BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have electronically filed today with the Illinois Pollution Control Board the Post-Hearing Comments of the Illinois Attorney General's Office, a copy of which is hereby served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
by LISA MADIGAN, Attorney
General of the State of Illinois

BY: _____

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POST-HEARING COMMENTS OF THE ILLINOIS ATTORNEY GENERAL'S OFFICE

Pursuant to 35 Ill. Adm. Code § 102, and the Hearing Officer's Order of July 25, 2014, the Illinois Attorney General's Office, on behalf of the People of the State of Illinois (the "People"), hereby submits its post-hearing comments in the above-referenced matter.

I. INTRODUCTION

Among her obligations as the chief legal officer of the State of Illinois, the Attorney General has a duty to represent the interests of the People so as to ensure a healthful environment for all citizens of the state. Ill. Const. 1970, art. V, § 15; *People v. NL Industries*, 152 Ill.2d 82, 103 (1992). These obligations include ensuring that all wastes—including coal combustion waste ("CCW" or "coal ash")—are disposed of and managed properly and that all waters of the State of Illinois—including groundwater—are not threatened by water pollution. *See* 415 ILCS 5/21, 5/12(a) and (d). To this end, the People recognize the efforts of the Illinois Environmental Protection Agency ("Illinois EPA" or the "Agency") and the Board to address threats and contamination from coal ash surface impoundments and to "assure that adverse effects upon the environment are fully considered and borne by those who cause them." 415 ILCS 5/2(b).

Prior to adopting a first-notice proposal in this proceeding, the People urge the Board to revise the proposed regulations, as discussed below, on the topics of applicability, closure, and

post-closure care.[1] The Board should also include a financial assurance requirement under its general rulemaking authority and pursuant to Section 21.1 of the Act. These sets of revisions are discussed in turn below.

II. REVISIONS REGARDING APPLICABILITY, CLOSURE, AND POST-CLOSURE CARE

A. Applicability

The Agency describes this proposed rulemaking as one of "general applicability for coal combustion waste ("CCW") surface impoundments at power generating facilities." Statement of Reasons at 1. Its proposed language, however, would exempt coal ash units that are (1) not operating at the time of the rule enactment and (2) have not been found to be causing any groundwater exceedances. *See* Section 841.105 (Revised Rule Language filed July 17, 2014). The People do not believe that these historical sites (unless they have been properly closed) should be completely excluded from the regulations. They still constitute coal ash dumps even if they are no longer receiving waste and have not been found to be polluting the groundwater.

Rather than being left out of the proposed rulemaking, these "legacy sites," as they are referred to by Illinois EPA (Prefiled Answers 7/17/14 at 1), should proceed through the hydrological characterization and groundwater monitoring steps of the proposed rules to confirm the continuing lack of groundwater impacts. This is especially true, because a "water pollution hazard can be found although the actor does not yet threaten to cause pollution." *Tri-County Landfill Co. v. Illinois Pollution Control Bd.*, 41 Ill.App.3d 249, 258 (2nd Dist. 1976); *see also* 415 ILCS 5/12(d). The legacy sites should also be subject to the closure procedures set forth in the proposed rules if and when the unit owners decide to pursue closure, or if they are ordered to do so in the future.

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[1] Pursuant to 35 Ill. Adm. Code § 102.600(a), "[t]he Board may revise the proposed regulations before adoption upon its own motion or in response to suggestions made at hearing and in written comments . . . ."

The Environmental Groups have submitted proposed amendments to Section 841.105. *See* Environmental Groups' Proposed Amendments to Proposed New 35 Ill. Adm. Code Part 841, filed July 21, 2014 (hereinafter, "Proposed Amendments"), at 3-4. The People support those amendments because they more appropriately reflect the scope of this rule of general applicability (*i.e.*, encompassing all surface impoundments at power generating facilities that contain coal combustion waste or leachate from coal combustion waste and that have not been properly closed). *See* Environmental Groups Pre-Filed Answers 7/17/14 at 1 ("[T]he Environmental Groups urge that any CCW impoundment that has not yet been properly closed should be subject to the rules in full.").

B. Submission of Closure and Post-Closure Care Plans

Under the Agency's proposal, owners and operators are not required to develop closure and post-closure care plans, until such time as the owner or operator elects to close a unit or is ordered to do so. *See* Section 841.410 ("[b]efore a unit may be closed, the owner or operator must submit a closure plan to the Agency for review and approval"). The People support the Environmental Groups' proposed amendments to Sections 841.130(b) and 841.410 that would require owners and operators of new units to provide closure and post-closure care plans before accepting any coal ash and for owners and operators of existing units to develop them within one year after the effective date of the rules.

There are two reasons to require advance planning of closure and post-closure care, both of which have been articulated by the Environmental Groups. *See generally* Tr. 6/19/14 at 10. The first is that the closure and post-closure care plans allow for calculation of the amount of financial assurance that would be required assuming a financial assurance component is added to the proposed rules. Second, having advance planning for closure and post-closure care would

align coal ash surface impoundment requirements with what Illinois requires of other waste management sites and of other long-term operations involving reclamation or restoration (such as coal mining).[2] It is sound policy to require advance planning for waste disposal for several reasons. Advance planning provides companies and regulators with a road map in the event of a pollution problem that necessitates closure. In addition, it permits owners and operators to know what type of expectations to include in their long-term business plans. Finally, it provides the public with some degree of certainty about how sites will be handled and pollution problems addressed in the future.

The Agency stated that it decided not to require closure and post-closure plans on an upfront basis, because the size of the impoundments could change over time. Tr. 2/27/14 at 62-63. But the Agency also acknowledges that the maximum volume of an impoundment can be calculated under its current and planned configuration. Tr. 2/27/14 at 63. It is true that the owner or operator may not end up filling the impoundment to its maximum volume. It is also true that the owner or operator may propose to expand or enlarge the unit—or that additional groundwater monitoring data may be gathered over the years. Or perhaps new technologies or approaches may be developed. All of these facts are reasons why, as pointed out numerous times in this proceeding, the closure and post-closure plans can be amended or modified over time and, indeed, should be updated in the appropriate circumstances. *See* Tr. 2/27/14 at 65; Tr. 6/18/14 at 53-54. This process is similar to how plans can and do evolve under other waste management regulations. *See, e.g.*, 35 Ill. Adm. Code § 807.503-505 (addressing closure plans, amendments of closure plans, and notice of closure and final amendments to plans); 35 Ill. Adm. Code 813

[2] See 35 Ill. Adm. Code 807 Subpart E (requiring closure plans for waste management sites at application stage); 35 Ill. Adm. Code 812.114(requiring closure plans for waste management sites at application stage); 35 Ill. Adm. Cod 812.115 (requiring post closure care plans for waste management sites at application stage); 62 Ill. Adm. Code 1780.18 (requiring surface mining reclamation plan at application stage); 62 Ill. Adm. Code 1784.13 (requiring underground mining reclamation plan at application stage).

Subpart B (addressing modifications of existing waste disposal permits, including closure and post-closure care plans).

Accordingly, the Board should adopt the Environmental Groups' proposed amendments to Sections 841.130(b) and 841.410.

C. Length of Post-Closure Care Period

In Section 841.440(a)(2), the Agency proposes that the post-closure care period should last a minimum of 10 years. *See* IEPA Revised Rule Language 7/17/14 at 43. The People urge the Board to consider expanding this minimum timeframe. Another option is to select a longer default time period, such as the 30 years proposed by the Environmental Groups (Proposed Amendments 7/21/14 at 56), but allow the Agency to increase or decrease that default period, within certain parameters, similar to the recent proposal in North Carolina. *See* N.C. Senate Bill 729 § 130A-309.212(a)(3)(b)[3] (owners of impoundments shall "conduct post-closure care for a period of 30 years, which period may be increased by the Department upon a determination that a longer period is necessary to protect public health, safety, welfare; the environment; and natural resources, or decreased upon a determination that a shorter period is sufficient to protect public health, safety, welfare; the environment; and natural resources").

D. Closure Prioritization

The People generally agree with the Environmental Groups' proposed approach to simplify the Agency's four-part closure prioritization schedule set forth in Section 841.405(a). Under the more streamlined structure proposed by the Environmental Groups, units that are impacting existing potable water supplies would need to be closed within two years of the owner or operator choosing to take that route or from being ordered to do so by the Agency as part of a

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[3] http://www.ncleg.net/Sessions/2013/Bills/Senate/HTML/S729v6.html

corrective action plan. All other exceedance-causing units that owners or operators choose to close or that are ordered to close—regardless of whether they are "active" or "inactive" and regardless of whether they are in Class IV groundwater areas—would need to be closed within five years.[4]

Combining this revision with the proposed revision to develop advance closure and post-closure plans results in a more straightforward and predictable regulatory structure that has fewer contingencies, categories, and layers. To sum up, under the revisions suggested here, all units would develop closure plans after the regulations become effective—plans that can then be implemented, following any necessary amendments, upon occurrence of the triggering event (*i.e.*, the decision of the owner or operator or an order from the Agency). If a unit has groundwater exceedances, then it must be closed within two years or five years (or longer if by removal) depending on whether it is impacting drinking water. If there are no exceedances at the unit, it may be closed on a schedule established between the owner or operator and the Agency.

II. REVISIONS REGARDING FINANCIAL ASSURANCE

A. Background

1. Coal Ash Surface Impoundments: Potential Adverse Effects

According to the United States Environmental Protection Agency ("USEPA"), "[p]otential environmental concerns from coal ash pertain to pollution from impoundment and landfills leaching into groundwater and structural failures of impoundments, like that which occurred at the Tennessee Valley Authority's plant in Kingston, Tennessee" in December 2008.[5]

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[4] When an owner or operator desires to close a unit that has no groundwater exceedances, the People agree that a closure schedule can be proposed by the owner or operator and approved by the Agency. *See* Section 841.405(b). We also agree that a period longer than five years (the Environmental Groups propose ten) should be an option in the case of closure by removal. *See* Proposed Amendments at 45.

[5] http://www.epa.gov/osw/nonhaz/industrial/special/fossil/ccr-rule/index.htm.

More recently, on February 2nd of this year, a coal ash surface impoundment owned by Duke Energy in North Carolina spilled approximately 38,000 tons of ash into a river.[6] As pointed out by Illinois EPA in its Statement of Reasons ("SR"), coal ash can contain "antimony, arsenic, barium, boron, beryllium, cadmium, chromium, chloride, iron, lead, mercury, manganese, nickel, selenium, silver, sulfate, and thallium." SR at 3. These materials are soluble, mobile, and can threaten groundwater quality. *Id.*

Following the Kingston, Tennessee spill, Illinois EPA launched an effort to assess coal ash surface impoundments at Illinois power plants. SR at 5. The Agency reported that some historical coal ash operations "discharged to low lying areas or borrow pits." *Id.* at 2. In other words, the coal ash at these locations was and is being dumped into large holes excavated in the ground (some with liners and some without liners). *Id.* at 2-3. Operators of coal ash impoundments would then sometimes build "diked enclosures" to increase the capacity, SR at 2-3, like building up the sides of a bowl to hold more liquid.

As of August 2013, there were 18 Illinois coal ash impoundments found by USEPA to be in "poor" condition,[7] including several rated with a "significant" hazard potential.[8] Illinois EPA reported that "[t]he information gathered as a result of the Illinois EPA's ash impoundment strategy shows that 14 facilities have violations of the numerical groundwater quality standards

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6 "Dan River Coal Ash Spill FAQ" available at http://portal.ncdenr.org/web/guest/dan-river-spill.

7 "Poor" condition is defined as the following: "A management unit safety deficiency is recognized for a required loading condition (static, hydrologic, seismic) in accordance with the applicable dam safety regulatory criteria. Remedial action is necessary. 'Poor' also applies when further critical studies or investigations are needed to identify any potential dam safety deficiencies." Exhibit 13, also available at: http://www.epa.gov/osw/nonhaz/industrial/special/fossil/surveys2/statelet/il_epa_let.pdf.

8 "Significant" hazard potential is defined as the following: "Dams assigned the significant hazard potential classification are those dams where failure or mis-operation results in no probable loss of human life, but can cause economic loss, environment damage, disruption of lifeline facilities, or impact other concerns. Significant hazard potential classification dams are often located in predominantly rural or agricultural areas, but could be located in areas with population and significant infrastructure." Exhibit 13, also available at: http://www.epa.gov/osw/nonhaz/industrial/special/fossil/surveys2/statelet/il_epa_let.pdf.

on-site." *Id.* This information is consistent with the experiences in other states where problems with coal ash surface impoundments have been documented.[9]

2. Financial Assurance

Financial assurance rules require potential polluters to demonstrate they have the resources to correct any environmental damage that may be caused by their operations. Other states require financial assurance for coal ash dumps. *See, e.g.*, 6 CCR 1007-2:1-1.8 (Colorado); Ga Comp. R. & Regs. 391-3-4-.13 (Georgia); La. Admin Code. tit. 33, pt. VII, § 1303 (Louisiana). Here in Illinois, we have financial assurance requirements for operations like landfills, underground storage tanks, and used tire facilities. *See, respectively*, 35 Ill. Adm. Code 811.700; 41 Ill. Adm. Code 176.220; 35 Ill. Adm. Code 848.401. There are several different mechanisms that can be used, either alone or in combination, to demonstrate financial assurance.[10]

Pollution from coal ash impoundments can require expensive remediation of groundwater impacts. And all impoundments will need to be closed and monitored at some point in the future. If the entity that caused the damage (*i.e.*, the power generator) is defunct, dissolved, bankrupt, or otherwise unavailable to address the pollution it caused, the public would be left with the responsibility for the costs of cleaning up and closing the sites. The vast majority of Illinois coal-fired power plants are not owned by regulated utilities. They are owned and operated by private companies called merchant generators, which exist at the mercy of the power markets, the price of natural gas, and many other factors. These companies are bought and

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[9] As reported by the Government Accountability Office ("GAO"), as of October 2009, USEPA had "found that 24 cases in 13 states were proven cases of damage to groundwater and surface water, and an additional 39 were potential damage cases. . . . Since the report was issued, EPA has identified 3 additional cases of proven damage and one additional case of potential damage." http://www.gao.gov/assets/100/96435.pdf.

[10] Potential mechanisms include a trust fund, a surety bond guaranteeing payment, a surety bond guaranteeing performance, a letter of credit, closure insurance, self-insurance, a local government financial test, a local government guarantee, a corporate financial test, or a corporate guarantee.

sold.[11] They go through bankruptcy.[12] They petition the Board for relief from environmental requirements because they argue they cannot afford to comply with them.[13] They close plants and spin them off into separate corporations that are ring-fenced from other corporate assets.[14] All of this is to say that the Board should not merely accept an entity's representations that it: (1) will be in existence and (2) will have the resources to comply with remediation orders or closure and post-closure care of their coal ash dump sites.

The Agency decided not to include financial assurance in the proposed rules. *See* SR at 26 (stating that industry opposed the requirement). The Board, however, has shown an interest in financial assurance. *See, e.g.*, Hearing Officer Order of Feb. 5, 2014 (Exhibit A, Questions 56 and 57, inquiring as to the expected costs of complying with financial assurance and requesting information as to other Illinois regulations that require financial assurance for corrective action); Hearing Officer Order of June 11, 2014, (Attachment A, Question 24). The topic of financial assurance also arose during the various hearings in this proceeding, including the February 27, 2014 session. There, in response to questions by the Board and others, Agency witness Rick Cobb stated his understanding that the Agency did not believe it had the authority to propose

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[11] Ameren sold its operational coal plants to Dynegy in December 2013. Edison International sold the Midwest Generation coal plants to NRG in March of this year.

[12] Dynegy and Midwest Generation filed for bankruptcy in July 2012 and January 2013, respectively.

[13] *See, e.g., Illinois Power Holdings, LLC and AmerenEnergy Medina Valley Cogen, LLC v. Illinois EPA*, PCB 14-10 (Variance-Air); *Ameren Energy Resources v. Illinois EPA*, PCB 12-126 (Variance-Air); *Midwest Generation, LLC-Waukegan Generating Station v. Illinois EPA*, PCB 12-121 (Variance-Air).

[14] Federal Energy Regulatory Commission ("FERC"), Order Authorizing Disposition of Jurisdictional Facilities and Acquisition of Securities, Docket No. EC13-93, 145 FERC 61,034 (Oct., 11, 2013) at 9 ("Ameren Energy Generating will also transfer to Medina Valley two mothballed generating facilities, the Hutsonville Plant and the Meredosia Plant, together with certain associated liabilities.").

financial assurance requirements in this rulemaking.[15] Tr. 2/27/14 at 54-57.

The People respectfully disagree with the assertion that there is no authority to require financial assurance. The Board has ample authority to require it, both under its general rulemaking authority and pursuant to Section 21.1 of the Act. It should, therefore, revise the proposed regulations to include the proposal made by the Environmental Groups to add a Subpart F for financial assurance. *See* Proposed Amendments at 63.

B. Discussion

As discussed in more detail below, the Board has the authority to include a financial assurance component as to coal ash surface impoundments based on its general rulemaking authority to promote the purposes of the Act. In addition, Section 21.1 of the Act specifically provides the Board with the authority to require financial assurance, because coal ash surface impoundments are subject to Section 21(d) of the Act.

1. The Board has general rulemaking authority to promote the purposes of the Act and to require financial assurance for coal ash surface impoundments.

As stated in the Act, the fundamental duty of the Board is to "determine, define and implement the environmental control standards applicable in the State of Illinois." 415 ILCS 5/5(b). To carry out this duty, the Act provides the Board with broad authority to adopt substantive regulations, limited only in that regulations adopted by the Board must promote the purposes and provisions of the Act. *See* 415 ILCS 5/5(b), 5/26, and 5/27(a) ("The generality of this grant of [rulemaking] authority shall only be limited by the specifications of particular classes of regulations elsewhere in this Act."); *Landfill, Inc. v. Pollution Control Bd.*, 74 Ill. 2d

[15] The Illinois EPA has previously argued to the Board that the Hutsonville Ash Pond D was "by omission seek[ing] that financial assurance . . . be forgone." *See In the Matter of: Petition of Ameren Energy Generating Company for Adjusted Standards from 35 Ill. Adm. Code Parts 811, 814, and 815 (Hutsonville Power Station)*, AS9-01, Illinois Environmental Protection Agency Response To Board Order Of September 16, 2008, ¶ 14, p. 5.

541, 554 (1978) (stating that the Board "must determine, define, and implement the environmental control standards and may adopt rules and regulations").

Significantly, "[t]he terms and provisions of th[e] Act shall be liberally construed so as to effectuate [its] purposes." 415 ILCS 5/2(c). In Section 2(b) of the Act, the General Assembly set forth those purposes, which are "to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them." 415 ILCS 5/2(b) (emphasis added); *Town & Country Utilities, Inc. v. Illinois Pollution Control Bd.*, 225 Ill.2d 103, 107 (2007). This purpose is echoed in Section 11(b) of the Act, concerning Illinois water resources—"to restore, maintain and enhance the purity of the waters of this State in order to protect health, welfare, property, and the quality of life." 415 ILCS 5/11(b).

The General Assembly has also described the importance of groundwater in Illinois as follows:

> [I]t is the policy of the State of Illinois to restore, protect, and enhance the groundwaters of the State, as a natural and public resource. The State recognizes the essential and pervasive role of groundwater in the social and economic well-being of the people of Illinois, and its vital importance to the general health, safety, and welfare. It is further recognized as consistent with this policy . . . that waste and degradation of the resources be prevented.

415 ILCS 55/2(b) (emphasis added).

The General Assembly's interest in environmental protection cannot be overstated. It has given the Board broad authority to implement those interests through rulemaking. If the Board agrees with the People that financial assurance should be included for coal ash surface impoundments, then the Act provides all the authority the Board needs to ensure that there will be adequate funding to clean up and close coal ash dumps and to ensure that any "adverse effects

upon the environment are fully considered and borne by those who cause them." 415 ILCS 5/2(b).

2. Financial Assurance is also required by Section 21.1 of the Act, which grants the Board authority to promulgate regulations.

Section 21.1 of the Act requires financial assurance for closure and post-closure care for a "waste disposal operation" that requires a permit under Section 21(d) of the Act. 415 ILCS 5/21.1, 5/21(d). Section 21.1(b) specifically directs the Board to "adopt regulations to promote the purposes of this Section." 415 ILCS 5/21.1(b). Where there is an express grant of authority, there is likewise the clear and express grant of power to do all that is reasonably necessary to execute the power or perform the duty specifically conferred. *See Ralston Purina Co. v. Pollution Control Bd.*, 27 Ill. App. 3d 53, 58 (4th Dist., 1975).

The financial assurance requirements found in Section 21.1 of the Act apply to coal ash surface impoundments when: (1) coal ash is "waste," (2) deposition of coal ash into a surface impoundment constitutes "disposal," and (3) a coal ash surface impoundment requires a permit pursuant to Section 21(d) of the Act.

a. Coal ash left in a surface impoundment is "waste."

Section 3.140 of the Act provides a definition for coal combustion waste, which is a subset of the general category of "waste."[16] It specifically references "wastes generated as a result of the combustion of coal." In addition, Section 3.535 of the Act provides a general

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[16] 415 ILCS 5/3.140: "Coal combustion waste. 'Coal combustion waste' means any fly ash, bottom ash, slag, or flue gas or fluid bed boiler desulfurization by-products generated as a result of the combustion of: (1) coal, or (2) coal in combination with: (i) fuel grade petroleum coke, (ii) other fossil fuel, or (iii) both fuel grade petroleum coke and other fossil fuel, or (3) coal (with or without: (i) fuel grade petroleum coke, (ii) other fossil fuel, or (iii) both fuel grade petroleum coke and other fossil fuel) in combination with no more than 20% of tire derived fuel or wood or other materials by weight of the materials combusted; provided that the coal is burned with other materials, the Agency has made a written determination that the storage or disposal of the resultant wastes in accordance with the provisions of item (r) of Section 21 would result in no environmental impact greater than that of wastes generated as a result of the combustion of coal alone, and the storage disposal of the resultant wastes would not violate applicable federal law."

definition for "waste" that excludes "coal combustion by-product" as defined in Section 3.135 of the Act. 415 ILCS 5/3.535, 5/3.135. Coal combustion by-product differs from coal combustion waste in that it must be "beneficially reused," whereas coal combustion waste is disposed of or discarded. In addition, the proposed definition for "surface impoundment" in this rulemaking is "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." Illinois EPA Proposed Part 841 Regulations, Section 841.110 (emphasis added).

Accordingly, unless coal ash is being beneficially reused, it is "waste." The Board should reject the argument that coal ash can never be considered a waste because someone could theoretically dig it up out of the impoundment and sell it.

b. Leaving coal ash in a surface impoundment constitutes "disposal."

During the promulgation of the Illinois landfill regulations, the Board recognized that surface impoundments could involve disposal, but declined to further explore the issue in that rulemaking. *In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills*, p. 36, Slip Op. March 1, 1990, PCB R88-7. The Board noted that "waste is accumulated over time" at landfills, which "may or may not be true of a surface impoundment." *Id.* However, "disposal" as defined in the Act does not contain a time component. *See* 415 ILCS 5/3.185 (defining "disposal" 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") (emphasis added). To date, Illinois EPA has found 14 coal ash surface impoundments in the state where coal ash constituents have entered the environment through groundwater. SR

at 3. All other impoundments "may" have releases, or may have the potential to cause a release, which qualifies them under the definition of disposal in the Act.

Illinois EPA recognizes that depositing coal ash in a surface impoundment is disposal, stating that "[d]isposal of CCW can be either a wet or dry system." SR at 7. Similarly, the Board has found that depositing coal ash into a surface impoundment constitutes disposal. *In the Matter of: Petition of Ameren Energy Generating Company for Adjusted Standards from 35 Ill. Adm. Code Parts 811, 814, and 815 (Hutsonville Power Station)*, p. 11, Slip Op. March 5, 2009, PCB AS09-1 ("Ameren has persuasively argued that Pond D accumulated waste for final disposal without automatically becoming subject to the landfill regulations"). In sum, unless coal ash is being beneficially reused as a coal combustion byproduct pursuant to Section 3.135 of the Act, it is being "disposed" in surface impoundments.

c. A coal ash surface impoundment requires a permit pursuant to Section 21(d) of the Act.

Section 21(d) of the Act makes no distinction about whether coal ash is being deposited into surface impoundments or landfills, both of which are waste operations subject to permitting under Section 21(d) [415 ILCS 5/21(d)]. Section 21(d)(1) prohibits any person from conducting any waste-storage, waste-treatment, or waste-disposal operation without a permit issued by Illinois EPA. However, Section 21(d)(1)(i) provides an exception for "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." While this may appear to be a straightforward proposition, it is not. Indeed, both the Board and Illinois Appellate Courts take a narrow interpretation of the scope of the Section 21(d)(1)(i) exception.

The Board discussed the exception in the landfill rulemaking process as follows:

> Beginning in 1975, the Board began construing the exemption as applicable to "minor amounts of refuse which could be disposed of without environmental harm on the site where it was generated," a position which has been consistently sustained by the courts, despite the "plain language" of Section 21. *See Pielet Bros. Trading, Inc. v. Pollution Control Board*, 442 N.E. 2d 1374, 1377—1378, 110 Ill. App. 3d 752 (5th Dist. 1982) which traces the legislative history of the exemption and case law at the Board and appellate court levels.

In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills, p. 41, Slip Op. February 25, 1988, PCB R88-7 (emphasis added)); *see also People v. Commonwealth Edison Company*, Slip Op. November 10, 1976, PCB 75-368 (onsite CCW landfill violated Section 21(e)[17] for disposing of waste without a permit). In *Pielet Bros. Trading, Inc. v. Pollution Control Bd.*, the court noted that the legislature had acquiesced to the Board's limited interpretation of 21(d)(1). 110 Ill. App. 3d 752, 757 (5th Dist., 1982) (concurring with the Board's construction of the exemption only applying to "minor amounts of refuse which could be disposed of without environmental harm on the site where it was generated").

In another case, the Board was upheld in excluding a landfill on the site of an aluminum plant from the 21(d)(1) exemption. *Reynolds Metals Co. v. Illinois Pollution Control Bd.*, 108 Ill. App. 3d 156, 159 (1982). The *Reynolds* Court agreed with the Board's determination that the disposal facility—"a quarry"—"due to its permeability, cracks or fissures, is an extremely dangerous site," because the "[l]eachate produced in a quarry can be transmitted readily to the ground water, thus necessitating great diligence in the oversight" of such a facility. *Id.* at 160.

The most recent case to construe the legislature's intent regarding the 21(d)(1)(i) exemption is *People ex rel. Madigan v. Dixon-Marquette Cement, Inc.*, 343 Ill. App. 3d 163 (2nd Dist., 2003). This case centered on cement kiln dust containing contaminants such as arsenic,

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[17] At the time, Section 21(e) (rather than the current Section 21(d)) provided a permit exception for facilities that disposed of waste on the same site as the waste was generated.

barium, chromium, and lead that had been accumulating at the site for over 30 years. Runoff from the pile of cement kiln dust had altered the PH levels of a nearby river beyond acceptable limits. The court pointed out that "[t]he intent of section 21(d)(1) of the Act was not to create a legislative loophole or gap in the permit system." *Dixon-Marquette*, 343 Ill. App. 3d at 173. It found that Section 21(d)(1) provides an exemption to "those on-site facilities that generate minor amounts of waste that can be disposed of without a significant threat of environmental harm." *Id.* at 175. Significantly, the *Dixon-Marquette* court recognized that "the protection of the public interest is the central concern in the storage, treatment, and disposal of waste, regardless of the party generating the waste or the location in which it is being generated." *Id.*

The Board has interpreted and applied the Section 21(d)(1) exemption the same way for 40 years, and it must control in the context of this rulemaking as well. The Board should find the exemption inapplicable to coal ash surface impoundments that dispose of more than "minor amounts of refuse" and that this disposal cannot be done without the possibility of causing environmental harm.

In summary, unless they are truly coal combustion byproduct storage sites, coal ash surface impoundments subject to this rulemaking are "waste disposal operation[s]" that require permits pursuant to Section 21(d) of the Act. They should therefore be required to provide financial assurance for any remediation that may be ordered and for closure and post-closure care. *See also In the Matter of: Petition of Ameren Energy Generating Company for Adjusted Standards from 35 Ill. Adm. Code Parts 811, 814, and 815 (Hutsonville Power Station)*, p. 11, Slip Op. March 5, 2009, PCB AS09-1 (stating Ameren's view that a "closure plan would provide for financial assurance and post-closure care requirements where necessary and appropriate").[18]

[18] Although addressing financial assurance for coal ash surface impoundments by rule is appropriate and legally justified, the People also point out that the Board can also address the issue of financial assurance through

IV. CONCLUSION

For the reasons set forth above, the People respectfully request that the Board revise the proposed rules to: (1) adjust the applicability section to encompass all coal ash surface impoundments in Illinois that have not already been properly closed; (2) require advance development of closure and post-closure care plans; (3) expand the minimum post-closure care time period; (4) streamline the closure prioritization schedule; and (5) add a financial assurance component under its general rulemaking authority and pursuant to Section 21.1 of the Act.

Dated: October 20, 2014

Respectfully submitted,

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enforcement. The imposition of a bond is authorized by Section 33(b) of the Act in enforcement proceedings. 415 ILCS 5/33(b); and *Freeman Coal Mining Corp. v. Illinois Pollution Control Bd.*, 21 Ill. App. 3d 157, 169 (5th Dist., 1974). Any person may bring an enforcement action before the Board, and seek a bond requiring proper closure and post-closure care of a CCW surface impoundment. *See* 415 ILCS 5/31 (2014).

CERTIFICATE OF SERVICE

I, STEPHEN J. SYLVESTER, an Assistant Attorney General in this case, do certify that I caused to be served this 20th day of October, 2014, the foregoing the Post-Hearing Comments of the Illinois Attorney General's Office and Notice of Filing upon the persons listed on the Service List by depositing same in an envelope, first class postage prepaid, with the United States Postal Service at 100 West Randolph Street, Chicago, Illinois, at or before the hour of 5:00 p.m.

STEPHEN J. SYLVESTER