

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

<b>IN THE MATTER OF:</b>	)	
	)	
	)	<b>AS 2021-006</b>
<b>PETITION OF SOUTHERN ILLINOIS</b>	)	<b>(Adjusted Standard)</b>
<b>POWER COOPERATIVE FOR AN</b>	)	
<b>ADJUSTED STANDARD FROM 35</b>	)	
<b>ILL. ADM. CODE 845 OR, IN THE</b>	)	
<b>ALTERNATIVE A FINDING OF</b>	)	
<b>INAPPLICABILITY</b>	)	

**NOTICE OF SERVICE**

To:  
SOUTHERN ILLINOIS POWER COOPERATIVE  
Steve Bonebrake  
Bina Joshi  
Joshua More  
ARENTFOX SCHIFF LLP  
233 South Wacker Drive  
Suite 6600  
Chicago, Illinois 60606  
[Steve.bonebrake@afslaw.com](mailto:Steve.bonebrake@afslaw.com)  
[Bina.joshi@afslaw.com](mailto:Bina.joshi@afslaw.com)  
[Joshua.more@afslaw.com](mailto:Joshua.more@afslaw.com)

ILLINOIS POLLUTION CONTROL BOARD  
Don Brown, Clerk  
Carol Webb, Hearing Officer  
James R. Thompson Center  
100 W. Randolph, Suite 11-500  
Chicago, Illinois 60601  
[Don.brown@illinois.gov](mailto:Don.brown@illinois.gov)  
[Carol.webb@illinois.gov](mailto:Carol.webb@illinois.gov)

PLEASE TAKE NOTICE that I have today served the Illinois EPA's Response to SIPC's Motion to Stay the Proceedings.

Respectfully submitted,

Date: July 26, 2023

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,

Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, IL 62794-9276  
(217) 782-5544  
[sara.terranoa@illinois.gov](mailto:sara.terranoa@illinois.gov)

BY: /s/Sara Terranova  
Sara Terranova

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

<b>IN THE MATTER OF:</b>	)	
	)	
	)	<b>AS 2021-006</b>
<b>PETITION OF SOUTHERN ILLINOIS</b>	)	<b>(Adjusted Standard)</b>
<b>POWER COOPERATIVE FOR AN</b>	)	
<b>ADJUSTED STANDARD FROM 35</b>	)	
<b>ILL. ADM. CODE 845 OR, IN THE</b>	)	
<b>ALTERNATIVE A FINDING OF</b>	)	
<b>INAPPLICABILITY</b>	)	

**ILLINOIS EPA’S RESPONSE TO SIPC’S MOTION TO STAY THE PROCEEDINGS**

The Illinois Environmental Protection Agency (“Illinois EPA or Agency”), by one of its attorneys, provides this Response to Southern Illinois Power Cooperative’s (“SIPC” or “Petitioner”) Motion to Stay Proceedings and requests that the Illinois Pollution Control Board (“Board”) DENY Petitioner’s motion. In support, Illinois EPA states as follows:

**I. Background**

- 1) Pursuant to 415 ILCS 5/22.59(g)(1), the Board was directed to adopt rules for coal combustion residuals (“CCR”) surface impoundments “at least as protective and comprehensive” as Subpart D of 40 CFR 257 (“Part 257”) and to use Part 257 “as a baseline.” 415 ILCS 5/22.59(g)(1) and *In the Matter of: Standards for Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19* (“R20-19”), Order (February 4, 2021), at 11.
- 2) On April 15, 2021, the Board adopted new regulations providing standards for disposal of CCR in surface impoundments at 35 Ill. Adm. Code 845. R20-19, Final Order (April 15, 2021). The Part 845 rules became effective on April 21, 2021. 45 Ill. Reg. 5884 (May 7, 2021).

- 3) Part 845 complies with the statutory mandate in 415 ILCS 5/22.59(g)(1) using Part 257 as a baseline and written to provide at least the same protection and comprehensiveness as Part 257. R20-19, Order (February 4, 2021), at 11. However, Part 845 remains independent of the federal rule.
- 4) On May 11, 2021, SIPC filed a “Petition for an Adjusted Standard From 35 Ill. Adm. Code Part 845 or, in the Alternative, a Finding of Inapplicability” (“Petition” or “Pet.”), concerning eight ponds located at SIPC’s Marion Station. See Petition at 1.
- 5) On September 2, 2021, SIPC filed an “Amended Petition for an Adjusted Standard from 35 Ill. Adm. Code Part 845 or, in the Alternative, a Finding of Inapplicability” (“Amended Petition” or “Amd. Pet.”). The Amended Petition concerned the same eight ponds addressed in the May 11, 2021 Petition and included results of a Pond Investigation Report for Certain Ponds at Southern Illinois Power Company’s Marion Station, the Updated Opinion of Lisa Bradley, and the Supplemental Declaration of Kenneth W. Liss. See Amd. Pet. at 1.
- 6) On January 13, 2023, Illinois EPA filed with the Board a Recommendation to deny Petitioner’s request for an adjusted standard from Part 845 and deny Petitioner’s request for a finding of inapplicability of Part 845. AS 2021-06, Agency Recommendation (January 13, 2023). Through a fact-based analysis, the Agency applied the criteria of a CCR surface impoundment and demonstrated how each Pond at issue in the Amended Petition meets the requirements of a CCR surface impoundment and is therefore subject to Part 845.
- 7) On January 17, 2023, Petitioner requested and was granted an indefinite amount of time for discovery before filing its response to the Agency’s Recommendation. AS 2021-006, Hearing Officer Order (January 17, 2023).
- 8) On May 18, 2023, in accordance with a consent decree (Consent Decree. *Statewide Organizing for Community Empowerment v US EPA.*, No. 22-cv2526 (D.D.C., May 3, 2023) (“Consent Decree”), the

United States Environmental Protection Agency (“US EPA”) proposed language and solicited comments to revise 40 CFR Part 257. 88 Fed Reg 31982 and 32033 (May 18, 2023).

9) On July 12, 2023, Petitioner filed a motion to stay proceedings stating, “this Proposed Rule could impact this proceeding, and moving forward now with this proceeding could lead to inconsistent obligations and waste of party and Board resources.” See *Petitioner Southern Illinois Power Cooperative’s Motion to Stay Proceedings and Status Report* (“Motion”) at 4 (July 12, 2023). Petitioner requests that the Board stay this proceeding until the earlier of May 6, 2024, or US EPA taking final action on the Proposed Rule. See Motion at 8.

10) Within 14 days after service of a motion, a party may file a response to a motion. 35 Ill. Adm. Code 101.500(d). On July 12, 2023, Illinois EPA received service of Petitioner’s motion, prompting a response from the Agency by July 26, 2023.

## **II. Support for Illinois EPA’s Opposition to the Requested Stay**

11) Illinois EPA opposes SIPC’s requested stay not only because of the uncertainties surrounding the US EPA proposal, but also because Part 845 remains applicable independently of Part 257.

12) There are various uncertainties surrounding US EPA’s proposal. To start, both the date of final action and the content of the final rule are unknown. Petitioner is overstating the certainty that US EPA will take final action regarding the proposed language by May 6, 2024. Petitioner failed to recognize that the May 3, 2023, Consent Decree also contains a provision allowing deadlines to be extended. See Consent Decree at 3. Paragraph 6 of the Consent Decree states, “The deadlines established by this consent decree... may be extended... by the Court upon motion by EPA for good cause shown...”. Id.

13) Depending on the number of comments received during the comment period and the potential issues those comments raise, US EPA may have good cause to extend the deadline to take final action beyond May 6, 2024. In fact, US EPA received over 15,000 comments in an advanced notice period in

2020 regarding this very issue. See 88 Fed Reg at 31988. That large number of comments from environmental groups, states, one tribe, individual utilities and industry trade associations is a significant indicator of the wide-spread interest and potential on-going controversy. What's more, it took US EPA three years to review those 15,000 comments and propose a rule. Id. Given this level of interest to date, it is entirely reasonable to assume a similar voluminous number of comments could be received again, and the amount of time necessary for US EPA to review and modify the proposed rule could provide good cause to extend the deadlines for final action could extend well beyond May 6, 2024.

14) Further, although Petitioner seems to recognize that the full scope and applicability of the proposed rule will not be clarified by US EPA until some future date (Motion at 8), the Petitioner simultaneously seems to assume that any final action taken by US EPA (regardless of the timeframe) will produce a final rule that will mirror what is currently being proposed (Motion at 4-7).

15) All proposed federal rules must be published in the in the Federal Register to notify the public and give them an opportunity to submit comments. See 5 USC 553(b). The proposed rule and public comments received on it form the basis for the final rule. Id. It is common and to be expected that the final rule will not mirror a proposed rule. Because a final rule often differs from the proposed rule, the notice for the final rule will include a section outlining those major differences.<sup>1</sup>

16) Petitioner is attempting to analyze the impact of proposed language before it has gone through the required rulemaking process. Id. Petitioner cannot know the extent of the comments US EPA will receive regarding the proposed language and how those comments might alter the language in any final rule.

17) What's more, Illinois EPA opposes SIPC's requested stay because Part 845 remains applicable independently of Part 257. Part 845 is governed by the State law, making it imperative for the Board's

---

<sup>1</sup> See, for example, Section VII of the 2015 CCR rule. 80 Fed Reg 21302 at 21428. This section provides a summary of the major differences between the 2010 proposed CCR rule and the 2015 final CCR rule.

decision to strictly adhere to the mandates outlined in Section 22.59 of the Illinois Environmental Protection Act (415 ILCS 5/22.59) and Part 845. Since Petitioner's request for an adjusted standard is from the Part 845 requirements, the proposed modifications to Part 257 have no bearing on the issue before the Board.

18) The Agency has filed its Recommendation and the Board should now move forward determining if the ponds at issue in the Amended Petition meet the requirements of a CCR surface impoundment and are therefore subject to Part 845.

19) Based on the reasons stated above, the Agency files this Response requesting SIPC's Motion to Stay should be denied.

WHEREFORE, through this Response, Illinois EPA respectfully requests that the Board deny SIPC's Motion to Stay and move forward with this Adjusted Standard proceeding.

Respectfully submitted,

Date: July 26, 2023

Sara Terranova  
Division of Legal Counsel  
Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, IL 62794-9276  
(217) 782-5544  
[Sara.terranova@illinois.gov](mailto:Sara.terranova@illinois.gov)

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,

Respondent,

BY: /s/Sara Terranova  
Sara Terranova

**THIS FILING IS SUBMITTED ELECTRONICALLY**

**CERTIFICATE OF SERVICE**

I, the undersigned, on affirmation state the following:

That I have served the attached **ILLINOIS EPA'S RESPONSE TO SOUTHERN ILLINOIS POWER COOPERATIVE MOTION TO STAY** by e-mail upon Steve Bonebreak, Bina Joshi and Joshua More at the e-mail addresses: [steve.bonebreak@afslaw.com](mailto:steve.bonebreak@afslaw.com), [bina.joshi@afslaw.com](mailto:bina.joshi@afslaw.com) and [Joshua.more@afslaw.com](mailto:Joshua.more@afslaw.com)

That my e-mail address is: [sara.terranova@illinois.gov](mailto:sara.terranova@illinois.gov)

That the e-mail transmission took place before 4:30 p.m. on the date of July 26, 2023.

/s/Sara Terranova

