BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

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 **Dynegy's Prehearing Comment for the Second Hearing**, copies of which are herewith served upon you.

Respectfully submitted,

/s/ Ryan C. Granholm
Ryan C. Granholm

Dated: September 25, 2020

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Dynegy's Prehearing Comment

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, pursuant to 35 Ill. Adm. Code 102.108 and submits this Prehearing Comment. Given the complexity of this rulemaking, the extensive testimony presented by the participants, and the tight rulemaking timeframe, Dynegy presents this Prehearing Comment to highlight three key issues for the Board before the second hearing: (1) the comprehensive nature of proposed Section 845.710; (2) technically justified revisions to the final cover system standards listed in Section 845.750; and (3) required amendments to the definition of "inactive CCR surface impoundment," in Section 845.120.

1. **The Section 845.710 Analysis Requires Comprehensive Analysis That Will Ensure Closures are Protective of Human Health and the Environment.**

First, as demonstrated by IEPA's prefiled answers and testimony at the first hearing, proposed Section 845.710 is designed to require a comprehensive, site-specific closure alternatives analysis that will account for *all* potential environmental risks associated with each CCR surface impoundment, including the risks presented in Mark Hutson's prefiled testimony. As the Agency has noted, the Section 845.710 Closure Alternatives Analysis requires consideration of "more than 20 criteria," to select a closure alternative that will "be protective of

human health and the environment." IEPA's Pre-Filed Answers, Response to Board Q. 35, p. 161-62 (Aug. 3, 2020). This analysis will ensure that any site-specific risks associated with an impoundment are addressed by the closure plan. In fact, the Agency has repeatedly noted that the Section 845.710 analysis is better suited than bright-line rules, such as those proposed by Mr. Hutson. *Id.*; Transcript, 123:10-124:5 (Aug. 12, 2020). IEPA's testimony has explained that a number of the concerns raised by the environmental groups will be addressed in the Section 845.710 analysis, including:

Contact with groundwater	IEPA Pre-filed Answers, Response to ELPC, PRN, SC Q.3 to M. Shaw, p. 16 (Aug. 3, 2020).
Location in/near wetland	*Id.*, Response to ELPC, PRN, SC Q.6 to Melinda Shaw, p. 18 (Aug. 3, 2020).
Location in unstable area	Transcript, 129:5-16 (Aug. 12, 2020).
Failure to meet structural stability requirements	*Id.* at 123:10-124:5; IEPA Pre-filed Answers. Response to ELPC, PRN, SC Q.20 to Melinda Shaw, p. 23.
Location near fault	*Id.*, Response to ELPC, PRN, SC Q.9 to Melinda Shaw, p. 19.
Seasonal variations in groundwater conditions	*Id.*, Response to ELPC, PRN, SC Q. 16(b) to D. LeCrone, p. 80.
Community concerns	Transcript, 25:11-16 (Aug. 12, 2020).
Time required to achieve the groundwater protection standards	IEPA Pre-filed Answers, Response to ELPC, PRN, SC Q.14(e) to A. Zimmer, p. 60 (Aug. 3, 2020).
Availability of transportation for removed CCR	Transcript, 229:20-230:4 (Aug. 13, 2020).

IEPA's testimony regarding the comprehensive nature of the Section 845.710 analysis is further supported by Dynegy's expert witnesses, in particular, Andrew Bittner. Mr. Bittner's testimony includes a detailed examination of the Section 845.710 requirements, describing the analysis as "appropriately flexible, yet robust." Bittner Prefiled Testimony at 5 (Aug. 27, 2020).[1] Mr. Bittner explains that the Section 845.710 analysis "closely parallel[s]" existing

[1] Mr. Bittner also recommends that Section 845.710 explicitly identify worker safety and cost as performance metrics for closure alternatives analyses. *Id.* at 12-14.

requirements in the CCR Rule, as well as longstanding U.S. EPA regulatory programs including RCRA Part 258 Subpart E (municipal solid waste landfills), and CERCLA. *Id.* at 7-8. Mr. Bittner illustrates that the Section 845.710 analysis is well-suited to address the type of concerns raised by Mr. Hutson—such as contact with groundwater or location within a floodplain. *Id.* at 9-12.

2. The Final-Cover System Standards in Section 845.750 Should be Revised.

Second, Dynegy recommends that the Board revise the proposed standards for final cover systems to better reflect the CCR Rule, the science and physical characteristics of CCR surface impoundments, and IEPA's past practice. Section 845.750 requires a two-part final cover system: a low permeability layer and a final protective layer. For both layers, when using compacted earth, Part 845's default requirement is 36 inches. Section 845.750(c)(1)(A) & (c)(2)(B). These requirements greatly and unnecessarily exceed the CCR Rule, which allows for compacted earth low permeability layers to be a minimum of 18 inches, with a minimum six inch protective layer. 40 C.F.R. §§ 257.102(d)(3)(i)(B)&(C). As Dynegy's Cynthia Vodopivec and expert witness Dr. Rudy Bonaparte explain, the cost of requiring this additional cover material under Part 845 could be tens of millions of dollars. Vodopivec Prefiled Testimony at 18 (Aug. 27, 2020); Bonaparte Prefiled Testimony at 10-12 (Aug. 27, 2020).

IEPA has stated that it based Section 845.750 on the requirements of the Board's landfill regulations, 35 Ill. Adm. Code § 811.314. First Supplement to IEPA's Pre-Filed Answers, Response to Dynegy Q. 77, p. 54 (Aug. 5, 2020). But both IEPA and Dr. Bonaparte have testified that CCR, unlike the municipal waste in landfills, does not decompose and compresses only minimally. IEPA Pre-Filed Answers, Response to CWLP Q. 18(b), p. 133 (Aug. 3, 2020); Bonaparte Prefiled Testimony at 8-9. Therefore, post-closure settling of CCR surface impoundments will be much lower, meaning that less cover material is required in order to

preserve the integrity of the cover over time. For final protective layers, Section 845.750(c)(2)(B) states that 36 inches of final protective material are required to "protect the low permeability layer from freezing and minimize root penetration of the low permeability layer." But, as Dr. Bonaparte explains, a 36 inch final protective layer is not required where a geomembrane is used as the low permeability layer, because geomembranes are not vulnerable to either freeze/thaw cycles or to root penetration. Bonaparte Prefiled Testimony at 10.

The Agency has previously approved final cover systems that do not meet the default requirements of Part 845.750. For example, IEPA has approved final cover systems consisting of a geomembrane low permeability layer and an 18-inch protective layer for both the Coffeen Ash Pond 2 and the Hennepin West Ash Pond System. Vodopivec Prefiled Testimony at 18-19. The Agency has stated that it continues to believe that those cover systems are protective of human health and the environment. First Supplement to IEPA's Pre-Filed Answers, Response to Dynegy Q.81 & 81(a), p. 54-55 (Aug. 5, 2020). Furthermore, as Dyengy's expert witness Dave Hagen has testified, the reduced final cover standards proposed by Dr. Bonaparte will not have a meaningful effect on groundwater quality. Hagen Prefiled Testimony at 32-34 (Aug. 27, 2020); Hagen Prefiled Response to Environmental Groups Q.163, p. 53 (Sept. 24, 2020).

Dynegy therefore recommends the following revisions:

> **Section 845.750(c)(1)(A)(i):** "The minimum allowable thickness must be ~~0.91 meter~~ ~~(3 feet)~~18 inches; and . . ."
>
> **Section 845.750(c)(2)(B):** "Be at least three feet thick, when used in combination with a low permeability layer meeting the requirements of Section 845.750(c)(1)(A); or 18 inches thick, when used in combination with a low permeability layer meeting the requirements of Section 845.750(c)(1)(B), and must be sufficient to protect the low permeability layer from freezing and minimize root penetration of the low permeability layer."

3. The Board Should Conform the Definition of "Inactive CCR Surface Impoundment" with the Definition Adopted by the Illinois Legislature.

The Illinois Environmental Protection Act, as amended by P.A. 101-171, defines "CCR surface impoundment" as a unit "which is designed to hold an accumulation of **CCR and liquids**, and the unit treats, stores, or disposes of CCR." 415 ILCS 5/3.143 (emphasis added). This definition was copied from the CCR Rule. 40 C.F.R. § 257.53. IEPA has stated that only units that meet this definition are subject to Part 845. Transcript, 41:24-52:4 (Aug. 11, 2020). In other words, even inactive CCR surface impoundments must be "designed to hold an accumulation of CCR and liquids" in order to be subject to Part 845. But IEPA's proposed definition of "inactive CCR surface impoundment" creates confusion as to whether those units may be regulated if they do not first meet the definition of "CCR surface impoundment."

Specifically, while IEPA largely copied U.S. EPA's Part 257 definition of "inactive CCR surface impoundment," it deleted the phrase "and liquids" from that definition:

Proposed 845.120	40 C.F.R. 257.53
"'Inactive CCR surface impoundment' means a CCR surface impoundment in which CCR was placed before but not after October 19, 2015 and still contains **CCR** on or after October 19, 2015 . . . ." (emphasis added)	"Inactive CCR surface impoundment means a CCR surface impoundment that no longer receives CCR on or after October 19, 2015 and still contains **both CCR and liquids** on or after October 19, 2015." (emphasis added)

By altering U.S. EPA's definition, IEPA has created uncertainty as to whether units that were not "designed to hold an accumulation of CCR **and liquids**" can nonetheless be regulated under Part 845 as "inactive CCR surface impoundments." If they can, than IEPA has expanded the scope of Part 845 beyond the CCR Rule, and, more importantly, beyond the statutory mandate, by regulating units that do not qualify as "CCR surface impoundments." As Dynegy's expert Lisa Bradley has testified, units that contain CCR but do not impound liquid do not pose

the type of risks that the CCR Rule sought to mitigate. Bradley Prefiled Testimony at 31 (Aug. 27, 2020). The Board should therefore revise the definition of "Inactive CCR surface impoundment"—restoring the phrase "and liquids"—to conform Part 845 with the CCR Rule and the Illinois Legislature's definition of "CCR surface impoundment."[2]

Dynegy looks forward to addressing these key issues, as well as others, during the second hearing and post-hearing briefing.

Respectfully submitted,

/s/ Joshua R. More
Joshua R. More

Dated: September 25, 2020

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[2] Additionally, Dynegy supports Ameren's suggestion that Part 845 specifically exclude units that ceased receiving waste before October 21, 1976. Prefiled Testimony of Gary King at 21 – 22 (Aug. 27, 2020).

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 25th day of September, 2020, I have served electronically the attached **Dynegy's Prehearing Comment for the Second Hearing**, 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 11; and the email transmission took place today before 5:00 p.m.

Respectfully submitted,

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