ECO-JUSTICE COLLABORATIVE
Building a Just and Sustainable World

September 24, 2020

Mr. Don Brown, Clerk
Illinois Pollution Control Board
100 W. Randolph
Suite 11-500
Chicago, IL 60601

Re: STANDARDS FOR THE DISPOSAL OF COAL COMBUSTION RESIDUALS IN SURFACE IMPOUNDMENTS: PROPOSED NEW 35 ILL. ADM. CODE 845

Dear Mr. Brown:

On behalf of the Eco-Justice Collaborative, we want to thank the Board for the opportunity to provide comments on the Draft Rules for Combustion Residual Surface Impoundments filed with the Clerk on March 30, 2020. Our comments, outlined below, focus on Section 845.240, Pre-application Public Notification and Public Meeting; and Section 845.260, Draft Permit Public Notice and Participation, specifically as they relate to public involvement.

Background

Prior to establishing Eco-Justice Collaborative, we served as owners and principals of a land use and environmental planning firm in the Chicago area. In addition to providing services in land use planning and landscape architecture, our firm specialized in environmental impact analysis and the implementation of agency/public involvement programs for large public works projects that fell under the requirements of the National Environmental Policy Act. From major highway construction in Illinois, Iowa, Wisconsin and Michigan to the 270 mile High Speed Rail from Chicago to St. Louis, MO, we worked for nearly 25 years integrating the three threads of engineering, environmental impact and public participation in project planning. In these and scores of other projects, meaningful public participation led to better decisions, better designs and less public and political contention.

Over the past five years, Eco-Justice Collaborative has advocated the closure of the three unlined and leaking coal ash impoundments at the Dynegy-Vermilion Station. Our role has been to educate local residents about the coal ash problem on the Middle Fork, keep them apprised of the status of the regulatory review steps, and facilitate their engagement as informed participants in the process. Statutorily, the current

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process provides very limited opportunity for the public to understand, let alone influence a decision that will have a significant and long-lasting impact on their communities. Through grassroots organizing, EJC has endeavored to bring about greater transparency to the process and open up opportunities for the public to have a voice in agency decision-making.

SB9, the Coal Ash Pollution Prevention Act, in large part grew out of this organized effort, with local advocacy groups and residents of the Danville region coming together and calling on their elected representatives to address the coal ash problem. It is in the interest of all who have worked so hard to get to this point, to make sure that the rules that result from SB9 provide the strongest protections for all communities across the state that live with the threat of coal ash pollution.

The spirit, intent and language of the Coal Ash Pollution Prevention Act call for meaningful public involvement, and for good reason. The decisions that our state EPA will make regarding the handling, storage and permanent placement of coal ash will undeniably have long-term effects on the health, and safety of thousands and thousands of people throughout Illinois. The quality of drinking water for generations of men, women and children will be determined by the permits issued over the next several years. The safety risks of coal ash discharges will be weighed and reflected in the plans approved by IEPA technical staff. For those who will be approving these proposals, their work should not be seen as routine, perfunctory approvals of minor actions. We would argue that the potential impacts of decisions made as a result of implementing the rules under consideration are as great or greater than major public works projects warranting months of study and extensive public involvement programs under the National Environmental Policy Act. These projects have far reaching effects and deserve the input of all stakeholders, including the public who may ultimately bear the risks, the costs and the health impacts of the decisions.

What is Meaningful Public Involvement?

The term “meaningful public involvement” is used repeatedly and purposefully in the Coal Ash Pollution Prevention Act. But what does this mean?

Too often, public involvement is approached as a necessary inconvenience, a statutory requirement, a box to check off, or a way to document that the public has been informed of a proposed action and has subsequently had an opportunity to express their comments before the decision-makers move on. This may be expedient, but it is not meaningful, and invariably raises public distrust in the process. It also denies the process of interaction that could lead to better decisions.

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After nearly thirty years of experience developing and implementing public involvement programs for major public projects, it is our opinion that in order to be meaningful, public involvement must:

1. Be open and accessible to all stakeholders, interested parties and those who desire their voices to be heard, regardless of their positions on the proposal;
2. Make reasonable efforts to reach out and inform participants of both the specifics of the proposal, as well as the key steps in the decision-making process;
3. Be transparent, making readily accessible key documents and information used in the decision-making process;
4. Provide adequate time and opportunity for participants to review and provide input on the proposal; and
5. Require decision-makers to be responsive to public input, justifying their intended actions or requiring changes to the proposal.

It is from this perspective that we offer the following comments and suggestions on the proposed draft rule.

Comments

Section 845.240 b)

We believe that it is appropriate for the owner or operator of a CCR surface impoundment to hold public meetings in order to explain their proposal and take questions from stakeholders. Section 845.240 requires at least two public meetings to be held at least 30 days before the owner or operator submits its construction permit application to the IEPA. Notification requirements are outlined in subsection b). While Section 845.240 (e) requires the owner/operator to post documents on their website at least 14 days prior to the meetings, the rule is silent on when notification of the meeting must be issued. As currently written, the applicant could post documents on their website without notice and then issue and distribute their meeting notice just a few days before the meeting. This surely would minimize public participation.

Sufficient time to review relevant decision-making documents, is essential in giving legitimacy to the meetings Thirty days is the minimum time frame needed for notice and to provide access to documents, if you really want people to be aware of the meeting, understand what is being proposed and provide meaningful feedback. Less than that and you are merely checking off a box and not really interested in meaningful participation. The excuse that allowing too much time prior to the initial public meeting could affect application filing deadlines is poor justification for curtailing meaningful public participation in the interest of regulatory expediency and directly contradicts legislative intent.

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Section 845.240 b) 1) - 3) and c)
For meaningful public participation, notification of the meetings should involve reasonable efforts to ensure broad outreach. The notification requirements for the Pre-Application Public Meeting in the draft rule now require only mail or hand delivery to residents within a one-mile radius of the facility, posting notification on the owner or operator's social media sites and posting hard copies of notices in conspicuous locations within 10-miles of the facility. In an age of almost unlimited electronic communication, this seems like a very dated approach and one that would unnecessarily limit the dissemination of information to the full body of individuals who would want to attend. If the intent is to encourage participation we recommend the following simple measures, all of which should be well within the capabilities of the communications department of a major utility:

- Send the notice by either direct mail or electronic mail to all elected officials representing areas within ten miles of the site, including state and federal senators and representatives, mayors, county board chairs, city clerks and township supervisors;

- Notify primary broadcast media serving the area, as well as all newspapers with at least weekly general circulation in English and those published in common languages spoken within a five-mile radius of the site;

- Notify key civic and environmental organizations who have formally notified the Agency or owner/operator of their interest in the status of the site;

- When a proposed construction project or any related activity is located in an area with a significant number of non-English speaking residents, the applicant should demonstrate that it has taken reasonable measures to make its notification available in the appropriate non-English languages. In these areas, the notice should contain instructions on how to request that an interpreter be present at the public meetings.

Section 845.240 e)
This section specifies that at least 30 days prior to the public meeting, the owner or operator must post on the owner or operator's publicly accessible internet site, all documentation relied upon in developing its proposed plan for corrective action or closure. We believe that the use of the phrase "all documentation relied upon" is unduly vague and would not ensure that information of sufficient detail is posted by the owner or operator. While each site may have some unique considerations, there will be some essential decision-making documents common to all sites, such as a thorough evaluation of all alternatives considered, including the clean closure option. We suggest that the following be listed as a threshold of compliance:

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- For New Action Construction, the information and documents identified in 845.220(b)

- For Corrective Action Construction, the information and documents identified in 845.220(c)

- For Closure Construction, the information and documents identified in 845.220(d)

Section 845.260
Thirty days is a very short period of time for the public to be notified of a public hearing, review the application materials and provide final comments. Given the magnitude and permanence of the proposals under consideration, we believe that a minimum period of 30 days should be provided before the hearing and that the closure of the comment period should extend for at least 15 days after the hearing. This is a standard set by the National Environmental Policy Act for major projects. The 15 days post hearing allows public comments to be additionally informed by the hearing proceedings.

We ask that the draft rule be revised to require the Agency to accept written comments from interested persons on the draft permit determination for *45* days following the circulation of the public notice pursuant to subsection b), and that *a*ll written comments submitted during the *45*-day comment period be retained by the Agency and considered in the formulation of its final determination with respect to the permit application.

No decision is going to please everyone. But each decision should be defensible and be supported by the best information, analysis and professional judgement available. In all cases, the Agency should respond to substantive comments with specifics and documentation, not generalized summary statements. Similar comments could be grouped together, but all concerns should be addressed.

As with the notification for the Pre-Application Public Meeting discussed under Section 845.240, the distribution of the Notice of Public hearing should be far reaching so that all who wish to participate are made aware of the time, location and means of providing input.

Noticeably absent from this section is any reference to the availability of the information included in the application submitted to the Agency. Information offered by the owner or operator in a pre-app public meeting is likely to be different from the final application itself. Changes in the project may be made between the time of the pre-app meetings and the actual submittal of the permit application. Section 845.260 is intended to provide for public comment on the application under review, not just what is shared during the pre-application period.

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Meaningful public participation is impossible without information. Public input is essentially worthless if it is uninformed; worse yet if it is misinformed. Concurrent with the issuance of the Public Notice of the completed application for permit, and no later than the initiation of the public comment period, the permit application and related documents used in the review of the permit application and and preparation of the tentative determination should be posted on the Agency's website. This should include those documents made available by the applicant in the pre-application public meeting phase, Section 845.240, plus any subsequent revisions and updates.

Section 845.260 d) 1) Public Hearing
The Coal Ash Pollution Prevention Act specifically states that the rules must at a minimum specify meaningful public participation procedures for the issuance of CCR surface impoundment construction and operating permits, including an opportunity for a public hearing prior to permit issuance.

As currently written, the Agency's draft rule states that the Agency ***may*** hold a public hearing on the issuance or denial of a draft permit whenever the Agency determines that there exists a significant degree of public interest in the proposed permit.

We would suggest that defining the specific circumstances under which a public hearing will be provided is not unreasonable, such as when there is a significant degree of public interest. However, giving the Agency additional undefined discretion is not consistent with the intent of the law. The text of the rule should be changed to "The Agency **shall** hold a public hearing on the issuance or denial of a draft permit whenever the Agency determines that there exists a significant degree of public interest in the proposed permit.

Conclusion
Thank you for the opportunity to share our comments and provide recommendations on the current draft of the coal ash rules. We look forward to continued participation in the rule-making process.

Sincerely,

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