

ILLINOIS POLLUTION CONTROL BOARD  
March 21, 2024

IN THE MATTER OF: )  
)  
PETITION OF SOUTHERN ILLINOIS )  
POWER COOPERATIVE FOR AN ) AS 21-6  
ADJUSTED STANDARD FROM 35 ILL. ) (Adjusted Standard - Land)  
ADMIN. CODE PART 845 OR, IN THE )  
ALTERNATIVE, A FINDING OF )  
INAPPLICABILITY )

ORDER OF THE BOARD (by M. Gibson):

Southern Illinois Power Cooperative (SIPC) requests an adjusted standard from the coal combustion residuals (CCR) surface impoundments rules under Part 845 (35 Ill. Adm. Code 845) as they apply to certain disposal units at its Marion Generating Station. Specifically, SIPC requests a Board finding that the requirements of Part 845 are inapplicable to the “De Minimis Units” and the “Former Fly Ash Holding Units.” In the alternative, SIPC requests an adjusted standard from 35 Ill. Adm. Code 845.100 so that the requirements of Part 845 do not apply to the specified units. SIPC filed an amended petition (Pet.) on September 2, 2021, and the Illinois Environmental Protection Agency (IEPA) filed a recommendation on January 13, 2023, asking the Board to deny the adjusted standard.

On July 12, 2023, SIPC filed a motion to stay this proceeding. IEPA filed a response opposing the motion. Earthjustice, Prairie Rivers Network, and Sierra Club (Environmental Groups) objected to SIPC’s requested stay. SIPC filed a motion to strike the Environmental Groups response. The Board denies that motion as well as the motion to stay. Additionally, the Board finds that the amended petition meets the requirements of the Environmental Protection Act (Act) and the Board’s procedural rules and therefore accepts it for hearing.

**SIPC’S AMENDED PETITION**

On June 3, 2023, the Board accepted SIPC’s adjusted standard petition filed on May 11, 2021, under Section 28.1 of the Act and Part 104 of the Board’s procedural rules. *See* 415 ILCS 5/28.1 (2022); 35 Ill. Adm. Code 104 Subpart D. SIPC amended this petition on September 2, 2021. SIPC petitions the Board for an adjusted standard from Part 845 CCR surface impoundments rules. 35 Ill. Adm. Code 845. Specifically, SIPC requests a finding that the requirements Part 845 are inapplicable to the De Minimis Units and the Former Fly Ash Holding Units at its Marion Generation Station in Williamson County. Pet. at 25-40. In the alternative, SIPC requests an adjusted standard from Section 845.100 so that the requirements of Part 845 do not apply to specified units. Pet. at 40-60.

Section 28.1 of the Act and Section 104.408 of the Board’s procedural rules require publication of notice of an adjusted standard proceeding in a newspaper of general circulation in the area affected by the petitioner’s activity. 415 ILCS 5/28.1(d)(1) (2022); 35 Ill. Adm. Code 104.408(a). Notice must be published within 14 days of filing a petition for an adjusted standard

with the Board. 35 Ill. Adm. Code 104.408(a). As required by Section 104.410, SIPC timely filed a certificate of publication of notice of the initial adjusted standard petition on May 27, 2021. Notice of filing was published in the *Marion Republic* on May 19, 2021.

Section 104.418 of the Board's procedural rules provides that a petitioner may amend its petition at any time. 35 Ill. Adm. Code 104.418(a). If the petitioner amends the petition so that the amendment is a substantive change to the requested relief in that it requests additional or alternative relief, petitioner must re-notice the amended petition under Section 104.408. *Id.* Based on a review of the amended petition, the Board finds that it does not request additional or alternative relief that would require re-noticing. Thus, the Board finds that the amended petition meets the requirements of the Act and the Board's procedural rules and accepts it for hearing. This finding makes no determination on the informational sufficiency or the merits of SIPC's petition. The Board, through its own order or through the orders of its hearing officer, may direct SIPC to provide additional information concerning its request.

### **MOTION FOR STAY**

SIPC asks that the Board stay the proceeding to await federal rules or until May 6, 2024. Mot. at 1. SIPC argues that the proposed federal rules define "CCR Management Units" or "CCRMUs," as "any area of land on which any non-containerized accumulations of CCR are received, placed, or otherwise managed, that is not a CCR unit." Mot. at 5, *citing* 88 Fed. Reg. 32017. SIPC notes that the United States Environmental Protection Agency (USEPA) explained that this definition is intended to include "historical solid waste management units such as CCR landfills (including abandoned piles)" as well as "any other areas where the solid waste management of CCR on the ground has occurred, such as structural fill sites, CCR placed below currently regulated CCR units, evaporation ponds, or secondary or tertiary finishing ponds that have not been properly cleaned up[.]" *Id.* Under the proposed rule, CCRMUs would be required to comply with the existing federal CCR requirements in 40 C.F.R. 257 for "groundwater monitoring, corrective action, closure, and post-closure care[.]" *Id.*

SIPC asserts that the proposed federal rules, if adopted, may conflict "with any applicability determination or adjusted standard the Board may grant in this proceeding, and could potentially moot the entire proceeding by federally imposing the same requirements under the Illinois Part 845 rules that SIPC contends in this proceeding are not applicable." Mot. at 5 This situation could occur because some or most of the Marion units addressed in the adjusted standard could be classified as CCRMUs. *Id.* at 6. SIPC also argues that the stay is necessary to ensure that an adjusted standard granted by the Board is consistent with the applicable federal law under Section 28.1(c)(4) of the Act. *Id.* at 7.

IEPA filed its response on July 26, 2023, (Resp.). IEPA opposes SIPC's motion for a stay not only because of uncertainty around when the federal rules will be adopted and what those rules might contain, but also because Part 845 applies independently of the federal rules. Resp. at 5.

On July 28, 2023, the Environmental Groups filed a document opposing SIPC's motion to stay (Env. Opp.). The Environmental Groups argue that: 1) "Board decisions make clear that

speculative future action with uncertain timing does not justify a stay”; 2) “neither comity nor prevention of multiplicity, vexation and harassment justify a stay here”; and 3) “ongoing environmental harm continues while application of the Part 845 rules is stayed due to this proceeding” and “[f]urther delay caused by a stay would only exacerbate that harm.” Env. Opp. at 1.

On August 9, 2023, SIPC filed a motion to strike the Environmental Groups’ filing, along with a motion to file a reply attaching the reply (Mot. to Strike). The Board grants SIPC’s motion to file a reply and accepts the reply.

### **Discussion**

The Board’s rules regarding a motion to stay are found at 35 Ill. Adm. Code Section 101.514(a) and are as follows:

#### Section 101.514 Motions to Stay Proceedings

- a) Motions to stay a proceeding must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed, and in decision deadline proceedings, by a waiver of any decision deadline. A status report detailing the progress of the proceeding must be included in the motion

The decision to grant or deny a motion for stay is “vested in the sound discretion of the Board.” See People v. State Oil Co., PCB 97-103 (May 15, 2004). When exercising its discretion to determine whether an arguably related matter pending elsewhere warrants staying a Board proceeding, the Board may consider the following factors: 1) comity; 2) prevention of multiplicity, vexation, and harassment; 3) likelihood of obtaining complete relief in the foreign jurisdiction; and 4) the *res judicata* effect of a foreign judgment in the local forum, *i.e.*, in the Board proceeding. Sierra Club, et. al v. Midwest Generation, LLC, PCB 13-15, slip op. at 11 (April 17, 2014). The Board may also weigh the prejudice a stay would cause the nonmovant against the policy of avoiding duplicative litigation. *Id.* at 11, *citing Village of Mapleton v. Cathy’s Tap, Inc.*, 313 Ill. App. 3d 264, 267, 729 N.E.2d 854, 857 (3d Dist. 2000). Additionally, the Board must consider any ongoing environmental harm should the stay be granted.

SIPC’s motion fails to demonstrate that any of these factors weigh in favor of staying this proceeding.

SIPC asserts that its adjusted standard request is based on its position that the Marion units are not regulated by the federal CCR rules on which Part 845 was based. Mot. at 6. SIPC states that it bases this position on the existing federal definitions of “CCR surface impoundments,” “existing CCR surface impoundments,” and “inactive surface impoundments.” *Id.*

The Board notes that on March 13, 2024, the Fourth District Appellate Court issued an opinion in Midwest Generation, LLC, et al v. Pollution Control Board, 2024 IL App (4th)

210304 (Mar. 13, 2024). The appellate court reviewed challenges to several of the Board’s Part 845 rules, including the definition of “inactive CCR surface impoundments.” In deciding that the Board did not exceed its authority, the court stated:

The plain language of the Act demonstrates that the legislature directed the Board to promulgate rules that would protect Illinois groundwater from CCR contamination at existing CCR surface impoundments at active or inactive plants. The legislature’s command that the Board promulgate rules that are *at least as* protective as the federal rules demonstrates that the legislature granted the Board authority to promulgate rules that were *more* protective than the federal ones.

We additionally note that the legislature chose *not* to adopt the federal definition of “inactive CCR surface impoundments,” leaving to the Board the task of defining that term. If the legislature had intended for the state definition of “inactive CCR surface impoundment” to be the same as the federal definition, it would have adopted the federal definition, as it did for “CCR surface impoundment.”

Accordingly, we conclude that the Board did not exceed its authority by defining “inactive CCR surface impoundment” to include CCR surface impoundments that are designed to hold liquid but do not currently hold liquid. 2024 IL App (4th) 210304 ¶¶ 64-66 (emphasis in original).

The court also found that “Midwest and Dynegy have not demonstrated that the Board’s inclusion of dry impoundments in the definition of inactive CCR surface impoundments was arbitrary and capricious”. *Id.* at ¶93. The court affirmed the Board’s adoption of Part 845 on all issues.

The Board sees no need to await proposed federal rules on an issue when the Board’s Part 845 rules control. *See* Petition of Midwest Generation LLC for an Adjusted Standard from 35 Ill. Adm. Code 845.740(a) and Finding of Inapplicability of 35 Ill. Adm. Code 845, AS 21-3, slip op. at 4 (Oct. 5, 2023). The Board denies SIPC’s motion to stay this adjusted standard proceeding.

### **MOTION TO STRIKE**

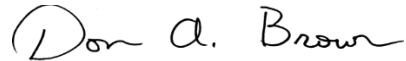
SIPC asks the Board to strike the Environmental Group’s filing opposing a stay because “the Environmental Groups are not parties to this proceeding and because their response is untimely.” Mot. to Strike at 2.

On August 18, 2023, the Environment Groups filed a comment opposing the motion to strike (Env. Group Comment). The Environmental Groups state that they filed their comments as participants in the proceeding, not as parties to the proceeding. Env. Comment at 1. According to the Environmental Groups, the 14-day deadline for filing a response to SIPC’s motion to stay does not apply since they are only participants and the comment was timely filed. *Id.* at 2.

The Board agrees with the Environmental Groups and finds that its filing opposing SIPC's motion to stay is a comment and was timely filed. Therefore, the Board denies SIPC's motion to strike.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 21, 2024, by a vote of 4-0.

A handwritten signature in cursive script that reads "Don A. Brown".

Don A. Brown, Clerk  
Illinois Pollution Control Board