

**BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD**

**ILLINOIS POWER GENERATING
COMPANY**

Petitioner

v.

**ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY**

Respondent.

PCB 2024-043

NOTICE OF FILING

To: Illinois Pollution Control Board
60 E Van Buren St, Ste. 630
Chicago, IL 60605
Don Brown
don.brown@illinois.gov
Carol Webb
carol.webb@illinois.gov

Office of the Attorney General
500 South Second Street
Springfield, IL 62706
Mallory Meade
mallory.meade@ilag.gov
Samuel Henderson
samuel.henderson@ilag.gov

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the attached **RESPONSE TO COMMENTS OF ILLINOIS ENVIRONMENTAL PROTECTION AGENCY**, copies of which are herewith served upon you.

/s/ Samuel A. Rasche

Dated: February 25, 2025

Joshua R. More
Bina Joshi
Samuel A. Rasche
233 South Wacker Drive, Suite 7100
Chicago, Illinois 60606
(312) 258-5500
Joshua.More@afslaw.com
Bina.Joshi@afslaw.com
Sam.Rasche@afslaw.com

Attorneys for Illinois Power Generating Company

**BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD**

**ILLINOIS POWER GENERATING
COMPANY**

Petitioner

v.

**ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY**

Respondent.

PCB 2024-043

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 25th day of February, 2025:

I have electronically served a true and correct copy of the attached Response to Comments of the Illinois Environmental Protection Agency by electronically filing with the Clerk of the Illinois Pollution Control Board and by e-mail upon the following persons:

Illinois Pollution Control Board
60 E Van Buren St, Ste. 630
Chicago, IL 60605
Don Brown
don.brown@illinois.gov
Carol Webb
carol.webb@illinois.gov

Office of the Attorney General
500 South Second Street
Springfield, IL 62706
Mallory Meade
mallory.meade@ilag.gov
Samuel Henderson
samuel.henderson@ilag.gov

My e-mail address is sam.rasche@afslaw.com

The number of pages in the e-mail transmission is 9.

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

/s/ Samuel A. Rasche
Samuel A. Rasche

Dated: February 25, 2025

ARENTFOX SCHIFF LLP

Joshua R. More

Bina Joshi

Samuel A. Rasche

233 South Wacker Drive, Suite 7100

Chicago, Illinois 60606

(312) 258-5500

Joshua.More@afslaw.com

Bina.Joshi@afslaw.com

Sam.Rasche@afslaw.com

Attorneys for Illinois Power Generating Company

**BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD**

**ILLINOIS POWER GENERATING
COMPANY**

Petitioner

v.

**ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY**

Respondent.

PCB 2024-043

**ILLINOIS POWER GENERATING COMPANY’S RESPONSE TO COMMENTS OF
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY**

On February 4, 2025, Respondent Illinois Environmental Protection Agency (“IEPA” or “Agency”) sought leave to and filed a public comment (P.C. # 3, the “IEPA Response”) to the November 21, 2024 Public Comments of Sierra Club, Earthjustice, and Prairie Rivers Network (P.C. # 1, the “Comment”). Here, to the extent the Board considers IEPA’s Response, Illinois Power Generating Company (“IPGC”) responds to the Agency’s comments.

IEPA’s Response addresses both the Comment as well as IPGC’s Response filed on January 10, 2025 (P.C. #2). While IPGC does not object to IEPA responding to new arguments presented in IPGC’s Response, IPGC notes that the Agency had every opportunity to request leave to respond to the original Comment when it was filed in November but elected not to do so for over two months. Thus, IEPA cannot claim, as it does in its Motion for Leave to File a Response, to be prejudiced by an inability to respond to the Comment. Further, given that summary judgment

briefing in this proceeding was completed on November 15, 2024, IPGC stresses that the belated filing of IEPA's Response should not delay the Board's consideration of those motions.

Regardless, to the extent the Board considers IEPA's Response, IPGC briefly responds to IEPA's new arguments that exceedances exist independently of operating permit approval and that "adopting the Comment's argument would lead to absurd results." *See* IEPA Response at 2-3, 5. IEPA's position incorrectly implies that Part 845 requirements are self-implementing. Importantly, this approach leaves no incentive for the Agency to issue timely permitting decisions and has in fact resulted in undue delays and inconsistent application and enforcement of Part 845 throughout the State of Illinois.

Part 845 is not a self-implementing program.

Part 845 provides a permitting system to ensure that CCR surface impoundments are operated and closed in a manner that does not pose unacceptable risks to human health or the environment, and a permitting system necessarily requires the issuance of permits. The regulations are clear that "no person may operate a CCR surface impoundment without an operating permit" and that a "CCR surface impoundment must maintain an operating permit" until the unit is closed and all post-closure care and monitoring has been completed. 35 Ill. Adm. Code § 845.200(a).¹ For units that existed prior to the effective date of Part 845, the rules required owners and operators to submit initial operating permit applications by October 31, 2021—well over three years ago—but otherwise do not consider the possibility of units operating for extended periods absent a permitting determination by IEPA. 35 Ill. Adm. Code § 845.230(d).

415 ILCS 5/22.59(b)(2) further provides "[n]o person shall . . . construct, install, modify, operate, or close any CCR surface impoundment without a permit granted by the Agency."

Thus, all requirements relating to the operation of a CCR surface impoundment, such as groundwater monitoring, necessarily assume the existence of a permit. The entire groundwater monitoring program—from the design and placement of sampling locations to the analytical procedures and statistical methods used to evaluate samples—must be included in and approved by the Agency as part of an operating permit application. *See* 35 Ill. Adm. Code § 845.230(d)(2)(I). The central role of permits in the Part 845 regulatory scheme is further illustrated by the fact that the rules only address enforcement in the context of the “General Provisions” of the “Permitting” subpart. *See* 35 Ill. Adm. Code § 845.210(f). Part 845 does not contain any standalone enforcement provisions, and enforcement is not mentioned in relation to groundwater monitoring.

IEPA nevertheless suggests that the “groundwater monitoring requirements of Section 845.650 . . . apply to all CCR surface impoundments, whether they have been issued an operating permit or not.” IEPA Response at 5.² But this interpretation leaves the Agency with no incentive to issue timely permitting decisions and arguably renders a permitting system, including its many requirements related to groundwater monitoring, unnecessary. The purpose of the permitting system is to ensure that releases from CCR surface impoundments do not cause harm to human health or the environment. If the rules adequately require all owners and operators to monitor for and correct any releases from CCR surface impoundments *independently of any permit*, then it is unclear what additional benefits an operating permit incorporating those requirements could provide that would justify the significant costs and effort (from both owners and operators and from IEPA) involved with submitting and reviewing permit applications.

² Significantly, the issue here is not simply the act of conducting groundwater monitoring, but whether true “exceedances” can occur/be determined without a final operating permit.

Enforcement of Part 845 absent approved operating permits is inefficient and unfair.

The urgent need for timely permitting decisions, and the inadequacy of IEPA's attempts to enforce Part 845's requirements without issuing permits, are made plain by observing Part 845 compliance efforts throughout the state. Owners and operators of CCR surface impoundments invested significant time, money, and other resources into submitting operating permit applications. Included with those applications were hundreds of thousands of dollars in permitting fees intended to fund the Part 845 permitting program. *See* 415 ILCS 5/22.59(j). Yet over three years after the deadline to submit initial permit applications, IEPA has yet to issue a *single* final operating permit decision.³ To the extent IEPA identifies a "gap" in Part 845 enforcement (*see* IEPA Response at 5-6), that gap is the result only of the Agency's own delay and does not excuse that, as written, a true "exceedance of the groundwater protection standards" under Part 845 cannot be determined without a final operating permit.

The prolonged absence of final operating permits (and with them approved groundwater monitoring programs) has resulted in inconsistent and inefficient application of Part 845. Certain owners and operators such as IPGC, in the spirit of cooperation, initiated groundwater monitoring according to proposed monitoring programs outlined in permit applications while awaiting a final IEPA permitting decision. But because Part 845's groundwater monitoring provisions assume the existence of an approved operating permit, this "temporary" solution has created significant problems the longer IEPA's permit review drags on. This very proceeding involves IEPA's rejection of an alternative source demonstration ("ASD") in part because of IEPA's dissatisfaction with the characterization of the CCR surface impoundment (*see* R. 32), but the characterization of CCR is

³ IEPA's website lists dozens of submitted applications but no final permitting determinations: <https://epa.illinois.gov/topics/water-quality/watershed-management/ccr-surface-impoundments.html#facilities> (accessed February 18, 2025).

a required component of an initial operating permit. *See* 35 Ill. Adm. Code § 845.230(d)(2)(B). Thus, IPGC is facing negative consequences due to its reliance upon its permit application when IEPA's issuance of a final operating permit at any point would have resolved the issue. Similar disagreements involving other ASDs, and their inclusion and/or reliance upon components of initial operating permit applications, have resulted in numerous petitions for review currently pending before the Board.⁴

Critically, this uncertainty has not impacted all owners and operators equally. IPGC and other entities who sought to cooperate with the Agency have incurred significant costs as a result of that cooperation. But not every owner or operator has agreed to initiate proposed groundwater monitoring programs and/or to evaluate groundwater samples for potential exceedances of proposed groundwater protections standards. Therefore, to IPGC's knowledge, Part 845 is currently being applied inconsistently among different owners and operators. IPGC and similarly situated entities are facing disparate treatment for their cooperation while IEPA continues to delay the issuance of final operating permits.

The Board does not have jurisdiction to review a nonconcurrence unless there is an actual exceedance.

Finally, IEPA incorrectly argues that, even if the Board finds that there can be no exceedance absent a final operating permit, the Board nevertheless has jurisdiction to review and

⁴ IEPA acknowledges the difficulty of extended reliance on proposed operating permits and explicitly agrees that "there could be circumstances under which a dispute over the classification of monitoring wells would create difficulties with determining whether an exceedance as defined in Section 845.120 occurred." IEPA Response at 4. However, it argues that should not matter where, as here, an "exceedance" is determined based on the standard set forth in Section 845.600(a)(1). *Id.* Under this interpretation some detections may be ripe for consideration as "exceedances" now, while others would remain uncertain until an operating permit is issued. This argument only proves the point of inconsistent application. Further, as noted in IPGC's Response to P. C. #1, potential operating permit submissions may be based on background, others may not. P.C. # 2 at 5-6. Still, the categorization of all such events as "exceedances" could change based on the contents of a final approved operating permit. *Id.*

uphold IEPA's nonconcurrency with IPGC's ASD. *See* IEPA Response at 10. But simply stating jurisdiction exists does not make it so. The rules authorize owners and operators to submit an ASD to IEPA (and subsequently impart jurisdiction upon IEPA to review the ASD and upon the Board to review IEPA's final decision) only in the event that an exceedance is detected. 35 Ill. Adm. Code § 845.650(e). If the Board agrees that there has not been an exceedance, then the rules did not require the submittal of an ASD and by extension there is nothing for the Agency or for the Board to review "pursuant to" the rules.

For the above reasons, to the extent it considers them, the Board should reject the arguments in IEPA's Response.

Respectfully submitted,

/s/ Bina Joshi

Bina Joshi

ARENTFOX SCHIFF LLP

Joshua R. More

Bina Joshi

Samuel A. Rasche

233 South Wacker Drive, Suite 7100

Chicago, Illinois 60606

(312) 258-5500

Joshua.More@afslaw.com

Bina.Joshi@afslaw.com

Sam.Rasche@afslaw.com

*Attorneys for Dynegy Midwest
Generating, LLC*