

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)	
)	
STANDARDS FOR THE DISPOSAL)	
OF COAL COMBUSTION RESIDUALS)	R 20-19(A)
IN SURFACE IMPOUNDMENTS:)	
PROPOSED NEW 35 ILL. ADM.)	(Rulemaking – Land)
CODE 845)	

NOTICE OF FILING

TO: Mr. Don A. Brown,	Vanessa Horton,
Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500	100 West Randolph Road, Suite 11-500
Chicago, Illinois 60601	Chicago, Illinois 60601
(VIA ELECTRONIC MAIL)	(VIA ELECTRONIC MAIL)

(SEE PERSONS ON ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board, a **COMMENT SUBMITTED BY THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP IN RESPONSE TO THE ENVIRONMENTAL GROUPS' AUGUST 6, 2021 RECOMMENDED RULES** copies of which are hereby served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP,

Dated: June 3, 2022

By: /s/ Melissa S. Brown

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**COMMENT SUBMITTED BY THE ILLINOIS ENVIRONMENTAL REGULATORY
GROUP IN RESPONSE TO THE ENVIRONMENTAL GROUPS'
AUGUST 6, 2021 RECOMMENDED RULES**

NOW COMES the Illinois Environmental Regulatory Group (“IERG”), by and through its attorneys, HEPLERBROOM, LLC, and pursuant to the Illinois Pollution Control Board’s (“Board”) Order of March 3, 2022, submits the following comment for the Board’s consideration in the above-referenced proceeding.

IERG is an Illinois non-profit corporation affiliated with the Illinois Chamber of Commerce and is comprised of fifty-two (52) member companies that are regulated by governmental agencies that promulgate, enforce, or administer environmental laws, rules, regulations, or other policies. IERG participated in the coal combustion residual (“CCR”) hearings in R 20-19, submitting pre-filed questions and questioning the Illinois Environmental Protection Agency’s (“Agency”) witnesses at hearing. IERG appreciates the opportunity to submit this comment.

I. Background

On February 4, 2021, the Board moved the proposed CCR rules in PCB R 20-19 to Second Notice. Second Notice Opinion and Order, *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845*, PCB R 20-19 (Feb. 4, 2021). In addition to proposing the rules for Second Notice, the Board

also directed the Clerk to open a sub-docket to explore the following 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.

Id. at 2, 106. The Board stated that, “[f]or each of these four subjects, the Board seeks more information and evidence, as well as proposed rules to consider.” *Id.* at 2.

The Board adopted the CCR rules in PCB R 20-19 on April 15, 2021. Final Opinion and Order, PCB R 20-19 (Apr. 15, 2021). The rules adopted in PCB R 20-19 implemented Section 22.59 of the Illinois Environmental Protection Act (“Act”), 415 ILCS 5, and are in large part consistent with the federal CCR rules at 40 CFR Part 257. Statement of Reasons, PCB R 20-19 at 10 (Mar. 30, 2020) (“The third purpose and effect of this proposed rule is to adopt the federal CCR rules in Illinois and obtain federal approval of Illinois’ CCR surface impoundment program.”).

On May 6, 2021, in this sub-docket proceeding, the Hearing Officer entered an order seeking comments, information and specific proposals on rule language from any interested party on any of the four subjects listed above. Hearing Officer Order, PCB 20-19(A) (May 6, 2021). Numerous public comments were received. The Environmental Groups’ public comment, filed on August 6, 2021, was the only comment to include proposed rule language. ELPC, Little Village Environmental Justice Organization, Prairie River Network, and Sierra Club’s (collectively ‘Environmental Groups’) Initial Comments and Recommended Rules, PCB R 20-19(A) (Aug. 6, 2021). The Environmental Groups’ August 6, 2021 Initial Comments and Recommended Rules included comments and explanations as to proposed rules, copies of the

rules and amendments proposed, and a number of exhibits. As to its Recommended Rules, the Environmental Groups proposed a new Part 846 to address historic ash fill, and proposed to amend existing Part 845 to address temporary CCR piles, fugitive dust monitoring, and environmental justice screening tools.

On March 3, 2022, the Board entered an Order in this sub-docket, providing background in this proceeding and summarizing the public comments received. Board Order, PCB 20-19(A) (Mar. 3, 2022). In the March 3, 2022 Order, the Board presented the Environmental Groups' Recommended Rules for a 90-day public comment period. *Id.*

II. The Environmental Groups' Proposal Must Satisfy the Board's Rulemaking Procedural Requirements

Part 102 of the Board's procedural rules governs the Board's rulemaking process and includes specific procedures and requirements that must be met. In particular, Section 102.202 includes the requirements for the contents of proposals for regulations of general applicability. 35 Ill. Adm. Code 102.202. Because the Environmental Groups' August 6, 2021 Recommended Rules constitute a proposal for regulations of general applicability, the Environmental Groups are required to adhere to the requirements of Part 102, Subpart B. However, the Environmental Groups' August 6, 2021 filing does not fully adhere to the requirements in Part 102, Subpart B, in particular Sections 102.200 and 102.202. Below are the requirements in Part 102 that have not been complied with, in whole or in part:

- Proposal must be served upon, in addition to Illinois EPA, the Attorney General and the Illinois Department of Natural Resources (Section 102.200)
- The language of the proposed rule, including any existing regulatory language proposed to be amended or repealed. Language being added must be indicated by underscoring, and language being deleted must be indicated by strike-outs. The proposed rule must be drafted in accordance with 1 Ill. Adm. Code 100.Subpart C (Section 102.202(a))
- Proposal must include a statement of reasons supporting the proposal, which must include the effect of the proposal and the environmental, technical, and economic

justification; all applicable factors in Section 27(a) of the Act; a statement of all affected sources and facilities and the economic impact of the proposed rules (Section 102.202(b))

- A synopsis of all testimony to be presented by the proponent at hearing (Section 102.202(c))
- Any material to be incorporated by reference within the proposed rules under Section 5-75 of the Illinois Administrative Procedures Act (Section 102.202(d))
- A descriptive title or other description of any published study or research report used in developing the rule, the identity of the person who performed such study, and a description of where the public may obtain a copy of any such study or research report. If the study was performed by an agency or by a person or entity that contracted with the agency for the performance of the study, the agency shall also make copies of the underlying data available to members of the public upon request if the data are not protected from disclosure under the Freedom of Information Act (FOIA) [5 ILCS 140]. [5 ILCS 100/5-40(3.5)] (Section 102.202(e))
- Unless the proponent is Illinois EPA or IDNR, a petition signed by at least 200 persons, under Section 28 of the Act and Section 102.410(b) (Section 102.202(g))
- For a proposed rule that amends an existing Board rule, a written statement or certification that the proposal amends the most recent version of the rule as published on the Board's Web site or as obtained from the Clerk (Section 102.202(i))

Additionally, if the Environmental Groups believe any of the above information required is inapplicable or unavailable, the Environmental Groups are required to provide a complete justification for the inapplicability or unavailability. 35 Ill. Adm. Code 102.202(k). No such justification was included in the Environmental Groups' August 6, 2021 filing.

In order for the Environmental Groups' Recommended Rules to be considered by the Board as a proposal for rulemaking, the Environmental Groups must amend or supplement their August 6, 2021 filing to comply with the requirements of Part 102. The above information is required so that the Board and participants in the rulemaking can have a complete understanding of the regulations being proposed and the effects of the proposal on regulated entities and the environment. The Board should not move forward with the Environmental Groups' Recommendation Rules until the Environmental Groups' proposal adheres to the procedural requirements in Part 102.

III. IERG Does Not Support the Environmental Groups' Recommended Rules

Overall, IERG does not support the Environmental Groups' Recommended Rules. The requirements in existing Part 845 already contain comprehensive fugitive dust requirements and provisions concerning environmental justice ("EJ"). *See* 35 Ill. Adm. Code 845.500 and 845.700(g)(6). Existing Part 845 is comprehensive and aims to protect human health and the environment from any impacts attributable to fugitive dust, historic fill areas, temporary storage piles, and provides protection of areas of EJ concern. Additional requirements concerning these topics is unnecessary and duplicative.

Furthermore, amendments to Part 845, and/or a new set of regulations governing coal ash, is also premature. Part 845 was adopted a little over one year ago, on April 15, 2021. The effects of the requirements of Part 845, including any benefits or potential shortcomings, have yet to be seen. There has not been adequate time to let the requirements in Part 845, or in the federal CCR rules, take effect in order to determine if additional requirements are necessary for the protection of the environment. Additionally, owners and operators of CCR surface impoundments regulated under existing Part 845 have already begun complying with the requirements of Part 845, including submitting applications for operating and construction permits and, in many cases, already completing closure. In this regard, the Environmental Groups' proposal is not clear as to what actual effect their Recommended Rules may have.

Moreover, the Environmental Groups' proposal is clearly a chance to take another bite at the apple in regulating CCR in Illinois. Part 845 was adopted pursuant to the Coal Ash Pollution Prevention Act (Public Act 101-171). The Coal Ash Pollution Prevention Act was hotly contested and heavily negotiated in the legislature, with numerous opportunities for the Environmental Groups to provide their position and comments on the proposed legislation. Once

the Coal Ash Pollution Prevention Act was adopted, Illinois EPA conducted extensive public outreach and hosted six listening sessions to receive input on drafting regulations pursuant to the Coal Ash Pollution Prevention Act.¹ Illinois EPA then filed its rulemaking proposal and the Board opened PCB R 20-19. The rulemaking proceeding in PCB R 20-19 was a robust rulemaking proceeding, with numerous days of hearing and chances for public participation. Further, during the most recent legislative session, multiple environmental groups shepherded proposed legislation that aimed to add additional requirements on specific CCR sites.² The Environmental Groups' proposal in this proceeding if adopted, would expand the scope of CCR regulation intended by the Coal Ash Pollution Prevention Act. IERG views the Environmental Groups' proposal as forum shopping in an attempt to persuade the Board to second guess or expand the scope of CCR regulation beyond the scope of the Coal Ash Pollution Prevention Act.

The Environmental Groups' Recommended Rules are unnecessary and duplicative, or at the very least premature. Environmental groups have had multiple bites at the apple at proposals to regulate CCR in recent years and are currently requesting that the Board go beyond the scope of CCR regulation envisioned by the legislature in the Coal Ash Pollution Prevention Act. The Board should not move forward with the Environmental Groups' Recommended Rules and should dismiss this sub-docket.

A. IERG Does Not Support the Recommended Rules Concerning Historic, Unconsolidated Coal Ash Fill

IERG opposes the Environmental Groups' proposal to add a new Part 846 governing historic, unconsolidated coal ash fill. In its Initial Comments, the Environmental Groups stated

¹ See Public Notice, publicly available at <https://www2.illinois.gov/epa/public-notices/Documents/Public%20Notice.pdf>.

² See Senate Bill 3073, 102nd Illinois General Assembly, publicly available at <https://www.ilga.gov/legislation/BillStatus.asp?DocNum=3073&GAID=16&DocTypeID=SB&LegId=137687&SessionID=110&GA=102>.

that rules should be adopted to regulate historic, unconsolidated coal ash fill because it has allegedly been a source of groundwater pollution similar to coal ash impoundments. Initial Comments at 1. The Environmental Groups then proposed adding a new Part 846, which contains requirements for removal of coal ash fill, corrective action, and cover systems, among other requirements.

The Environmental Groups proposed to define “CCR fill area” as follows:

“CCR fill area” means any area of land that holds an accumulation of CCR and stores or disposes of that CCR located at an active facility or inactive facility, including, but not limited to: (1) scattered ash and any ash that was placed on the surface of the land; (2) any area holding an accumulation of CCR; and (3) CCR fill used for construction, if that CCR does not meet the definition of “coal combustion by-product, 415 ILCS 5/3.135. “CCR fill area” does not include: (1) any area that meets the definition of “CCR surface impoundment,” 15 ILCS 5/3.143; 35 IAC 845.120; (2) any area holding an accumulation of CCR when that CCR meets the definition of “coal combustion by-product,” 415 ILCS 5/3.135; and (3) any area meeting the definition of “existing CCR landfill” under the federal Standards for the Disposal of Coal Combustion Residuals in Landfills and Surface Impoundments, 40 C.F.R. §257.53.

Proposed Section 846.110.

As seen above, the Environmental Groups proposed “CCR fill area” to mean an area of land that holds an accumulation of CCR, and stores or disposes of that CCR, that is not a CCR surface impoundment, coal combustion by-product, or a regulated CCR landfill.³ However, as referenced by the Environmental Groups in their Initial Comments, unconsolidated coal ash fill is already regulated via enforcement. In particular, the Act states that “[n]o person shall cause or allow the open dumping of any waste.” 415 ILCS 5/21(a). “Waste” is defined to include discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial and commercial activities. 415 ILCS 5/3.535. While the Environmental Groups

³ It is also important to note that proposed Part 846, as currently proposed, would appear to require permits for all permit-exempt on-site CCR landfills currently regulated by Part 811, but not currently permitted.

argued that a more proactive approach is necessary, the Environmental Groups did not explain or try to estimate how many sites in Illinois will be potentially impacted by proposed Part 846.

Initial Comments at 7 (“Second, some of these sites are known, but there are very likely many that are unknown.”) Based on the broad proposed definition of “CCR fill area,” IERG believes that the definition is far-reaching and would include a large number of sites across the State.

The proposal to regulate areas of historic CCR by rule is also unnecessary because any potential threat to human health or the environment is already addressed by applicable Board regulation (including 35 Ill. Adm. Code Part 620), remediation (including 35 Ill. Adm. Code Part 745), and enforcement mechanisms (as discussed above). Any additional regulation would be duplicative and unnecessary. Additionally, the Environmental Groups do not discuss the technical feasibility or economic reasonableness the requirements in proposed Part 846 would have on the unidentified sites. Proposed Part 846 would likely be burdensome and costly to regulated entities given its breadth and complexity. Given the broad potential impact of proposed Part 846, and the lack of technical or economic justification, the Board should not move forward with the Environmental Groups’ Recommended Rules regarding historic, unconsolidated coal ash fill.

B. IERG Does Not Support the Recommended Rules Concerning the Use of Temporary Storage Piles of Coal Ash

The Environmental Groups proposed to revise several portions of existing Part 845 to address the use of temporary storage piles of coal ash. Overall, IERG does not support the Environmental Groups’ Recommended Rules concerning use of temporary storage piles of coal ash. The requirements in existing Part 845 already provide protective limits on temporary storage piles, including liners and storage pads. Additionally, existing Part 845 provides Illinois EPA oversight concerning temporary storage piles because temporary storage piles must be

discussed in closure plans submitted as part of construction permit applications. Additional requirements concerning use of temporary storage piles is not needed, especially when the requirements in Part 845 were so recently adopted that the effects of the existing requirements have yet to be seen.

Furthermore, the Environmental Groups did not provide any justification for the proposed requirements. For instance, the Environmental Groups did not provide examples of temporary CCR storage piles in Illinois complying with existing Part 845 that have had a negative impact on air quality, groundwater, or surface water. Additionally, as with other aspects of their Recommended Rules, the Environmental Groups did not discuss the technical feasibility or economic reasonableness of the proposed requirements concerning use of temporary storage piles. Therefore, the Board should not move forward with the Environmental Groups' Recommended Rules concerning the use of temporary storage piles.

C. IERG Does Not Support the Recommended Rules Concerning Fugitive Dust

Overall, IERG does not support the Environmental Groups' Recommended Rules concerning fugitive dust requirements. The requirements in existing Part 845 already contain comprehensive fugitive dust requirements, including the requirement to prepare and operate in accordance with a CCR fugitive dust control plan. 35 Ill. Adm. Code 845.500. Fugitive dust from CCR surface impoundments is also already regulated by the Board's regulations at 35 Ill. Adm. Code Part 212 and standards promulgated by the Occupational Safety and Health Administration ("OSHA"). Additional requirements concerning fugitive dust at CCR surface impoundments is not needed, especially when the requirements in Part 845 were so recently adopted that the effects of the existing requirements have yet to be seen.

The Environmental Groups proposed to amend Section 845.500, which provides requirements for air criteria, including that the owner or operator of a CCR surface impoundment must adopt measures that will effectively minimize CCR from becoming airborne at the facility. 35 Ill. Adm. Code 845.500(a). The Environmental Groups proposed to amend Section 845.500 by adding a new subsection (c) that would require owners and operators of CCR surface impoundments to prepare and operate in accordance with a CCR fugitive dust monitoring and mitigation plan. *See Recommended Rules at proposed Section 845.500(c).* Among other requirements, proposed subsection (c) requires continuous Federal Equivalent Method (“FEM”) real-time PM₁₀ and PM_{2.5} monitors around the perimeter of the facility. *Id.* at proposed Section 845.500(c)(1). The owner or operator would be required to notify the Illinois EPA, in writing within 24 hours, if a monitor exceeds the applicable “Reportable Action Level.” *Id.* at proposed Section 845.500(c)(5). “Reportable Action Level” is defined in proposed amendments to Section 845.120. The proposed requirements concerning fugitive dust would be costly and burdensome on regulated entities. As noted herein, the Environmental Groups have not addressed the technical justification or economic reasonableness of their proposal. Additionally, the Environmental Groups have not explained the environmental benefit of the added monitoring and reporting requirements proposed. It is not clear from the Environmental Groups’ proposal exactly what the programmatic purpose of the proposed additional fugitive dust requirements is. The Environmental Groups did not provide any estimated metrics of the alleged benefits to the environment or human health that the proposed monitoring would accomplish. For the same reasons, IERG also objects to the Environmental Groups’ proposed amendments to Section 845.750(e), which proposes to include similar requirements at facilities that are closing in place. *See proposed Section 845.750(e).*

Additionally, the Environmental Groups proposed to amend Section 845.740, which provides the requirements for closure by removal. 35 Ill. Adm. Code 845.740. The Environmental Groups proposed to amend Section 845.740 by adding a new subsection (c)(3). First, it is not clear whether the Environmental Groups intended to replace existing Section 845.740(c)(3) with the new proposed subsection, or whether Environmental Groups proposed to insert a new provision, numbered (c)(3), and then propose to renumber the remaining subsections of Section 845.740(c) accordingly. The new proposed provisions recommended by the Environmental Groups provide additional project-specific CCR fugitive dust monitoring and mitigation plan requirements for those facilities closing by removal. *See* proposed 35 Ill. Adm. Code 845.740(c)(3). A portion of these proposed amendments include placing and operating continuous FEM real-time PM₁₀ and PM_{2.5} monitors in the vicinity of the surface impoundments at which closure activities are occurring, as well as at any transfer point and at where the CCR is being disposed of. *Id.* at proposed Section 845.740(c)(3)(A)-(B). Another portion of these proposed amendments include installation and continuous operation of a video camera and webcam on each truck, barge, or railcar transporting CCR and requires, on a monthly basis, an upload of the footage to the facility's state CCR website. *Id.* at proposed Section 845.740(c)(3)(C). Similar to the above discussion, the Environmental Groups have not provided justification for the technical feasibility or economic reasonableness for the proposed additional requirements. The proposed amendments would be costly and overly burdensome to regulated entities. While the Environmental Groups provided a few figures regarding costs to install and operate the proposed monitors, such cost estimates were not supported. Therefore, the Board should not move forward with the Environmental Groups' Recommended Rules regarding fugitive dust.

D. IERG Does Not Support the Recommended Rules Concerning Environmental Justice Screening Tools

Overall, IERG does not support any of the Environmental Groups' Recommended Rules concerning environmental justice ("EJ") screening tools. The requirements in existing Part 845 already contain environmental justice requirements; for example, environmental justice is factored into the considerations for closure prioritization in Section 845.700(g). Also, environmental justice in Illinois has been, and continues to be, addressed in other, more appropriate contexts, such as the Illinois legislature. Additional requirements concerning EJ at CCR surface impoundments is not needed, especially when the requirements in Part 845 were so recently adopted that the effects of the existing requirements have yet to be seen.

The Environmental Groups proposed to amend Section 845.700(g)(6), which defines what an area of EJ concern is in regards to closure prioritization in Section 845.700(g). The Environmental Groups proposed to add a new subsection (c), which provides that an area of EJ concern includes any area within the top 25% of scores based on a cumulative impacts assessment. *See* proposed Section 845.700(g)(6)(C). The proposed new subsection provides new criteria to identify an area of EJ concern, but does not address how the new provisions intersect with the existing provisions in Section 845.700(g)(6). Additionally, the Environmental Groups did not show that the proposed amendment would result in any additional facilities being categorized as Category 3.

Moreover, any proposed amendment to Section 845.700(g)(6) is a moot point and should not be considered by the Board. As explained above, existing Section 845.700(g)(6) provides criteria to identify an area of EJ concern as it relates to the closure prioritization in Section 845.700(g). Section 845.700(g)(1)(C) provides that CCR surface impoundment located in areas of EJ concern are categorized as Category 3. 35 Ill. Adm. Code 845.700(g)(1)(C). Section

845.700(h)(1) requires that Category 3 CCR surface impoundment owners or operators must submit its construction permit application by February 1, 2022. *Id.* at Section 845.700(h)(1). Because the application deadline for Category 3 surface impoundments has passed, any amendment to Section 845.700(g)(6) is moot and should not be adopted. If it is instead the Environmental Groups' intention to add this criterion so that it can be used in other regulations, existing or future, this is not the correct forum to do so. The Environmental Groups should instead avail themselves of the legislature if they are intending for the proposed criterion to have a wider impact outside of existing Part 845. The Board should not move forward with the Environmental Groups' Recommendation Rules regarding EJ screening tools.

IV. Conclusion

The Environmental Groups' Recommended Rules do not conform to the Board's rulemaking procedural requirements. Additionally, the requirements in existing Part 845 were recently adopted and the environmental effects and benefits have yet to be fully realized; as such, any amendments to Part 845 or additional CCR requirements at this time are premature. Moreover, the proposed rules would be costly and overly burdensome on regulated entities. The Environmental Groups have not provided any discussion as to technical feasibility or economic reasonableness of the proposed requirements. IERG urges the Board to not move forward with the Environmental Groups' Recommended Rules and dismiss this sub-docket.

IERG reserves the right to supplement this comment and respond to additional suggestions and/or comments filed in this sub-docket.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
REGULATORY GROUP

Dated: June 3, 2022

By: /s/ Melissa S. Brown

One of Its Attorneys

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CERTIFICATE OF SERVICE

I, the undersigned, on oath state the following:

That I have served the attached COMMENT SUBMITTED BY THE ILLINOIS ENVIRONMENTAL REGULATORY GROUP IN RESPONSE TO THE ENVIRONMENTAL GROUPS' AUGUST 6, 2021 RECOMMENDED RULES via electronic mail upon:

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That my email address is Melissa.Brown@heplerbroom.com

That the number of pages in the email transmission is 18.

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Date: June 3, 2022

/s/ Melissa S. Brown
Melissa S. Brown