

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	R 2020-019
STANDARDS FOR THE DISPOSAL)	
OF COAL COMBUSTION RESIDUALS)	(Rulemaking - Water)
IN SURFACE IMPOUNDMENTS:)	
PROPOSED NEW 35 ILL. ADM.)	
CODE 845)	

NOTICE OF FILING

TO: Persons identified on Board's CCR service list on its website:
<https://pcb.illinois.gov/Cases/GetCaseDetailsById?caseId=16858>.

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached Pre-Hearing Comment of the Illinois Attorney General's Office a true and correct copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
By KWAME RAOUL,
Attorney General of the State of Illinois

BY: /s/ Stephen J. Sylvester
STEPHEN J. SYLVESTER
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CERTIFICATE OF SERVICE

I, STEPHEN J. SYLVESTER, an attorney, do certify that on August 10, 2020, I caused true and correct copies of the Notice of Filing and Pre-Hearing Comments of the Illinois Attorney General's Office served via email upon the persons with email addresses named on the Service List provided on the Board's website, available at:
<https://pcb.illinois.gov/Cases/GetCaseDetailsById?caseId=16858>.

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PRE-HEARING COMMENT OF THE ILLINOIS ATTORNEY GENERAL'S OFFICE

The Illinois Attorney General's Office, on behalf of the People of the State of Illinois (“People”), notes a procedural issue for the Board’s consideration in advance of upcoming hearings. Several separate enforcement matters are currently pending before the Board involving a number of coal combustion residual (“CCR”) surface impoundments: 1) [Sierra Club et al. v. Midwest Generation](#), PCB 13-15; 2) [Sierra Club et al. v. City of Springfield](#), PCB 18-11; 3) [Sierra Club v. Illinois Power Generating Co. et al.](#), PCB 19-78; and 4) [Prairie Rivers Network v. Dynegy Midwest Generation, LLC](#), PCB 19-93. The Illinois EPA also has referred alleged violations relating to some CCR surface impoundments to the Illinois Attorney General’s Office for enforcement action under the Act. Further, on July 27, 2020, AmerenEnergy Medina Valley Cogen, LLC, and Union Electric Company filed a lawsuit against Illinois EPA, Director John Kim and Bill Buscher, an Illinois EPA witness in support of the rulemaking, in Sangamon County Circuit Court, challenging the applicability of Section 22.59 of the Act, 415 ILCS 5/22.59 (2018), to four specific ponds at the retired Hutsonville and Meredosia plants.

As required by Section 22.59(g), the “Illinois EPA has developed a *rule of general applicability* for [CCR] surface impoundments at power generating facilities.” *See* Statement of Reasons at 1 (emphasis added). Already in pre-filed questions to Illinois EPA, though, some participants have posed detailed questions explicitly related to specific sites. It is also foreseeable

that Illinois EPA may be asked additional follow-up questions at hearing, seeking its opinions about specific sites for which litigation is ongoing or contemplated.

The Board might remind participants in this rulemaking proceeding that the Board serves “both quasi-judicial and quasi-legislative functions.” *County of Will v. Pollution Control Bd.*, 2019 IL 122798, ¶ 42. “When the Board conducts hearings on complaints charging putative violations of the Act, it acts in a quasi-judicial capacity.” *Id.* “When it promulgates regulations, it acts in a quasi-legislative capacity.” *Id.* This is not an adversarial proceeding to litigate contested issues of fact or expert opinion regarding specific impoundments or facilities. This is a rulemaking of general applicability to implement a time-limited statutory requirement. While it is reasonable for the participants to seek to understand the intended legal operation of the proposed rules, it does not seem appropriate for the Illinois EPA to be required to offer expert opinions about specific sites that are, or may be, in litigation. Such inquiries not only test the bounds of relevance in this rulemaking of general applicability, but also threaten to prejudice the interests of the People, the Illinois EPA, other participants, and even the Board itself in separate enforcement matters.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
by KWAME RAOUL,

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