BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

TO: See attached Service List

PLEASE TAKE NOTICE that on October 20, 2014, I filed electronically with the Clerk of the Pollution Control Board of the State of Illinois, the Dynegy's **POST-HEARING COMMENTS**, a copy of which is herewith served upon you.

Respectfully submitted,

/s/ David L. Rieser

David L. Rieser
Much Shelist, P. C.
191 North Wacker Drive, Suite 1800
Chicago, Illinois 60606
312-521-2000
drieser@muchshelist.com

CERTIFICATE OF SERVICE

I, David L. Rieser, an attorney, hereby certify that on October 20, 2014, I served the foregoing **POST-HEARING COMMENTS** upon those listed below:

Via the Illinois Pollution Control Board Clerk's Office Online (COOL) electronic filing system to:

Mr. John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

Via U.S. Mail to:

Mr. John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

Stephen Sylvester
Division Chief of Environmental Enforcement
Office of the Attorney General
69 W. Washington Street, Suite 1800
Chicago, IL 60601

Joanne Olson
James Jennings
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, IL 62794-9276

Christine Zeman
City of Springfield
Office of Public Utilities
800 East Monroe, 4th Floor
Municipal Building East
Springfield, IL 62757

Amy Antoniolli
Schiff Hardin, LLP
6600 Willis Tower
233 S. Wacker Drive
Chicago, IL 60606

Andrew Armstrong
Faith E. Bugel
Jennifer L. Cassel
Jessica Dexter
Environmental Law and Policy Center
35 E. Wacker Drive, Suite 1600
Chicago, IL 60601

Jack Darin
Sierra Club
70 E. Lake Street
Suite 1500
Chicago, IL 60601

Ameren Services
One Ameren Plaza
P.O. Box 66149
St. Louis, MO 63166

Michael Smallwood
Ameren Services
1901 Chouteau Avenue
St. Louis, MO 63103

Jason McLaurin
Southern Illinois Power Cooperative
11543 Lake of Egypt Road
Marion, IL 62959-8500

Traci Barkley
Prairie Rivers Network
1902 Fox Drive, Suite 6
Champaign, IL 61820

Alec Messina
IERG
215 E. Adams Street
Springfield, IL 62701

Abel Russ
Environmental Integrity Project
1000 Vermont Avenue NW
Suite 1100
Washington, DC 20005

Electric Energy, Inc.
2100 Portland Road
P.O. Box 165
Joppa, IL 62953

Prairie Power, Inc.
P.O. Box 10
Peral, IL 62361

Office of Legal Services
Illinois Department of Natural Resources
One Natural Resources Way
Springfield, IL 62702-1271

Exelon Law Department
10 S. Dearborn, 49th Floor
Chicago, IL 60603

Susan M. Franzetti
Nijman Franzetti LLP
10 S. LaSalle Street
Suite 3600
Chicago, IL 60603

Rick Diericx
Dynegy Midwest Generation, Inc.
604 Pierce Blvd.
O'Fallon, IL 62269

Christopher Foley
Midwest Generation
500 W. Madison Street, Suite 2640
Chicago, IL 60661

Kincaid Generation LLC
P.O. Box 260
Kincaid, IL 62540

Prairie State Generating Company
4190 County Highway 12
Marissa, IL 62257

/s/ David L. Rieser

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

DYNEGY'S POST-HEARING COMMENTS

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 post-hearing brief and comments before the Board.

I. INTRODUCTION

Dynegy owns and operates more than 30 coal combustion waste ("CCW") ash ponds and surface impoundments ("CCW impoundments") at its power generating facilities in Illinois, more than any other company in Illinois. In 2009, Ameren Energy Generating Company filed the first site specific rule change petition regarding the closure of a CCW impoundment, relief which the Board granted on January 20, 2011. In April of 2013, Ameren Energy Resources filed a broader site-specific rule change petition regarding closure of CCW impoundments at its Illinois facilities, many of which are now owned by certain Dynegy affiliates. This petition led the Illinois Environmental Protection Agency ("IEPA" or "Agency") to initiate stakeholder meetings among all of the owners of generating companies with CCW impoundments and to develop the proposal that started this rulemaking. Dynegy has been an active participant both in the stakeholder discussions and this proceeding.

Dynegy notes at the outset that the U.S. Environmental Protection Agency ("U.S. EPA") has long proposed regulations regarding the operation and closure of CCW impoundments and has executed a consent decree in which it has stated that it will issue these rules as final by December 19, 2014. Once these rules are adopted, Dynegy would be required to implement these rules at its Illinois facilities regardless of what action the Board takes here. In order to avoid the confusion associated with inconsistent state and federal regulation of the same activities and to further inform this proceeding, Dynegy requests that the Board take no further action on this proceeding until U.S. EPA finalizes its rules.

Should the Board seek to move forward either now, despite this risk of inconsistent regulation, or later, after considering the imminent federal rule, Dynegy agrees with the IEPA that regulation of CCW impoundment closure is appropriate in order to provide an orderly and consistent process and to avoid the burden of site specific relief for every impoundment. Although active CCW impoundments are regulated under their NPDES permits, the IEPA had taken the position that inactive CCW impoundments must be closed consistent with the Board's landfill regulations under 35 Ill. Adm. Code 811. This would require retrofitting these impoundments with liners and leachate collection systems and imposing stringent monitoring and corrective action systems designed for heterogeneous municipal solid waste and not for generally uniform CCW. These retrofits would come at great cost without any significant environmental benefit. It clearly makes sense to develop rules specific to CCW impoundments rather than try to shoehorn them into a regulatory scheme not intended to apply to them.

Dynegy also generally agrees with the IEPA's proposal as it has been modified through these hearings. IEPA worked closely with stakeholders to provide a workable and pragmatic

approach to these issues. While Dynegy has concerns with select parts of the Agency's approach and proposes certain modifications (as discussed below) Dynegy believes that the Board should adopt the majority of the rules proposed by the Agency.

Dynegy does not agree with either the approach or the revised proposal presented by the environmental groups represented by the Environmental Law and Policy Center (collectively "ELPC"). ELPC's proposal is completely out of proportion with the actual condition of CCW impoundments in Illinois and based on risks which are clearly not documented by the available data. While ELPC has presented an extraordinary amount of information, very little of it is directed at Illinois facilities or conditions. Despite the fact that the bulk of the issues addressed by the ELPC are national in scope, ELPC has also decided that the rules proposed by U.S. EPA specifically to address those issues are inadequate to that task and that the Board should adopt regulations far more stringent than U.S. EPA's. To the extent that ELPC has focused on Illinois issues, its focus has been CCW impoundments at two Dynegy facilities, Vermilion and Edwards. While the ELPC's concerns regarding those facilities are badly misplaced, it has scoped its statewide proposal to address its concerns at these facilities whether or not those concerns have any statewide validity. ELPC also recommends that the Board take actions which are not authorized by state law and which would imperil and delay this entire rulemaking.

As always, Dynegy appreciates the time and care that the Board has taken with this rulemaking. These proceedings produced a wealth of information and useful exchanges which have led to improvements in the IEPA's original proposal.

II. THE BOARD SHOULD NOT TAKE ACTION UNTIL U.S. EPA ACTS ON ITS OWN REGULATIONS AND CANNOT INCORPORATE THE CCR RULE BY REFERENCE

As the Board is aware, U.S. EPA issued proposed regulations regarding coal combustion residuals ("CCR") in 2010. (75 Fed. Reg. 35128, "CCR Rule"). U.S. EPA proposed two alternative approaches: treating CCR as a special waste subject to RCRA Subtitle C hazardous waste requirements or treating it as a solid waste and establishing regulations under RCRA Subtitle D. This proposal generated more than 420,000 comments, but has not yet been made final. On January 29, 2014, U.S. EPA entered into a consent decree (*Appalachian Voices, et al. v. McCarthy*, No. 1:12-cv-00523, D.C. D.C.) in which it committed to "taking final action" regarding this proposal by December 19, 2014. (Exhibit 53). U.S. EPA entered into this consent decree three months after IEPA filed its initial proposal here.

While U.S. EPA's rulemaking was acknowledged in the Agency's initial proposal and was a source of data and comparison throughout the hearings, the issue of what action the Board should take when U.S. EPA issues the final CCR Rule remains uncertain. The parties have assiduously worked through numerous issues during the hearings, but the Board should neither ignore nor anticipate the impact of the CCR Rule on these issues but should instead see what the U.S. EPA determines and act on this proposal accordingly.

What the Board cannot do is provide a mechanism in these rules to apply automatically portions of the CCR Rule after it becomes adopted. Yet the Agency's proposal appears to contain language intended to achieve just that end. Section 841.450 states that if any of the proposed Part is less stringent than or inconsistent with RCRA, then RCRA shall prevail. When the Board asked the Agency whether IEPA would be proposing amendments after the CCR Rule goes final, IEPA responded that "The Agency will comply with any RCRA amendments that the USEPA

adopts," but that there are too many variables associated with the U.S. EPA proposal for the Agency to commit to any amendments of these proposed rules. (Exhibit 5, Answers to Board Questions, p. 30 of 30). The implication is that the Agency will somehow determine which portions of the CCR Rule apply in determining obligations of CCW impoundment operators.

Yet Illinois law does not allow the Agency to pick and choose which rules it will apply. To the extent that the intent of Section 841.450 is to allow the Agency to incorporate requirements unilaterally from the final CCR Rule, that intent violates the Administrative Procedure Act (5 ILCS 5/100-75(a), "APA"). The APA precludes incorporation by reference unless the document to be incorporated is currently available. The APA also prohibits inclusion of future amendments of documents incorporated by reference in state regulations. While the Agency's proposal does not do so explicitly, it still appears to represent an attempt to modify the Board's rule automatically by incorporation of a federal rule that has not yet been adopted. ELPC clearly believed that this was the Agency's intent since it proposed additional language to Section 841.450 to include "any regulation adopted under" RCRA, a clearer reference to the CCR Rule. Illinois law simply prohibits such incorporation.

That prohibition is justified especially here when Section 841.450 identifies no process for determining what portions of this proposal may be less stringent than or inconsistent with RCRA. As a result, once U.S. EPA acts, neither the regulated community nor the Board, nor the Agency will have any certainty regarding what rules apply to Illinois CCW impoundments. It would be untenable, not to mention a waste of state and private resources, to proceed through this process only to find that the applicable rules are still uncertain.

Dynegy respectfully suggests that the Board should wait for U.S. EPA to act before proceeding with this proposal. There is of course uncertainty associated with the timing of any regulatory action. It was not expected that the CCR rulemaking process to date would take as long as it did, and U.S. EPA has previously issued rules later than the dates to which it committed in consent decrees. Yet at this point it makes no sense for the Board to rush to issue a First Notice on this proposal prior to December 19. Instead the Board should wait to take action after that date, either by issuing its First Notice if it appears that U.S. EPA will be significantly late in issuing the CCR Rule or asking the parties to provide additional direction should the U.S. EPA issue the CCR Rule on the date promised.

III. THE SCOPE OF THE PROPOSALS HAVE EXPANDED FAR BEYOND THE DOCUMENTED RISKS ASSOCIATED WITH CCW IMPOUNDMENTS

While Dynegy supports the adoption of uniform statewide regulations for closure of CCW impoundments, the Board should consider that the various proposals before it here have expanded considerably during these proceedings without a basis in identified risks which the Board can regulate. The Kingston, TN and Eden, NC incidents which drive much of the concern were both matters of the structural integrity of the impoundments, an issue which the IEPA did not present to this Board in this proceeding and which the Board does not have authority to address. Instead, the record in this proceeding documents that the environmental issues associated with impoundments relate to localized impacts to groundwater, most of which are already being addressed by compliance agreements between the generating companies and the Agency.

This proposal originally arose from efforts by power generators to establish regulations for the closure of CCW impoundments. When the Board adopted its general landfill rules in 1990, it was aware that the regulations might not be suitable for other types of waste facilities and provided additional time for industries with on-site landfills to file regulations regarding their specialized facilities. (*In the Matter of Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills,* R88-7, June 7, 1990, pp. 112-82- 112-84). The Board also specifically acknowledged that surface impoundments were not landfills for purposes of the landfill requirement, a regulatory definition which continues in force. (35 Ill. Adm. 807.103).

Despite this clear statement of intent, the Agency required generating facilities which sought to shut down CCW impoundments to meet, retroactively, design and operating requirements for new landfills. Ameren engaged in a long running and eventually successful effort to obtain site-specific standards for closure of a CCW impoundment at one of its facilities (*In the Matter of: Ameren Ash Pond Closure Rules (Hutsonville Power Station); Proposed 35 Ill. Adm. Code Part 840.101 through 840.152*, R09-21) but when it sought to expand that relief to CCW impoundments at its other facilities (*In the Matter of: Site-Specific Rule for the Closure of Ameren Energy Resources Ash Ponds: Proposed new 35 Ill. Ad. Code Part 840, Subpart B*, R13-19) the Agency indicated its preference to propose its own rules. Although the Ameren proposal addressed only closure, the Agency expanded its proposal to address monitoring and corrective action as well.

Despite this expansion, the Agency has been generally clear in identifying the nature of the risk which its proposal seeks to address: exceedences of the Part 620 regulations and potential threats to groundwater resources. The Agency has stated specifically that it is not aware of any

impact to groundwater being used as a drinking water source and the rules are not intended to address impacts to surface waters. The Agency has acknowledged issues with insuring the structural integrity of the CCW impoundments but acknowledged that these issues are currently subject to regulation by the Illinois Department of Natural Resources ("IDNR") and that it did not intend to address those issues in the context of this proposal.

ELPC has sought to expand the scope of the Agency's proposal to address structural integrity, design criteria for new and existing impoundments and financial assurance. ELPC's original approach would have also have imposed draconian corrective action and closure requirements, including closure by removal in most circumstances without any recognition of economic reasonableness. Although ELPC withdrew some of its more drastic proposals it has still insisted that the Board apply an extraordinarily high level of scrutiny and regulation to units which have been present in the state and subject to regulation for years without much demonstrated impact to health or the environment.

In its testimony, ELPC focused on potential impacts to drinking water and surface water as a basis for adopting its far more stringent approach yet nothing in the record actually supports the risk assessment supporting their proposal.

Drinking Water

In its testimony and documents, the Agency has clearly stated that they do not believe that CCW impoundments threaten drinking water. (Testimony of Richard Cobb, Exhibit 4, p.4; Illinois EPA's Ash Impoundment Strategy Progress Report, October 2011, Exhibit C, p. 3 to Pre-filed Answers of IEPA, March 4, 2014, Exhibit 5)) Although the proposed regulations classify CCW impoundments which threaten drinking water as a Class I priority for closure, the Agency

does not identify a single impoundment which meets this criterion. The Agency required operators of impoundments to conduct well surveys and establish groundwater monitoring systems. (Richard Cobb Pre-filed Testimony, Exhibit 4, pp. 2-3) Many operators have long established groundwater monitoring systems and have begun or completed corrective action. The Agency has established enforceable agreements regarding many impoundments, either in the form of compliance commitment agreements or groundwater management zones ("GMZ") (Id.). Despite this wealth of information and activity, IEPA has not identified one impoundment as creating an impact to groundwater currently used as potable water.

While ELPC stated numerous times that these impoundments create an imminent threat to drinking water supplies, many of them have been in place for years and none of them have been identified as threatening drinking water. This does not mean that CCW impoundments should not be regulated, but that those regulations should be adopted in the context of the identified and demonstrated threats and not based on phantom and unproven concerns.

Surface Water

ELPC has also stressed threats to surface waters which are unsupported by the record. CCW impoundments have long been regulated under the NPDES permit system yet no impairments to surface water have been identified. The Agency made no mention in its Technical Support Document or testimony of any concern regarding any impacts to surface waters despite the proximity of many impoundments to rivers and lakes. IEPA's Integrated Water Quality Report and Section 303(d) List dated March 24, 2014 (http://www.epa.state.il.us/water/tmdl/303d-list.html#2014) includes two tables summarizing potential sources of use impairment in streams

(C-37, attached as Exhibit 1) and lakes (C-39, attached as Exhibit 2) and neither identify CCW impoundments as potential sources of impairment.

Groundwater Resources

As the record documents, CCW impoundments have created exceedences of the Board's Part 620 groundwater standards. Illinois adopted both the Groundwater Protection Act (415 ILCS 55/1 et seq.,"GPA") and the Illinois Environmental Protection Act ("Act") for the express purpose of protecting groundwater resources. The GPA specifically recognizes, however, that efforts to protect groundwater can be prioritized based on the actual use (415 ILCS 55/8(b)). In adopting its Ground Water Quality Standards in 35 Ill. Adm. Code 620, the Board recognized that groundwater beneath and immediately adjacent to certain types of industrial activities need not be restored to immediate availability for potable use. Indeed in some instances if there are legal bars to the use of groundwater as a potable water resource, the Board has determined that that use need not be restored. (35 Ill. Adm. Code 742.105(f)).

As a result, there is no basis to treat CCW impoundments as presenting risks that are orders of magnitude different from landfills or areas of contamination subject to the Board's Tiered Approach to Corrective Action Objectives (35 Ill. Adm. Code 742, "TACO"). While it is accurate that old CCW impoundments were not engineered as current landfills are, they have a long history of use which, as far as threats to groundwater are concerned, ought to provide sufficient data to preclude concerns that they will create catastrophic conditions in the future in ways that they have not in the past. Enhanced groundwater monitoring, compliance wells and improved modeling tools will provide further assurances of predictability. The Board and the IEPA have vast experience in successfully crafting regulations to address remedial issues, the

record here supports that CCW impoundments create no significant additional risks that require the Board to reject that experience by adopting extraordinary corrective action and closure requirements.

IV. THE BOARD LACKS STATUTORY AUTHORITY TO ADOPT DESIGN STANDARDS OR FINANCIAL ASSURANCE

In their June 6, 2014 post-hearing comments ELPC makes the remarkable statement that the Board's "broad" authority under the Act is "limited only by the principle that the rules must promote the purposes and provisions of the Act." (ELPC Post-Hearing Comments, June 6, 2014, p.1) Like any other administrative agency the Board is constrained by the terms of its enabling statute and whether its rules promote the purposes of the Act or not, it cannot take actions which the General Assembly has not authorized. (*Bevis v. Illinois Pollution Control Board*, 681 N.E.2d 1096 (5th Dist. 1997)). Based on that standard, the Board has no statutory authority to adopt either financial assurance requirements or design standards for CCW impoundments.

Financial Assurance

Board Member Burke questioned the IEPA during the hearings whether the Board had statutory authority to impose financial assurance requirements. (February 27, 2014 Hearing, p. 54). The Agency responded that it did not. (Id.) The Board then asked ELPC in writing whether the Board had ever required financial assurance for operating a facility without specific statutory authority. In its prefiled Answers to the Pollution Control Board's June 11, 2014 Questions for Environmental Groups dated July 17, 2014, ELPC admitted that the Board had never imposed financial assurance requirements without specific authorization. (Prefiled Answers, pp. 8-9) Despite that admission, ELPC argues that the Board still had generic authority under 415 ILCS 21.1(a) to require financial assurance for CCW impoundments.

This argument falls by its own terms. First, Section 21.1(a) states:

> Except as provided in subsection (a.5), no person other than the State of Illinois, its agencies and institutions, or a unit of local government shall own or operate a MSWLF unit or other waste disposal operation on or after March 1, 1985, which requires a permit under subsection (d) of Section 21 of this Act, unless such person has posted with the Agency a performance bond or other security for the purpose of insuring closure of the site and post-closure care in accordance with this Act and regulations adopted thereunder.

In other words, it authorizes financial assurance only for waste disposal operations which require a permit under Section 21(d) and there is no suggestion, even under ELPC's proposals that CCW impoundments would be issued permits under Section 21(d). Second, most of the types of operations listed by ELPC as being legislatively required to obtain financial assurance are, in fact, required to have Section 21(d) permits. This documents that the Board has never relied on what ELPC perceives to be its implied authority under Section 21.1(a) to actually impose financial assurance requirements.

The Board should not deviate from its appropriate adherence to its legal authority to require financial assurance here. If the ELPC believes that it is necessary for CCW impoundments to have financial assurance they should make that case to the General Assembly. Until the General Assembly specifically grants that authority, the Board should not - and cannot - adopt this financial assurance proposal.

Design Criteria

The General Assembly clearly assigned responsibility for the structural integrity of surface impoundments to the IDNR and not the Pollution Control Board or the IEPA. Section 23a of the Rivers Lakes and Streams Act (615 ILCS 5/4.9 et seq.) authorizes IDNR to regulate dams: it authorizes IDNR to inspect, to issue permits for construction of new dams and to issue orders if it determines that a dam presents a serious threat to life or property. There is no definition of the term "dam" in the Rivers Lakes and Streams Act, but in its regulations IDNR defines dams to include "all obstructions, walls embankments, or barriers…constructed for the purpose of storing or diverting water or creating a pool." (17 Ill. Adm. Code 3702.20). As IEPA testified, IDNR considers CCW impoundments to be dams and subject to their authority. (February 27, 2014 Hearing, p. 40). In short, the structural integrity of CCW impoundments is not an issue for the Board to resolve.

Even if the Board had such authority, the record before it is too limited to allow it to make its statutorily required determination as to whether the design criteria proposed by ELPC were technically feasible and economically reasonable. ELPC filed this proposal literally on the eve of the second round of hearings, leaving no opportunity for the Agency or the other participants to analyze the proposal or prepare a response. ELPC presented limited, second hand anecdotal information as to the potential costs and feasibility of their proposal and filed no statement of reasons or technical supporting documents as required by Board regulations (35 Ill. Adm. Code 102.202). Although they based their proposal on U.S. EPA's proposed CCR Rule, ELPC also acknowledged that their proposal was in some respects more stringent, again without any technical or economic basis. The Agency asked the Board to place this matter in a second docket in order to be allowed time to study the issue in greater detail. (Agency Motion to Sever,

June 11, 2014) Unlike the Agency's initial proposal, there had been no stakeholder discussions regarding design criteria and there was no expectation on the part of the regulated community that design criteria would be a subject of this proceeding.

Because of the lack of statutory authority and the extremely limited record, the Board should not – and cannot – adopt ELPC's proposal regarding design criteria.

V. THE BOARD SHOULD ALLOW THE USE OF TACO IN EVALUATING CCW IMPOUNDMENT REMEDIATION

Although the Agency rejected the application of the Board's Tiered Approach to Corrective Action (TACO) regulations (35 Ill. Adm. 742) (IEPA Pre-filed Answers July 17, 2014, pp. 5-14), Dynegy believes the Board should allow consideration of TACO in addressing CCW impoundments. TACO represents a coordinated and ongoing effort by industry, the Agency, and the Board to develop sophisticated and useful risk based approaches to remediation issues applicable to a wide variety of waste constituents, media and pathways. Given the relatively narrow issues associated with CCW impoundments – a limited universe of contaminants of concern and limited pathways to evaluate – addressing remediation through TACO should be neither difficult nor controversial.

The Act does not preclude the application of TACO to CCW impoundments. Section 58.1 of the Act states that TACO regulations do not apply if "the site is a treatment, storage, or disposal site for which a permit has been issued, or that is subject to closure requirements under federal or State solid or hazardous waste laws" but also states that such sites "may utilize the provisions of this Title, including the procedures for establishing risk-based remediation objectives under Section 58.5." (415 ILCS 5/58.1(a)(2)). Board regulations specifically allow

these rules to be applied to RCRA closures (35 Ill. Adm. Code 742.105(b)(3)) and none of the other limitations identified by the Board would be applicable here.

The Agency referenced the inapplicability of TACO to landfills, but that is not a meaningful distinction. TACO was not made specifically inapplicable to landfills until the Board added that limitation some eight years after TACO's initial adoption. Even then the Board clarified that the only landfills to which TACO did not apply were those regulated pursuant to 35 Ill. Adm. Code Parts 807 and 811-814. (*In the Matter of: Proposed Amendments to Tiered Approach to Corrective Action Objectives (35 Ill. Adm. Code 742)*; R06-10, December 7, 2006). The Board based its action on brief Agency testimony that TACO was not a good "fit" for landfills and that the change would reflect longstanding Agency practices. Nothing in that Board action or in the record for this proceeding suggests any basis for precluding CCW impoundments from using TACO.

Among the reasons cited by the Agency for rejecting the application of TACO here is the need to ensure compliance with the GPA and Part 620. In an apparent effort to contrast this with the TACO process, the Agency cited the purpose language of Section 11(b) of the Act and stated that it used "Part 620 to serve as the appropriate groundwater quality standard." (Pre-Filed Answers dated July 17, 2014, p.13). The Agency also stressed the need to protect beneficial uses of groundwater and the need to require "every effort" to be made to restore potential groundwater resources before alternative groundwater standards could be approved under Part 620.

Despite its active participation in developing and promoting TACO, the Agency appears to be taking a different position here, essentially stating that TACO is insufficiently protective of

and contrary to the GPA and Part 620 rules. The Agency testified, "we wanted to more closely parallel Part 620, which protects the resource and requires that a legitimate attempt be made to protect the resource *as opposed to being able to say no one is using that resource, we don't need to care about it.*" (August 4 hearing, p. 178, emphasis added). The GPA and the Part 620 regulations were both part of the regulatory landscape surveyed by the Board and the Agency at the time of the initial adoption of TACO. The Board specifically amended Part 620 to recognize groundwater conditions as compliant with the Part 620 when included in au Agency approved TACO resolution. The Agency participated thoroughly in every bit of this process. It appears that Agency witnesses here view TACO as some type of shortcut around Part 620 which does not require sufficient effort to restore the beneficial use of groundwater resources prior to determining a risk based resolution. Yet the point of TACO is to prioritize remedial efforts and develop a systematic mechanism for determining the utility of such efforts compared to the actual risks to surrounding and future populations. Clearly TACO could be applied here.

The Agency also indicated that CCW impoundments present different technical issues than the sites to which TACO usually applied, but was not clear about why these could not be surmounted. (July 24, 2014 Hearing, pp. 179 – 182) There are TACO standards for most of the contaminants of concern at a CCW impoundment. The key issue is that most of the approved groundwater models under TACO assume that the source of contamination has been contained or removed which would not be the case here absent closure by removal of CCW. Yet there is available groundwater modeling for CCW impoundments which the Agency would require as part of the hydrogeologic evaluation. In addition, the Board allows the use of TACO even in the

presence of free product if it can be shown that the source has been addressed to the extent practicable.

The Board's TACO rules are nationally recognized and widely copied. They represent an advanced approach adopted after a unique level of discussion and cooperation between the regulated community and the Agency. They are very flexible and not the "highly prescriptive risk based approach" as characterized by these Agency witnesses. (Pre-filed questions, July 17 2013, p. 6). The Board and the Agency should seek to use these rules wherever they can be applied and not arbitrarily limit them regarding CCW impoundments.

VI. DYNEGY FACILITIES

As stated above, Dynegy owns and operates more CCW impoundments in the state than any other company. Many of these impoundments already have groundwater monitoring networks or have approved groundwater management zones adopted as a result of corrective action plans approved by the Agency. Despite Dynegy's record of compliance several of these impoundments, particularly those at the Edwards and Vermilion power plants, were the subject of specific testimony by the ELPC and identified as exemplars of the risks of the current impoundment regulatory system.

Dynegy believes that ELPC's testimony painted an inaccurate picture of these facilities and of Dynegy's operations in general. Rather than use the Board's and other parties' time during the hearings in this proceeding, Dynegy uses these comments to correct the record.

As an initial matter, Dynegy reviewed the March 25, 2014 Post-Hearing Comments regarding the location of CCW impoundments at Dynegy facilities relative to groundwater recharge areas, wetlands and mine voids. Dynegy attaches the affidavit of Thomas L. Davis,

Dynegy's Director of Water and Waste Permitting in their Environmental Compliance Group correcting some of the IEPA's statements as Exhibit 3.

While ELPC made numerous misstatements of facts relating to Dynegy facilities, two stand out as the most egregious. With respect to the Vermilion facility, ELPC made numerous attempts to bring into question the stability of the CCW impoundments, particularly the North and Old East impoundments, adjacent to the Middle Fork of the Vermilion River. Yet the URS Engineering geotechnical report that ELPC submitted as Exhibit 42 concluded specifically that "[t]he evaluation found that the slopes currently meet or exceed the requirements by the Illinois Department of Natural Resources for the slope stability of dams" and that "it is estimated that the river will take approximately 80 years to erode to the failure condition for the North Ash Pond and 100 years to erode to the failure condition for the Old East Ash Pond." (Exhibit 43. p. ii). In the meantime, Dynegy is working with the Agency to close these CCW impoundments ponds and provide for their future stability, a process in which the public and ELPC is involved. If the Vermilion CCW impoundments are ELPC's main exhibit for the need for more intensive regulation of all CCW impoundments, their own evidence documents that the risk is not significant or imminent and that the risk is already being addressed by the current system.

The second issue involved the Dynegy's Edwards facility. ELPC stated that its CCW impoundment becomes flooded by river water when the Illinois River rises and over tops the levies. Yet Mr. Davis states in Exhibit 3 that he has not seen or heard of floodwaters overtopping the levies and entering the Edwards CCW impoundment. He also states that this outlet includes a valve which prevents floodwater from entering the impoundment through its discharge outlet.

Because the impoundment is still in use however, its elevation rises because discharge water and CCW continue to enter the impoundment but have no outlet.

As the record indicates, Dynegy has worked extensively with IEPA regarding any groundwater or closure issues associated with their CCW impoundment and its efforts in this regard have been well documented.

VII. SPECIFIC REGULATORY ISSUES

A. Section 841.105(a)(3) – Applicability

Having initially proposed this rule as a way to address sites where releases exceeded groundwater quality standards, the Agency decided, prior to the July 24, 2014 hearing, to expand its proposal to cover those impoundments where releases were in compliance with groundwater quality standards. In its July 17, 2014 revised proposal the Agency added the above subsection to include within the proposal those sites which are addressing groundwater exceedences through Agency approved groundwater management zones but where corrective action "has not been completed." This was clearly in response to ELPC testimony drawing the obvious conclusion that rules requiring corrective action and closure for impoundments which violated Part 620 would not apply to sites which were in compliance by virtue of a GMZ. (June 18, 2014 Hearing, p. 227).

The Agency's position imposes additional and unjustified burdens on facilities which have been working to comply. Having determined that a facility was performing sufficient corrective action to justify a GMZ, the Agency now wants to withdraw its approval unilaterally and impose additional and previously unjustified requirements against that facility. Under Part

620, if the Agency determined that the ongoing corrective action was inadequate it would have to so advise the facility with appropriate factual justification and evidence. It would also have to be prepared for any administrative challenge associated with changing its determination. The addition of this subsection would achieve this result without the Agency having to justify this changed determination in any individual case. For those facilities which relied on the Agency's decision as part of their planning this presents and entirely new and unwarranted landscape completely unrelated to any actions they took in implementing their corrective action under their GMZ.

B. 841.105(b)(4) – Applicability

This subsection excludes from regulation impoundments meeting three conditions: an impermeable liner, temporary storage for up to one year and a volume of no more than 25 cubic yards. In its testimony, the Agency acknowledged that the 25 cubic yard volume value was essentially arbitrary, representing an additional level of protection above an impermeable liner and temporary storage. (February 26, 2014 Hearing, pp. 104 – 108). It selected the 25 cubic yard value because was half of the 50 cubic yards of volume proposed by one of the generating companies. (February 26, 2014 Hearing, p. 104). In essence there is no basis for any volume limitation here other than a generic sense that it would be more protective than just requiring an impermeable liner and precluding storage for more than one year. Dynegy recommends that the Board either delete the volume limit at Section 841.105(b)(4)(C) or modify it to 50 cubic yards.

C. 841.125(b) - Groundwater Quality Standards

The Agency specifically testified that it would recognize Environmental Land Use Controls as an institutional control under this Part. (February 26, 2014 Hearing, p. 91) There is also a typo in this subsection which should read "authorized for environmental uses" rather than "authorized or environmental uses." Dynegy proposes that ability to use ELUCs be specifically recognized as follows:

"...or an alternative instrument authorized for environmental uses under Illinois law and approved by the Agency (including but not limited to an Environmental Land Use Control) may be used..."

D. 841.135(a) – Recordkeeping

Section 841.135(a) requires all records to be kept on site. Yet for those locations where the actual generating facilities are no longer in operation, (such as Vermilion), there may not be a facility on site where such records could be kept. Dynegy suggests that the following be added as Section 841.135(c):

> If the owner operator does not maintain facilities on-site where such records could be kept, the owner or operator shall designate a location within the state of Illinois for keeping such records where they can be maintained and made available for inspection and shall notify the Agency of this location.

E. 841.155(b)(3)K and L – Construction Quality Assurance Program

In its July 17, 2014 revised proposal the Agency added two additional elements to those features to which a CQA officer must certify: "CCW stabilization, transport and disposal" and

"site restoration, if any." Unlike the other findings under this subsection, these are not factual determinations and it is not clear to what the CQA officer would be certifying. These additional features should be modified so that they are more factual, e.g. "any CCW stabilization, transport and disposal was consistent with plans approved by the Agency."

F. 841.165(a) – Public Notice

This section requires the Agency to post "all proposed corrective action plans and closure plans or modifications thereto" on its website. Dynegy notes that administrative or minor modifications of permits, such as changes of address or personnel or minor operational changes are typically not subject to public notice requirements under the permit programs on which this proposal is based. Dynegy believes that such administrative or minor modifications here should not be subject to public notice or initiate a round of public comments to which the Agency would be required to respond. This is especially true if the Board adopts the ELPC position which would require public meetings as well. Dynegy suggests that the following language be added to the end of Section 841.165(a):

This subsection shall not apply to minor modifications such as changes of addresses or operating personnel, changes in ownership, or changes in operation which have no impact of the performance of the plan.

G. 841.170(a) – Inspection

This section requires inspection for units which are "in operation," but this term has not been defined in the regulation or in testimony. To clarify this issue, the Board should add a definition of "in operation" for purposes of this subsection.

H. 841.230 – Sampling Frequency

At Subsection 841.230(b), the proposal states that sampling frequency "at each well" must be increased from semi-annual to quarterly in the event of exceedences of Part 620 or statistically significant increases of contaminant levels in any one well. Dynegy contends that there may not be a reason to increase the frequency of sampling at all wells surrounding a unit, especially at larger sites and where the change is limited to one well at one location. Dynegy suggests that language be added to allow an owner or operator to propose to limit the increase in sampling frequency to a subset of wells if that would be sufficient to identify the nature and source of the change. Dynegy suggests adding a Subsection 841.230(b)(3) as follows:

An owner or operator of a unit required to initiate quarterly sampling pursuant to this Section may request the Agency to limit the increase in sampling frequency to the one well where the change was identified or to such additional wells as necessary to detect, monitor or delineate the source, extent or nature of the change.

I. 841.400(d)(2) – Deed notation

The Agency included this addition subsection in its July 17, 2014 proposal which states that "The notation on the deed or other instrument must *be made in such a way that in perpetuity* notify any potential purchaser of the property that…" (Emphasis added). The italicized language above should be deleted. It appears to imply that deed recordation is insufficient and that some other mechanism must be imposed (somehow) to meet the perpetuity requirement.

J. 841.405 – Closure Prioritization

This section establishes specific deadlines for closure, in each instance "unless the Agency approves a longer timeline." Dynegy specifically supports this quoted language allowing the Agency to approve a longer time frame for closure. The time necessary to close a CCW impoundment is subject to many variables and is not susceptible to being limited to an arbitrary time frame. Thus, the language allowing the Agency to approve a longer timeline for closure is critically important. CCR impoundments vary significantly in surface area, depth and volume, and any of these components may affect the logistics of dewatering, capping or removal. The nature of the CCR itself may vary resulting in different challenges depending on the materials. Climate and weather clearly present issues, especially in the northern part of the state where freezing conditions may preclude any work. Geology can also be a factor presenting logistical difficulties. Indeed many of these variables also may not be clear from the start, requiring schedule adjustments to provide for changing circumstances. Finally, the activity may be dependent on other operations at the facility (e.g. construction of new CCW impoundments or landfills), the availability of qualified engineers and raw materials, and the potential need to manage impoundment closure activities at more than one facility concurrently. In light of these types of issues, it is essential to allow flexibility in the allowed time frame for closure. Dynegy believes that the Agency's proposal provides the needed flexibility.

K. 841.500(c)(3) – Agency Review Factors

This subsection contains a list of factors the Agency believes it must consider in evaluating corrective action, closure, and post-closure plans. In its July 17, 2014 proposal the Agency significantly expanded this list to address specific issues recommended by ELPC.

Missing from this list however are the issues of the economic reasonableness and technical feasibility which the Act requires the Agency to consider in all of its permit determinations. As the record before the Board has demonstrated, there are a wide range of options to addressing CCW impoundments. Some of these have extremely high costs but may provide no or only slightly more environmental benefits when compared to lower cost alternatives. The Agency requires owners and operators to provide alternative impact assessments intended to address these among other issues. The Agency must be able to base its decision on pragmatic feasibility and economic factors in addition to those it sets out.

The Act requires the Board to consider technical feasibility and economic reasonableness when it adopts regulations (415 ILCS 5/27(a)) and has directed the Agency to consider those same factors in making permit decisions (e.g. 35 Ill. Adm. Code 302.105; 35 Ill. Adm. Code 304.102). There were extensive discussions during the hearings as to the necessity of considering technical feasibility and economic reasonableness in making determinations regarding CCW impoundment corrective action and closure especially given ELPC's proposal to consider technical feasibility but not economic reasonableness. In its July 17 revised proposal, the Agency required owners and operators to submit information regarding technical feasibility and economic reasonableness as part of the alternative impact assessments for both corrective action (Section 841.310(e)(6)(D)) and closure (Section 841.410(a)(6)(D)).

Despite this requirement, the factors the Agency is required to consider in evaluating corrective action and closure plans do not include technical feasibility and economic reasonableness. Section 841.500(c)(3) lays out the factors for the Agency to evaluate and they include the likelihood that the proposal will result in containment of CCW or leachate and the

management of risk to health or the environment. At no point is the Agency required to consider the technical feasibility or economic reasonableness of the proposal. As currently written the Agency could reject a corrective action plan because it did not propose the most absolutely protective approach available regardless of any consideration of cost, feasibility or relative merit compared to other approaches. The owner or operator would have difficulty in successfully challenging this determination to the Board because the rules did not require the Agency to consider technical feasibility or economic reasonableness.

This is not mere speculative concern over potential bureaucratic excess. ELPC testified in support of their initial proposal that closure by removal should be the default corrective action and closure strategy and that economic reasonableness should not be considered. Although they have withdrawn that part of their proposal, the Agency has amended its proposal to include some of the ELPC considerations as part of its assessment. ELPC clearly intends to be part of the discussion on submitted corrective action or closure plans for certain facilities. In these circumstances it cannot be assumed that technical feasibility and economic reasonableness will be among the allowed factors for Agency evaluation unless they are clearly specified in the regulation.

Dynegy proposes the following as Section 841.500(c)(3)(C):

Whether the proposed plan is technically feasible and economically reasonable.

VIII. CONCLUSION

Dynegy supports the Agency's proposal with the few modifications proposed in these comments. At the same time, in order to avoid confusion over conflicting regulation, Dynegy's suggests that the Board should wait for U.S. EPA to act on their CCR Rule prior to moving to First Notice on this proposal and allow the parties to comment on the need for further rules in light of U.S. EPA's action. To the extent the Board believes it needs to act in advance of U.S. EPA, Dynegy believes that the Board does not have the authority to adopt rules on financial assurance and design criteria and that it should consider the application of TACO to corrective action and closure. As Dynegy demonstrated, ELPC's proposal is based on an extreme view of the risks presented by CCW impoundments that is not supported by the record and should be rejected.

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

By /s/ David L. Rieser

Date: October 20, 2014

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

EXHIBIT 1

Table C-37. Summary of Potential Sources of All Use Impairments in Streams, 2014

Potential Source of Impairment	Stream Miles Impaired
Source Unknown	7,868
Atmospheric Deposition - Toxics	3,050
Crop Production (Crop Land or Dry Land)	2,718
Channelization	2,616
Agriculture	1,694
Loss of Riparian Habitat	1,419
Municipal Point Source Discharges	1,304
Urban Runoff/Storm Sewers	1,262
Natural Sources	681
Animal Feeding Operations (NPS)	666
Streambank Modifications/destabilization	647
Impacts from Hydrostructure Flow Regulation/modification	542
Dam or Impoundment	500
Contaminated Sediments	445
Surface Mining	433
Combined Sewer Overflows	299
Livestock (Grazing or Feeding Operations)	285
Habitat Modification - other than Hydromodification	245
Petroleum/natural Gas Activities	191
Site Clearance (Land Development or Redevelopment)	181
Impacts from Abandoned Mine Lands (Inactive)	164
Upstream Impoundments (e.g., PI-566 NRCS Structures)	146
Acid Mine Drainage	117
Highway/Road/Bridge Runoff (Non-construction Related)	110
Irrigated Crop Production	86
Non-irrigated Crop Production	83
Spills from Trucks or Trains	83
Mine Tailings	56
Drainage/Filling/Loss of Wetlands	45
Sediment Resuspension (Contaminated Sediment)	45
Industrial Point Source Discharge	41
Runoff from Forest/Grassland/Parkland	39
Sanitary Sewer Overflows (Collection System Failures)	32
Golf Courses	24
Municipal (Urbanized High Density Area)	23
Pesticide Application	22
Dredging (E.g., for Navigation Channels)	20
Wet Weather Discharges (Point Source and Combination of Stormwater, SSO or CSO)	13
Subsurface (Hardrock) Mining	13
Other Recreational Pollution Sources	10
Dredge Mining	9
Coal Mining (Subsurface)	8
Unpermitted Discharge (Domestic Wastes)	7
Highways, Roads, Bridges, Infrastructure (New Construction)	6
Landfills	4
Industrial Land Treatment	4
Managed Pasture Grazing	3
On-site Treatment Systems (Septic Systems and Similar Decentralized Systems)	1

EXHIBIT 2

Table C-39. Statewide Summary of Potential Causes of All Use Impairments in Freshwater Lakes, 2014

Potential Cause of Impairment	Acres Impaired
Total Suspended Solids (TSS)	113,330
Phosphorus (Total)	107,648
Mercury	78,337
Aquatic Algae	75,111
Aquatic Plants (Macrophytes)	31,134
Polychlorinated biphenyls	25,859
Cause Unknown	9,669
Oxygen, Dissolved	6,575
Chlordane	4,820
Turbidity	4,695
Sedimentation/Siltation	4,511
Atrazine	4,272
Silver	4,194
Aldrin	3,345
pH	2,017
Simazine	1,554
Manganese	1,168
Fecal Coliform	722
Total Dissolved Solids	635
Nonnative Fish, Shellfish, or Zooplankton	634
Cadmium	524
Endrin	524
Zinc	524
Nickel	325
Color	310
Fluoride	172
Hexachlorobenzene	172
Non-Native Aquatic Plants	62
Debris/Floatables/Trash	35
Odor	35

EXHIBIT 3

AFFIDAVIT OF THOMAS DAVIS

I, Thomas L. Davis, P.E. being duly sworn on oath, do state and depose as follows:

1. I am currently employed as Director, for Water and Waste Permitting in the Environmental Compliance Group for the Dynegy Operating Company. In that position I have responsibility for environmental compliance for all of the coal combustion waste ("CCW") impoundments at facilities owned by Dynegy Midwest Generation, LLC, Illinois Power Generating Company, Illinois Power Resources Generating, LLC and Electric Energy, Inc. ("collectively Dynegy"). I am also a professional engineer licensed in the State of Illinois.

2. I have direct knowledge of the conditions at all of the CCW impoundments owned or operated by Dynegy.

3. I reviewed Illinois EPA's Post-Hearing Comments dated March 25 2014 filed in this matter. Included in these comments is an Attachment 1 which provided the Illinois EPA's answers to questions asked at the February 26 and 27 hearings. Answers 7, 8, and 9 (pp. 5-6) provide Illinois EPA's information regarding CCW impoundments which Illinois EPA believed to be constructed over a mine void, constructed over a groundwater recharge area and constructed over a wetland.

4. With respect to the Dynegy facilities which the Illinois EPA lists as being constructed over a mine void in answer to Question 7, it is my belief based on my knowledge of these facilities that the Illinois EPA was not correct with regard to the following impoundments which are not constructed over a mine void: Hennepin East Ash Pond, Hennepin West Ash Pond, Vermilion Old East Ash Pond and Coffeen Bottom Ash Recycle Pond. In addition, the Coffeen Gypsum Management Facility Primary Pond may be constructed over a mine void.

5. With respect to the Dynegy facilities which the Illinois EPA lists as being constructed over a groundwater recharge area in answer to Question 8, I note that the term "groundwater recharge area" was not defined in the answers to questions or at the hearings. I am familiar with the term "regulated groundwater recharge area" which is defined in the Illinois Groundwater Protection Act. I can state based on my knowledge of Dynegy CCW impoundments that none of them are located over regulated groundwater recharge areas.

6. With respect to the Dynegy facilities which the Illinois EPA lists as being constructed over a wetland in answer to Question 9, it is my belief based on my knowledge of these facilities that the Illinois EPA was not correct with regard to the following impoundments which are not constructed over a wetland: Wood River East Ash Pond System, Joppa West Ash Pond System, Joppa East Ash Pond System.

7. I am also familiar with the CCW impoundment at the E.D. Edwards Power Station in Bartonville, Illinois ("Edwards"). I understand that Tracey Barkley testified on behalf of ELPC that during flood stage on the Illinois River, floodwaters are "rising and flowing over the levies into the coal ash ponds..." (June 19, 2014 Hearing Transcript at p. 36) That statement is incorrect. The CCW impoundment discharge outfall at Edwards includes a valve which is closed before the river flows back into the ash pond. I have also not observed and am not aware of an event where floodwaters at Edwards overtopped the levies. The level of water in the impoundment will rise during flood stage because the effluent from the plant cannot be discharged through the outfall and remains in the impoundment.

FURTHER AFFIANT SAYETH NAUGHT

Thomas L. Davis

Thomas L. Davis

On this 20th day of October in the year 2014
before me personally appeared Thomas L. Davis
and acknowledged that (s)he executed the
same for the purposes therein contained.
In witness whereof, I hereunto set my
hand and official seal.

Notary Public

MAUREEN WEIR
OFFICIAL SEAL
Notary Public, State of Illinois
My Commission Expires
June 18, 2018