BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	R 2020-019
STANDARDS FOR THE DISPOSAL	)	
OF COAL COMBUSTION RESIDUALS	)	(Rulemaking - Land)
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 today I have filed with the Illinois Pollution Control Board the attached Illinois Attorney General's Office's Reply to Post-Hearing Comments 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*

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CERTIFICATE OF SERVICE

I, STEPHEN J. SYLVESTER, an attorney, do certify that on November 6, 2020, I caused true and correct copies of the Notice of Filing and the Illinois Attorney General's Office's Reply to Post-Hearing Comments 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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THE ILLINOIS ATTORNEY GENERAL'S OFFICE'S
REPLY TO POST-HEARING COMMENTS

The Illinois Attorney General's Office, on behalf of the People of the State of Illinois ("People"), hereby offers the following comments in reply to post-hearing comments on several legal issues we consider to be of particular importance.

1. The People support and concur in other participants' comments.

The People fully support and concur in the Agency's comments in opposition to Dynegy's proposed revision to the definition of an "inactive CCR surface impoundment". (Agency Post-Hearing Comments (Oct. 30, 2020), at 31-35). In addition, the People fully support and concur in the Agency's comments concerning Ameren's testimony and requests for site-specific relief. (*Id.* at 50-58).

Dynegy commented that "[i]t would be inappropriate for the Board to decide the applicability of that definition [of a "CCR surface impoundment"], shortcircuiting the procedural mechanisms provided by Illinois law to resolve those disputes, such as Section 31 of the Illinois Environmental Protection Act and the Illinois Supreme Court Rules." (Dynegy Post-Hearing Comments (Oct. 30, 2020), at 21). The People agree with this statement and concur in Dynegy's comment that the Board should not make any site-specific determinations as to which CCR units are subject to the Part 845 Regulations. (*Id.* at 20-21).

The People support the environmental groups' proposal to open a subdocket "on coal ash fill, landfills and piles." (ELPC, et al. Public Comments (Oct. 30, 2020), at 61). The People agree with the environmental groups that the closure of dozens of impoundments statewide, some involving the movement of CCR to new disposal sites, with related corrective action to address groundwater at power plant sites that may also be contaminated from historic ash landfills and piles, calls for a comprehensive examination of coal ash beyond the setting of CCR surface impoundments. The People also support the environmental groups' proposed amendments to ensure meaningful public participation in the State's regulation of CCR surface impoundments. (*Id*. at 87-106).

2. The Board should reject Ameren's attempt to have the Board make site-specific determinations concerning its legal obligations under Section 22.59 of the Act in this rulemaking of general applicability.

Ameren improperly seeks to have the Board grant it site-specific relief, stating that it "raised specific and discreet issues concerning the [Agency's] proposed rule in relation to the status of these former ponds – *issues specific to Ameren*." (Ameren Post-Hearing Brief (Oct. 30, 2020), at 1) (emphasis added). However, the Board has earlier considered and rejected this type of inappropriate request for site-specific relief, and it should do so again with respect to Ameren's requests. Specifically, in a rulemaking of general applicability, like this one, a participant sought to have the Board grant it site-specific relief arguing the proposed rule would adversely affect it:

> The Village of Winnetka argues that the record in this matter demonstrates that there is no environmental need for further particulate controls at its power plant, that the proposed rules would impose an unreasonable economic hardship upon it, and that the adoption of rules which would require greater control of emissions from its electric plant would be unlawful.

In the Matter of: Particulate Emission Limitations Rule 203(G)(1) and 202(B) of Chapter 2, R82-1, slip op. at 16 (Jul. 19, 1984). In the foregoing case, the Board lauded the hearing officer's efforts

to "distinguish testimony directed toward site-specific relief and information directed toward a regulation of general applicability and has attempted to exclude site-specific testimony." *Id.* at 17. Ultimately, the Board "declined to propose site-specific relief" and succinctly explained its rationale:

> The Village was allowed sufficient latitude to present evidence which is relevant to the promulgation of a rule of general applicability which was the purpose of this rulemaking. *The Village has no right, and the Board has no duty, to go beyond that*. If the Village's reasoning were taken to its logical extreme, the Board would be forced to allow detailed testimony regarding each specific source in the State which could conceivably be affected by a rulemaking proceeding.

Id. (emphasis added).

The cases that Ameren relies on do not support its request for site-specific relief. (*See* Ameren Post-Hearing Brief (Oct. 30, 2020), at 2). Ameren contends "[o]ne of the most fundamental tasks in framing regulations is to make as clear as possible what operations are subject to the regulations." (*Id*.) (citing *In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills*, R88-7, slip op. at 34 (Mar. 1, 1990)). However, that quote is taken out of context. In the opinion, the Board goes on to discuss the context of Ameren's quoted language, explaining that it was attempting to narrow the scope of the new waste disposal regulations (Parts 810-815). *Id*. at 35 ("It became clear that the Board would have to defer to another proceeding the crafting of regulations to properly address the rest of the universe of storage, treatment and disposal solid waste facilities."). The Board was not saying that it had to make site-specific findings as Ameren suggests.

The other out-of-context quote that Ameren recites is even more of a stretch. Ameren cites *In the Matter of: Groundwater Quality Standards*, R89-14, slip op. at 6 (Nov. 7, 1991), for the proposition that the Board was "interpreting statutory language in order to 'more clearly alert[] the

public to what is being regulated.'" (Ameren Post-Hearing Brief (Oct. 30, 2020), at 2). However, this quote arose in the Board's discussion of why it was proposing to change the language of Section 620.105, which "sets forth the purpose of the Part." *In the Matter of: Groundwater Quality Standards*, R89-14, slip op. at 6 (Nov. 7, 1991). Finally, the Board, in explaining its preferred policy language, put Ameren's quote into context:

> This language comes from the policy statement found at Section 2(b) of the IGPA. While the Board fully stands behind this policy statement, the Board believes that today's Section 620.105 language is a better descriptor of the contents of the Part 620 rules, and therefore opts to use this version. The Board believes that this narrow purpose statement more clearly alerts the public to what is being regulated.

Id. In this proceeding, there are no disputes about "what is being regulated" (i.e., "CCR surface impoundments"); rather, Ameren's fact-dependent disputes concern whether its specific, individual, facilities fall within that regulated category.

Finally, in its "brief", Ameren includes a prayer for relief seeking to have the Board make quasi-judicial rulings in this non-adversarial rulemaking of general applicability declaring that its facilities are exempt: (1) by eliminating the applicable October 19, 2015 effective date from the definition for an "Inactive Closed CCR surface impoundment"; (2) by finding that Part 845 does not apply to four of its "ash ponds" as "they are no longer surface impoundments as defined in Section 3.143 of the Act;" (3) because "Part 845 does not apply to the Meredosia Old Ash Pond;" and (4) because there are existing rules for its Hutsonville Pond D. (Ameren Post-Hearing Brief (Oct. 30, 2020), at 5). The People have already addressed the impropriety of Ameren's request for adjudicatory relief from the Board in this rulemaking of general applicability. (*See* AGO Post-Hearing Comments (Oct. 30, 2020), at 3-4). Further, both Illinois EPA and Dynegy commented that the Board should make no such site-specific findings. (*See* Agency Post-Hearing Comments (Oct. 30, 2020), at 50-58; *see also* Dynegy Post-Hearing Comments (Oct. 30, 2020), at 20-21).

Accordingly, the Board should decline Ameren's request that it make quasi-judicial site-specific determinations in this rulemaking of general applicability.

3. Ameren's proposals to limit Part 845's applicability should be rejected, because they fail to acknowledge the General Assembly's express intent that the Board's rules be "at least as protective and comprehensive" as federal rules.

Ameren's legal analysis in support of its proposals to limit Part 845's applicability is actually quite similar to the People's arguments opposing them, but for Ameren's failure to account for two fundamental legal issues. **First**, Ameren's analysis does not acknowledge Section 22.59(g)(1) of the Act, which makes clear that Part 845 must be "at least as comprehensive and protective" as the federal Part 257 regulations. 415 ILCS 5/22.59(g)(1). The General Assembly's unambiguous directive supplies a legislative indication of temporal reach that Ameren asserts is otherwise missing from Section 22.59, pursuant to *Landsgraf v. USI Film Products*, 511 U.S. 244 (1994). (*See* AGO Post-Hearing Comments (Oct. 30, 2020), at 7.) **Second**, Ameren errs in asking the Board to give legal effect to Part 257's original exemption for "legacy ponds," which was invalidated over two years ago in *Utility Solid Waste Activities Group v. Environmental Protection Agency*, 901 F. 3d 414 (D.C. Cir. 2018) ("*USWAG*"). (*See* AGO Post-Hearing Comments (Oct. 30, 2020), at 5-6). The Board should reject all of Ameren's proposed revisions to Sections 845.100 and 845.120, because they are inconsistent with the General Assembly's express intent set forth in Section 22.59 of the Act.

Section 22.59(g)(1)'s directive that the Board adopt regulations "at least as comprehensive and protective" as Part 257 speaks decisively to the statute's temporal reach. The federal Part 257 regulations do not merely cover CCR surface impoundments that contained CCR as of the effective date of the state Act's Section 22.59, or as of the future effective date of the Board's Part 845 regulations, as Ameren variously advocates for Part 845. Instead, Part 257's regulation of CCR

surface impoundments is keyed to *its* effective date of October 19, 2015. *See* 80 Fed. Reg. 37988, 37989 (July 2, 2015). The Board's regulations therefore must, at a minimum, reflect that same temporal scope, or they will violate Section 22.59(g)(1). As a corollary, the definition of "CCR surface impoundment" adopted in Section 3.143 of the Act—which, on its face, contains no indication of temporal reach—must be construed as including, at a minimum, impoundments containing CCR as of Part 257's October 19, 2015 effective date. 415 ILCS 5/3.143; *see People v. Minnis*, 2016 IL 119563, ¶ 25 ("A court must view the statute as a whole, construing words and phrases in light of other relevant statutory provisions and not in isolation.").

The Agency's proposal to reference October 19, 2015 in delineating requirements under Part 845 therefore is the correct legal approach. By contrast, Ameren's myopic focus on its own purportedly "unique" circumstances has led to a proposal that would be inconsistent with Part 257. For example, Ameren requests that the Board adopt at Section 845.100(k) an exemption for any CCR surface impoundment closed by removal pursuant to a State-approved closure plan prior to the future effective date of Part 845, which will occur in 2021. As reflected in Illinois EPA's August 3, 2020 pre-filed answers, however, there are potentially multiple CCR surface impoundments at active plants that (i) have been regulated continuously under Part 257 since its promulgation in 2015, (ii) will continue to be regulated under Part 257, and (iii) are "likely" to be closed by July 31, 2021. (*See* Illinois EPA Pre-Filed Answers (Aug. 3, 2020), at 180-81). To the extent any of those impoundments are closed by removal prior to Part 845's 2021 effective date, the Board's rules immediately upon adoption would fail to be "at least as comprehensive and protective" as Part 257, under Ameren's proposed exemption. 415 ILCS 5/22.59(g)(1). This result can be avoided by instead adopting the Agency's proposed language ensuring that Part 845 has the same temporal scope as the federal rules.

Notably, Ameren has not proposed that all references to October 19, 2015 in the proposed rules be stricken—only the reference to October 19, 2015 in Section 845.120's definition of "Inactive Closed CCR surface impoundment." In proposing this internally inconsistent approach, Ameren for all intents and purposes is asking the Board to give legal effect to Part 257's original exemption for "legacy ponds," vacated over two years ago. Ameren explains as follows:

> Ameren's most significant objection to the IEPA's proposed rules is that the operative date in this proposed structure for closure is October 19, 2015—the effective date of [Part 257], a date which is almost five years past. During that time frame, the federal rule did not apply to Ameren . . . .

(Ameren Post-Hearing Brief (Oct. 30, 2020), at 16).

Ameren's argument to exempt its "legacy ponds" here is at odds with both the plain language of Section 22.59 and federal law as interpreted in *USWAG*. In adopting Section 22.59, the General Assembly pointedly *did not* draw the same distinction between impoundments at active and inactive power plants that USEPA did when it promulgated Part 257 in 2015. *See* 415 ILCS 5/22.59(a)(3) (finding that "CCR generated by the electric generating industry has caused groundwater contamination and other forms of pollution at *active and inactive plants* throughout this State") (emphasis added). The definition of "CCR surface impoundment" in Section 3.143 does not include any requirement that the impoundment be at an active power plant.

With respect to federal law, the D.C. Circuit's vacatur of Part 257's "legacy pond" exemption in *USWAG* had an immediate retroactive effect, as argued in the People's post-hearing comments. (*See* AGO Post-Hearing Comments (Oct. 30, 2020), at 5-6). The D.C. Circuit could have remanded 40 C.F.R. § 257.50(e) to USEPA for further rulemaking, *without* vacating it, as Ameren seems to view the opinion. The D.C. Circuit did not. Instead, it *vacated and* remanded the provision. *USWAG*, 901 F.3d at 449. "To 'vacate,' as the parties should well know, means to

annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside." *Action on Smoking & Health v. C.A.B.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (quotations omitted); *Waterkeeper Alliance, Inc. v. Wheeler*, No. CV 18-2230 (JDB), 2020 WL 1873564, at *6-*7 (D.D.C. Apr. 15, 2020) (rejecting USEPA's argument that court should leave in place USEPA's approval of state coal ash program allowing continued operation of unlined impoundments in violation of *USWAG*, pending further rulemaking).[1]

Ameren contends that *USWAG*'s vacatur of 40 C.F.R. § 257.50(e) "cannot be construed to operate with an immediate retroactive effect," but fails to cite any supporting caselaw for this legally erroneous conclusion. (*Contrast* Ameren Post-Hearing Brief (Oct. 30, 2020), at 20, *with Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) (holding that a federal court's opinion "must be given full retroactive effect . . . as to all events, regardless of whether such events predate or postdate" the opinion)).

Instead, Ameren refers only to an October 1, 2020 pre-publication "Advanced Notice of Proposed Rulemaking" ("ANPR") from USEPA, in which USEPA discusses future plans for a rulemaking on "legacy ponds." (*See* Ameren Post-Hearing Brief (Oct. 30, 2020), Ex. B.) It is true that, despite the D.C. Circuit's vacatur and remand of 40 C.F.R. § 257.50(e) *over two years ago*, USEPA has failed to complete—or even begin—additional notice-and-comment rulemaking regarding "legacy ponds," but that in no way impacts the retroactive effect of the *USWAG* decision under federal caselaw. In fact, USEPA's pre-publication ANPR, although entitled to no legal weight, demonstrates why Ameren's proposed approach is flawed. Ameren implies that USEPA's

[1] The *USWAG* court's vacatur of the "legacy pond" exemption was not at issue in *Waterkeeper*, but must be afforded the same full retroactive effect as the other vacaturs in *USWAG*, under the same clear-cut federal caselaw.

future rules concerning "legacy ponds" will necessarily regulate only CCR surface impoundments that still contain CCR as of the time of USEPA's rulemaking. (*See* Ameren Post-Hearing Brief (Oct. 30, 2020), at 20 ("As Ameren proposes, those [legacy ponds] that continue to contain CCR would be subject to regulation *prospectively* . . . .") (emphasis in original)). In the pre-publication ANPR, however, USEPA actually expresses its intent to seek comment on three options—

including among them an "Option 1" regulating all "legacy" CCR surface impoundments that "contained both CCR and liquids on the effective date of the 2015 CCR rule (i.e., October 19, 2015)." (*Id*., Ex. B at 12). That is, indeed, the *only* option compatible with the "full retroactive effect" accorded to *USWAG* under relevant caselaw—and is the same temporal scope that the Agency correctly proposes here. *Harper*, 509 U.S. at 97. If the Board were to adopt Ameren's interpretation of the Act, however, the Board would be unable to *ever* adopt a program with that temporal scope under existing State law, rendering Part 845 less comprehensive and protective than Part 257. Ameren's proposals to limit Part 845's applicability should be rejected.

Moreover, if the Board fails to promulgate regulations that are consistent with the federal rules' temporal reach, it could jeopardize USEPA's approval of the state's CCR permitting program:

> *to approve the State's permitting program for CCR surface impoundments*, the state program must require *each CCR unit located in the state* to achieve compliance with either the applicable requirements in 40 C.F.R. Part 257 or alternative state standards that EPA has determined are *at least as protective as the requirements in the federal regulations.*

(USEPA Public Comments (Oct. 30, 2020), at 1) (emphasis added).

Ameren contends that inclusion of the required federal effective date of October 19, 2015 in Part 845 "effectively nullifies Ameren's prior closures" of its CCR surface impoundments. (Ameren Post-Hearing Brief (Oct. 30, 2020), at 17). As was explained to Ameren on multiple

occasions during the hearing, however, this is not the case, because Section 22.59(e) exempts impoundments closed prior to July 31, 2021, pursuant to a plan submitted to the Agency on or before May 1, 2019, from the closure construction permit requirement. 415 ILCS 5/22.59(e); (*see, e.g.*, Transcript of 8/25/20 hearing at 34:2-21). The point is not to "nullify" previous closures, but to ensure that all CCR surface impoundments in the State are regulated under Section 22.59, as the General Assembly mandated. The Agency explained well in its post-hearing comments why Part 845's post-closure requirements—including of financial assurance—should apply to Ameren's impoundments, such that Ameren's proposal to exempt CCR surface impoundments regulated by Part 840 should be rejected. (Agency Post-Hearing Comments (Oct. 30, 2020), at 54-55).[2]

4. Ameren has failed to provide any support for its proposal to require the Agency to maintain records regarding site-specific costs.

The People explained in their post-hearing comments how Ameren's proposed regulations requiring the Agency to maintain records regarding site-specific costs are unauthorized by the Act and serve no legitimate purpose given the General Assembly's establishment of flat fees. (AGO Post-Hearing Comments (Oct. 30, 2020), at 9-11). Ameren referenced this proposal only cursorily in its Post-Hearing Brief, without raising any additional substantive argument. (Ameren Post-Hearing Brief (Oct. 30, 2020), at 29). The People stand on their argument in previous comments that Ameren's proposal should be rejected.

[2] The People further note that Part 840 was adopted prior to the enactment of Section 22.59 and USEPA's promulgation of Part 257, and therefore cannot conceivably be considered an adequate legal substitute for the more specific requirements of Section 22.59 and the federal regulations it incorporates by reference. Ameren cites to the principle that specific enactments should govern over general enactments; in this case, however, Section 22.59 undoubtedly is the General Assembly's most specific enactment concerning CCR surface impoundments, and must be applied to Ameren's impoundments. (Ameren Post-Hearing Brief (Oct. 30, 2020), at 27).

Respectfully submitted,

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