

**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 I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board the attached **DYNEGY RESPONSE IN OPPOSITION OF ENVIRONMENTAL GROUPS’ MOTION TO MODIFY**, a copy of which is hereby served upon you.

Dated: September 16, 2022

Respectfully submitted,

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Kincaid Generation, LLC

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**DYNEGY’S RESPONSE IN OPPOSITION OF ENVIRONMENTAL GROUPS’ MOTION TO MODIFY**

NOW COMES Dynegy Midwest Generation, LLC; Electric Energy, Inc.; Illinois Power Generating Company; Illinois Power Resources Generating, LLC; and Kincaid Generation, LLC (collectively, “Dynegy”), by their attorneys ArentFox Schiff LLP and pursuant to Illinois Pollution Control Board (the “Board”) Rule 101.500(d), and submits this Response in Opposition of Environmental Law & Policy Center, Little Village Environmental Justice Organization, Prairie River Network, and Sierra Club’s (the “Environmental Groups”) September 2, 2022, Motion to Modify Certain Provisions of Part 845 and Memorandum in Support of Motion to Modify Certain Provisions of Part 845 (the “Motion to Modify”).

The Environmental Groups’ Motion to Modify is improper for this forum, improper as a matter of law, and dwells on past issues that have been raised, heard, and reviewed multiple times in the primary rulemaking. Because the Motion to Modify is improper and redundant on several fronts, Dynegy respectfully requests that the Board deny the motion without further consideration.

**DISCUSSION**

The Board should deny the Environmental Groups’ Motion to Modify because it raises issues outside the limited scope of this sub docket, is unsupported by any Board rule or procedure,

and attempts to circumvent the proper legal mechanisms for challenging or proposing revision to a final rulemaking and implemented regulatory scheme.

**I. The Environmental Groups' Motion to Modify Exceeds the Scope of this Sub Docket.**

Although the limited purpose and scope of this sub docket has been raised before in response to an Environmental Groups' filing,<sup>1</sup> it is again relevant here. On February 4, 2021, the Board opened this sub-docket to the rulemaking proceeding establishing Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments, 35 Ill. Admin. Code Part 845 ("Part 845"), and identified "four distinct issues that merited further exploration:"

- (1) Historic, unconsolidated coal ash fill in the State;
- (2) The use of temporary storage piles of coal ash, including time and volume limits;
- (3) Fugitive dust monitoring plans for areas neighboring coal combustion residuals ("CCR") surface impoundments; and
- (4) The use of environmental justice ("EJ") 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. On May 6, 2021, the Hearing Officer entered an order stating that the Board sought "comments, information, and specific proposals on rule language from any interested party on these four issues." Hearing Officer Order at 1 (May 6, 2021), *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).

Despite this clear enunciation of the sub docket's purpose by both the Board and the Hearing Officer, the Environmental Groups have now filed a Motion to Modify that urges the

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<sup>1</sup> 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 at 7-8 (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).

Board to amend Part 845 to (1) “remove provisions in Section 845.750(d) that allow CCR to be consolidated in unlined CCR surface impoundments before closure,”<sup>2</sup> (2) “modify Part 845 to ensure that background wells are not affected by any CCR unit,”<sup>3</sup> and (3) “incorporate additional protections for CCR piles in Part 845.”<sup>4</sup> On the face of the Environmental Groups’ Motion to Modify, it is clear that these three proposed amendments fall outside the limited scope of this sub docket. *See* Second Notice Order and Opinion at 2.

The Environmental Groups’ only potential explanation as to why their request is permissible is that the entire Part 845 rulemaking record has been incorporated by reference into this sub docket. *See* Memorandum in Support at 10–11 (arguing that the requirements for a rule proposal, such as an adequate statement of reasons, should be waived, if the Board finds them applicable because the primary rulemaking record has been incorporated). If this were sufficient to raise arguments outside of the limited scope of this sub docket to the Board for review, it would allow all interested parties to re-raise and re-adjudicate issues that were already decided in the primary rulemaking. This cannot be the case.

The Board had a duty to implement Part 845 by March 30, 2021, 415 Ill. Comp. Stat. 5/22.59(g), and Environmental Groups’ reliance on the incorporation of the Part 845 rulemaking record into this sub docket as a basis for their Motion to Modify renders the Board’s, participants’, the Joint Committee on Administrative Rules’ (“JCAR”), and the Illinois Environmental Protection Agency’s efforts to meet that statutorily-required deadline and finalize the rulemaking

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<sup>2</sup> Environmental Groups’ Memorandum in Support of Motion to Modify Certain Provisions of Part 845 at 3 (Sept. 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 “Memorandum in Support”)

<sup>3</sup> *Id.* at 4.

<sup>4</sup> *Id.* at 9.

meaningless. The scope of this sub docket is limited for a reason, and the Environmental Groups should not be able to circumvent that Board-dictated scope.

**II. The Environmental Groups' Motion to Modify Is an Improper Mechanism to Challenge a Final Board Order and Implemented Regulatory Scheme.**

In addition to the Environmental Groups' Motion to Modify being outside the scope of this sub docket, it is also improper as a matter of law. Though filed under a different title, Environmental Groups' Motion to Modify is essentially a request that this Board reconsider its final Order in the Part 845 rulemaking.

As neatly laid out in their Motion to Modify, the Environmental Groups raised these three issues multiple times throughout the primary rulemaking. *See* Memorandum in Support 2 n.5 (laying out all the times the Environmental Groups raised these issues in the primary rulemaking); *see also* Motion to Modify at 2–3 ¶¶ 5–8 (stating that the Environmental Groups raised these issues to the Board in their initial comment and final comment and in their comment to JCAR); *see also* Initial Public Comments of Environmental Law & Policy Center, Prairie Rivers Network, and Sierra Club at 21–22, 25–27 (June 15, 2020), *Comments: In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845*, R2020-019PC; Environmental Law & Policy Center, Prairie River Network, Sierra Club, and Little Village Environmental Justice Organization's Final Post-Hearing Comments at 106–109 (Oct. 30, 2020), *Comments: In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845*, R2020-019PC; Public Comment of Environmental Law & Policy Center, Prairie Rivers Network, and Sierra Club: P.C.# 144B (Feb. 24, 2021), *Comments: In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845*, R2020-019PC. Under Section 102.702, the Board is “precluded from allowing a motion for

reconsideration of a final order adopting a rule, if that rule has been filed with the Secretary of State,” 35 Ill. Admin. Code § 102.70, and is thus precluded here.

There are methods by which the Environmental Groups could have challenged the Board’s final order—be it through judicial appeal<sup>5</sup> or filing of a new rulemaking that meets all the procedural requirements of a rulemaking proposal<sup>6</sup>—but they did not and have not done so. The Environmental Groups’ failure to appeal the Board’s final rulemaking to an Illinois appellate court, as permitted by Section 102.706, does not allow them to now file a disguised motion for reconsideration that circumvents both the Board’s procedural rules as well as the scope of this sub docket. Because the Environmental Groups’ Motion to Modify is improper for this sub docket and as a matter of law, the Board should deny it without further consideration.

### **CONCLUSION**

Because it is improper both in scope and as a matter of law, Dynegy respectfully requests that the Board deny the Environmental Groups’ Motion to Modify without further consideration. Dynegy reserves the right to provide additional, substantive comments on the Environmental Groups’ proposed amendments and modifications in the event the Board allows the Motion to Modify to proceed.

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<sup>5</sup> See 35 Ill. Admin. Code § 102.706 (“Any final Board order may be appealed to the appellate court within 35 days after the service of that order (see 35 Ill. Adm. Code 101.300(d)), under Sections 29 and 41 of the Act.”).

<sup>6</sup> See 35 Ill. Admin. Code § 102.200 (“Any person may submit a regulatory proposal for the adoption, amendment, or repeal of a regulation. The proposal must be filed with the Clerk in accordance with 35 Ill. Adm. Code 101.302(h) and served upon the Attorney General, the Agency, and DNR in accordance with 35 Ill. Adm. Code 101.304(c).”).

Dated: September 16, 2022

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on this 16th day of September, 2022:

I have electronically served true and correct copies of Dynegy's Response in Opposition of Environmental Groups' Motion to Modify 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 11.

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

/s/ Sarah L. Lode

Sarah L. Lode

Dated: September 16, 2022

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