

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	
PROPOSED AMENDMENTS TO)	
GROUNDWATER QUALITY)	R 2022-018
(35 ILL. ADM. CODE 620))	(Rulemaking - Public Water Supply)
)	
)	

Dynegy’s First Notice Comments

Dynegy Midwest Generation, LLC; Electric Energy Inc.; Illinois Power Generating Company; Illinois Power Resources Generating, LLC; and Kincaid Generation, LLC (collectively, “Dynegy”), collectively submit these Comments to the Illinois Pollution Control Board’s First Notice Opinion and Order in R22-18.

Comment 1 - Revisions to Part 620 to Clarify the Interplay Between Part 620 and Part 845

The Board should add new section 35 Ill. Admin. Code 620.140, as follows, to provide regulatory clarity, avoid unnecessary administrative burden, and avoid dueling and duplicative regulatory regimes.

Section 620.140 – Exclusion for Groundwater Regulated Under 35 Ill. Adm. Code Part 845

This Part does not apply to the constituents listed in 35 Ill. Adm. Code Section 845.600(a) and (b), for any groundwater regulated under 35 Ill. Adm. Code Part 845.

During the rulemaking for Part 845 of Title 35 of the Illinois Administrative Code (the “845 Rulemaking”) IEPA explained it was its intent that the groundwater quality standards (“GWQS”) in 35 Ill. Admin. Code Part 620 not apply to CCR surface impoundment constituents with groundwater protection standards (“GWPS”) under 35 Ill. Admin. Code Part 845, until the end of the Part 845 post-closure care period. *See e.g.* R2020-19, *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845*, IEPA’s Response to Illinois Pollution Control Board’s Prefiled Questions at 48 (Aug. 3, 2020) (“Part 845 must be applied first for any constituent with a GWPS. For any constituent which has no GWPS, and after the active life of a CCR surface impoundment as defined by Part 845, the requirements of Part 620 are applicable.”); R2020-19, *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845*, Hrg. Transcript at 28-30 (Aug. 13, 2020) (“Q. Let’s use an example. Boron. There’s a GWPS under 845 for boron, correct? A: right. Q: And there’s also a corresponding GWQS under Part [620] for boron, correct? A: Correct. Q: So for boron, are the corresponding Part 620 standards applicable during the active life of a CCR surface impoundment? A: No, they’re not. Q: And can

you give me an example of a constituent where the Part 620 standards would be applicable during the active life of a CCR surface impoundment? A: An example would be nitrate.”).

Notably, 35 Ill. Admin. Code Section 845.600(c) prohibits an owner or operator of a CCR surface impoundment from obtaining an alternative standard under 35 Ill. Admin. Code Section 620.450(a)(4) for any constituent with a GWPS before the end of post-closure care under Section 845.780, when closing with a final cover system, or before the end of groundwater monitoring under Section 845.740(b), when closing via removal. This alternative standard is otherwise available for any constituent with a GWQS or source subject to the GWQS. This further supports the idea that Part 620 requirements are intended to be superseded by Part 845, for overlapping constituents, while a CCR surface impoundment is undergoing Part 845 closure and post-closure care.

From a practical perspective, this application of Parts 620 and 845 makes sense. Under Part 845, the owner or operator of a CCR surface impoundment has an obligation to investigate and take corrective action to remedy elevated constituent levels for which a Part 845.600 GWPS exists and to which a CCR surface impoundment is contributing. If Part 620 and Part 845 concurrently apply, in the event of an exceedance, the owner or operator would likely have to simultaneously engage in corrective action steps under Part 845 and the submittal of a groundwater management zone under Part 620. It makes little sense to have these two regulatory regimes apply simultaneously. Both contain different administrative requirements. But the requirements in both are geared towards the same goal of improving groundwater quality. The simultaneous application of both will result in application and approval processes under Part 620 and Part 845 that contain conflicting requirements and also duplicative requirements. Having both apply simultaneously adds an unnecessary administrative burden upon IEPA and upon owners and operators.

While IEPA’s intended interpretation of the interplay between the Part 620 and Part 845 is clear from the 845 Rulemaking record, and such an interpretation makes practical sense, a recent Board decision had indicated a need for further regulatory clarity on this subject. See PCB 2019-11, *Sierra Club et. Al v. City of Springfield, Office of Public Utilities d/b/a City Water, Light and Power*, Interim Opinion and Order of the Board at 8-9 (Sept. 7, 2023) (noting the Board was not persuaded the Part 845 rules provided an exemption from Part 620 standards because, in its opinion, that intention is not clear from the “plain language of the Part 845 rules”). The current Part 620 rulemaking proceeding provides an ideal opportunity for the Board to promulgate language making the intended interplay between Part 845 and Part 620 clear.

Dynergy understands that other parties and participants in this Rulemaking may propose their own language intended to reach a similar goal as Dynergy’s proposed language. Dynergy is open to a variation on its proposed revisions to Part 620.401 so long as it accomplishes the same, necessary goal discussed above.

IEPA’s Proposed June 17, 2024 Revisions

Dynergy has had the opportunity to briefly review the revisions IEPA proposed to Part 620 on June 17, 2024, to address the same concerns discussed above. R2022-18, *In the matter of: Proposed Amendments to Groundwater Quality (30 Ill. Adm. Code 620)*, Illinois Environmental Protection

Agency's Responses to the Illinois Pollution Control board's Questions and First Notice Comments (June 17, 2024) ("IEPA's First Notice Comment"). Dynege is generally supportive of statements in IEPA's First Notice Comment clarifying the interplay between Part 620 and Part 845 and the intention of IEPA's proposed revisions regarding that interplay. Dynege believes the proposal Dynege has presented in this Comment achieves the objectives of IEPA's proposal in a more streamlined fashion. That said, if the Board chooses to proceed with IEPA's proposal, Dynege recommends a few revisions to avoid ambiguity and potential internal inconsistency.

IEPA's First Notice Comment explains

groundwater regulated under Part 845 falls within a specific area at electric utilities and independent power producers, is associated with one or more CCR surface impoundments, is being monitored up gradient, cross-gradient and down gradient of the CCR surface impoundments by an Agency approved groundwater monitoring system and includes all of the of groundwater impacted by releases from a CCR surface impoundment. This may include groundwater both onsite and offsite at an electric utility or independent power producer.

IEPA's First Notice Comment at 11 (emphasis added). IEPA acknowledges that Part 845 regulates contamination that is both onsite at the property of an electric utility or independent power producer and that travels offsite. IEPA's intention, and the needed outcome in this rulemaking, is to clarify that all groundwater contamination subject to Part 845 should be regulated exclusively under that program. As drafted, IEPA's proposed revisions to Section 620.240(h) and 620.440(d) could be interpreted as resulting in the simultaneous application Part 845 and Part 620 when contamination regulated under Part 845 migrates offsite. To avoid this unintended consequence and to make IEPA's stated intent more clear, Dynege recommends the following revisions to IEPA's proposed Sections 620.240(h) and 620.440(d):

620.240

Except as provided in Section 620.250, Other Groundwater is:

h) Groundwater regulated under 35 Ill. Adm. Code 845-~~at both active and inactive electric utilities and independent power producers.~~

620.440

d) For groundwater ~~at both active and inactive electric utilities and independent power producers~~ regulated under Part 845, the groundwater protection standard (GWPS) under Section 845.600 must not be exceeded for any constituent with a GWPS under Section 845.600. For any constituent that does not have a GWPS under Section 845.600, the groundwater quality standards (GWQS) of Sections 620.410, 620.420, 620.430 or 620.440(b) and (c) apply.

Dynegy also recommends the following revision to 620.250(i) to align with IEPA's intent that a groundwater management zone not be available for constituents that are regulated under Part 845:

620.250:

i) Regardless of subsections (a) through (f), any corrective action conducted under 35 Ill. Adm. Code 845 must follow the corrective action process of Sections 845.650, 845.660, 845.670, and 845.680. A GMZ will not be approved for any constituent regulated under ~~with a Part 845 Groundwater Protection Standard (GWPS)~~. A site owner or operator may apply for a GMZ for any constituent with no Part 845 Groundwater Protection Standard (GWPS) subject to the requirements of subparts (a) through (f).

These revisions to IEPA's proposal provide necessary clarity and avoid unnecessary ambiguity.

Comment 2 – The Board's Proposed Adoption of IEPA's Proposed Revisions to Class I and certain Class II Standards for Selenium, Fluoride, Molybdenum, Cobalt and Vanadium

The Board's March 7, 2024, First Notice Opinion and Order ("Order"), arbitrarily and capriciously ignores the evidence and arguments that Dynegy and other parties presented regarding selenium, fluoride, molybdenum, cobalt, and vanadium. The Board should reconsider its approval of IEPA's proposed revisions to these standards and should consider adding language to Part 620 that allows for the consideration of background, consistent with other Illinois regulatory programs.

Selenium: The Order does not address or consider the arbitrariness of the Board setting a different standard for selenium now based on the same information¹ it had when it previously set the selenium standard, particularly when IEPA presented no basis for why a different outcome is now appropriate. The 1972 Water Quality Criteria document's recommendation regarding the a 0.02 mg/L concentration for use up to 20 years on "neutral and alkaline fine textured soils until greater information is obtained on soil reactions" existed during the rulemaking that occurred in R1989-014 (and its subdockets). Water Quality Criteria at 339, 334-35. The Board did not rely upon this information to set the current selenium standard (promulgated in R1989-014), and instead set the current Class I selenium standard based on the USEPA MCL and Class II selenium standard based on the livestock watering recommendation in the 1972 Water Criteria document. The Order provides no changed circumstances to support why these standards should now change (based on a previously available recommendation).

The Order also improperly dismisses the fact that the 0.02 mg/L concentration presented in the 1972 Water Quality Criteria document is based on studies done in areas (Oregon, Wyoming, New Zealand and Denmark) with different agricultural conditions than Illinois. Ex. 24 at 9. This appears to be largely because of an incorrect assumption regarding the relationship between range plants and forage plants. The Order states "[r]egarding Ms. Yost's contention that selenium value was

¹ This information is a 1972 Water Quality Criteria Document prepared by the National Academy of Science for USEPA (referred to here as "1972 Water Quality Criteria")

based on geographical areas with range crops that grow in arid climates, IEPA notes that the 1972 Water Quality Criteria document specifically recommends the 0.02 mg/L value for use on forage plants, and not range plants.” Order at 43. However, this argument improperly suggests that a range crop and forage crop are mutually exclusive; they are not. A forage crop is simply a crop that an animal grazes upon independently. A range crop is a type of crop (not common to Illinois) that can serve as a forage crop for livestock i.e. rather range crops serve as a type of forage crops. The studies upon which the recommended selenium concentration in the 1972 Water Quality Criteria is based relate to livestock *foraging on range plants*, which do not typically serve as forage for livestock in Illinois. Ex. 24 at 6, 8-9. Range plants typically require higher levels of irrigation than the types of forage crops that exist in Illinois. Ex. 30 at 3-4.

The Order further ignores the evidence Dynegy presented regarding irrigation rates in Illinois. Specifically, the standard proposed in the 1972 Water Quality Criteria document is based on 3 acre-feet water use per acre, per year. Ex. 24 at 7. The average irrigation in Illinois is estimated at 0.5 acre-foot of water use per acre, per year. *Id.* No evidence was presented in the proceeding and the Board cites to no evidence in its Order refuting the fact that irrigation rates in Illinois are much lower than the irrigation rate that serves as a basis for the 0.02 mg/L recommendation.

Finally, the Order references IEPA’s claim that it could not evaluate the evidence Dynegy provided regarding selenium deficiency in livestock in Illinois because Dynegy did not provide any references for review. Order at 43. These documents are discussed and referenced in Ex. 24, IEPA had the opportunity to ask Dynegy’s witness, Ms. Yost, questions about this evidence during her oral testimony in this rulemaking proceeding, and copies of these documents were provided with Dynegy’s Post-Hearing Comment (and are available in the docket for this matter). Ex. 24; See R2022-018, *In re Proposed Amendments to Groundwater Quality* (35 Ill. Adm. Code 620), Dynegy’s Post-Hearing Comment at Exs. D and E (Mar. 3, 2023) (P.C. #57). The evidence clearly demonstrates that selenium deficiency is a problem for Illinois livestock and that supplements are recommended for livestock to protect against selenium deficiency. *Id.* The Board should review and consider this important information prior to setting a new Class I and II selenium standard, particularly when reducing the standard may prove unnecessary or even detrimental for the group (i.e. Illinois livestock) it is intended to protect.

Fluoride: The Order does not address or consider the information presented by Dynegy during the rulemaking process regarding fluoride, including evidence that: (1) the proposed Class I and Class II standard of 2.0 mg/L is based on a potential aesthetic dental impact upon livestock, with any other harmful effect not expected until concentrations were multiple times higher; (2) that the proposed standard is based on evidence that the Board had, but chose not to rely upon, when promulgating the current Class I and Class II standard of 4.0 mg/L for fluoride; and (3) the arbitrariness of the Board setting a different standard now based on the same information it had when it previously set the fluoride standard (with no new evidence or arguments presented). P.C. #57 at 4, 18-20, 24; Ex. 24. The Board should maintain the current Class I and Class II standard for fluoride, which is protective of human health and the environment.

Molybdenum:

Risk-Based Class I Standard

The Board should not rely upon the toxicity value from USEPA's Integrated Risk Information System ("IRIS") to set a Class I molybdenum standard. Ample evidence was presented in the proceeding that this value is outdated, unreliable and scientifically questionable given significant additional information that has been collected since 1991 (the year IRIS toxicity value for molybdenum upon which the Board's proposed Class I standard is based, was set). Dynegy's Index of Exhibits and Third Hearing Exhibits (hereinafter "Dynegy's Third Hearing Exhibits"), Ex. B at 16 (Dec. 5, 2022); Ex. 24 at 14-15.² IEPA itself admitted the IRIS molybdenum reference dose (RfD) is outdated. R2022-018, *In the Matter of: Proposed Amendments to Groundwater Quality (35 Ill. Adm. Code 620)*, Transcript of June 21, 2022 Hearing at 59:13–61:21, 83:23–84:02 (June 27, 2022). As Dynegy pointed out in P.C. #57, relying upon ATSDR toxicity values is consistent with the USEPA directive concerning toxicity hierarchy upon which IEPA relies:

IRIS is not the only source of toxicology information, and in some cases more recent, credible and relevant data may come to the Agency's attention. In particular, toxicological information other than that in IRIS may be brought to the agency by outside parties. Such information should be considered along with the data in IRIS in selecting toxicological values; ultimately the Agency should evaluate risk upon its best scientific judgement and consider all credible and relevant information available to it.

USEPA, *Memorandum re: Human Health Toxicity Values in Superfund Risk Assessment* at 2 (Dec. 5, 2003), <https://www.epa.gov/sites/default/files/2015-11/documents/hhmemo.pdf>. Just because unreliable and outdated data is being used elsewhere (see Order at 40) does not mean that the Board should use that data to set standards in Illinois.

IEPA's New Class I and II Proposal

Dynegy appreciates the Board's recognition that IEPA had not provided information justifying setting a Class II molybdenum concentration of 0.05 mg/L in Illinois. The Board asked IEPA to provide information justifying its proposal; however, instead of justifying its proposed 0.05 mg/L irrigation-based Class II standard for molybdenum, IEPA's Response to Questions presented an equally unjustified proposal that the Class I and II standard for molybdenum be further lowered to 0.01 mg/L based on "beneficial use to livestock." R2022-018, *In the Matter of: Proposed Amendments to Groundwater Quality (35 Ill. Adm. Code 620)*, IEPA's Response to Questions at 5 (Apr 30, 2024) ("IEPA's April 2024 Response to Questions"). This standard is newly proposed,

² U.S. Dept. Health and Human Servs., ATSDR, *Toxicological Profile for Molybdenum* at A-22 (May 2020), www.atsdr.cdc.gov/toxprofiles/tp212.pdf ("The [IRIS] study has a number of deficiencies that limit the interpretation of the results: (1) the control group consisted of 5 individuals compared to 52 subjects in the exposed group; (2) no information was provided on the controls to assess whether they were matched to the exposed group; (3) it does not appear that the study controlled for potential confounders, such as diet and alcohol, which can increase uric acid levels; and (4) NAS (2001) noted that there were potential analytical problems with the measurement of serum and urine copper levels (ATSDR 2020).")

allowing participants and stakeholders limited time for evaluation and comment. Its exact origin is also somewhat unclear based on IEPA's Response to Questions. That said, the new proposal is unsupported.

The only reference in the 1972 Water Quality Criteria document to a recommended 0.01 mg/L concentration of molybdenum is for irrigation "*waters used continuously* on all soil." 1972 Water Quality Criteria at 339, 344 (emphasis added). This recommendation does not apply in Illinois because, as IEPA has acknowledged, continuous irrigation is not used in Illinois. R2022-018, *In the Matter of: Proposed Amendments to Groundwater Quality (35 Ill. Adm. Code 620)*, Transcript of the March 9, 2022 Hearing at 154:16–19 (Mar. 14, 2022) ("I do not believe continuous irrigation is a practice that is used in Illinois simply because we do not have a necessity for it. We do get regular rainfall."); *id.* at 148:13–14 ("We have, yeah, I would say intermittent irrigation here."). IEPA's April 2024 Response to Questions does not explain why the recommended *continuous irrigation concentration* should apply in Illinois.³

To the extent IEPA's new proposal for a 0.010 mg/L standard is based on the watering of livestock, that is also not justified. IEPA's April 2024 Response to Questions at 5 ("the standard for molybdenum should be 0.01 mg/L based on livestock toxicity"). IEPA notes that "[t]he footnote accompanying the proposed Class I standard [for Molybdenum] should be changed from ("c") to ("h") to reflect the Class I standard is based on beneficial use for livestock." *Id.* Footnote ("h") indicates a standard is "based on beneficial use for watering livestock" per the 1972 Water Quality Criteria document. However, the 1972 Water Quality Criteria document *refuses* to set a molybdenum standard for watering livestock, noting "[b]ecause there are many factors influencing toxicity of molybdenum, setting an upper allowable limit for its concentration in livestock waters is not possible at this time." 1972 Water Quality Criteria at 314. Thus, the 1972 Water Quality Criteria document does not have a recommended molybdenum concentration for watering livestock and does not support IEPA's new proposal.⁴ There is no other molybdenum concentration recommended in the 1972 Water Quality Criteria document for the protection of livestock. IEPA's new proposal does not have sufficient justification to be promulgated.

Background Concentrations / Cobalt and Vanadium: In response to concerns expressed about cobalt and vanadium standards being set above background levels for much of the State of Illinois, the Order notes "program-specific regulations are able to address situations where background levels are higher than the groundwater quality standard." Order at 41. Dynegy appreciates that programs, outside of Part 620, include provisions to address situations where background levels

³ Nor does it explain why the 0.05 mg/L irrigation-based value IEPA originally proposed, recommended for short term use "for only acid fine textured soils or acid soils with relatively high iron oxide contents," should apply in Illinois.

⁴ Clearly the 1972 Water Quality Criteria document does not recommend a 0.01 mg/L standard based on watering of livestock or to protect livestock in areas where continuous irrigation does not occur. It is possible that IEPA's proposal for a 0.01 mg/L standard for molybdenum is self-created based on its interpretation of statements the 1972 Water Quality Criteria document, but not actually based upon any conclusory recommendation in that document. There is no precedent or justification for IEPA to propose or the Board to adopt a standard in such a manner. Clearly, the authors of the 1972 Water Quality Criteria document had the same information available to them when they drafted the document and chose not to recommend a standard of 0.01 mg/L for molybdenum for any situation other than continuous irrigation.

of contaminants are higher than applicable limits. However, as explained in Dynegy's Post-Hearing comment, Part 620 includes independently enforceable standards that place burdens upon property owners and operators outside of the context of other "program-specific regulations." P.C. #57 at 9-10. Costs associated with investigation, delineation, remediation, or other corrective actions may be required based on the enforceable standards in Part 620, independent of any other regulatory program. *Id.* Thus, even if the Board does not consider background when setting Part 620 Class I and II standards, it should more explicitly account for background under Part 620. Dynegy continues to propose the following amendment to Part 620.410 and 620.420 to accomplish this goal:

Section 620.410

a) Inorganic Chemical Constituents

Except due to natural causes or background (determined in accordance with 35 Ill. Adm. Code Section 742.410) or as provided in Section 620.450, concentrations of the following chemical constituents must shall not be exceeded in Class I groundwater:

Section 620.410(b)

b) Organic Chemical Constituents

Except due to natural causes or background (determined in accordance with 35 Ill. Adm. Code Section 742.410) or as provided in Section 620.450 or subsection (d), concentrations of the following organic chemical constituents must shall not be exceeded in Class I groundwater:

Section 620.420(a)

a) Inorganic Chemical Constituents

1) Except due to natural causes or background (determined in accordance with 35 Ill. Adm. Code Section 742.410) or as provided in Section 620.450 or subsection (a)(3) or (e) (d) of this Section, concentrations of the following chemical constituents must shall not be exceeded in Class II groundwater:

Section 620.420(b)

b) Organic Chemical Constituents

1) Except due to natural causes or background (determined in accordance with 35 Ill. Adm. Code Section 742.410) or as provided in Section 620.450 or subsection (b)(2) or (e) (d) of this Section, concentrations of the following chemical constituents must shall not be exceeded in Class II groundwater:

These revisions (or other revisions of the Board's choosing with similar purpose and intent) will more fully align Part 620 with the rules under various other regulatory programs such as the Illinois Underground Storage Tank program, Site Remediation Program, and Coal Combustion Residual Surface Impoundment program.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 17th day of June, 2024, I have served electronically the attached **Dynegy's First Notice Comment**, upon the individuals on the attached service list. I further certify that my email address is bina.joshi@afslaw.com; the number of pages in the email transmission is 14; and the email transmission took place today before 5:00 p.m.

Respectfully submitted,

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