BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	R 2020-019 (A)
STANDARDS FOR THE DISPOSAL	)	
OF COAL COMBUSTION RESIDUALS	)	(Rulemaking - Land)
IN SURFACE IMPOUNDMENTS:	)	
PROPOSED NEW 35 ILL. ADM.	)	
CODE 845	)	

NOTICE OF FILING

TO: Persons identified on Board's CCR service list on its website:
https://pcb.illinois.gov/Cases/GetCaseDetailsById?caseId=16975

PLEASE TAKE NOTICE that today I have filed with the Illinois Pollution Control Board the attached Public Comment of the Illinois Attorney General's Office's a true and correct copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
By KWAME RAOUL,
Attorney General of the State of Illinois

BY: /s/ *Stephen J. Sylvester*

STEPHEN J. SYLVESTER, Chief
Environmental Bureau/Chicago
Illinois Attorney General's Office
69 W. Washington St., 18th Floor
Chicago, IL 60602
Office phone: (312) 814-5396
Cell phone: (312) 848-6318
Stephen.Sylvester@ilag.gov

CERTIFICATE OF SERVICE

I, STEPHEN J. SYLVESTER, an attorney, do certify that on August 2, 2022, I caused true and correct copies of the Notice of Filing and the Public Comment of the Illinois Attorney General's Office's to be served via email upon the persons with email addresses named on the Service List provided on the Board's website, available at:

https://pcb.illinois.gov/Cases/GetCaseDetailsById?caseId=16975

/s/ *Stephen J. Sylvester*
STEPHEN J. SYLVESTER, Chief
Environmental Bureau/Chicago
Illinois Attorney General's Office
69 W. Washington St., 18th Floor
Chicago, IL 60602
Office Phone: (312) 814-5396
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PUBLIC COMMENT OF
THE ILLINOIS ATTORNEY GENERAL'S OFFICE

The Illinois Attorney General's Office, on behalf of the People of the State of Illinois ("People"), hereby submits this public comment pursuant to the Illinois Pollution Control Board's ("Board") May 26, 2022 Order and responding to public comments filed in June 2022. This comment centers around three legal issues: (1) this sub-docket's procedural posture; (2) the Illinois Environmental Protection Act's ("Act") existing regulation of historic ash fills at coal-fired power plants; and (3) environmental justice screening methods.

As an overarching point, the People observe that the Environmental Groups, in filing their August 6, 2021 public comments, followed the instructions set out in the May 6, 2021 Hearing Officer Order in this sub-docket. Should the Board elect to move forward with new regulations concerning coal combustion residuals ("CCR") based on proposed language or concepts within the Environmental Groups' August 6, 2021 public comments, there is no insurmountable legal obstacle preventing the Board from doing so.

I. The Board has authority under the Act to proceed with a rulemaking of its own, or the Environmental Groups', proposal.

The Board opened this sub-docket on its own motion. The Board's February 4, 2021 Opinion and Order made clear that the Board was sufficiently concerned with four specific subject areas that it found additional consideration of them warranted. Accordingly, "based on testimony

and comment from participants, including members of the public," the Board ordered a sub-docket opened "to explore four subjects in greater detail: (1) historic, unconsolidated coal ash fill in the State; (2) the use of temporary storage piles of coal ash, including time and volume limits; (3) fugitive dust monitoring plans for areas neighboring CCR surface impoundments; and (4) the use of additional environmental justice screening tools." (Feb. 21, 2021 Order at 2).

To that end, a May 6, 2021 Hearing Officer Order stated that: "[t]he Board hereby seeks comments, information, and **specific proposals on rule language from any interested parties**" on the four subject areas. (May 6, 2021 Hearing Officer Order at 1) (emphasis added). Moreover, for each of the four subject areas, the May 6, 2021 Hearing Officer Order solicited targeted information and even potential rule language—not general proposals.

For example, on the first issue regarding "[h]istoric, unconsolidated ash fills," the May 6, 2021 Hearing Officer Order stated:

> The Board would like the comments to provide information on historic, unconsolidated fills, including the number of fills in the State, the location of the fills, whether the fills are located at active or inactive power stations, ownership status of the fills, potential groundwater issues, and regulatory approaches to manage or close the fills along with specific rule language to that effect.

(*Id*.).

Based on this language, it seemed evident that the Board was not seeking submissions of new rulemaking proposals cut from whole cloth. To the contrary, the Board was seeking "**specific** rule language" embedded within public comments that provided requested information and discussed possible "regulatory approaches." (*Id*.) (emphasis added).

In the public comments filed in June 2022, though, multiple participants have criticized the Environmental Groups for doing exactly what was requested by the May 6, 2021 Hearing Officer Order. The criticism is unwarranted, not just because interested parties should endeavor to follow

Board orders, but because it misapprehends the scope of the Board's authority and the Act's rulemaking provisions.

One of the Board's enumerated duties is to "determine, define and implement the environmental control standards applicable in the State of Illinois." 415 ILCS 5/5(b). To carry out this duty, the Act provides the Board with broad authority to adopt substantive regulations, limited only in that regulations adopted by the Board must promote the purposes and provisions of the Act. *See* 415 ILCS 5/27(a) ("The generality of this grant of [rulemaking] authority shall only be limited by the specifications of particular classes of regulations elsewhere in this Act."); *Landfill, Inc. v. Pollution Control Board*, 74 Ill. 2d 541, 554 (1978) (stating that the Board "must determine, define, and implement the environmental control standards and may adopt rules and regulations"). Section 28(a) of the Act provides that: "Any person may present written proposals for the adoption, amendment, or repeal of the Board's regulations, **and the Board may make such proposals on its own motion**." 415 ILCS 5/28(a) (emphasis added). The Board has clear authority to open a sub-docket on its own motion and adopt rules of its own proposal.

Accordingly, the Board was within its rulemaking authority when it requested "specific rule language" from the public to potentially propose on its own motion rules that the May 6, 2021 Hearing Officer Order actually described in some detail, for example, (1) "rules to manage or close [historic, unconsolidated] fills" and (2) "limitations on" and "criteria for" temporary storage of CCR. (May 6, 2021 Hearing Officer Order at 1).

Contrary to some assertions within the June 2022 public comments, the Board has latitude to move forward with rulemaking should it elect to do so. The Board would be within its rulemaking authority under Sections 27(a) and 28(a) of the Act, 415 ILCS 5/27(a) and 28(a), should it make a proposal to adopt rules on its own motion. The People do not construe the Board's

March 3, 2022 Order as having done so, but there would be no legal impediment to the Board issuing a second first notice order proposing rules on the Board's own motion.

And, even if the Board instead determined that it should proceed with the Environmental Groups' proposed rule language as a third-party rulemaking proposal, any concerns with Section 28(a) compliance could be remedied. The Board could simply request the Environmental Groups comply with any of the Section 28(a) requirements not already covered by their detailed August 6, 2021 public comment, and then set hearings. The Board took a similar tack in an earlier proceeding in which it had solicited rulemaking proposals from the public. *See In the Matter of: Limits to Volatility of Gasoline*, R88-30 (Apr. 6, 1989) (requesting that not-for-profit entity provide additional information in support of proposed rules); (Apr. 27, 1989) (accepting the proposal for hearing and directing Hearing Officer to establish hearing schedule, after the not-for-profit entity submitted additional information).

II. The Board should exercise its authority to promulgate regulations concerning historic, unconsolidated coal ash fill in the State.

The People support, at a minimum, the collection of information regarding "historic, unconsolidated fills, including the number of fills in the State, the location of the fills, whether the fills are located at active or inactive power stations, ownership status of the fills, [and] potential groundwater issues." (May 6, 2021 Hearing Officer Order at 1). Currently, there is no central repository for this important information, and it is not at all clear that the efforts to identify groundwater contamination (and address any such contamination) from CCR surface impoundments is inclusive of all CCR "historic, unconsolidated fills". In addition, while there are a variety of currently applicable statutes and regulations (*e.g.*, 35 Ill. Adm. Code Parts 620, 810-814, and 415 ILCS 5/21(a), (d), (r)) concerning the disposal of CCR in and on the land, there is no distinct set of regulations for land CCR disposal, like there is for CCR surface impoundments in

Part 845. Accordingly, the People support the promulgation of regulations concerning the disposal of CCR in and on the land.

A. The General Assembly has granted the Board authority to regulate CCR disposed of in and on the land.

The Board's authority to regulate the disposal of CCR at disposal sites other than CCR surface impoundments is well established. Section 21(d)(1) of the Act prohibits any person from conducting "any waste-storage, waste-treatment, or waste-disposal operation . . . without a permit granted by the Agency or in violation of any conditions imposed by such permit. . . ." 415 ILCS 5/21(d)(1). Pursuant to Section 22 of the Act, the Board has authority to promulgate regulations "to promote the purposes of this Title," including, but not limited to, standards for the operation of disposal, storage, and treatment facilities and standards for monitoring contaminant discharges at their source. 415 ILCS 5/22(a), (d).

Further, the General Assembly has already found that it is the policy of the State of Illinois to have the type of information that Board is concerned with regarding the historic disposal of waste including CCR. Specifically, the General Assembly has found that "[i]t is the policy of the State of Illinois, as expressed in the Environmental Protection Act [415 ILCS 5/1 et seq.], the Illinois Solid Waste Management Act [415 ILCS 20/1 et seq.], the Solid Waste Planning and Recycling Act [415 ILCS 15/1 et seq.] and other laws, to collect information about the disposal of waste at landfills and incinerators in Illinois." 415 ILCS 5/22(e)(1). The Board regulations define landfills as "a unit or part of a facility in or on which waste is placed and accumulated over time for disposal, and that is not a land application unit, a surface impoundment or an underground

injection well. For the purposes of this Part and 35 Ill. Adm. Code 811 through 815, landfills include waste piles,[1] as defined in this Section." 35 Ill. Adm. Code 810.103.

With respect to CCR disposal in particular, the General Assembly has recognized that the disposal of coal combustion waste, as defined in Section 3.140 of the Act, 415 ILCS 5/3.140, which specifically includes CCR, which is defined in Section 3.142 of the Act, 415 ILCS 5/3.142, must be handled appropriately. In particular, Section 21(r)(1) of the Act, 415 ILCS 5/21(r)(1), provides that no person shall "[c]ause or allow the storage or disposal of coal combustion waste unless: (1) such waste is stored or disposed of at a site or facility for which a permit has been obtained or is not otherwise required under subsection (d) of this Section. . . ." Section 21(d)(1)(i) of the Act, 415 ILCS 5/21(d)(1)(i), exempts from the permit requirement "any person conducting a waste-storage, waste-treatment, or waste-disposal operation for wastes generated by such person's own activities which are stored, treated, or disposed within the site where such wastes are generated. . . ." As discussed in more detail below, while this language appears to exempt from permitting requirements CCR generated and disposed of on-site at an electric generating facility, this permitting exemption has long been interpreted to apply only to sites where minor amounts of waste are generated and disposed of on-site without a significant threat of environmental harm.

B. The permit exception in Section 21(d) of the Act only applies to on-site facilities that generate minor amounts of waste that can be disposed of without a significant threat of environmental harm.

The Board discussed the Section 21(d) exception in the landfill rulemaking process as follows:

[1] A "waste pile" is defined as "an area on which non-containerized masses of solid, non-flowing wastes are placed for disposal. For the purposes of this Part and 35 Ill. Adm. Code 811 through 815, a waste pile is a landfill, unless the operator can demonstrate that the wastes are not accumulated over time for disposal. At a minimum, this demonstration must include photographs, records, or other observable or discernable information, maintained on a yearly basis, that show that within the preceding year the waste has been removed for utilization or disposal elsewhere." 35 Ill. Adm. Code 810.103.

> Beginning in 1975, the Board began construing the exemption as applicable to "**minor amounts of refuse which could be disposed of without environmental harm** on the site where it was generated," a position which has been consistently sustained by the courts, despite the "plain language" of Section 21.

In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills, PCB 88-7 (Feb. 25, 1988), at 41 (emphasis added); *see also People v. Commonwealth Edison Company*, PCB 75-368 (Nov. 10, 1976) (onsite coal combustion waste landfill violated Section 21(e)[2] for disposing of waste without a permit). Illinois courts have adopted the Board's sound rationale in construing the Section 21(d)(1)(i) permit exemption.

In *Pielet Bros. Trading, Inc. v. Pollution Control Board*, 110 Ill. App. 3d 752 (5th Dist. 1982), the appellate court upheld a Board decision that an automobile shredder was not exempt from permit requirements under Section 21(d)(1)(i). The appellate court analyzed two earlier Board decisions that held that the intent of the exemption was "to exempt minor amounts of refuse which could be disposed of without environmental harm on the site where it was generated." *Id.* at 755 (quoting *IEPA v. City of Pontiac*, PCB 74-396 (Aug. 7, 1975), at 4); *see also IEPA v. R.E. Joos Excavating Co.*, PCB 76-262 (July 7, 1977), at 3. The appellate court held that the Board's interpretation was reasonable in light of the purposes of the Act, "acquiescence by the legislature," and the absence of contrary authority.

In *Reynolds Metals Co. v. Pollution Control Board*, 108 Ill. App. 3d 156 (1st Dist. 1982), the appellate court upheld a Board decision dismissing an aluminum fabrication plant's petition for a variance from certain land disposal regulations due to the plant's failure to obtain a Section 21(d)(1) permit. Before the Board, the plant argued that its disposal of waste in an on-site quarry qualified for an exemption under Section 21(d)(1)(i). The Board rejected the plant's argument and

[2] At the time, Section 21(e) (rather than the current Section 21(d)) provided a permit exception for facilities that disposed of waste on the same site where the waste was generated.

held that disposal in the quarry "present[ed] a real potential for serious environmental harm" that was "not the type of activity envisioned by the legislature when it enacted this exception to its permit requirement." *Id*. at 159. On appeal, the appellate court considered the language of the exemption in light of the purposes of the Act and held that "[i]t would be contrary to the objectives of the permit requirement to exempt from the agency oversight inherent in such requirement a landfill site which presents so great a potential for serious environmental harm." *Id.* at 161.

In *People ex rel. Madigan v. Dixon-Marquette Cement, Inc.*, 343 Ill. App. 3d 163 (2d Dist. 2003), the appellate court reversed a circuit court decision relying on the Section 21(d)(1)(i) exemption to dismiss four counts of the State's complaint. The defendant produced cement and disposed of cement kiln dust ("CKD")—a waste byproduct of cement production—on the same site. Defendant's on-site disposal created a CKD pile 30 acres in size and 70 feet high, and CKD-laden stormwater discharged into a nearby river. In dismissing portions of the State's complaint, the circuit court had held that earlier appellate cases involved "rationalizations to rubber stamp decisions of the Pollution Control Board by ignoring basic tenets of statutory construction." *Id.* at 169. Noting existing precedent while conducting its own independent analysis, the appellate court stated that an overly literal interpretation of Section 21(d)(1) "achieves nothing other than circumventing both the permit system and the purposes of the Act." *Id.* at 174. The appellate court held that Section 21(d)(1) provides "an exemption to those on-site facilities that **generate minor amounts of waste that can be disposed of without a significant threat of environmental harm**." *Id.* at 175 (emphasis added).

Thus, unless an electric generating facility generated only minor amounts of coal ash that could be disposed of without a significant threat of harm, the Section 21(d)(1) permit requirement is applicable, and the Board has authority to promulgate regulations prescribing permit

requirements for CCR "landfills" and "waste piles". However, the General Assembly has already determined that disposal of "CCR generated by the electric generating industry has caused groundwater contamination and other forms of pollution at active and inactive plants throughout this State." 415 ILCS 5/22.59(a)(3). The plain language of this finding by the General Assembly is not limited to just CCR disposed of in CCR surface impoundments. Historic CCR disposal at electric generating plants, whether in "landfills" or "waste piles", is captured in the General Assembly's findings. Accordingly, this historic CCR disposal in "landfills" or "waste piles" is subject to permitting.[3]

C. Section 21.1 of the Act requires financial assurance for disposal sites that require a permit under Section 21 of the Act.

In addition, like CCR surface impoundments (415 ILCS 22.59(f)), CCR disposed of into "landfills" or "waste piles" may similarly require financial assurance pursuant to Section 21.1 of the Act. 415 ILCS 5/21.1. Section 21.1 of the Act requires financial assurance for closure and post-closure care for a "waste disposal operation" that requires a permit under Section 21(d) of the Act. Section 21.1(b) specifically directs the Board to "adopt regulations to promote the purposes of this Section." 415 ILCS 5/21.1(b). Where there is an express grant of authority, there is likewise the clear and express grant of power to do all that is reasonably necessary to execute the power or perform the duty specifically conferred. *See Ralston Purina Co. v. Pollution Control Board*, 27 Ill. App. 3d 53, 58 (4th Dist. 1975).

The financial assurance requirements found in Section 21.1 of the Act apply to CCR "landfills" or "waste piles", because: (1) CCR or coal combustion waste is "waste," (2) deposition

[3] Even if an electric generating facility were exempt from permit requirements pursuant to Section 21(d)(1)(i), the Board has promulgated regulations imposing requirements on otherwise permit-exempt disposal activities. Part 815 of the Board's regulations applies to "to all landfills exempt from permits pursuant to Section 21(d)" of the Act, 35 Ill. Adm. Code 815.101(a), and requires submission of an initial facility report, annual reports, and quarterly groundwater reports.

of CCR into a "landfill" or "waste pile" constitutes "disposal," and (3) a CCR "landfill" or "waste pile" requires a permit pursuant to Section 21(d) of the Act.

D. TACO does not apply to landfills that are required to obtain a permit.

It is important to note that the Board has already determined that the Tiered Approach to Corrective Action Objectives ("TACO") does not apply to "landfills" or "waste piles". Specifically, Section 742.104(h) of the Board's regulations concerning "Risk Based Cleanup Objectives", 35 Ill. Adm. Code 742.105(h), provides that "[t]his Part may not be used in lieu of the procedures and requirements applicable to landfills under 35 Ill. Adm. Code 807 or 811 through 814." Accordingly, CCR "landfills" or "waste piles" that are subject to the permit requirement under Section 21 of the Act are prohibited from using TACO to address soil and groundwater contamination from CCR disposal.

III. An EJ Screening Methodology Utilizing Additional Environmental and Demographic Indicators Would Be Preferable to the Current Methodology in Section 845.700(g)(6).

In their public comments, the Environmental Groups correctly observed that robust conversations are taking place nationwide on how to identify areas of environmental justice ("EJ") concern. The issue is important because people who live and work within overburdened communities are exposed to disproportionately high levels of pollution. As the United States Environmental Protection Agency ("USEPA") stated earlier this year:

> Research has reaffirmed what underserved and environmentally overburdened communities have for years expressed—that many communities in this country that are underserved are also exposed to higher pollution burdens and as a result have higher rates of morbidity and mortality. Furthermore, many overburdened or underserved communities have also been effectively cut out of decision-making processes, raising basic procedural fairness issues.

USEPA, *EPA Legal Tools to Advance Environmental Justice* (May 2022), at 1 (citations omitted) ("*USEPA Legal Tools*").[4]

Under the current Section 845.700(g)(6), 35 Ill. Adm. Code 845.700(g)(6), "areas of environmental justice concern" are identified by looking at the percentage of population in a given census block group that is categorized as (1) "low income" or (2) "minority." This methodology corresponds to the EJ Start map that has been employed by the Illinois Environmental Protection Agency ("Illinois EPA").[5]

In their August 6, 2021 public comments, the Environmental Groups suggested a third alternative for identifying areas of EJ concern, as those areas that fall "within the top 25 percent of scores based on a cumulative impacts assessment" as determined by, but not limited to, 19 environmental and demographic factors. (PC #10 at Appendix 4). The 19 factors include percent of low-income and black, indigenous, and people of color, as well as such factors as: population density; National-Scale Air Toxics Assessment air toxics cancer risk; particulate matter; lead paint; proximity to hazardous waste treatment, storage, and disposal facilities; proximity to National Priorities List sites; and frequency of low birth weight infants. (*Id*.).

As the Environmental Groups note in their comments, this proposed approach corresponds closely to the method for environmental justice communities employed by the Illinois Commerce Commission ("ICC") in implementing the Illinois Solar for All program.[6] This approach had been recommended to the ICC by the Illinois Commission on Environmental Justice ("EJ Commission"). *See* R20-19, Ex. 11. The EJ Commission is an advisory group created by the

[4] USEPA, *EPA Legal Tools to Advance Environmental Justice* (May 2022), can be accessed at: https://www.epa.gov/system/files/documents/2022-05/EJ%20Legal%20Tools%20May%202022%20FINAL.pdf
[5] Illinois EPA's EJ Start map can be accessed at: https://illinois-epa.maps.arcgis.com/apps/webappviewer/index.html?id=f154845da68a4a3f837cd3b880b0233c.
[6] *See* https://www.illinoissfa.com/environmental-justice-communities/.

Illinois Environmental Justice Act, including members "of affected communities concerned with environmental justice." 415 ILCS 155/10 (2020).[7]

In its June 2, 2022 public comment, Illinois EPA stated that "the Environmental Groups' attorneys make strong arguments for an EJ screening methodology that incorporates additional data." (PC #15 at 17). The People concur for several reasons. First, the EJ Commission—which includes representation from among the communities most affected by pollution—has endorsed use of a screening methodology including various environmental and demographic indicators. (R20-19, Ex. 11). As USEPA recently observed, "many overburdened or underserved communities have . . . been effectively cut out of decision-making processes, raising basic procedural fairness issues." *USEPA Legal Tools* at 1. The People submit that, for regulators to effectively address EJ issues, they must listen to those communities. Second, moving to a more nuanced approach could more accurately pinpoint those communities most overburdened by pollution. Third, incorporating additional factors into the screening process would bring Illinois in line with other states that are reckoning with EJ concerns. An increasing number of states have EJ screening tools that rely on a variety of different environmental, health, and demographic factors.[8]

The People have not analyzed whether adding a screen like the Illinois Solar for All methodology—with or without a buffer zone—would change the categorization of any CCR surface impoundments subject to Part 845.[9] Nevertheless, should the Board reconsider the

[7] The Illinois Solar for All map of EJ communities can be accessed at: https://elevate.maps.arcgis.com/apps/webappviewer/index.html?id=cfd020c99ed844668450c6b77eacb411.

[8] *California Office of Environmental Health Hazard Assessment, CalEnviroScreen 4.0*, https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-40 ; *Wash. State Dept. of Health, Washington Tracking Network,* https://fortress.wa.gov/doh/wtn/WTNIBL/; *Maryland EJScreen Mapper,* https://p1.cgis.umd.edu/ejscreen/; *Draft Michigan Environmental Justice Screening Tool,* https://egle.maps.arcgis.com/apps/webappviewer/index.html?id=b100011f137945138a52a35ec6d8676f.

[9] In the People's experience comparing the categorization of facilities under both the EJ Start and Illinois Solar for All maps, the EJ Start map generally provides at least the same coverage as the Illinois Solar for All map, due to the EJ Start map's one-mile buffer zone.

screening methodology within Section 845.700(g)(6), the People support using a multivariable approach as suggested by the Environmental Groups.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
by KWAME RAOUL,

By: /s/ *Andrew Armstrong*
ANDREW ARMSTRONG
KEVIN D. BONIN
Environmental Bureau/Springfield
Illinois Attorney General's Office
500 South Second Street
Springfield, Illinois 62706
(217) 782-7968
andrew.armstrong@ilag.gov
kevin.bonin@ilag.gov

STEPHEN J. SYLVESTER
ARLENE R. HAAS
Environmental Bureau/Chicago
Illinois Attorney General's Office
69 West Washington Street, Suite 1800
Chicago, Illinois 60602
(312) 814-5396
stephen.sylvester@ilag.gov
arlene.haas@ilag.gov

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