quasi-judicial types of proceedings, noting that, "rulemakings and enforcement actions are entirely distinct proceedings with different aims. Rulemakings are forward-looking and impose future obligations, while enforcement actions

[5] The Illinois EPA was careful to separate a witness's response from an "Agency Response." On the cover motion of its answers, the Agency states, "It should be noted that if a question was directed at a witness and the Agency answered it as a panel, the answer is provided as: "Agency Response".

[6] *In the Matter of: Petition of Illinois Power Resources Generating, LLC for an Adjusted Standard from 35 Ill. Admin. Code Part 845, or In the Alternative, a Finding of Inapplicability,* PCB21-04, Order, (Feb. 17, 2022); *In the Matter of: Midwest Generation LLC's Petition for an Adjusted Standard and Finding of Inapplicability for the Powerton Station,* PCB21-2, Order (Feb. 17, 2022). Additionally, on September 22, 2021, the Illinois EPA agreed that Ponds 1 and 3 at Joliet 29 are not CCR surface impoundments. *In the Matter of: Midwest Generation LLC's Petition for Adjusted Standard (Joliet 29 Station),* Illinois EPA Recommendation, PCB21-1 (Sept. 22, 2021).

concern alleged past or ongoing violations and the proper remedies to redress proven violations." *Sierra Club et al. v. Midwest Generation, LLC,* PCB13-15, Order, April 17, 2014, p. 13. Further, "the burdens of proof and the standards of review in a quasi-legislative action [i.e., rulemaking] are distinctly different than a quasi-judicial action. (*Cf.* Titles VII and IX of the Act.)" *Burlington Environmental Inc. v. Illinois EPA*, PCB 97-177, 1994 Ill. ENV LEXIS 1363, *18 (October 20, 1994). Given these distinctions in purpose, proof, and review, there must be a clear and obvious finding of relevancy before incorporating materials from a legislative proceeding into a site-specific enforcement case.

Mr. Pressnall's testimony and answers never discuss MWG, nor Sections 12(a) and 21(a) of the Act or the groundwater standards, nor the provisions for orders for determining a remedy or penalty (33(c) and 42(h)), which are at issue here. 415 ILCS 5/12(a), 21(a), 33(c), 42(h); 35 Ill. Adm. Code Part 620. Also, Complainants fail to explain ***how*** Mr. Pressnall's testimony regarding consideration of environmental justice when ranking surface impoundments for closure is relevant to the suitability or the unsuitability of MWG's Stations and CCR surface impoundments to their locations, pursuant to Section 33(c)(iii) of the Act. Are Complainants suggesting that the CCR surface impoundments in environmental justice areas are not suitable for their location? Mr. Pressnall did not say that. In fact, his testimony, coupled with the Illinois CCR, rule suggest the opposite. Mr. Pressnall testified to his view that, generally, CCR surface impoundments in environmental justice areas should have a priority of closure deadlines. But the closure options allowed by the Illinois CCR rule include closure in place or retrofitting an impoundment, without other limitation on the future closure or use of the CCR surface impoundment.[7] Further, Mr.

[7] In fact, Illinois EPA Manager, Mr. Darin LeCrone, in response to a pre-filed question asking why the rule did not prohibit construction of new CCR surface impoundments in environmental justice areas, testified that the environmental justice policies and regulations do not prohibit construction or development in areas with environmental justice concerns. *See* Excerpt of Illinois EPA Answer, p. 79-80 attached as Ex. 2.

Pressnall does not address any specific situations that might alter his view of the "priorities", including the proximity of communities around the stations, or the risk or impact to those communities, if any. In any case, it is highly irrelevant and prejudicial to MWG to allow Complainants to incorporate Mr. Pressnall's testimony without any connection to the suitability or unsuitability of the MWG Stations and its CCR surface impoundments to their location.

If simply discussing the broad concept of environmental justice in a rulemaking it is relevant to the remedy in an unrelated, site-specific enforcement proceeding, then the Board effectively opens the door for a myriad of unrelated materials being incorporated into enforcement actions in the future. For instance, one could envision a party arguing that since environmental justice is generally important under Illinois law and policy, Mr. Pressnall's testimony should be incorporated into *every* CCR proceeding in the future, without discovery, cross examination, rebuttal experts, or site specific connection. Because Mr. Pressnall's testimony in the Illinois CCR Rulemaking was unconnected to the issues here, it is not relevant and should not be incorporated.

B. Complainants' Request is Contrary to Board Rules and Procedures and was Waived

Complainants' request to incorporate must be rejected because Complainants did not comply with Board rules and procedures and is seeking an end-run around the rules for expert witnesses in this case. Allowing this unrelated testimony which Complainants never identified before into the proceedings at such a late stage would be improper and highly prejudicial to MWG.

First, Complainants do not even identify specifically what testimony they seek to incorporate. Contrary to the requirements in Section 101.306, Complainants failed to file the material to be incorporated. Section 101.306, cited by Complainants (Comp. Mot., ¶ 1), states, "the person seeking incorporation *must* file the material to be incorporated with the Board in compliance with Section 101.302(h)." (emphasis added). Section 101.302(h) provides that "all documents must be

filed through COOL electronically." For example, in *ExxonMobil Oil Corp.*, the case cited by Complainants, ExxonMobil Oil attached the two transcripts it sought to incorporate as Exhibits 1 and 2. *See ExxonMobil Oil Corp. v. Illinois EPA*, Motion to Incorporate Hearing Transcripts From R11-24 Rulemaking, PCB11-86, PCB12-46 (cons.) (Sept. 21, 2011).

Here, Complainants failed to file the documents they seek to incorporate through COOL electronically, or otherwise. Instead, they inserted into their Motion footnotes with the links that purport to contain the documents. While Mr. Pressnall's pre-filed testimony and pre-filed answers appear to be included in those links, so is the pre-filed testimony and pre-filed answers of ***all*** eight Illinois EPA witnesses. The testimony of all eight of the Illinois EPA witnesses in the Illinois CCR rulemaking certainly has no relevance to this matter and the Hearing Officer should reject Complainants' motion for that reason alone.

Complainants' citation to the entire documents creates confusion as to what documents or testimony Complainants seek to incorporate. Even if Complainants are only seeking to include Mr. Pressnall's pre-filed testimony, they do not state whether they seek to incorporate his entire testimony. Complainants only cite to the first page of his testimony, further confusing what they seek to incorporate. Comp's Motion, ¶5.

There is even greater confusion about which Illinois EPA Pre-filed Answers Complainants seek to incorporate. Again, Complainants only provide a citation in a footnote to the Agency's 184 page Answer to Pre-Filed Questions, in violation the requirements in Section 101.306. The entire 184 page Pre-filed Answers by Illinois EPA is not relevant to this proceeding, and for that reason alone Complainants' motion should be rejected. If however, Complainants are seeking to incorporate only Mr. Pressnall's answers, it is impossible to tell which ones. Complainants state that the document "contains IEPA's answers to pre-filed questions directed at Chris Pressnall",

but Complainants do not identify the answer numbers they seek to incorporate. Instead, Complainants cite to five non-consecutive pages of the answers. Comp. Mot., ¶6. But it is unclear if the answers they seek to incorporate are limited to those pages, or if there are additional pages. For example, Complainants cite to page 12 of the Illinois EPA answers to questions. Comp. Mot. ¶6. On page 12 of the Answers, there is Mr. Pressnall's answer to the first question, but then his answers to the following questions continue through page 15. Do Complainants only want to incorporate the answer on page 12? Or all his answers in the following pages? And if so, which ones? Similarly, Complainants cite to page 88 of the Illinois EPA Pre-filed Answers. Comp. Mot. ¶6. On page 88, Mr. Pressnall provides one answer to the first question, and then also repeats the second question. His answer to the second question is on page 89, and his remaining answers to questions continues through page 98. Are Complainants only seeking to incorporate the single answer on page 88, and are rejecting the others? Or any of the answers in the following pages? It is impossible to determine, resulting in only confusion prejudicial to MWG.[8]

Second, Complainants are wrong in suggesting that MWG had the opportunity to cross examine Mr. Pressnall at the rulemaking (Comp. Mot. ¶ 8), and Complainants conveniently omit that MWG does not have any current opportunity for cross examination (Sec. 101.306(b)). While the opportunity for cross-examination arguably goes to weight of the evidence, it also goes to reliability of the evidence when MWG had no opportunity nor motive to determine the basis of Mr. Pressnall's testimony as to MWG, what he relied on, how he reached his conclusions, how his opinion on environmental justice had any relationship to ***MWG's*** Stations and the locations of the MWG Stations, or how environmental justice might even impact a proposed remedy for the Stations. *People v. Rice*, 166 Ill. 2d 35, 41–42, 651 N.E.2d 1083, 1086 (1995) (Supreme Court

[8] Even if Complainants were to try to fix this error now, they cannot. Pursuant to the Hearing Officer's pre-hearing Order, *all* pre-hearing motions were due on February 4, 2022.

held that testimony in a preliminary hearing was not admissible at trial because the motive and focus for cross-examination at the hearing was different). Because Mr. Pressnall's testimony was about general environmental justice concepts in the Illinois CCR Rule as applied throughout the State of Illinois, the cross-examination he was subjected to was limited, and had nothing to do with any specific property. In fact, MWG was precluded from asking Mr. Pressnall any questions about how his testimony relates to MWG. The Hearing Officer in the rulemaking did not allow questions about specific facilities and sites. *See* Ex. 1.

Third, the reality is that Complainants are attempting an end-run around the Board, as well as the Hearing Officer's discovery schedule and the requirements for naming expert witnesses. Whether environmental justice should be a consideration under Section 33(c) of the Act is a legal question for the Board, based on the Board's prescribed duties from the Illinois legislature. The Board has not made that determination because it is not prescribed in the rules and is not an alleged issue in this case. The question of *how* environmental justice might be considered as part of Section 33(c)(iii) of the Act is, at best, an issue for an expert – and not only have Complainants waived the right to name an expert now, but attempting to substitute the general, unrelated opinions from a rulemaking proceeding as expert opinions in this site specific case does not meet the basic tenet that an expert's testimony must aid the Board. *Johns Manville v. IDOT*, (PCB 14-3, April 26, 2016, B. Halloran), *slip op.* p. 2, *citing Thompson v. Gordon*, 221 Ill. 2d 414, 428-429 ("A person will be allowed to testify as an expert …where his testimony will aid the trier of fact in reaching its decision."); Ill. R. Evid. 702. Here, Mr. Pressnall's testimony is of no use to the Board because it is unrelated to the MWG Stations and not relevant in consideration of a remedy.

Also, Mr. Pressnall's testimony and pre-filed answers cannot be accepted as expert opinion testimony because his stated experience and qualifications do not afford him the knowledge to

opine on remedy issues *in this case*. *JohnsManville,* PCB14-3, at 2. Illinois Rule of Evidence 702 states that a "witness is qualified as an expert by knowledge, skill, experience, training or education. IL. R. Evid. 702. Complainants present Mr. Pressnall's qualifications as if they believe him to be an expert. Comp. Mot. ¶5. While Mr. Pressnall certainly has general experience with environmental justice in his role as the Illinois EPA Environmental Justice Coordinator – a role he has only held for approximately four years – his previous experience was as an attorney in the air division of Illinois EPA. Mr. Pressnall is not an engineer, he has no experience with CCR, no experience with evaluating groundwater contamination or remedies for contamination. Because none of his experience and qualifications are regarding the issues in this matter, Mr. Pressnall does not have the experience and qualifications to afford him the knowledge to give an opinion here.

Complainants could have identified an expert witness to testify how environmental justice factors into the suitability or unsuitability of the MWG Stations and its CCR surface impoundments – but they did not. The Hearing Officer's discovery order required experts to be named over 15 months ago, by November 15, 2020, and deposed by October 22, 2021. Complainants failed to do that and have waived the right to raise this new expert and new issue at such a late stage in this proceeding. Complainants should not be permitted to substitute Mr. Pressnall's materials for naming an expert.

To include Mr. Pressnall's testimony from the Illinois CCR Rulemaking into this private enforcement proceeding would require reopening discovery, allowing MWG to depose Mr. Pressnall, and allowing MWG to submit expert testimony in rebuttal. The equities of an adjudicatory matter require that MWG be allowed to counter any testimony/materials regarding whether or how environmental justice fits into the consideration of the suitability or unsuitability of the MWG Stations and the CCR surface impoundments to the area in which they are located,

and how consideration of environmental justice informs the question of priority of location of the MWG Stations and CCR surface impoundments. Additionally, MWG must be allowed to prepare expert testimony in rebuttal. To our knowledge, the Complainants seem very concerned about delays (see Motion for Sanctions), yet delay is the only result of their request to add new issues, materials, and expert testimony at this late date.

C. CONCLUSION

Mr. Pressnall's testimony and answers to questions in the Illinois CCR Rulemaking are not relevant to this proceeding. His testimony and answers addressed general environmental justice considerations for scheduling closures of CCR surface impoundments throughout the State of Illinois. Mr. Pressnall did not discuss or mention the MWG Stations or their surrounding areas, he did not discuss the relevant regulations and statutes at issue here, and he did not discuss how environmental justice affects consideration of the suitability or unsuitability of the MWG Stations and CCR surface impoundments in their area and their question of priority. Complainants failed to even follow the Board rules to include the documents they seek to incorporate, not only creating confusion but also making it impossible to fully respond to the motion. Finally, Complainants waived any right to include what is essentially expert opinion into this matter by failing to include this issue, or name an expert, pursuant to the Hearing Officer's discovery orders in this case. Based on the above, Respondent, Midwest Generation, LLC respectfully requests that the Hearing Officer deny Complainants' Motion to Incorporate Certain Documents.

Respectfully submitted,
MIDWEST GENERATION, LLC.

By ____/s/ Jennifer T. Nijman_____
One of Its Attorneys

Jennifer T. Nijman
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EXHIBIT 1

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	No. R20-19
	)	(Rulemaking-Land)
Standards for the Disposal	)	
of Coal Combustion	)	
Residuals in Surface	)	
Impoundments: Proposed new	)	
35 Ill. Adm. Code 845	)	

REPORT OF THE PROCEEDINGS held in the above entitled cause before Hearing Officer Vanessa Horton, called by the Illinois Pollution Control Board, taken by Steven Brickey, CSR, RMR, for the State of Illinois, 1021 North Grand Avenue East, Springfield, Illinois, on the 13th day of August, 2020, commencing at the hour of 8:02 a.m.

that should be imposed in connection with the rule. You're getting at how should the rule be implemented. That's a separate question.

MS. CASSEL: I'm getting at what requirements need to go into the rule, Mr. More.

HEARING OFFICER HORTON: I will overrule Mr. More's objection, but I caution Ms. Cassel to please not go into specifics about specific facilities or sites, but only in generalities. Please proceed.

MS. CASSEL: Absolutely. I'm sorry. I forgot if there was a question pending.

MR. DUNAWAY: I would -- you should probably just go ahead and pick up your questioning where you think you need to.

MS. CASSEL: Okay. So you had noted that the modeling had been done I believe and then the question was whether if there is an effect of groundwater on surface water, when can it be assumed there is some hydrological connection there? I will -- I'll scratch that question. Let me -- let me ask you're a geologist, sir, is that correct?

MR. DUNAWAY: Lynn Dunaway. That's

demonstration is an opportunity for an owner/operator to claim that there is ash contamination or contamination found in the groundwater is coming from elsewhere. I'm pointing to instances where folks have identified sources of ash contamination and I'm wondering whether the Agency considers that excludeing the public from those determinations. So it is relevant to these rules.

HEARING OFFICER HORTON: I'll sustain Ms. Gale's objection just on the basis that this is pending -- a pending matter before the Board. It continues to be. I'd ask, Ms. Cassel, I believe you can ask this question in a more general manner and not related specifically to this case 13-15.

MS. CASSEL: Thank you, Hearing Officer.

Mr. Dunaway, did you or other Agency staff in preparing this rule consider instances where workers, former workers or the public have identified sources of contamination at coal ash sites?

MR. DUNAWAY: Lynn Dunaway. No, we

site to review, but I may have been asked about it. I really can't remember honestly.

MS. BUGEL: Do you know if -- I realize you can't remember, but since you may have reviewed some of it, I'm just going to ask a question or two about it.

Do you know if that modeling accounted for seasonal variations in the water table?

MS. ZEIVEL: This is Christine Zeivel. I'm going to have to object to the question. It's very site specific and outside the scope of the rulemaking.

MS. BUGEL: I realize it's site specific, but the modeling that has already been submitted related to closure of existing ash ponds speaks to Agency practices in relation to modeling that they accept and I will tie this up to the modeling requirements in the rule if I'm given a little leeway.

MS. ZEIVEL: The Agency's objection stands.

HEARING OFFICER HORTON: I'll sustain -- yes, I'll sustain the objection just

based on prior objections relating to specific cites such as in 13-15. If you could perhaps make a general question.

MS. BUGEL: I can make some general questions.

Ms. Zimmer, have you ever seen modeling related to the closure of ash ponds submitted to the Agency that does not account for seasonal variations in the water table?

MS. ZIMMER: This is Zimmer. Yes.

MS. BUGEL: And did the Agency accept that modeling as submitted without seasonal variations?

MS. ZIMMER: Zimmer.

MR. BUSCHER: This is Bill Buscher. We've looked at several models and we have -- I expect in somewhere they may have not taken seasonal variation into account.

MS. BUGEL: Mr. Buscher, I just want to ask the court reporter if he got your whole answer or ask the Hearing Officer, I apologize, just because I'm not -- I saw him lean to try to hear.

HEARING OFFICER HORTON: He says

EXHIBIT 2

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

ILLINOIS EPA'S PRE-FILED ANSWERS

NOW COMES the Illinois Environmental Protection Agency (Illinois EPA or Agency), by and through one if its attorneys, and submits the following information with respect to its pre-filed answers.

1. On March 30, 2020, the Illinois EPA filed a rulemaking, proposing new rules at 35 Ill. Adm. Code 845 concerning coal combustion residual surface impoundments at power generating facilities in the State.

2. Public Act 101-171, effective July 30, 2019, amended the Illinois Environmental Protection Act, by among other things, adding a new Section 22.59 (415 ILCS 5/22.59). Public Act 101-171 includes a rulemaking mandate in Section 22.59(g) which directs the Board to adopt rules "establishing construction permit requirements, operating permit requirements, design standards, reporting, financial assurance, and closure and post-closure care requirements for CCR surface impoundments." 415 ICLS 5/22.59(g). The Board is required is adopt new rules for 35 Ill. Adm. Code part 845 by March 30, 2021.

3. The Agency timely filed pre-filed testimony for eight witnesses.

4. Based on the pre-filed testimony, Illinois EPA received over 1000 questions counting subparts.

5. On June 30, 2020, the Agency asked that it be granted until August 3, 2020 to respond to the pre-filed questions.

6. On July 14, 2019, the hearing officer granted the Agency's request.

7. Since receiving all the pre-filed the questions, Agency staff has been working diligently to respond to all the pre-filed questions. However, despite the extra time granted the Agency was not able to prepare final answers by the August 3, 2020 filing deadline for the following: Dynegy and Midwest Generation.

8. The Agency will continue to work to address questions raised by Dynegy and Midwest Generation and hopes to file written answers before the first hearing. If that is not possible, the Agency will be prepared to address those pre-filed questions at the August hearing.

9. The Agency is today filing responses to: Little Village Environmental Justice Organization, ELPC, Prairie Rivers Network and Sierra Club, CWLP, Illinois Environmental Regulatory Group, Ameren, and the Board.

10. It should be noted that if a question was directed at a witness and the Agency answered it as a panel, the answer is provided as: "Agency Response".

statistical procedures and performance standards in Section 845.640(f) and (g), provided that: i) concentrations have been reduced to the maximum extent feasible and ii) concentrations are protective of human health and the environment."

a. What does the Agency mean by "the maximum extent feasible"?

Response: See Response to question #10(b)

b. What information will be considered in determining what is "feasible"? Please identify the regulatory provision(s) where that is specified.

Response: Feasibility will be based on the modeling required by the closure alternatives analysis in Section 845.710(d) and the statistical analysis requirements of Section 845.640.

c. Is there any sort of information that the Agency will not consider in determining what is "feasible"? Please explain and identify the regulatory provision(s) where that is specified.

Response: Please see Response 38(b).

39. At closed-in-place CCR surface impoundments where groundwater protection standards have been achieved, are there circumstances in which leaching of CCR constituents could increase, leading to renewed exceedances of groundwater protection standards at CCR units that have completed post-closure?

Response: Yes.

a. If so, what are those circumstances?

Response: The Agency would be forced to speculate.

b. If not, please provide the basis for your statement.

DARIN LECRONE

1. In your testimony, you state that, "[i]n accordance with the Act, any rules adopted by the Board must at a minimum . . . specify which types of permits are required for certain activities " Which activities are those? Please provide the basis for your answer.

Response: Section 845.200(a) describes the activities related to CCR surface impoundments, which require a permit pursuant to these rules. Subsection 845.200 (a)(1) establishes which activities require a construction permit. These activities include the construction, installation, or modification of a CCR surface impoundment or related treatment or mitigation facilities related to a corrective action. Subsection 845.200 (a)(2)

Response: Review of whether the appropriate and sufficient justification has been provided for use of previous assessments, investigations or plans will occur during the application review process.

iii. Will that verification be conducted prior to making permitting decisions about the site, including permitting decisions concerning corrective action or closure?

Response: Yes.

iv. Could you please specifically identify the Agency staff who will verify whether the previous assessment, investigation, or plan continues to accurately reflect conditions at the impoundment?

Response: Agency technical staff from either the Division of Public Water Supplies Groundwater Section, or the Division of Water Pollution Control Permit Section will review a request to use a previous assessment, investigation or plan to satisfy regulatory requirements as part of the permit application review process.

14. Regarding proposed 35 Ill. Adm. Code 845.220, why do the rules not require cost estimates be provided as part of a construction permit?

Response: Section 845.220 contains the technical requirements which must be provided in a construction permit application. These include location restrictions, design criteria, and other technical information which must met to receive a construction permit. This information is necessary to determine compliance with the technical performance requirements of the proposed rule. These technical requirements do not allow cost to be considered.

15. Regarding proposed 35 Ill. Adm. Code 845.220(b):

a. Why do the rules not prohibit new construction of a surface impoundment in floodplains?

Response: In Illinois, construction activities in a floodplain are governed by the Rivers, Lakes, and Streams Act (615 ILCS 5/5 through 29a) and 17 Ill. Adm. Code Part 3700 as administered by the Illinois Department of Natural Resources.

b. Why do the rules not prohibit new construction of surface impoundments in areas with environmental justice concerns?

Response: Environmental justice policies and regulations do not prohibit construction or development in areas with environmental justice concerns. The goal of environmental justice is to ensure that communities are not disproportionately impacted by degradation of the environment or receive a less than equitable share of environmental protection and

benefits, and to strengthen the public's involvement in environmental decision-making, including permitting and regulation, and where practicable, enforcement matters.

16. Regarding proposed 35 Ill. Adm. Code 845.220(c)(2) and (d)(3):

a. Why do the rules not require a demonstration of achieving compliance with applicable groundwater standards within thirty years?

Response: 40 CFR Part 257 does not require compliance with applicable groundwater standards within thirty years. (Agency Response)

b. Do the proposed rules require modeling groundwater with consideration of seasonal variation of groundwater elevations? If so, please specify the relevant provision(s) and answer the following questions.

Response: The proposed rules do require groundwater modeling take into account seasonal variation. It is specifically mentioned in Section 845.710(d)(3) under Closure Alternatives: "include a description of the fate and transport of contaminants with the closure alternative over time including consideration of seasonal variations." (Agency Response)

i. How does the Agency define seasonal variation?

Response: A seasonal variation is repeated and expected changes in a value of a parameter over time periods of one year or less. (Agency Response)

ii. How will the modeling consider seasonal variation?

Response**:** Transient groundwater modeling will need to be conducted to determine the effect of seasonally varying parameters on the outcome of the model(s). (Agency Response)

c. If the proposed rules do not required modeling groundwater with consideration of seasonal variation of groundwater elevations, why not?

Response: See response to 17(b).

17. Regarding proposed 35 Ill. Adm. Code 845.230(a), why do the rules not prohibit existing surface impoundments in floodplains?

Response: Most existing CCR surface impoundments are located at a coal fired power station on the banks or either a river or lake. The power stations were located near a body of water that is normally used to provide a water source for facility operations. Neither 40 CFR 257 nor the proposed Part 845 require automatic closure by removal for surface impoundments which may be located in a floodplain. Existing surface impoundments must meet the location restrictions of Section 845 Subpart C to continue to operate. Pursuant to Section 845.350(a), an owner or operator of a CCR surface impoundment who fails to demonstrate compliance with the requirements of Subpart C, is subject to the requirements of Section 845.700: Required Closure of Retrofit if CCR Surface Impoundments.