

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)	
COAL COMBUSTION WASTE (CCW))	
ASH PONDS AND SURFACE)	
IMPOUNDMENTS AT POWER)	R14-10
GENERATING FACILITIES:)	(Rulemaking – Water)
PROPOSED NEW 35 ILL. ADM.)	
CODE 841)	

DYNEGY’S RESPONSE TO ENVIRONMENTAL GROUPS’ MOTION TO REOPEN PROCEEDING

Dynegy Midwest Generation, LLC, Illinois Power Generating Company, Illinois Power Resources Generating, LLC and Electric Energy, Inc. (collectively “Dynegy”) by and through their attorneys, Much Shelist, P.C., now file this response to the Motion to Reopen Proceeding and Amended Proposal filed by Prairie Rivers Network, Sierra Club and Environmental Law and Policy Center (collectively, “Environmental Groups”). Dynegy requests that the Board deny this motion but, should it grant the motion, to schedule hearings on the Amended Proposal.

The Illinois Environmental Protection Agency (“IEPA”) has already recommended that the Board stay these proceedings indefinitely based on the numerous uncertainties associated with the federal Coal Combustion Residuals regulation (“CCR Rule”) and that remains the best approach. Both industry and environmental groups (including the Sierra Club and Prairie Rivers Network who are parties to this motion) have challenged parts of the CCR Rule in federal court and Congress is considering proposed legislation to modify it and allow states to implement the rule through a permit program. At a time when the State’s resources are extremely strained, it would be wasteful for the Board to continue its process of considering the IEPA’s Coal Combustion Waste proposal (“CCW Proposal”) in the face of this substantial uncertainty, as well as the significant ongoing efforts of surface impoundment owners and operators to comply with the CCR Rule.

Further, harmonizing the CCR Rule and the CCW Proposal will be no easy task. They apply to different types of sites, require different actions and establish different procedures. Adopting one rule which incorporates and allows for those differences requires substantial thought and discussion by all parties. Duplicative, confusing and needless regulation should be avoided. The United States Environmental Protection Agency (“EPA”) and Illinois operate under very different statutory authorities which allow for different policy decisions. It would be extremely difficult for the Board to structure one program which navigates these varying limitations and regulatory landscapes. In addition the Board’s action would be ineffective if the CCR Rule eventually is changed. As Dynege noted in its Post-Hearing Comments, Illinois law precludes the Board from adopting regulations which incorporate future changes to federal rules by reference. Should the CCR Rule be modified by EPA or otherwise, the Board would have to initiate another rulemaking to incorporate those changes.

It is not even clear if harmonization, in the sense of having one state rule incorporating both state and federal requirements, is either feasible or desirable. The CCR Rule takes effect on October 19, 2015. At this point, given the integrated compliance planning needed by owners and operators of coal combustion residual surface impoundments to evaluate and address the complex technical compliance determinations and different compliance paths available under the CCR Rule (as well as the implications of other federal environmental rules affecting surface impoundments at power generating facilities), it is not yet clear how the CCR Rule will work in practice with respect to specific impoundments. While the Environmental Groups might not like the CCR Rule, it imposes significant obligations -- many of which have already required the expenditure of significant effort and resources in terms of compliance planning -- on the owners and operators of coal combustion residual surface impoundments and requires ongoing public

disclosure of information concerning surface impoundment design and operation. At the same time, as IEPA testified to the Board, nearly all the existing coal combustion residual impoundments in Illinois are subject to some sort of IEPA oversight, either through active enforcement actions or approval and management of groundwater management zones.

In fact, on an initial review, the Environmental Groups' proposal is not a thought out harmonization at all, but rather a chunky amalgam embodying the Environmental Groups' wish list for modifications to both the CCR Rule and the CCW Proposal. While the CCR Rule and CCW Proposal apply to different sets of specified sites, the Environmental Group's proposal would apply to all impoundments, active or inactive. While the CCR Rule does not require lengthy governmental approval procedures, the Environmental Group's proposal does. While the CCW Proposal did not require financial assurance or impose design standards (primarily because the Board lacks authority to adopt either), the Environmental Groups' proposal requires these for all sites. The fact that the CCR Rule sets design criteria provides no more authority to the Board to adopt these criteria than the Board currently has. By combining the CCR Rule and CCW Proposal, the Environmental Groups seek to expand the scope of both in order to avoid the limitations contained in federal and state law.

There are numerous other issues but these suffice to document that there are significant problems with the Environmental Groups' proposal. While the Environmental Groups seek to lessen the level of effort necessary to deal with these by asking the Board to evaluate its proposal solely on paper submittals, it would be a significant abdication of the Board's rulemaking responsibilities for the Board to grant the motion. The Environmental Groups' proposal presents a series of policy decisions and choices different from those made in the CCR Rule and from the series of proposals already considered by the Board. The Board would need to evaluate the costs

and benefits of those decisions before determining that the “harmonized” proposal could be adopted consistent with Illinois law. While the current record may be voluminous, it was not directed at incorporating the CCR Rule into the CCW Proposal. The Environmental Groups did suggest including certain elements of the CCR Rule, but they never provided the technical support necessary to support their proposal, despite the Board’s procedural requirements which mandate such support. To consider the Environmental Groups’ proposal solely on the basis of the current record would be inconsistent with the Board’s obligations to thoroughly evaluate the technical feasibility and economic reasonableness of proposed regulations (415 ILCS 5/27(a)).

Dynegy respectfully requests that the Board continue to allow the parties to sort out application and implementation of the CCR Rule, to determine the regulatory landscape with respect to those coal combustion residual surface impoundments to which it does not apply, and to determine whether the IEPA’s action under its current authority remains sufficient. The Board should deny the Environmental Groups’ motion.

Respectfully Submitted,

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

By /s/ David L. Rieser

Date: October 2, 2015

David L. Rieser
Much Shelist, P.C.
191 North Wacker Drive
Chicago, IL 60606
312-521-2717
drieser@muchshelist.com