

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF: )  
)  
COAL COMBUSTION WASTE (CCW) ASH ) R14-10  
PONDS AND SURFACE IMPOUNDMENTS ) (Rulemaking - Water)  
AT POWER GENERATING FACILITIES: )  
PROPOSED NEW 35 ILL. ADM. CODE 841 )

**NOTICE OF ELECTRONIC FILING**

To: **Attached Service List**

PLEASE TAKE NOTICE that on August 19, 2014, I electronically filed with the Clerk of the Illinois Pollution Control Board the **Post Hearing Comments of the Environmental Integrity Project, Environmental Law & Policy Center, Prairie Rivers Network, and Sierra Club**. A copy is attached hereto and herewith served upon you.

Dated: August 19, 2014

Respectfully submitted,



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PROPOSED NEW 35 ILL. ADM. CODE 841	)	

**POST HEARING COMMENTS OF**  
**ENVIRONMENTAL INTEGRITY PROJECT,**  
**ENVIRONMENTAL LAW AND POLICY CENTER,**  
**PRAIRIE RIVERS NETWORK, AND SIERRA CLUB**

The Environmental Integrity Project, Environmental Law and Policy Center, Prairie Rivers Network, and Sierra Club (collectively, “Environmental Groups”) submit the following responses to questions raised by participants during the Illinois Pollution Control Board’s (“Board”) July 24, 2014 hearing:

**1. The Environmental Groups’ response to the Illinois Environmental Protection Agency’s (“Agency”) Answer to Board Question 2 in its July 17, 2014 pre-filed answers, regarding the proposed definition of “surface impoundment” (July 24, 2014 Transcript at 16.)**

The Environmental Groups do not object to referencing “earthen materials” in the definition of “surface impoundment.” The Environmental Groups note that the Agency’s proposed definition of “surface impoundment” is not similar to any others in the Board’s regulations. The Environmental Groups suggest the Board consider adopting language that is more consistent with the United States Environmental Protection Agency’s (“USEPA”) proposed rule on coal ash impoundments and existing Board regulations.

Below are five different definitions for “surface impoundment”: (1) the Environmental Groups’ most recently proposed definition; (2) the Agency’s most recently proposed definition; (3) the United States Environmental Protection Agency’s proposed definition at 75 Fed. Reg. 35,239-240; (4) the existing definition in 35 Ill. Adm. Code 720.110; and (5) the existing definition in 35 Ill. Adm. Code 810.103. The Environmental Groups’ most recently proposed definition is similar to the existing definition of “surface impoundment” in the Board’s solid waste regulations, at 35 Ill. Adm. Code 810.103, while the Agency’s is not similar to any others.

**ENVIRONMENTAL GROUPS:**

"Surface impoundment" means a natural topographical depression, man-made excavation, or diked area that is designed to hold liquid waste or wastes containing free liquids, and which is not a landfill permitted under Illinois Solid Waste Disposal rules at 35 Ill. Adm. Code, Parts 813 or 814.

**IEPA:**

"Surface impoundment" means a natural topographical depression, man-made excavation, or diked area where earthen materials provide structural support for the containment of liquid wastes or wastes containing free liquids, and which is not a landfill, as defined in 35 Ill. Adm. Code 810.103.

**USEPA:**

*CCR surface impoundment* or *impoundment* means a facility or part of a facility which is a natural topographic depression, man-made excavation, or diked area formed primarily of earthen materials (although it may be lined with man-made materials), which is designed to hold an accumulation of CCRs containing free liquids, and which is not an injection well. Examples of CCR surface impoundments are holding, storage, settling, and aeration pits, ponds, and lagoons. CCR surface impoundments are used to receive CCRs that have been sluiced (flushed or mixed with water to facilitate movement), or wastes from wet air pollution control devices, often in addition to other solid wastes.

**35 Ill. Adm. Code 720.110 (from Board's hazardous waste regulations):**

"Surface impoundment" or "impoundment" means a facility or part of a facility that is a natural topographic depression, manmade excavation, or diked area formed primarily of earthen materials (although it may be lined with manmade materials) that is designed to hold an accumulation of liquid wastes or wastes containing free liquids and which is not an injection well. Examples of surface impoundments are holding, storage, settling and aeration pits, ponds, and lagoons.

**35 Ill. Adm. Code 810.103 (from Board's solid waste regulations)**

"Surface impoundment" means a natural topographic depression, a man-made excavation, or a diked area into which flowing wastes, such as liquid wastes or wastes containing free liquids, are placed. For the purposes of this Part and 35 Ill. Adm. Code 811 through 815, a surface impoundment is not a landfill. Other Parts of 35 Ill. Adm. Code: Chapter I may apply, including the permitting requirements of 35 Ill. Adm. Code 309.

**2. Could the phrase "could be impacted" be substituted for "nearby" in Sections 841.200 and 841.205? (July 24, 2014 Transcript at 23.)**

The Agency's suggestion that "could be impacted" would be a reasonable substitution for the word "nearby" in subsections 841.200(c)(3)-(5) and 841.205(c)(6) is acceptable to the Environmental Groups. The Environmental Groups' proposed Section 841.200(c) could be amended as follows:

- (3) Identification of ~~nearby~~ surface water bodies that could be impacted by a release from the unit and downgradient hyporheic zones where exchanges between groundwater and surface water occurs;
- (4) Identification of ~~nearby~~ pumping wells that could be impacted by a release from the unit, including but not limited to all downgradient or downstream community water supplies;
- (5) Identification of any potential hydrologic connection between the unit and any ~~nearby~~ surface water bodies or pumping wells that could be impacted by a release from the unit;

The Environmental Groups' proposed Section 841.205(c)(6) could be amended as follows:

- (6) establish the hydraulic gradient between the unit and any ~~nearby~~ surface water that could be impacted by a release from the unit, including as necessary the installation and/or identification of monitoring points for measuring water levels and collecting water samples from multiple depths within the hyporheic zone where exchange between groundwater and surface water occurs.

**3. What is the Environmental Groups' citation for the following prefiled answer: "The Agency has testified that earlier in this proceeding that it suspected that the liners at some Midwest Generation impoundments were, in fact, incapable of severing the connection between the impoundment and groundwater."? (July 24, 2014 Transcript at 37-38.)**

The exchange in question can be found in the transcript for the Board's February 26, 2014 hearing, at page 227, line 21, to page 228, line 9. The exchange reads as follows:

MR. ARMSTRONG: And my question was that with respect to the impoundments at the Midwest Generation facilities that the Agency through a compliance agreement required to be relined, those impoundments. During the time that they were, what the Agency considers to be inadequately lined, does the Agency believe, suspect, that they caused contaminants to leach into groundwater?

MS. FRANZETTI: Same objection.

MR. DUNAWAY: The Agency did issue violation notices on certain facilities so, therefore, we had suspicion that there may have been a leak from one or more of their impoundments.

**4. What permits are necessary (if any) to install a piezometer in a stream or other water body? (July 24, 2014 Transcript at 42).**

Piezometers would be used to assess the hydrology of the hyporheic zone as part of a groundwater monitoring system. For groundwater monitoring compliance determinations under Illinois law, permits may be required for monitoring wells for community water supply wells. *See* 35 Ill. Adm. Code 620.505(a)(5)(D). The Environmental Groups are not aware of

any other permit requirement for installing monitoring wells or other monitoring devices to measure groundwater quality and contamination under Part 620.

The installation of piezometers in a stream bed could be an activity that requires discharge of dredged or fill material into a waterway, which is prohibited by the Clean Water Act unless the user has specific authorization. 33 U.S.C. § 1311(a). If the installation did require a discharge, it likely could be authorized by the United States Army Corps of Engineers (“Corps”) under a streamlined nationwide or regional general permit.

The authorization to discharge dredged or fill material is made by the Corps and takes the form of either an individual permit, issued on a case-by-case basis, *id.* § 1344(a), or a general permit, which covers a category of activities. *Id.* § 1344(e). General or nationwide permits (“NWP”) may be issued on a state, regional, or national level, *id.* § 1344(e)(1), and are designed to regulate activities with minimal impacts “with little, if any, delay or paperwork.” 33 C.F.R. § 330.1(b). Activities that fall within the scope of a general permit or NWP do not require individual notice and a hearing before going forward. *See, e.g.*, 33 C.F.R. § 330.2(c).

The installation of a piezometer, if it led to any discharge of material into a waterway subject to the Clean Water Act, would likely fall within the scope of a nationwide permit or regional general permit. For example, the Chicago District of the Army Corps of Engineers has issued a regional general permit for Cook, DuPage, Kane, Lake, McHenry and Will Counties for “minor discharges and dredging” of no more than 25 cubic yards below the ordinary high water mark. *See* Chicago District Regional Permit Program, April 1, 2012, <http://www.lrc.usace.army.mil/Portals/36/docs/regulatory/pdf/RPP2012.pdf>. NWP 5, reissued on March 19, 2012, covers the use of “Scientific Measurement Devices,” defined as devices “whose purpose is to measure and record scientific data, such as . . . water recording and biological observation devices, water quality testing and improvement devices, and similar structures.” Reissuance of Nationwide Permits, 77 Fed. Reg. 10184, 10271 (February 21, 2012). NWP 18, also reissued on March 19, 2012, covers “Minor Discharges” and allows activities that meet the following criteria: “(a) The quantity of discharged material and the volume of area excavated do not exceed 25 cubic yards below the plane of the ordinary high water mark or the high tide line; (b) The discharge will not cause the loss of more than 1/10-acre of waters of the United States; and (c) The discharge is not placed for the purpose of a stream diversion.” *Id.* at 10273. Illinois has issued Section 401 water quality certifications for both NWP 5 and 18, the latter with additional regional conditions. *See* Illinois Environmental Protection Agency, *Re: Final Notice of Issuance of Nationwide Permits* (Apr. 2, 2012), available at <http://www.epa.state.il.us/public-notices/2011/usace-nationwide-permit/nationwide-permit.pdf>.

**5. To Dr. Soderberg: What is the shortest timeframe in which a remediation project you have worked on achieved compliance with groundwater standards? (July 24, 2014 Transcript at 53.)**

Groundwater remediation sites that Dr. Soderberg has personally worked on include two rocket propellant-related facilities in California and Oklahoma, one natural gas storage facility in Mississippi, one petroleum product release site in California, one natural gas pipeline facility in Pennsylvania, one animal feed manufacturing facility in Florida, one phosphate mine in Florida,

and one uranium mill tailings site in New Mexico. Groundwater remediation is either ongoing or still at the site characterization stage for these sites.

**6. Does the Environmental Groups' proposed 841.405(a)(2)(B)(i)-(ii) need to be clarified? (See July 24, 2014 Transcript at 55-58.)**

The Environmental Groups do not believe that any clarification is needed. Under Section 841.300 in both the Agency's and the Environmental Groups' proposed rules, the owner or operator of every unit subject to the rules would be required to provide confirmation sampling for exceedences of groundwater quality standards. This is so even if there have been groundwater quality exceedences that predate the effective date of the rules. It is this confirmation which triggers the requirement of a corrective action plan and, under the Environmental Groups' proposal, closure of the impoundment. *See* Proposed Sections 841.300(b)(2) and Section 841.405.

To clarify any perceived ambiguity in the Environmental Groups' proposed language, the Environmental Groups suggest that the following revision could be made (in bold):

- B) ~~If the unit is inactive, a closure plan must be submitted to the Agency within 180 days from the submission of groundwater monitoring results confirming an exceedence of the applicable groundwater quality standards attributable to a release from a unit at an approved compliance point.~~ The unit shall be closed within five years of the Agency's approval of the closure plan or, within five years from the submission pursuant to Section 841.300 of groundwater monitoring results that confirm an exceedence of the applicable groundwater quality standard attributable to a release from the unit at an approved compliance point, whichever occurs later, unless the Agency approves a longer timeline. The Agency may allow up to ten years for closure by removal of CCW and leachate in accordance with a closure plan approved by the Agency. The requirement to close the impoundment following the exceedence of an applicable groundwater quality standard is waived if:
- i) no groundwater quality standard applicable at the time of the exceedence is exceeded for four consecutive quarters during the five years following the groundwater monitoring results confirming the exceedence; or
  - ii) the unit meets the requirements of Section 841.450 within five years following the groundwater monitoring results confirming the exceedence.

**7. What is the difference between a "treatment operation" and a "waste disposal operation"? (July 24, 2014 Transcript at 79.)**

The Illinois Environmental Protection Act defines "disposal" in 415 ILCS 5/3.185 as "the discharge, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste into or on any land or water or into any well so that such waste or hazardous waste or any

constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.”

The Act defines “treatment” in 415 ILCS 5/3.505 as “any method, technique or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any waste so as to neutralize it or render it nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.”

**8. The Environmental Groups’ response to the Agency’s Answer to Board Question 4 in its July 17, 2014 pre-filed answers, regarding proposed Section 841.315. (July 24, 2014 Transcript at 85.)**

The Agency’s proposed language is acceptable to the Environmental Groups.

**9. Is the Illinois National History Survey part of the Illinois Department of Natural Resources or the University of Illinois? (July 24, 2014 Transcript at 102-03.)**

The Illinois Natural History Survey is a division of the University of Illinois. *See* Illinois Natural History Survey, *How INHS Works*, available at <http://www.inhs.illinois.edu/organization/admin/> (“The Illinois Natural History Survey is a Division of the Prairie Research Institute at the University of Illinois.”). INHS once was a division of the Illinois Department of Natural Resources, but it was formally transferred from IDNR to the University of Illinois’ Institute for Natural Resources Sustainability in 2008, as stated in INHS’s Fiscal Year 2008 Annual Report:

Founded in 1858, the Survey, a division of the Illinois Department of Natural Resources, is headquartered on the campus of the University of Illinois at Urbana-Champaign. . . . Note: As of July 1, 2008, INHS was transferred from the Illinois Department of Natural Resources to the University of Illinois Institute for Natural Resources Sustainability.

Illinois Natural History Survey, *Annual Report FY2008*, <http://www.inhs.illinois.edu/files/6913/3916/6941/AnnRpt08.pdf>.

**10. Regarding the study being performed by INHS for Prairie Rivers Network, what were the sample sizes? (July 24, 2014 Transcript at 105.)**

For snails, the researchers collected 5 composite samples of 1 gram of wet material at each location. The snails are much too small to analyze individually, hence composite samples were collected. The sample size of 5 allowed for reasonable measure of the variation between samples. As the data shows, there was very little, and in some cases no, overlap in ranges of concentrations of elements in snails between the up- and downstream sites, giving the researchers much confidence that the detected differences in concentrations are real.

For sunfish, the researchers used a target sample size of 10, since there could be greater variability in this larger, mobile animal (compared to snails). The researchers did not distinguish gender. The researchers did use a less variable size range, i.e. they excluded smaller and larger

individuals. The sample size of 10 allowed statistical power to be able to detect reasonably large effects, i.e. differences in concentrations.

**11. To Dr. Soderberg, please provide answers to the following:**

- a. What is the design basis for requiring each earthen dam to have instruments for monitoring the water content or the pore pressure?**
- b. How is water content of material within an existing earthen dam determined?**
- c. At which locations in a dam should water content be monitored?**
- d. How is pore water pressure within an earthen dam determined?**
- e. At which locations in a dam should pore water pressure be monitored?**

**(July 24, 2014 Transcript at 124-25.)**

USEPA's *Technical Report—Design and Evaluation of Tailings Dams* (Aug. 1994) emphasizes the importance of installing instrumentation "...in the embankment or its foundation to monitor changes which may be critical to stability...", and lists measuring pore water pressure as one potentially useful parameter. This guidance lists various types of piezometers that can be used for this purpose. *Id.* at 39.

The State of Washington, in its guidance on dam safety, provides more detail on the motivation, design and frequency of such monitoring, including the use of piezometers or porous stone sensors. Washington State Department of Ecology, *Dam Safety Guide Part III: An Owner's Guidance Manual* (July 1992) at 54-59, available at <https://fortress.wa.gov/ecy/publications/summarypages/9255c.html> and attached hereto as Exhibit A. Other types of water content sensors can be useful for monitoring slope stability. Pan et al., *Data Assimilation with Soil Water Content Sensors and Pedotransfer Functions in Soil Water Flow Modeling*, Soil Science Society of America Journal (2011), available at [http://www.ars.usda.gov/SP2UserFiles/ad\\_hoc/12655300EnvironmentalTransport/SSSAJ2011reprint.pdf](http://www.ars.usda.gov/SP2UserFiles/ad_hoc/12655300EnvironmentalTransport/SSSAJ2011reprint.pdf) and attached hereto as Exhibit B; Tohari et al., *Laboratory Rainfall-Induced Slope Failure with Moisture Content Measurement*, Journal of Geotechnical and Geoenvironmental Engineering (May 2007), available at [http://ascelibrary.org/doi/abs/10.1061/\(ASCE\)1090-0241\(2007\)133%3A5\(575\)](http://ascelibrary.org/doi/abs/10.1061/(ASCE)1090-0241(2007)133%3A5(575)) and attached hereto as Exhibit C.

Water content and pore water pressure are functionally related, and this function can be estimated through a laboratory study of a given soil. Both piezometers and water content sensors can be connected to a wireless data delivery network. A primary objective of monitoring water content or pore water pressure in an embankment is to locate the phreatic surface and track its movements over time, and this objective should guide the location of monitoring points. *See* Exhibit A.

Controlling the pore pressure or water content during construction of an earthen dam is important for optimizing the compaction of soils and sediments to improve their structural properties. Knowing the optimal water content determined for the construction of a given earthen dam could be useful information for dam safety inspectors. Applicable guidance is available from the U.S. Department of Interior, Bureau of Reclamation, in its design standards for embankment dams



(USDOJ, *Design Standards No. 13, Embankment Dams, Chapter 4: Static Stability Analysis Phase 4 (Final)*, (Oct. 2011), available at [www.usbr.gov/pmts/tech\\_services/engineering/design/DS13-4.pdf](http://www.usbr.gov/pmts/tech_services/engineering/design/DS13-4.pdf) and attached hereto as Exhibit D.

In further response to the above questions, see also the following statements from USEPA's *Technical Report - Design and Evaluation of Tailings Dams* (Aug. 1994):

**page 21:**

“When an embankment is constructed on a foundation of saturated impervious clay, for example, the loading of the embankment will create excess pore water pressure in the foundation material. Because the immediate loading is taken by the water phase in the foundation material, there is no increase in shear strength and the rapid increase in loading can precipitate embankment failures extending through the foundation.”

**page 22:**

“Excessive pore pressure within the embankment may lead to exceedence of the sheer strength of the fill material, resulting in local or general slope failure. Additionally, high pore pressures within or beneath the embankment face may result in uncontrolled seepage at the dam face leading to piping failure (discussed below). Similarly, seepage through weak permeable layers of the foundation may result in piping or exceedence of soil shear strength, causing foundation subsidence and compromising the stability of the overlying embankment. These and other threats to embankment stability may be partially reduced through seepage control. Generally speaking, seepage control may be affected through the establishment of zones of differing permeability up-stream of, beneath, and within the embankment, either through drainage systems or low permeability layers or cores, or both.”

**page 39:**

“Instrumentation should be installed in the embankment or its foundation to monitor changes which may be critical to stability, and in order to help predict unstable conditions. Instruments can be installed to measure pore water pressures, seepage flows, embankment movements, and total pressures. Pore water pressure in soils may be measured with piezometers. The Casagrande piezometer, a simple and effective piezometer, has a porous ceramic stone element and is designed to measure pressure changes with a minimum lag time. It is installed in a hole drilled into the embankment or its foundation, and water levels are measured by a probe lowered down the hole. Similar types can be installed using porous plastic, porous bronze, perforated steel casing, or steel casing and well points.”

**pages 16-17:**

“Factors that affect the phreatic surface in the embankment affect its stability. These factors include the depositional characteristics of the tailings (permeability, compressibility, grading, pulp density, etc.) and site-specific features such as foundation characteristics and the hydrology and hydrogeology of the impoundment area and its upstream catchment area. Changes in the phreatic surface in a waste embankment will change the pore water pressures and consequently the resistance of the dam materials to sliding. Changes to the phreatic surface can be caused by: malfunction of drainage systems, freezing of surface layers on the

downstream slope of the dam, changes in construction method (including the characteristics of the placed material), and changes in the elevation of the pond.”

**12. Do onsite landfills that are exempt from permitting under Illinois regulations for landfills have to provide financial assurance? (July 24, 2014 Transcript at 141.)**

The Environmental Groups interpret this question as referring to landfills that would be exempt from permitting pursuant to 415 ILCS 5/21(d)(1)(i) (exempting from permitting requirements “(i) 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.”) Such landfills are not required to provide financial assurance pursuant to 415 ILCS 5/21.1.

Notably, the Board and courts consistently have interpreted the exemption in 415 ILCS 5/21(d)(1)(i) to apply only to “those on-site facilities that generate minor amounts of waste that can be disposed of without a significant threat of environmental harm.” *See People v. Dixon-Marquette Cement, Inc.*, 343 Ill. App. 3d 163, 175 (2d Dist. 2003) (citing Board and court decisions).

**13. Can the Agency as a general matter require a bond or other security measure when issuing permits? (July 24, 2014 Transcript at 141.)**

415 ILCS 5/39 provides as follows: “Except as otherwise provided in this Act, a bond or other security shall not be required as a condition for the issuance of a permit.”

**14. Do the Environmental Groups propose any further revisions to Subsection 841.105(b)(2)? (July 24, 2014 Transcript at 158.)**

The Environmental Groups do not propose any further revisions to subsection 841.105(b)(2). As discussed at hearing, it is probable that a unit that has initiated but not yet completed closure will still be “operated,” under the Environmental Groups’ proposed definition of “operate,” and therefore would not be exempt from the rule. This conforms with the Environmental Groups’ intent: that any unit continuing to receive coal combustion waste, stormwater flow, or precipitation should be within the scope of the rule.

Additionally, at an earlier hearing, Ms. Barkley had been asked to supply an address for the website at which LiDAR data for the State of Illinois is publicly available. LiDAR data used by the Illinois State Geological Survey is available at the following site:

<http://crystal.isgs.uiuc.edu/nsdihome/webdocs/ilhmp/county/dsm-dtm.html>.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I, Andrew Armstrong, hereby certify that I have filed the attached **Post Hearing Comments of the Environmental Law & Policy Center, Environmental Integrity Project, Sierra Club, and Prairie Rivers Network** in R14-10 upon the attached service list by depositing said documents in the United States Mail, postage prepaid, in Chicago, Illinois on August 19, 2014.

Respectfully submitted,



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