BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PETITION OF SOUTHERN ILLINOIS	)	
POWER COOPERATIVE FOR AN	)	
ADJUSTED STANDARD FROM 35 ILL.	)	AS 21-6
ADMIN. CODE PART 845 OR, IN THE	)	
ALTERNATIVE, A FINDING OF	)	
INAPPLICABILITY	)	

I am commenting to opposite the Amended Petitions by Southern Illinois Power Cooperative (SIPC) for an exemption from geenrally applicable regulations in the guise of an adjusted standard as they apply to certain disposal units at its Marion Generating Station. These regulations are the recently adopted coal combustion residuals (CCR) surface impoundments rules under Part 845 (35 Ill. Adm. Code 845).

Let me introduce myself. I'm a retired enviromental lawyer. I remember the first Earth Day when I was in high school. Fast forward to the end of that decade, I took the only course on environmental law at Rutgers Law School, which in those early days dealt primarily with NEPA. My career commenced at the McLean County State's Attorney's Office where I indicted two separate companies for felony hazardous waste offenses; these were some of the first such charges in the State after that law was enacted in 1983. Coming to the Illinois EPA in December 1984, after prosecuting my second murder trial, I wanted to pursue my original career goal of being an environmental lawyer. I consider myself to be a part of the "second-generation" within the Illinois EPA; the "first-generation" were the folks from Public Health and other State units to this agency created by the General Assembly. I worked four years with many of these many committed State

employees, both technical staff and my fellow attorneys in what was then the "Enforcement Division" of the Illinois EPA. While at the Illinois EPA, I had the useful experience of also working with the first and second generations of Pollution Control Board members such as Jacob Dumelle (who served 21 years on the Board) and Ron Flemal and John Marlin. In fact, as agency counsel I assisted the Board in its revision of the procedural rules, especially in regard to evidentiary matters due to my extensive trial experience. I continued my public service with the Attorney General's Office, first in the Asbestos Bureau and then in the Environmental Bureau for the 81 "downstate" counties; I was chief of this bureau from September 1991 until January 2014. The Board's archives contain hundreds of complaints filed and signed by me on behalf of four different Attorneys General and the People of the State of Illinois. While I had to abruptly retire on disability in 2014, I am proud of the successes my staff and I achieved. Toward the end of my 25 years with the Office, I also had the privilege of working closely with Barbara Flynn Currie and numerous other legislators, stakeholders and environmental groups during the extensive negotiations to enact the Illinois Hydraulic Fracturing Regulatory Act in 2013.

My background as to my lengthy professional environmental protection record on behalf of the State of Illinois is intended to qualify me to take a long view regarding our unique environmental protection system in Illinois. In 1970, the General Assembly passed the Illinois Environmental Protection Act, thereby creating the Illinois EPA and the Pollution Control Board, the first and most comprehensive legal framework and state regulatory agencies in the entire nation dedicated to cleaning up and protecting our environment. We must be proud of and strive to preserve and further our heritage, especially as the Board fulfills its obligations to promulgate rules to achieve the explicit lrgal objectives. The Constitution of 1970, Article XI, Section 2, provides: "Each person has the right to a healthful environment.

Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law." In addition to this Constitutional right, my fellow citizens and I rely upon the findings of the General Assembly in enacting the Illinois Environmental Protection Act as set forth in pertinent parts of Section 2(a) of the Act as follows:

"i) that environmental damage seriously endangers the public health and welfare . . .

iii) that air, water, and other resource pollution, public water supply, solid waste disposal, noise, and other environmental problems are closely interrelated and must be dealt with as a unified whole in order to safeguard the environment;

iv) that it is the obligation of the State . . . to promote the development of technology for environmental protection and conservation of natural resources . . .

v) that in order to alleviate the burden on enforcement agencies, to ensure that all interests are given a full hearing, and to increase public participation in the task of protecting the environment, private as well as governmental remedies must be provided;

vi) that despite the existing laws and regulation concerning environmental damage there exist continuing destruction and damage to the environment and harm to the public health, safety and welfare of the people of this State. . . ."

Section 2(b) of the Act also provides: "It is the purpose of this Act . . . to establish a unified state-wide program supplemented by private remedies to restore, protect and enhance the quality of the environment, and to assure that the adverse upon the environment are fully considered and borne by those who cause them."

Lastly, Section 2(c) of the Act mandates: "The terms and conditions of this Act shall be liberally construed so as to effectuate the purposes of this Act."

More precisely, the entirety of the additional legislative findings underlying Section 22.59(a) of the Act warrants our attention:
"(a) The General Assembly finds that:

(1) the State of Illinois has a long-standing policy to restore, protect, and enhance the environment, including the purity of the air, land, and waters, including groundwaters, of this State;

(2) a clean environment is essential to the growth and well-being of this State;

(3) CCR generated by the electric generating industry has caused groundwater contamination and other forms of pollution at active and inactive plants throughout this State;

(4) environmental laws should be supplemented to ensure consistent, responsible regulation of all existing CCR surface impoundments; and

(5) meaningful participation of State residents especially vulnerable populations who may be affected by regulatory actions, is critical to ensure that environmental justice considerations are incorporated in the development of, decision-making related to, and implementation of environmental laws and rulemaking that protects and improves the well-being of communities in this State that bear disproportionate burdens imposed by environmental pollution.

Therefore, the purpose of this Section is to promote a healthful environment, including clean water, air, and land, meaningful public involvement, and the responsible disposal and storage of coal combustion residuals, so as to protect public health and to prevent pollution of the environment of this State.

The provisions of this Section shall be liberally construed to carry out the purposes of this Section."

As to Section 22.59(a)(3), I am perhaps one of the few people commenting in this proceeding who has actually taken enforcement actions for groundwater contamination from ash impoundments at coal-fired power plants. As part of my professional experience, I have direct knowledge of the pollutional

impacts of CCR. I also note for emphasis here that Section 22.59(a)(4) explicitly governs "all existing CCR surface impoundments" and the rules promulgated thereunder at part 845 contains several provisions relating to "all existing CCR surface impoundments". I need not recite to the Board its own rules. In fact, further discussion of the statute and rules seems unnecessary when SIPC openly admits that the Board has already "declined industry's request to adopt a new definition of *de minimis* units in Part 845." 2nd Pet. at 32. Truly, there is no definition of *de minimis* units in Part 845. SIPC instead tenuously argues that in the rulemaking "the Board appeared to recognize" and "suggested" that such requested relief is consistent with the statute and rules. Well, I suggest that a lawyer shall not advance a claim the lawyer knows is unwarranted under existing law, except that the lawyer may advance such claim only if it can be supported by a good-faith argument for an extension, modification, or reversal of existing law. Rule 1.2(f)(2) of the Illinois Rules of Professional Conduct. These ethical rules apply to all attorneys practicing in Illinois. However, SIPC through its counsel makes no argument for an extension, modification, or reversal of existing law, and apparently repeats to a large extent its previous unsuccessful arguments made during the rulemaking proceeding. Now these rules are indeed existing law. Good-faith be damned while SIPC merely seeks to weasel out of these laws with these rehashed arguments.

Let's focus briefly on the phrase "all existing CCR surface impoundments". Collectively, this term "all" designates the whole number of particulars, individuals, or separate items; distributively, it may be equivalent to "each" or "every." As to another common sense term-- "existing"-- Section 22.59(m) provides that "this Section shall apply, **without limitation**, to all existing CCR surface impoundments and any CCR surface impoundments constructed after July 30, 2019. . . . [emphasis added]." In other words, "existing" impoundments cover all those

constructed prior to July 30, 2019, while the provisions of this Section also govern newer impoundments constructed after that date. And, of course, the phrase "without limitation" is also important.

Conventional wisdom suggests that the term *de minimis* generally refers to situations involving minimal environmental impact or contribution to contamination. It is often used to refer to situations where the potential for environmental harm or contribution to an existing problem is so small that it can be treated as insignificant for certain regulatory purposes. A common example pertains to a small contribution of waste disposed at a Superfund site. In contrast, SIPC has made the total contributions of CCR to these surface impoundment. My argument is that "potential" problems cannot be treated as so "small" as to be "insignificant" when the General Assembly has properly found that "CCR generated by the electric generating industry has caused groundwater contamination and other forms of pollution at active and inactive plants throughout this State." Section 22.59(a)(3). Problems with CCR surface impoundments are actual and historical, and not merely potential. The industry must comply with Part 845 in order to rectify actual problems and to prevent potential problems.

Lastly, as the General Assembly found at Section 22.59(a)(5), the implementation of these laws and the rules thereunder is intended to protect and improve "the well-being of communities in this State that bear disproportionate burdens imposed by environmental pollution." As a state-wide program, this particular legislative finding as liberally construed applies not just to Marion and its vicinity, but to all communities in Illinois with active and inactive coal-fired plants. Throughout this adjusted standard proceeding, despite heretofore unlimited amendments of the petitions, the Board has afforded "meaningful public involvement" and it is now time to heed the concerns of our fellow citizens instead of safeguarding SIPC's profit margins with the requested

exemptions or finding of inapplicability.

The Board must fulfill its obligations to Illinois and its residents despite whatever the federal government unlawfully seeks to accomplish—or demolish—with actions such as the President's April 8, 2025 executive order grandiosely entitled "Reinvigorating America's Beautiful Clean Coal Industry." While the term "clean coal" is an oxymoron, the ongoing counterrevolution to dismantle environmental and other regulatory sustems that protect us in the US represents a program apparently conceived and implementeed by actual morons. The President cannot be allowed or condoned to usurp Congressional authority by declaring seemingly endless "emergencies" and issuing one proclamation after another as to national policy. For instance, this order states: "It is a national priority to support the domestic coal industry by removing Federal regulatory barriers that undermine coal production, encouraging the utilization of coal to meet growing domestic energy demands, increasing American coal exports, and ensuring that Federal policy does not discriminate against coal production or coal-fired electricity generation." While the federal "regulatory barriers" are discarded, the State of Illinois must stand firm and enforce our own laws for our own citizens. The feds may well act to revise or rescind "any guidance, regulations, programs, and policies within their respective executive department or agency that seek to transition the Nation away from coal production and electricity generation," but the Board does not need to follow those political and intellectual lemmings off the cliff of their own making. I mention this turmoil to tacitly acknowledge the very real threat to us in Illinois. In Illinois, the principle of state's rights, particularly regarding environmental protections, is enshrined in our State Constitution.

I strongly contend that our Constitutional right to a healthful environment in conjunction with these explicit legislative findings in Sections 2 and 22.59 of the Act are unequivocal mandates upon

the Board. The obvious meaningful objective of our laws and regulations is to make continuous progress in reducing pollution as environmental controls are made more stringent in order to mitigate the risks and rectify the damage that are increasingly documented at CCR surface impoundments. In closing, I ask that the Board seriously consider and take to heart the numerous pubic comments in support of the progress in protecting their health and well-being against the "disproportionate burdens imposed by environmental pollution." SIPC's relief of an adjusted standard or finding of inapplicability must be DENIED.

Submitted by Thomas Davis, Springfield Illinois
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