

**BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF:

PETITION OF SOUTHERN ILLINOIS
POWER COOPERATIVE FOR
AN ADJUSTED STANDARD FROM
35 ILL. ADMIN. CODE PART 845 OR, IN
THE ALTERNATIVE, A FINDING OF
INAPPLICABILITY

AS 2021-006

(Adjusted Standard)

NOTICE OF FILING

To: Don Brown
Carol Webb
Pollution Control Board
100 West Randolph Street
James R. Thompson Center
Suite 11-500
Chicago, Illinois 60601-3218

Stephanie Diers
Sara G. Terranova
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 N. Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the attached Petitioner's Motion to Strike and for Leave to Reply, Reply in Support of Petitioner's Motion to Stay Proceedings, and a Certificate of Service, copies of which are herewith served upon you.

/s/ Bina Joshi

Bina Joshi

Dated: Aug 9, 2023

Stephen Bonebrake
Joshua R. More
Amy Antonioli
Bina Joshi
233 South Wacker Drive, Suite 7100
Chicago, Illinois 60606
(312) 258-5500
Steve.Bonebrake@afslaw.com
Joshua.More@afslaw.com
Amy.Antonioli@afslaw.com
Bina.Joshi@afslaw.com

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Attorneys for Southern Illinois Power Cooperative

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**PETITIONER SOUTHERN ILLINOIS POWER COOPERATIVE'S
MOTION TO STRIKE AND FOR LEAVE TO REPLY**

Petitioner Southern Illinois Power Cooperative (“SIPC”), by its attorneys and pursuant to 35 Ill. Admin. Code § 101.500(d) and (e), respectfully requests that the Board (1) strike Environmental Groups’ Opposition to SIPC’s Motion to Stay, and (2) grant SIPC leave to reply to the Illinois Environmental Protection Agency’s (“IEPA”) Response to SIPC’s Motion to Stay Proceedings and (if the motion to strike is denied) to Environmental Groups’ Opposition to SIPC’s Motion to Stay. In support of its motion, SIPC states as follows:

I. Introduction

1. On July 12, 2023, SIPC filed a Motion to Stay Proceedings (the “Motion to Stay”) until the earlier of May 6, 2024, or the United States Environmental Protection Agency (“U.S. EPA”) taking final action on its proposed Legacy Coal Combustion Residual Surface Impoundment rulemaking, U.S. EPA Docket No. EPA-HQ-OLEM-2020-0107 (the “Proposed Rule”).

2. On July 26, 2023, IEPA filed a Response to SIPC’s Motion to Stay Proceedings (“IEPA’s Response”).

3. On July 28, 2023, sixteen days after SIPC filed its Motion to Stay Proceedings, Earthjustice, Prairie Rivers Network, and Sierra Club (collectively, “Environmental Groups”) filed

a document titled “Environmental Groups’ Opposition to the Motion to Stay” (“Environmental Groups’ Response”), which responds to the Motion to Stay.

4. SIPC respectfully requests that the Board strike the Environmental Groups’ Response because the Environmental Groups are not parties to this proceeding and because their response is untimely. Additionally, SIPC respectfully requests that the Board grant SIPC leave to file the attached reply to IEPA’s Response and, if it is not stricken, to the Environmental Groups’ Response as well because SIPC will be materially prejudiced if it is not able to respond to factual and legal inaccuracies and mischaracterizations in the responses.

II. The Board should strike the Environmental Groups’ Opposition to SIPC’s Motion to Stay.

5. 35 Ill. Admin. Code § 101.500(d) provides that “within 14 days after service of a motion, a *party* may file a response to the motion.” (emphasis added). A “party” is defined as “the person by or against whom an adjudicatory proceeding is brought or who is granted party status by the Board through intervention or joinder.” 35 Ill. Admin Code § 101.202.

6. This proceeding was not brought by or against the Environmental Groups, and none of the Environmental Groups have been granted party status.¹ Accordingly, the Environmental Groups are not parties to this proceeding and do not have standing to respond to the Motion to Stay. *See* 35 Ill. Admin. Code § 101.110(b) (“A person who wishes to participate in a Board adjudicatory proceeding and who is not a party will be considered a participant and will have only those rights specifically provided in these rules.”). No provision of the Board’s rules allows a non-party that specific right.

¹ Apart from the Environmental Groups’ Response, the only filing by Earthjustice, Prairie Rivers Network, or Sierra Club in this docket is a request for public hearing filed on June 9, 2021, and titled “Environmental Organizations’ Request for Public Hearing.”

7. Nonetheless, even if the Environmental Groups were parties to this proceeding with the right to file a response, their response was untimely. It was filed sixteen days after SIPC filed and served its Motion to Stay upon all parties to this proceeding, two days past the fourteen-day deadline imposed by 35 Ill. Admin. Code § 101.500(d).² The Environmental Groups did not request leave to file an untimely response. 35 Ill. Admin. Code § 101.500(d) (“Parties may request that the Board grant more time to respond by filing a motion for extension of time *before* the response period expires.”) (emphasis added).

8. Because the Environmental Groups do not have a right to respond to the Motion to Stay and because their Response is untimely, the Board should strike the Environmental Groups’ Response.

III. Request for Leave to Reply

9. A moving party may file a reply “as the Board or Hearing Officer permits to prevent material prejudice. A motion for permission to file a reply must be filed with the Board within 14 days after service of the response.” 35 Ill. Admin. Code § 101.500(e).

10. IEPA’s and the Environmental Groups’ Responses contain legal and factual inaccuracies and mischaracterizations relevant to the Motion to Stay. For example, IEPA and the Environmental Groups both misstate or misunderstand the relationship between the proposed federal rules and SIPC’s requested relief, and as a result incorrectly conclude that the ongoing federal rulemaking referenced in the Motion to Stay (*Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments*, USEPA

² SIPC served the Motion to Stay on all parties entitled to service in accordance with 35 Ill. Admin. Code § 101.304. Because the Environmental Groups were and are not parties to this proceeding and are not on the service list for this docket, they were not served with the Motion to Stay. However, the Motion to Stay has been publicly posted and available to the Environmental Groups on the Board’s website since it was served.

Docket No. EPA-HQ-OLEM-2020-0107) (the “Proposed Rule”) does not have the potential to moot or otherwise impact this proceeding. Additionally, IEPA and the Environmental Groups both incorrectly imply that SIPC is seeking an indefinite stay and misconstrue the impact of uncertainties associated with the federal rulemaking.

11. SIPC will be materially prejudiced if it is not given the opportunity to respond to and correct these legal and factual errors and mischaracterizations.

12. This Motion is filed within 14 days after service of IEPA’s and the Environmental Groups’ Responses on SIPC.

13. Petitioner’s proposed reply brief is attached as Exhibit 1.

IV. Conclusion

14. For the above reasons, SIPC respectfully requests that the Board strike the Environmental Groups’ Response, and grant SIPC leave to file the attached reply to IEPA’s Response and the Environmental Groups’ Response.

Respectfully submitted,

/s/ Bina Joshi

Bina Joshi

ARENTFOX SCHIFF LLP
Stephen Bonebrake
Joshua R. More
Amy Antonioli
Bina Joshi
233 South Wacker Drive, Suite 7100
Chicago, Illinois 60606
(312) 258-5500
Steve.Bonebrake@afslaw.com
Joshua.More@afslaw.com
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**PETITIONER SOUTHERN ILLINOIS POWER COOPERATIVE'S
REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS**

Petitioner Southern Illinois Power Cooperative (“SIPC”), by its attorneys and pursuant to 35 Ill. Admin. Code § 101.500(e), submits this reply in support of its Motion to Stay Proceedings, stating as follows:

1. On July 12, 2023, SIPC filed a Motion to Stay Proceedings (the “Motion to Stay”) until the *earlier* of May 6, 2024, or the United States Environmental Protection Agency (“U.S. EPA”) taking final action on U.S. EPA’s proposed Legacy Coal Combustion Residual Surface Impoundment rulemaking, U.S. EPA Docket No. EPA-HQ-OLEM-2020-0107 (the “Proposed Rule”).
2. On July 26, 2023, the Illinois Environmental Protection Agency (“IEPA”) filed a Response to SIPC’s Motion to Stay Proceedings (“IEPA’s Response”). On July 28, 2023, sixteen days after SIPC filed its Motion to Stay Proceedings, Earthjustice, Prairie Rivers Network, and Sierra Club (collectively, “Environmental Groups”) filed a document titled “Environmental Groups’ Opposition to the Motion to Stay” (“Environmental Groups’ Response”). For the reasons stated

in the attached motion to strike, the Board should strike the Environmental Groups' Response; however, this reply addresses that response as well in case the Board does not grant the motion to strike.

3. IEPA's and the Environmental Groups' Responses misconstrue and misstate SIPC's requested relief and the legal support for it.

I. IEPA and the Environmental Groups Misunderstand and Misstate the Impact of the Proposed Rule on this Proceeding.

4. IEPA's assertion that "Part 845 remains applicable independently of Part 257" (IEPA Response at 5) misses the point and is irrelevant.

5. In this proceeding, SIPC is requesting a "finding of inapplicability with respect to the current and former ponds at issue or, in the alternative, an adjusted standard exempting the units at issue from Part 845 requirements." AS 2021-006, *In the Matter of: Petition of Southern Illinois Power Cooperative for an Adjusted Standard from 35 Ill. Admin. Code Part 845 or, in the Alternative, a Finding of Inapplicability*, Amended Petition at 2 (September 2, 2021) (the "Petition"). Accordingly, SIPC's Petition for a finding of inapplicability is predicated on the argument that the units at issue are *not* regulated by Part 845, or in the alternative, if the units are regulated by Part 845 that an adjusted standard would be consistent with federal law.

6. The scope of Part 257, including the pending federal rulemaking, is relevant for two reasons. First, the pending federal rulemaking clarifies that the scope of Part 257 does not currently regulate the units subject to the Petition, which supports the merits of SIPC's contention that the units are not currently regulated by Part 845 (or Part 257). Second, the upcoming federal rules could render this proceeding unnecessary or require significant revision to SIPC's Petition in two ways: (a), if adopted (as proposed or even with revisions) it would render, in whole or in part, the relief SIPC is seeking through its request for inapplicability and alternative request for an adjusted

standard meaningless and (b) if the units are found to be subject to Part 845, it would further moot this proceeding by making SIPC's adjusted standard request in whole or in part inconsistent with federal law.

B. IEPA and Environmental Groups Misstate the Scope of Part 845

7. As an initial matter, the suggestions by IEPA and the Environmental Groups that Part 845 is intended to be broader in application than the federal Part 257 or to regulate units not regulated by Part 257 are incorrect. Part 845 was plainly intended to regulate the same universe of CCR surface impoundments as Part 257, as made clear by the legislature and the Board's adoption of the same definition of "CCR surface impoundment" as found in the current federal rule. *Compare* 40 C.F.R. § 257.2 ("CCR surface impoundment") *with* 415 ILCS 5/3.143 and 35 Ill. Admin. Code § 845.120 ("CCR surface impoundment").³ The basis for SIPC's request for a finding of inapplicability is, in part, based on the fact that current Part 257 does not apply to the units at issue in the Petition. Further, SIPC's Petition argues that an adjusted standard is appropriate, in part, because Part 257 does not apply and SIPC's requested relief is, therefore, consistent with federal law. Thus, the scope of Part 257 is directly relevant to the legal arguments and any ruling and relief in this proceeding.

³ IEPA's statements when adopting Part 845 further emphasize the intent to mirror the federal rules. *See, e.g.,* R 2020-019, *In the Matter of Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845*, IEPA Responses to Pre-Filed Questions (Aug. 3, 2020) ("IEPA Responses") at 7–8 ("It is the Agency's position that the same universe of CCR surface impoundments [that is regulated by Part 257] is intended to be regulated by Part 845."); *id.* at 17 ("CCR surface impoundments not subject to Part 257, are not subject to the requirements of Part 845."); R 2020-019, Hearing Transcript (Aug. 11, 2020) at 43–44 (Q: "[M]y question was is Part 845 intended to apply to the same ponds that are subject to requirements under Part 257 given that they both define CCR surface impoundments in an identical fashion?" A: "In the Agency's opinion, they will be the same ones.").

8. The Proposed Rule further supports SIPC's assertion that the units in question here are not regulated CCR surface impoundments under current (state or federal) regulations. U.S. EPA is proposing to "extend" the Part 257 rules to apply, for the first time, to "inactive CCR landfills[,] . . . structural fill sites, CCR placed below currently regulated CCR units, evaporation ponds, or secondary or tertiary finishing ponds . . ." 88 Fed. Reg. at 32,018. U.S. EPA has specifically requested comments (and stakeholders have submitted comments on) on how units similar to those at issue in this Petition should be regulated. *See, e.g., Id.* at 32,016 (discussing the "Cooper Station" unit in Kentucky where former a CCR surface impoundment below a CCR landfill is provided as an example of one of the types of units for which the new rule was proposed). The units at issue in the Petition include the types of units the Proposed Rule suggests are not currently regulated, but would be under the proposal: secondary or tertiary ponds, an area that has historically operated as an inactive landfill, and former CCR surface impoundments located under a landfill. *See, e.g.* Petition at 8-16.⁴

C. Relief Granted by the Board May be Rendered Moot and/or Meaningless by the Federal Rulemaking

9. Most importantly, contrary to IEPA's suggestion that only Illinois regulations are relevant, the pending rulemaking has the ability to render this proceeding moot and/or meaningless. *Forest Pres. Dist. of Kane Cnty. v. City of Aurora*, 600 N.E.2d 1194, 1196 (1992) ("A matter is considered moot when it presents or involves no actual controversy, interests or rights of the parties, or where

⁴ Environmental Groups spend much of their response discussing the merits of this case, including their claim that Part 845 currently applies to the units that are the subject of the Petition. While the ultimate merits of that argument are not directly relevant to this Motion for Stay, as noted above the Proposed Rule provides further support for the current inapplicability of Part 845. The Environmental Groups wholly fail to even acknowledge, let alone address, how the proposed amendments to the federal rule undermine their arguments that Part 845 currently applies to the units. The Environmental Groups do, however, seem to recognize the weakness of their position, asserting only that Part 845 "may" apply currently.

the issues have ceased to exist.”) (internal quotations and citation omitted). The ongoing Part 257 rulemaking may void SIPC’s interests in bringing this Petition. The relief SIPC seeks through its request for inapplicability or, in the alternative, for an adjusted standard, is from the requirements in Part 845, including requirements that mirror or are similar to the requirements for units that would be regulated by the Proposed Rule. It makes little sense for the Board to provide, and for the parties to contest, relief that may at a practical level end up not mattering. Additionally, any request for and grant of an adjusted standard must be consistent with federal law. 5 ILCS 5/28.1(c)(4) (“the Board may grant individual adjusted standards whenever the Board determines, upon adequate proof by petitioner . . . the adjusted standard is consistent with any applicable federal law”); 35 Ill. Admin. Code § 104.406(i). It further makes little sense to move forward on an adjusted standard request that may soon not be valid given new federal requirements that may be promulgated in short order. Thus, even if SIPC is successful in its argument on the inapplicability of Part 845 or in its alternative request for an adjusted standard, the Proposed Rule as finalized may result in requirements that make the Petition meaningless, or in need of significant revision, and may make a final Board order granting an adjusted standard inconsistent with federal law. Why expend resources on a proceeding that may soon, in whole or in part, have no necessity or an adjusted standard request that may soon, in whole or in part, have no validity?

10. SIPC provides the Board with a practical example of how the Proposed Rule may render this matter unnecessary: three of the units at issue in SIPC’s petition are former CCR surface impoundments (the Former Fly Ash Holding Units) located underneath an inactive landfill (Former Landfill), that for decades was treated by IEPA as a unit regulated under the Illinois landfill regulations. *See* Petition at 14-17. IEPA in its Recommendation suggests the Former Fly Ash Holding Units, and perhaps even the Former Landfill itself, are CCR surface impoundments

regulated under Part 845. SIPC has maintained that these Former Fly Ash Holding Units no longer contain liquids and thus are not CCR surface impoundments regulated under Part 257, and therefore not regulated under Part 845 (or, if they are regulated under Part 845, an adjusted standard would not be inconsistent with federal law). *See* Petition at 35-40. SIPC has also maintained that the Former Landfill is not a CCR surface impoundment regulated under Part 257. *Id.* As CCR management activities not regulated under current Part 257, these units are similar to the CCR Management Units that are the focus of the Proposed Rule, which would subject these units to Part 257 requirements for the first time. 88 Fed. Reg. at 32,018, 32,034.

11. Finalization of the Proposed Rule could make SIPC's request for a finding of inapplicability and request for adjusted standard unnecessary for the Former Fly Ash Holding Units and Former Landfill by imposing requirements upon these units that are similar to those required under Part 845. In its current form, the Proposed Rule would "establish groundwater monitoring, corrective action, closure, and postclosure care requirements for all CCR management units (regardless of how or when that CCR was placed)" consistent with existing requirements under Part 257. 88 Fed. Reg. at 31982. While Part 257 and Part 845 requirements are not identical, they are substantially similar, with Part 257 serving as a baseline for the Part 845 requirements. R2020-19, *In the Matter of Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845*, Second Notice Opinion and Order at 11 (February 4, 2021).

12. Additionally, on the request for an adjusted standard, SIPC may find itself currently entitled to relief related to the Former Fly Ash Holding Units and Former Landfill that it would not be entitled to upon finalization of the Proposed Rule. Federal requirements serve as a floor for adjusted standards and the Former Fly Ash Holding Units and Former Landfill cannot be excused

from federal requirements through an adjusted standard. The Board may grant SIPC's requested adjusted standard from Part 845, finding that Part 845 governs these units but that current Part 257 does not.⁵ In such an event, the adjusted standard will be less stringent than the Proposed Rule. Even if the Proposed Rule is revised prior to promulgation, it will likely impose monitoring, corrective action, closure, postclosure care or other requirements more stringent (and inconsistent with) the requested adjusted standard. This would render SIPC's requested relief, and a Board order granting that relief, inconsistent with federal law and, thus, moot.

13. SIPC sees no point in wasting the parties' and the Board's resources to now adjudicate the merits of the Petition when a currently proposed federal rule could render the Petition unnecessary, in whole or in part. SIPC believes it is correct on the merits, but if the Proposed Rule becomes final (in its current or different form) the relief SIPC is requesting may well no longer matter or may be significantly impacted.

D. Environmental Groups Rely on Inapplicable Precedent

14. The Environmental Groups rely on several decisions from a protracted enforcement proceeding that is inapplicable here, *Sierra Club, et. al. v. Midwest Generation, LLC*, PCB 2013-15, slip op. (Apr. 17, 2014) & slip op. (Apr. 16, 2020). That matter was an enforcement proceeding where the Board could proceed with enforcement simultaneously with pending related rulemakings.⁶ Reliance upon that matter misses the important distinction between an enforcement

⁵ SIPC's request is for an adjustment from the applicability provision of Part 845, 845.100. Thus, this would in effect provide for an adjustment from any of the monitoring, corrective action, closure, postclosure care or other requirements applicable to "CCR surface impoundments" under Part 845.

⁶ The four-factor test Environmental Groups propose is likewise inapplicable. While the Board has at times utilized that test in enforcement proceedings, there is no requirement that the Board consider all of or only these factors in other types of proceedings. *See, e.g., U.S. Steel Corp. v. IEPA*, PCB 2010-023, Order of the Board (Feb. 2, 2012) (granting a stay in a permit appeal

proceeding and a proceeding for a finding of inapplicability or, in the alternative, adjusted standard. The Board in *Midwest Generation* emphasized the distinction between enforcement cases and other types of proceedings and the fact that nothing in the pending rulemaking could “conceivably obviate” the enforcement proceeding. PCB 2013-15, slip op. at 12-13 (Apr. 17, 2014). Here, the outcome of the federal rulemaking could completely or partially obviate the relief SIPC seeks and the scope of Part 257 has a direct impact on the scope of relief the Board may grant. Thus, a stay is warranted. *See, e.g., U.S. Steel Corp. v. IEPA*, PCB 2010-023, slip op. (Feb. 2, 2012) (granting a stay in a permit appeal proceeding where a federal review of permits at the same facility may moot the state proceedings).

II. Concerns Raised About Uncertainty are Irrelevant

15. SIPC is not requesting an indefinite stay. Again, its request is for a stay until the *earlier* of the promulgation of the federal rule or May 6, 2024. Any discussion of extensions in the deadline for the final promulgation of the federal rule at this point is pure speculation. The Board has considered this issue in the past and granted the same relief SIPC now seeks. *See U.S. Steel*, PCB 2010-023, slip op. at 8 (weighing concerns of uncertainty and granting a stay to the early of date-certain or a final decision in a related federal case). If the deadline for promulgating the final rule

proceeding without applying the four-factor test); *In re Petition of the Louis Berkman Company, d/b/a The Swenson Spreader Company, for an Adjusted Standard from 35 Ill. Adm. Code 215, Subpart F*, PCB AS No. 97-5, 1997 Ill. Env. Lexis 188, at *4 (Apr. 3, 1997) (considering a motion to stay an adjusted standard proceeding without invoking the four-factor test).

is extended, a further stay of this matter can be reevaluated if and as needed at that time.⁷ At this point, this argument is simply premature and irrelevant.⁸

16. Additionally, any uncertainty surrounding the *content* of the future federal rule further supports a stay because the relief granted by the Board in this proceeding must be consistent with federal law. If the Board grants an adjusted standard, it does not matter if the federal rule is *exactly* the same as currently proposed – what matters is that some new federal requirements could apply in some form to units subject to this Petition, and the relief granted by the Board should be consistent with those requirements. Further, as discussed above, even if there are revisions to the proposal before the rule is finalized, it will have an impact on the effectual relief that may be sought and granted in this proceeding. It is wasteful to “litigate” the Petition when the scope of available relief may change significantly in the relative near term.

III. Conclusion

17. For the reasons stated above and in the Motion to Stay, the Board should stay these proceedings until the earlier of the promulgation of a final federal rule or May 6, 2024.

⁷ Environmental Groups also engage in poorly supported assertions of ongoing environmental harm. SIPC has presented evidence of lack of environmental harm by the units at issue in its Petition. *See e.g.* SIPC’s Amended Petition at 47-48, 58-59, Pet. Ex. 28. Unlike PCB 2013-15, this is not an enforcement action. Regardless, no similar concern was raised during the more than 14-month extension requested by IEPA to file its Recommendation to SIPC’s Petition and, significantly, Petitioner’s requested stay is for a limited period.

⁸ IEPA’s comparison to the timeline for the original 2015 Federal CCR rulemaking is also misleading. The current proposed rule impacts only a small subset of stakeholders impacted by the 2015 rule, and, compared to the tens of thousands of comments received for the initial rule, as of August 9, 2023, only 715 comments are posted to the rulemaking docket. <https://www.regulations.gov/docket/EPA-HQ-OLEM-2020-0107>.

Respectfully submitted,

/s/ Bina Joshi

Bina Joshi

ARENTFOX SCHIFF LLP
Stephen Bonebrake
Joshua R. More
Amy Antonioli
Bina Joshi
233 South Wacker Drive, Suite 7100
Chicago, Illinois 60606
(312) 258-5500
Steve.Bonebrake@afslaw.com
Joshua.More@afslaw.com
Amy.Antonioli@afslaw.com
Bina.Joshi@afslaw.com

*Attorneys for Southern Illinois Power
Cooperative*

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 9th day of August, 2023:

I have electronically served a true and correct copy of the Motion to Strike and For Leave to Reply; Reply in Support of Motion to Stay; and this Certificate of Service by email upon the following persons and the number of pages in the email transmission is 19:

Stefanie Diers
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Ave. East, PO Box 19276
Springfield, Illinois 62794-9276
Stefanie.Diers@Illinois.Gov

Sara Terranova
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Ave. East, PO Box 19276
Springfield, Illinois 62794-9276
Sara.Terranova@illinois.gov

Pollution Control Board
100 West Randolph Street
James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601-3218
Don.Brown@Illinois.Gov
PCB.Clerks@illinois.gov
Carol.Webb@illinois.gov

My e-mail address is bina.joshi@afslaw.com;

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

/s/ Bina Joshi
Bina Joshi

ARENTFOX SCHIFF LLP
Stephen Bonebrake
Joshua R. More
Amy Antonioli
Bina Joshi
233 South Wacker Drive, Suite 7100
Chicago, Illinois 60606

(312) 258-5500

Steve.Bonebrake@afslaw.com

Joshua.More@afslaw.com

Amy.Antonioli@afslaw.com

Bina.Joshi@afslaw.com

Attorneys for Southern Illinois Power Cooperative