

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF: )  
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 )  
STANDARDS FOR THE DISPOSAL OF ) **R20-19**  
COAL COMBUSTION RESIDUALS ) **(Rulemaking – Land)**  
IN SURFACE IMPOUNDMENTS: )  
PROPOSED NEW 35 ILL. ADM. CODE 845 )

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**NOTICE OF FILING**

To: ALL PARTIES ON THE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the **Joint Motion to Reschedule the Second Hearing and Set Prefiling Deadlines**, copies of which are herewith served upon you.

Respectfully submitted,

/s/ Ryan C. Granholm

Ryan C. Granholm

Dated: May 7, 2020

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<b>PROPOSED NEW 35 ILL. ADM. CODE 845</b>	)	

**Joint Motion to Reschedule the Second Hearing and Set Prefiling Deadlines**

NOW COMES Dynegy Midwest Generation, LLC; Electric Energy Inc., Illinois Power Generating Company; Illinois Power Resources Generating, LLC; and Kincaid Generation, LLC (collectively, “Dynegy”) by their attorneys, Schiff Hardin LLP; Midwest Generation, LLC (“Midwest Generation”), by their attorneys, Nijman Franzetti LLP; and the Environmental Law and Policy Center, Little Village Environmental Justice Organization, Prairie Rivers Network, and Sierra Club (collectively, the “Environmental Groups”), by their undersigned attorneys (Dynegy, Midwest Generation, and the Environmental Groups are referred to collectively as the “Interested Participants”). Pursuant to 35 Ill. Adm. Code 101.500, the Interested Participants request that the Hearing Officer re-schedule the second hearing in this matter to either September 8 – 10 or September 29 – October 1 and establish pre-filing deadlines for that hearing. In support of this Joint Motion, the Interested Participants state as follows:

1. On April 24, 2020, the Hearing Officer issued an Order setting hearing dates for R20-19. The first hearing was scheduled for July 21 – 23, with prefiled testimony, questions, and responses to be filed in the seven weeks leading up to that hearing. The second hearing was scheduled for August 25 – 27, less than five weeks after the first hearing concludes. No prefiling deadlines were established for the second hearing.

2. The Illinois Pollution Control Board's ("Board") procedural rules grant the Hearing Officer "authority to rule on all motions that are not dispositive of the proceeding." 35 Ill. Adm. Code 101.502(a). Specifically, the Board's rules grant the Hearing Officer the authority to schedule hearings. 35 Ill. Adm. Code 101.610. The Hearing Officer may also require the prefiling of testimony, questions, and responses, if such a procedure will "provide for a more efficient hearing." 35 Ill. Adm. Code 102.424(b).

3. Dynegey has a significant interest in this proceeding. Dynegey owns a total of five operating coal-fired, and three operating gas-fired, generating plants in Illinois. Dynegey's retail electric and natural gas brands serve about 750,000 retail customers, in over 400 communities, throughout Illinois. Dynegey's Homefield brand is also the largest retail electric supplier in Downstate Illinois, with customers in over 290 communities. Currently, Dynegey directly employs approximately 650 people in Illinois, supports thousands of indirect jobs, has an annual Illinois payroll of about \$39 million, and pays approximately \$23 million per year in State – Local Sales/Use taxes and \$17 million in local property taxes. Dynegey's annual economic impact to the State of Illinois is over \$2 billion in direct and indirect benefits, reaching about 80 of Illinois' 102 counties. Dynegey owns twenty CCR surface impoundments potentially subject to the Part 845 rules—more than any other rulemaking participant—located at ten different current and former generating plants. Units subject to IEPA's proposed Part 845 rule may be subject to, *inter alia*, construction and operating permits, corrective action and closure standards, and financial assurance requirements.

4. Midwest Generation also has a significant interest in this rulemaking. Midwest Generation operates approximately 4,325 megawatts of generation from five power plants, which is about one third of the conventional fuel power generation from northern and central Illinois.

The Midwest Generation plants provide fuel and geographic diversity to ensure Illinois is not over-reliant on any one fuel source for power generation. Additionally, the Midwest Generation plants play an important role during the hottest and coldest days of the year and during outages of other plants. Midwest Generation employs hundreds of Illinois residents, is a significant taxpayer in five communities, and serves more than 200,000 residential and small commercial customers in Illinois. MWG owns nine CCR surface impoundments. MWG contests an additional seven areas that the Illinois EPA believes are CCR surface impoundments.

Accordingly, there are many units and areas at issue at MWG stations that may be subject to Part 845 rules, including construction and operating permits, corrective action and closure standards, and financial assurance requirements.

5. The Environmental Law and Policy Center (ELPC), Little Village Environmental Justice Organization (LVEJO), Prairie Rivers Network, and Sierra Club are organizations dedicated to protecting the environment and people affected by pollution. Collectively, they have tens of thousands of members across Illinois. Many of their members and staff live, work, and recreate in communities where coal ash impoundments and other coal ash disposal sites are located, including environmental justice communities. Many members and staff of ELPC, LVEJO, Prairie Rivers Network and Sierra Club participated in the stakeholder meetings held by Illinois EPA concerning the rules at issue here and plan to participate actively in this rulemaking.

6. As explained further below, to ensure an efficient hearing process, reduce the likelihood that additional hearing days will be required, and prevent material prejudice, the Interested Participants request that the Hearing Officer re-schedule the second hearing to either September 8 – 11 or September 29 – October 1 and establish deadlines for prefiled testimony, questions, and responses before that hearing.

**I. The Board Should Expect Extensive Public Participation in this Rulemaking.**

7. This rulemaking is subject to a tight statutory deadline. 415 ILCS 5/22.59(g).

There are only 11 months remaining for the completion of the rulemaking steps required by the Illinois Administrative Procedure Act: solicitation of public input, two hearings, post-hearing briefing, Board deliberation, second notice publication (including JCAR review), and issuing a final Board order. 5 ILCS 100/5-40.

8. The Board should anticipate extensive participation in this rulemaking from IEPA, other state agencies, regulated companies, environmental groups, and members of the public. By way of example, the most recent attempt to draft regulations for CCR surface impoundments in Illinois—R14-10—elicited substantial public participation and generated a voluminous record.<sup>1</sup>

9. Here, the Board and the Hearing Officer should anticipate an even more extensive record, in a significantly shorter period of time. IEPA's proposed regulations are 133 pages long. The Agency has stated that it anticipates presenting testimony from eight witnesses.<sup>2</sup> Besides IEPA, attorneys have already appeared on behalf of ten additional participants.<sup>3</sup> Each of those participants should be expected to file written questions, present witness testimony, and submit post-hearing comments.

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<sup>1</sup> In a period of approximately twelve months: seven individuals prefiled testimony; eleven sets of prefiled questions were filed; 80 exhibits were submitted; seven days of hearings were held; and eleven sets of post-hearing comments were filed. But that was only a partial record; the rulemaking was stayed before it reached second notice and was eventually abandoned.

<sup>2</sup> R20-18, IEPA Statement of Reasons at 39-40 (Mar. 30, 2020) (IEPA states that it “anticipates presenting six witnesses,” but then goes on to list eight employees who may testify).

<sup>3</sup> This number counts the Dynegy entities together. Counting them separately (which is technically accurate) attorneys have actually appeared on behalf of fourteen separate entities.

10. Dynegy anticipates presenting at least five company and expert witnesses.

Midwest Generation anticipates at least two company and expert witnesses. The Environmental Groups anticipate presenting at least two witnesses. Accounting for the other rulemaking participants, twenty or more witnesses could testify in total.

**II. Delaying the Second Hearing and Setting Prefiling Deadlines Will Streamline the Hearing Process.**

11. In order to ensure an orderly and efficient hearing process, and to reduce the risk of needing to extend either of the two scheduled hearings, the Hearing Officer should delay the second hearing until either September 8 – 10 or September 29 – October 1<sup>4</sup> and establish prefiling deadlines for that hearing.

12. Between the first and second set of hearings in this rulemaking, several things must occur. First, the rulemaking participants will need to review the transcripts from the first hearing to (a) review the testimony that was presented; (b) determine whether any typos or errors require correction; and (c) identify any questions that were not answered during the hearing that require written responses before the second hearing.<sup>5</sup> Based on experience from R18-20, transcripts will probably not be available until seven days following the first hearing: July 30.<sup>6</sup>

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<sup>4</sup> Counsel for the Environmental Groups cannot be available during the weeks of either September 14-18 or September 21-25.

<sup>5</sup> For example, in R18-20, *Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards (MPS)*, following the first hearing, there were a number of questions presented by the Board and/or rulemaking participants that witnesses were unable to answer in real time. Additionally, the Board posed additional questions for rulemaking participants immediately following that hearing. The Hearing Officer set a deadline for responses to those questions before the second round of prefiling questions were filed. R18-20, Hearing Officer Order (Jan. 19, 2018).

<sup>6</sup> In R18-20, the Board held seven days of hearings. The dates when each transcript was uploaded to the Board's electronic docket are listed on the table below:

<b>Date of Hearing</b>	<b>Date Transcript was Uploaded</b>	<b># of Days to Upload</b>
Jan. 17, 2018	Jan. 24, 2018	7
Jan. 18, 2018	Jan. 25, 2018	7

13. Second, many rulemaking participants will likely wish to present additional prefiled testimony in response to issues raised during the first hearing. The Board’s rules require prefiled testimony to be filed ten days before a hearing. 35 Ill. Adm. Code 102.306(b).

Therefore, the latest date for filing prefiled testimony before the second hearing, as currently scheduled, would be Friday, August 14.<sup>7</sup> Because, as noted above, complete transcripts from the first hearing will likely not be available until July 30, the current schedule allows just 15 days for prefiled testimony to be prepared before the second hearing.<sup>8</sup>

14. Third, to ensure efficient progress of the second hearing, it will be desirable for the Board, the Hearing Officer, and all participants that questions and responses to questions be filed in advance of the second hearing. This is consistent with the Board’s practice in complex rulemakings. Referring again to R18-20, the Hearing Officer in that proceeding required questions to be prefiled before each of the four hearings.<sup>9</sup> The current schedule does not allow sufficient time for prefiled questions (much less prefiled responses to those questions) before the second hearing.

Mar. 6, 2018	Mar. 12, 2018	6
Mar. 7, 2018	Mar. 13, 2018	6
Apr. 16, 2018	Apr. 26, 2018	10
Apr. 17, 2018	Apr. 24, 2018	7
Jan. 29, 2019	Feb. 4, 2019	6

<sup>7</sup> Ten days before August 25 is Saturday, August 15. Prefiled testimony will therefore need to be filed on Friday, August 14. 35 Ill. Adm. Code 101.1020(e)(2).

<sup>8</sup> And, as noted in ¶11, participants will also be occupied during this time reviewing the transcript, potentially drafting motions to correct the transcript, and responding to any remaining questions from the first hearing.

<sup>9</sup> R18-20, *Amendments to 35 Ill. Adm. Code 225.233, Multi-Pollutant Standards (MPS)*, Hearing Officer Order at 2 (Nov. 8, 2017); Hearing Officer Order at 1 (Jan. 29, 2018); Hearing Officer Order at 1 (Mar. 14, 2018); Hearing Officer Order at 2 (Nov. 15, 2018). Deadlines for prefiled answers were also established for the first and fourth hearings.

15. Finally, in addition to the normal requirements of a rulemaking, allowing time for prefiled testimony, questions, and responses is particularly important during the ongoing pandemic. It is currently unclear to what extent the State of Illinois will be under social-distancing requirements by July and August. If in-person testimony is permitted, prefilings may reduce the number of witnesses, attorneys, and experts who need to appear at the second hearing. In the event that in-person testimony is not permitted, or not advisable (including travel by expert and company witnesses from out of state), maximizing the amount of information that is prefiled will also ensure a more efficient videoconference hearing. Prefiling will help the participants to anticipate the timing of testimony, follow-up questions, and objections. It will therefore reduce the necessity and frequency of interjections and oral arguments, which will be challenging over videoconference in a hearing with this many participants.

16. Therefore, to allow adequate time for prefiled testimony, questions, and responses before the second hearing, it should be delayed until either September 8 – 10 or September 29 – October 1. The Interested Participants also suggest appropriate prefilings deadlines, such as the following:

- a. **Option 1:** September 29 – October 1 Hearing
  - Prefiled Testimony – August 27 (approximately four weeks after the first hearing transcripts are uploaded);
  - Prefiled Questions – September 10 (two weeks after Prefiled Testimony);
  - Prefiled Responses – September 24 (two weeks after Prefiled Questions).
- b. **Option 2:** September 8 – 10 Hearing
  - Prefiled Testimony – August 14 (approximately two weeks after the first hearing transcripts are uploaded);
  - Prefiled Questions – August 25 (1.5 weeks after Prefiled Testimony);
  - Prefiled Responses – September 3 (1.5 weeks after Prefiled Questions).

17. The Interested Participants would prefer Option 1 presented above, September 29 – October 1, which would allow sufficient time to complete comprehensive prefiled briefing

before the second hearing and is less likely to conflict with any vacation or family plans, as September 8 is the day after Labor Day and the first day of school for Chicago Public School children. However, the Interested Participants understand that the Board may prefer an earlier date and have therefore presented Option 2 as an alternative, but the condensed schedule may require more questioning and answering to occur live during the hearing.

WHEREFORE, for the reasons set forth above, the Interested Participants respectfully request that the Hearing Officer grant this motion and reschedule the second hearing in this matter and establish deadlines for prefiling testimony, questions, and responses.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on this 7th day of May, 2020, I have served electronically the attached **Joint Motion to Reschedule the Second Hearing and Set Prefiling Deadlines**, upon the individuals on the attached service list. I further certify that my email address is rgranholm@schiffhardin.com; the number of pages in the email transmission is 13; and the email transmission took place today before 5:00 p.m.

Respectfully submitted,

*/s/ Ryan C. Granholm*

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