From:	Eastvold, Jonathan C.
To:	Diers, Stefanie; Zeivel, Christine; Ankney, Clayton; Brown, Don; Horton, Vanessa; mraiff@gibsondunn.com; mdunn@atg.state.il.us; aarmstrong@atg.state.il.us; ssylvester@atg.state.il.us; KPamenter@atg.state.il.us; ahaas@atg.state.il.us; EXT Anker, Alisha; msmallwood@ameren.com; Cynthia.Skrukrud@sierraclub.org; EXT Darin, Jack; christine.nannicelli@sierraclub.org; jhammons@elpc.org; newman.christopherm@epa.gov; Schumacher.Jessica@epa.gov; Yang, Virginia; San Diego, Nick; Mool, Bob; Mauer, Paul; Snow, Renee; mlegge@earthjustice.org; mbilut@mwe.com; kknowles@prairierivers.org; arehn@prairierivers.org; aruss@environmentalintegrity.org; EXT Manning, Claire; aschuering@bhslaw.com; KCourtney@elpc.org; jcassel@earthjustice.org; tcmar@earthjustice.org; kharley@kentlaw.edu; dgrable@clclaw.org; mozaeta@earthjustice.org; deborah.williams@cwlp.com; adavis@ierg.org; jmartin@heplerbroom.com; kthompson@ierg.org; sbonebrake@schiffhardin.com; jmore@schiffhardin.com; Walter.Stone@nrg.com; sf@nijmanfranzetti.com; kg@nijmanfranzetti.com; va@nijmanfranzetti.com; fbugel@gmail.com; melissa.brown@heplerbroom.com; Jennifer.Martin@heplerbroom.com
Subject:	[External] Questions re: environmental groups" 2nd notice comments
Date:	Tuesday, March 2, 2021 1:52:02 PM
Attachments:	Environmental Groups Comments to JCAR on Illinois Coal Ash Rules.pdf

Dear Colleagues:

Attached is a document we received from the environmental groups. I'm e-mailing you to elicit any thoughts you have regarding their proposals—especially their third regarding consolidation of CCR.

Thank you for your consideration.

Sincerely,

Jonathan C. Eastvold, Ph.D.
Rules Analyst III

Illinois General Assembly
Joint Committee on Administrative Rules
700 Stratton Building
Springfield IL 62706
217-524-9010

Environmental Groups' Requested Changes to Illinois Coal Ash Rules (PCB R2020-19)

The Environmental Law & Policy Center, Prairie Rivers Network, and Sierra Club request the following changes to the Illinois coal ash rules, pending before the Pollution Control Board:

I. The Public Hearing Must Not Be Discretionary.

First, holding a public hearing on permits is not discretionary under the Coal Ash Pollution Prevention Act ("CAPPA"). The CAPPA requires the rules to include "an opportunity for public hearing prior to permit issuance." 415 ILCS 5/22.59(g)(6). The Board's second notice coal ash rules provide that IEPA "may" hold a public hearing whenever it "determines that there exists a significant degree of public interest in the proposed permit." Proposed 35 IAC § 845.260(d)(1). By using the term "may," rather than "shall" or "must," in the second notice rules, the Board allows IEPA the option of *not* holding a hearing, even where there is significant public interest, in violation of CAPPA. Replacing "may" with "must" in this provision of the second notice rules would bring them in line with CAPPA's requirement to provide an opportunity for a public hearing.

The proposed public participation procedures for coal ash permits were "modeled after the National Pollution Discharge Elimination System" ("NPDES"); therefore, Illinois' NPDES process provides an analogy.[1] The Board's NPDES permit requirements state that IEPA "*shall*" – rather than "may" – hold a public hearing when IEPA finds a "significant degree of public interest." *See* 35 IAC § 309.115(a)(1). Replacing "may" with "must" in the proposed coal ash rules' public hearing provision would bring the rules in line with the language concerning public hearings in other IEPA permitting programs, such as NPDES, where the statute similarly requires that the agency provide opportunity for public comment. *See* 415 ILCS 5/39(b); 33 U.S.C. § 1342(a)(1); *id*. § 1342(b)(3).

Accordingly, we request that JCAR recommend the following change to proposed 35 IAC § 845.260(d)(1):

Section 845.260 Draft Permit Public Notice and Participation

…

d) Public Hearing

1) The Agency must ~~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.

II. The Agency Must Prepare a Summary and Response to Comments Regardless of Whether a Public Hearing is Held.

Second, CAPPA requires a responsiveness summary whenever written comments are received. Responding to concerns from the Environmental Groups that the first notice rules only required a responsiveness summary if a hearing is held, the Board declined "to require that EPA prepare a responsiveness summary for each written public comment [IEPA] receives." Order p. 32. However, the Board's order did not discuss the statutory mandate in CAPPA that the rules must "specify meaningful public participation procedures…including…a summary and response of the comments prepared by the Agency." 415 ILCS 5/22.59(g)(6). The statutory language thus explicitly requires a summary and

[1] Prefiled Testimony of Darine E. LeCrone at 3 (June 1, 2020).

response to comments and does not limit the requirement to prepare a responsiveness summary to instances when there is a public hearing.

The Environmental Groups agree with the Board that the Agency need not prepare a summary and response of each individual comment submitted. Rather, CAPPA mandates that the Agency prepare a "summary and response of the comments," which does not require individualized responses to individual comments. Such summaries and responses are well known to the Agency, as they routinely prepare them for various types of permits and other proceedings involving public comment.[2] In sum, CAPPA requires, and the Board's rules should clearly state, that IEPA prepare a responsiveness summary whenever it receives public comments, regardless of whether a public hearing is held.

Accordingly, we request that JCAR recommend the following change to proposed 35 IAC § 845.260(f):

Section 845.260 Draft Permit Public Notice and Participation

…

f) When the Agency receives written comments ~~holds a public hearing~~ under this Section, the Agency must prepare a responsiveness summary that includes:

1) An identification of the public participation activity conducted;
2) Description of the matter on which the public was consulted;
3) If a public hearing was held, a~~A~~n estimate of the number of persons present at the hearing;
4) A summary of all significant comments, criticisms, and suggestions, whether written or oral, submitted in written comments and, if a public hearing was held, at the hearing or during the time the hearing record was open;
5) The Agency's response to all significant comments, criticisms, and suggestions; and
6) A statement of Agency action, including, when applicable, the issuance or denial of the permit.

III. Provisions from a Never-Finalized Trump Administration Proposal Must Be Deleted.

Third, the proposed rules impermissibly incorporate a never-finalized U.S. EPA proposal to allow consolidation of ash from one ash pond into another, resulting in a rule that is weaker than the federal CCR rule, in violation of CAPPA. CAPPA requires that the Board's rules "be at least as protective and comprehensive as the federal regulations or amendments thereto promulgated by the Administrator of the United States Environmental Protection Agency in Subpart D of 40 CFR 257 governing CCR surface impoundments. . . ." 415 ILCS 5/22.59(g)(6). While the U.S. EPA under the Trump Administration proposed to allow consolidation of ash from one ash pond to another,[3] that proposal was intentionally left out of the "Part B" amendment to the federal coal ash rule that was

[2] *See, e.g.*, https://www2.illinois.gov/epa/topics/community-relations/sites/ethylene-oxide/Documents/Responsiveness%20Summary%20-%20Vantage%20Specialties.pdf (Air Permit); http://www.epa.state.il.us/community-relations/fact-sheets/new-jersey-zinc/responsiveness-summary.pdf (Superfund site); http://www.epa.state.il.us/water/tmdl/report/lake-michigan-beaches/stage1-responsiveness-summary.pdf (water regulations).

[3] *See* USEPA Part B Proposal, 85 Fed. Reg. 12, 456, 12,477-478 (proposed Mar. 3, 2020) (proposing new subsection 40 C.F.R. 257.102(d)(4)).

finalized last November.[4] Because the Trump Administration proposal to allow consolidation of ash was never finalized, consolidation of ash is *not* allowed under the federal rule. USEPA itself made that clear in the preamble to its proposed "Part B" rule.[5] Therefore, by allowing consolidation of ash, the second notice rules are less protective than the federal rule and thus inconsistent with CAPPA.

The Board did not acknowledge Environmental Groups' repeated comments on the issue of consolidation and the unlawful incorporation of the never-finalized Part B rollback in the proposed rules. Order at 96-97 (discussing arguments concerning Closure with a Final Cover System under Proposed Section 845.750 without addressing Environmental Groups' arguments); *see also* initial 6.15.20 comments at 27; Final Comments 10.30.20 at 107; *see also* Hutson prefiled testimony at 21-22. In its order, the Board simply repeats IEPA's statement that "Part 845 does not incorporate any of the provisions of USEPA's Part B rule." Order at 84. However, proposed Section 845.750(d) provides for the same consolidation of CCR in closure as the proposed 40 CFR § 257.102(d)(4) that was not finalized, revealing the error in IEPA's statement. **Accordingly, to ensure compliance with CAPPA, we request that JCAR recommend deleting proposed 35 IAC § 845.250(d).**

IV. The Rules Must Provide Public Participation Opportunities for Inactive Closed Impoundments.

Fourth, the proposed rules improperly circumvent public participation opportunities for permits for "inactive closed" CCR surface impoundments. Inactive closed CCR impoundments – which include coal ash ponds at the retired Hutsonville, Meredosia, Venice, and Pearl Station power plants – are required to obtain permits under the Board's Second Notice proposed coal ash rules, but the rules do not provide for public participation in the permitting process. *See* Proposed 35 IAC § 845.170(a) (listing the provisions to which inactive closed CCR surface impoundments are subject and including requirements to obtain permits, but omitting proposed sections 845.240 and 845.260, which set out public participation mandates). CAPPA requires that the rules for coal ash impoundments "specify meaningful public participation procedures for the issuance of CCR surface impoundment construction and operating permits. . . ." 415 ILCS 5/22.59(g)(6). There is no exception in CAPPA for any subset of coal ash impoundments and, therefore, no basis for the Agency or the Board to exclude any permits from legislation's broad mandates for meaningful public participation. *See id*.; *see also id*. at 5/22.59(a)(5).

Accordingly, we request that JCAR recommend the following changes to proposed 35 IAC § 845.170(a)(2):

Section 845.170 Inactive Closed CCR Surface Impoundments

a) Among the provisions of this Part, only the following apply to inactive closed CCR surface impoundments:

…

2) The following Sections of Subpart B (Permitting):

A) Section 845.200;

[4] *See* Final "Part B" revision, 85 Fed. Reg. 72,606, 72,542 (Nov. 12, 2020).
[5] *See* Part B Proposal, 85 Fed. Reg. at 12,462 (explaining that "the current CCR regulations expressly prohibit ''placing CCR'' in a CCR unit required to close for cause pursuant to § 257.101 after dates established in the CCR regulations . . . [and any further placement of CCR] into the unit . . . is prohibited once the provisions of § 257.101 are triggered.") (cited in Environmental Groups' initial comments, dated June 15, 2020, to the Board).

B) Section 845.210;

C) Sections 845.220(a), (c), and (f)(1);

D) Sections 845.230(c) and (d)(4);

E) Section 845.2~~4~~5~~0~~;

F) Section 845.2~~5~~7~~0~~;

G) Section 845.2~~6~~8~~0~~;

H) Section 845.2~~7~~9~~0~~;

I) Section 845.280;

J) Section 845.290;

V. Inconsistencies Between the Rules and the Board's Order Should be Corrected.

Fifth, the Second Noticed Proposed Rules are Inconsistent with the Board's Order. Given the extremely limited time the Board had to review the entire rulemaking record and propose Second Notice rules,[6] typos and minor errors in the rules and the Order are to be expected. We have identified several places where the rules are internally inconsistent or inconsistent with the Order, as well as places where the Board may have inadvertently failed to address an issue raised. We ask JCAR to recommend certain changes, detailed below, based on those typos, inconsistences, and omissions.

a) To begin with, proposed rules concerning the timing of posting construction permit application materials on the company's CCR website are internally inconsistent, and one of them is also inconsistent with the Board Order. The Board Order states:

> The language proposed at first notice requires the owners or operator of a surface impoundment applying for a construction permit to post—on a publicly accessible website at least 14 days before the hearing—all documentation relied on in making its tentative application. The Board received several public comments asking the Board to extend this timeframe from 14 days to at least 30 days before the hearing. Tr. 2 PC at 49-50, 97. **Board Findings.** The Board has been directed by the State legislature to place a special emphasis on public notice and participation in this rulemaking. *See* 415 ILCS 5/22.59(a)(5), (g)(6). Based on this and the technical nature of the supporting documents, the Board agrees that an additional 16-days would foster that public participation.

Order at 26.

In the Addendum to the Order containing the redline of the rules, however, the Board revised only one of the two provisions specifying the timing of posting of application materials. The Board revised Section 845.810(f) to say that "[t]he owner or operator must place all the information specified in Section

[6] CAPPA requires the coal ash rules to be finalized within one year of their proposal, which was March 31, 2020. *See* 415 ILCS 5/22.59(g).

845.240(e) on the owner's or operator's CCR website at least 30 days before the public meeting." However, the Board did not make that same revision in Section 845.240(e), which says: "At least 14 days before a public meeting, the owner or operator of the CCR surface impoundment must post to its publicly accessible Internet site under section 845.810 all documentation relied upon in making a tentative construction permit application." The Board explicitly stated that it intends for the materials to be posted at least 30 days before the public meeting and Section 845.240(e) should be revised to be consistent with Section 845.810(f) and the Order. **Specifically, we request that JCAR recommend the following change to Section 845.240(e):**

Section 845.240 Pre-Application Public Notification and Public Meeting

…

e) At least 30~~14~~ days before a public meeting, the owner or operator of the CCR surface impoundment must post to its publicly accessible Internet site under section 845.810 all documentation relied upon in making a tentative construction permit application.

b) Next, in proposed 845.650(b)(4)(D), "well" should be "wells." The Board Order shows that the Board intended "well" to be plural, and it is necessarily plural, as the rules require that there be a minimum of three downgradient monitoring wells. Order at 74; *see also* proposed Section 845.630(c)(1). **Accordingly, we request that JCAR recommend the following change to Section 845.650(b)(4)(D):**

Section 845.650 Groundwater

…

b) Monitoring Frequency

…

4) After completion of five years of monitoring under this Part, the owner or operator of a CCR surface impoundment may request the Agency for approval of a semiannual monitoring frequency by demonstrating all of the following:

D) The concentrations of constituents monitored pursuant to Section 845.650(a) at the down-gradient monitoring well~~s~~ are below the applicable groundwater protection standards under Section 845.600;

c) Finally, the Board should clarify whether it intended to make any changes regarding progress reports during closure. The Board discussed and cited to Environmental Groups' argument that progress reports should be required during closure in place but made no findings or conclusions on this issue. The Board notes our recommendation that quarterly progress reports be submitted to ensure IEPA is aware of any pitfalls or problems with closure in place. Order at 96. The Board's Order, however, contains no "Board Findings" section on this issue and no response to Environmental Groups' suggestion regarding progress reports. The Board acknowledgment of Environmental Groups' suggestion but omission of a "Board Findings" section, which it consistently included throughout the Order to address arguments made, suggest that the Board may have inadvertently left out the Board Findings on that issue. **We ask JCAR to seek clarification from the Board as to whether it inadvertently failed to respond to Environmental Groups' arguments on that or other issues and, if so, to provide their findings and any relevant changes to the rule**.