

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)	
)	
)	
)	
STANDARDS FOR THE DISPOSAL OF)	R 2020-019(A)
COAL COMBUSTION RESIDUALS)	(Rulemaking – Land)
IN SURFACE IMPOUNDMENTS:)	
PROPOSED NEW 35 ILL. ADMIN.)	
CODE 845)	

NOTICE OF FILING

To: Attached Service List

PLEASE TAKE NOTICE that today I have electronically filed with the Office of the Clerk of the Illinois Pollution Control Board **DYNEGY AND SIPC’S JOINT RESPONSE TO ENVIRONMENTAL LAW & POLICY CENTER, LITTLE VILLAGE ENVIRONMENTAL JUSTICE ORGANIZATION, PRAIRIE RIVER NETWORK, AND SIERRA CLUB’S COMMENTS ON ENVIRONMENTAL GROUPS’ PROPOSED RULES** and a **CERTIFICATE OF SERVICE**, which are attached and copies of which are herewith served upon you.

Dated: August 2, 2022

Respectfully submitted,

Southern Illinois Power Cooperative

Dynegy Midwest Generation, LLC, Electric Energy, Inc., Illinois Power Generating Company, Illinois Power Resources Generating, LLC, and Kincaid Generation, LLC

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One of its Attorneys

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DYNEGY AND SIPC’S JOINT RESPONSE TO ENVIRONMENTAL LAW & POLICY CENTER, LITTLE VILLAGE ENVIRONMENTAL JUSTICE ORGANIZATION, PRAIRIE RIVER NETWORK, AND SIERRA CLUB’S COMMENTS ON ENVIRONMENTAL GROUPS’ PROPOSED RULES

NOW COMES Dynegy Midwest Generation, LLC; Electric Energy, Inc.; Illinois Power Generating Company; Illinois Power Resources Generating, LLC; and Kincaid Generation, LLC (collectively, “Dynegy”) and Southern Illinois Power Cooperative (“SIPC”), by their attorneys ArentFox Schiff LLP and pursuant to the Illinois Pollution Control Board’s (the “Board’s”) May 26, 2022 order, and submit this Joint Response to Environmental Law & Policy Center, Little Village Environmental Justice Organization, Prairie River Network, and Sierra Club’s (the “Commenters”) Comments on Environmental Groups’ Proposed Rules (“P.C. #20”).

P.C. #20 does not remedy the procedural and substantive deficiencies of the Commenters’ original proposed rules, urges the Board to consider issues that are not ripe as they are still being discussed, analyzed, and potentially governed by federal regulation and state legislation, and goes beyond the scope of this sub-docket.

Dynegy and SIPC do not support the Commenters’ proposed rules, as revised by P.C. #20, and do not believe that the Commenters’ proposed rules merit further consideration or hearing.

DISCUSSION

I. The Commenters' Proposed Rules Continue To Be Unsupported.

The Commenters' proposed rules, as revised by P.C. #20, continue to be unsupported for the reasons the Illinois Environmental Protection Agency ("IEPA"), Dynege, SIPC, and others made clear in previous comments submitted in this sub-docket. As noted previously, the proposal lacks "an adequate statement of reasons," which must include environmental, technical, and economic justifications. *See, e.g.*, Comment Submitted by the Illinois Environmental Protection Agency at 4–5 (June 2, 2022), *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845 (Sub Docket A)*, R2020-019 (A) (hereinafter cited as "P.C. #15") ("Please note that the Environmental Groups' Public Comment dated August 3, 2021 ('PC 10'), from which the proposed rule text originates, fails to meet the standards for rulemaking proposals required by Section 28(a) of the Environmental Protection Act ('Act'), 415 ILCS 5/28(a), and 35 Ill. Adm. Code 102.202."); *id.* at 15–17 (discussing the lack of technical support to the Commenters' proposed rules on fugitive dust monitoring); *id.* at 18 (noting that part of the Commenters' proposed Part 845.700 is already outdated given a United States Environmental Protection Agency ("USEPA") update from February 2022); *see also* Dynege and SIPC Joint Public Comment in Response to the Board's March 3, 2022 Order at 13–22 (June 3, 2022), *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845 (Sub Docket A)*, R2020-019 (A) (hereinafter cited as "P.C. #19") (discussing the proposed rules' procedural and substantive deficiencies).

P.C. #20 does not remedy these deficiencies and fails to provide environmental, technical, or economic support for the revised rule proposal. *See, e.g.*, Environmental Law & Policy Center,

Little Village Environmental Justice Organization, Prairie River Network, and Sierra Club's Comments On Environmental Groups' Proposed Rules at 2 (June 3, 2022), *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845 (Sub Docket A)*, R2020-019 (A) (hereinafter cited as "P.C. #20") (providing no technical or other justification for recommending that the Board "require a rigorous demonstration in order to meet Environmental Groups' recommended location restriction regarding placement above the uppermost aquifer" in proposed Section 846.300); *id.* at 18–19 (providing "data" to support fugitive dust monitoring that relates to air pollution generally, is not linked to CCR, and does not support how Commenters' proposed rules would address any potential air pollution from fugitive dust more than is already required by Part 845); *id.* at 20–21 (providing other EJ screening tools without any technical or other justification for how those tools will capture EJ areas of concern in Illinois that are not already captured under Part 845).

II. The Issues Presented by the Commenters Are Not Ripe for Review.

The Commenters' proposal remains unripe. The Board should avoid stepping ahead of, or being in conflict with, actions by federal regulators and the Illinois legislature. Proceeding with the Commenters' proposed Part 846 risks doing so. As IEPA noted, the Commenters' proposed Part 846 lacks any current statutory directive, lacks a practical basis for implementation, proposes requirements that are inconsistent with existing law, and, accordingly, IEPA states that "[s]tate legislative action to further regulate CCR should be the first step." *See* P.C. #15 at 13–14.

Relatedly, USEPA recently indicated that historic unconsolidated CCR fill may soon be the subject of a federal regulatory proposal. USEPA announced in its Unified Agenda that it is developing regulations to regulate legacy CCR units and is considering regulations that would require corrective action for all CCR located on site of a regulated facility (*i.e.* including historic

coal ash fill). See RIN 2050-AH14, *Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy Surface Impoundments*, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=2050-AH14> (stating USEPA is considering rules that “may include adding a new definition for legacy CCR surface impoundments,” “require such legacy CCR surface impoundments to follow existing regulatory requirements for fugitive dust, groundwater monitoring, and closure, or other technical requirements,” and may propose “corrective action requirements for all CCR contamination (regardless of how or when that CCR was placed) on site of a regulated facility.”); see also Agency Rule List Spring 2022, https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=2000&csrf_token=AF274385DA7066651EBD716FF8F28EA8DE09EEFF6F891090D2EF9740F5569B92F343F0D3F41F9FAFE8910313F9411EA37669. USEPA’s proposed adoption of rules that regulate all CCR deposits on the property of regulated facilities would directly impact and potentially conflict with the Commenters’ proposed Part 846.

Proceeding on the Commenters’ proposal will be inefficient and impractical in the absence of state legislation and in light of the possibility of federal regulation over the same subject area. For example, a previous rulemaking to govern CCR surface impoundments in Illinois—that began before federal regulation and Illinois legislation on the subject was finalized—resulted in stays, reconsideration of proposed language, a revised proposal based on the promulgation of federal rules, and ultimately, the closure of that docket and the creation of a new one to allow for a clean record once the state legislation was adopted. See generally *In the Matter of: Coal Combustion Waste (CCW) Ash Ponds and Surface Impoundments at Power Generating Facilities: Proposed New 35 Ill. Adm. Code 841*, R2014-010; Order of the Board (Sept. 19, 2019), *In the Matter of:*

Coal Combustion Waste (CCW) Ash Ponds and Surface Impoundments at Power Generating Facilities: Proposed New 35 Ill. Adm. Code 841, R2014-010 (ultimately dismissing the rulemaking and starting a new docket due to state legislation being passed); Order of the Board at 3 (Mar. 28, 2019) *In the Matter of: Coal Combustion Waste (CCW) Ash Ponds and Surface Impoundments at Power Generating Facilities: Proposed New 35 Ill. Adm. Code 841, R2014-010* (considering the effects of federal rulemaking on the proposal before it); Order of the Board (May 7, 2015), *In the Matter of: Coal Combustion Waste (CCW) Ash Ponds and Surface Impoundments at Power Generating Facilities: Proposed New 35 Ill. Adm. Code 841, R2014-010* (granting a temporary stay to evaluate the effect of a federal rulemaking).

III. P.C. #20 Goes Beyond the Scope of this Sub-docket by Discussing and Proposing Board and IEPA Interpretations of Existing Part 845 Language.

This sub-docket is limited, by Board order, to comment on the following four, discrete topics: (1) unconsolidated, historic coal ash fill,¹ (2) temporary storage piles of coal ash, (3) CCR fugitive dust, and (4) EJ areas of concern screening tools. Second Notice Order and Opinion at 2 (Feb. 4, 2021), *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R2020-019*.

P.C. #20 goes beyond the limited scope of this sub-docket to discuss how IEPA and the Board should *interpret* existing regulatory language that was established and finalized in R2020-

¹ Also outside the scope of the Board's authority, the Illinois Attorney General's Office in its public comment states that it supports a "collection of information" regarding unconsolidated, historic coal ash to develop a proposal regulating the same. Public Comment of the Illinois Attorney General's Office at 4 (Aug. 2, 2022), *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845 (Sub Docket A), R2020-019 (A)*. Dynegy and SIPC again note that this type of request—as with the Commenters' original request for the Board to gather information for this purpose—is improper because the Board cannot compel members of the public to provide information to help develop a regulatory proposal. *See* P.C. # 19 at 20 n.19. Board rulemaking proceedings are not the proper forum to gather information simply because there is "no central repository for" the information. *See* Public Comment of the Illinois Attorney General's Office at 4 (Aug. 2, 2022).

019 and to recommend amendment to established regulatory requirements that are outside the scope of this sub-docket. *See, e.g.*, P.C. #20 at 9; *id.* at 11; *id.* at 13;² *id.* at 10 (recommending amendment to Section 845.630, regulating groundwater monitoring requirements for CCR surface impoundments, which is clearly outside the scope of this sub-docket).

This sub-docket is not the proper forum for Commenters to suggest to the Board and IEPA how to interpret existing language, and the Board should ignore any comments that go beyond the scope of this sub-docket.

CONCLUSION

For the reasons set forth above, the Board should not hold a hearing on or further consider Commenters' proposed rules as revised in P.C. #20. Dynege and SIPC recommend that the Board dismiss the Commenters' revised proposed rules and close this sub-docket, R2020-019 (A). Dynege and SIPC reserve the right to provide additional, substantive comments on these topics should the Board choose to proceed.

² Dynege and SIPC disagree with Commenters' characterization of USEPA's recent draft Part A determinations as "binding" as they are non-final and subject to legal challenge.

Dated: August 2, 2022

Respectfully submitted,

Southern Illinois Power Cooperative

Dynegy Midwest Generation, LLC, Electric Energy, Inc., Illinois Power Generating Company, Illinois Power Resources Generating, LLC, and Kincaid Generation, LLC

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 2nd day of August, 2022:

I have electronically served true and correct copies of Dynegy and SIPC's Joint Response to Environmental Law & Policy Center, Little Village Environmental Justice Organization, Prairie River Network, and Sierra Club's Comments on Environmental Groups' Proposed Rules by electronically filing with the Clerk of the Illinois Pollution Control Board and by e-mail upon each person listed in the attached service list.

My e-mail address is Sarah.Lode@afslaw.com.

The number of pages in the e-mail transmission is 12.

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

 /s/ Sarah L. Lode
Sarah L. Lode

Dated: August 2, 2022

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