

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF: )  
 )  
PETITION OF AMEREN ENERGY MEDINA ) AS 2021-007  
VALLEY COGEN, LLC (HUTSONVILLE D) )  
FOR ADJUSTED STANDARDS FROM ) (Adjusted Standard)  
35 ILL. ADM. CODE PART 845 )

**NOTICE OF ELECTRONIC FILING**

To: See attached service list.

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board the attached RECOMMENDATION of the Illinois Environmental Protection Agency and a CERTIFICATE OF SERVICE, copies of which are herewith served upon you.

Dated: April 28, 2023

Respectfully submitted,  
ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,

Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
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Respondent,

BY: /s/Sara Terranova  
Sara Terranova

**THIS FILING IS SUBMITTED ELECTRONICALLY**

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**RECOMMENDATION**

The Illinois Environmental Protection Agency (“Illinois EPA” or “Agency”), by one of its attorneys, hereby files its Recommendation pursuant to 415 ILCS 5/28.1 and 35 Ill. Adm. Code §104.416 concerning Ameren Energy Medina Valley Cogen, LLC’s (“Petitioner” or “Ameren”) Hutsonville Pond D (“Hutsonville D”). Hutsonville D is a former Ameren ash pond that operated at Ameren’s inactive Hutsonville Power Station, located in Crawford County, Illinois. For the reasons stated below, Illinois EPA recommends that the Illinois Pollution Control Board (“Board”) GRANT Petitioner’s request for an adjusted standard from 35 Ill. Adm Code 845 with conditions as provided by the Agency.

**BACKGROUND**

1. Pursuant to 415 ILCS 5/22.59(g)(1), the Board was directed to adopt rules for coal combustion residuals (“CCR”) surface impoundments “at least as protective and comprehensive” as Subpart D of 40 CFR 257 (“Part 257”) and to use Part 257 “as a baseline.” 415 ILCS 5/22.59(g)(1) and *In the Matter of: Standards for Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19* (“R20-19”), Order (February 4, 2021), at 11.

2. On April 15, 2021, the Board adopted new regulations providing standards for disposal of CCR in surface impoundments at 35 Ill. Adm. Code 845 (“Part 845”). R20-19, Final Order (April 15, 2021). The Part 845 rules became effective on April 21, 2021. 45 Ill. Reg. 5884 (May 7, 2021).
3. While independent of the federal rule, Part 845 complies with the statutory mandate in 415 ILCS 5/22.59(g)(1) and is based on Part 257 and written with “at least the same protection and comprehensiveness” as Part 257. R20-19, Order (February 4, 2021), at 11.
4. On May 11, 2021, Petitioner filed a “Petition for an Adjusted Standards” (“Petition” or “Pet.”). On December 16, 2022, Petitioner filed an “Amended Petition for Adjusted Standards from Part 845” (“Amended Petition” or “Amd. Pet.”).
5. Illinois EPA must make a recommendation to the Board as to the disposition of the Petition within 45 days after the filing of the petition or at least 30 days before a hearing, unless otherwise ordered by the hearing officer or Board. 35 Ill. Adm. Code §104.416. Pursuant to Motions for Extension of Time, the Board has ordered that the Agency file its Recommendation by April 28, 2023.

#### **REQUIRED ADJUSTED STANDARD ANALYSIS**

6. Illinois EPA’s Recommendation must set forth the rationale for the Agency’s position and may present any information which the Agency believes is relevant to the Board’s consideration of the proposed adjusted standard. 35 Ill. Adm. Code §104.416(a). At a minimum, the Agency must address and respond to the petition with respect to each issue raised by the requirements of Section 104.406(a) through (j). 35 Ill. Adm. Code § 104.416(b).
7. Illinois EPA hereby provides its analysis of the Petitioner’s request for an adjusted standard from Part 845.

***35 Ill Adm. Code 104.406(a). A statement describing the standard from which an adjusted standard is sought. This must include the Illinois Administrative Code citation***

*to the regulation of general applicability imposing the standard as well as the effective date of that regulation;*

8. As an “inactive closed CCR surface impoundment” under 35 Ill. Adm. Code 845.120 (See Amd. Pet. at 6), both the Agency and Petitioner agree Hutsonville Pond D is subject to the requirements in 35 Ill. Adm. Code 845.170. *Id.*

9. Part 845, including Section 845.170, became effective on April 21, 2021.

10. Petitioner states: “Ameren is seeking adjusted standards from the requirements in Subpart B (Permitting) as listed in Section 845.170(a)(2) and the requirements of Subpart G (Closure and Post-Closure) as listed in Section 845.170(a)(3).” *Id.* at 7. Petitioner also states: “Ameren requests adjustments to all sections of 35 Ill. Admin. Code Part 845, except for the provisions of Part 845, Subpart H: Recordkeeping, Section 810, Publicly Accessible Internet Site Requirements, and Subpart I: Financial Assurance.” *Id.*

***35 Ill Adm. Code 104.406(b). A statement that indicates whether the regulation of general applicability was promulgated to implement, in whole or in part, the requirements of the CWA (33 USC 1251 et seq.), Safe Drinking Water Act (42 USC 300(f) et seq.), Comprehensive Environmental Response, Compensation and Liability Act (42 USC 9601 et seq.), CAA (42 USC 7401 et seq.), or the State programs concerning RCRA, UIC, or NPDES (see 415 ILCS 5/28.1);***

11. . The Agency disagrees with Petitioner’s statement that Part 845 was promulgated to implement the State’s programs related to the Resource Conservation and Recovery Act (See Amd. Pet. at 8).

12. Part 845 implements 415 ILCS 5/12, 22, and 22.59. “Part 845’s scope is dictated by the General Assembly’s mandate to the Board in Section 22.59 (415 ILCS 5/22.59). Section 22.59(g) directs the Board to adopt rules for “CCR surface impoundments”—a term defined in the Act—using USEPA’s Part 257 as a baseline. 415 ILCS 5/22.59(g).” See R20-19, Order (February 4, 2021), at 11

***35 Ill Adm. Code 104.406(c). The level of justification as well as other information or requirements necessary for an adjusted standard as specified by the regulation of general applicability or a statement that the regulation of general applicability does not specify a level of justification or other requirements;***

13. Illinois EPA agrees with Petitioner that since Part 845 does not specify a level of justification for an adjusted standard, the applicable level of justification are the factors identified in Section 28.1(c) of the Act, 415 ILCS 5/28.1(c).

***35 Ill Adm. Code 104.406(d). A description of the nature of the petitioner's activity that is the subject of the proposed adjusted standard. The description must include the location of, and area affected by, the petitioner's activity. This description must also include the number of persons employed by the petitioner's facility at issue, age of that facility, relevant pollution control equipment already in use, and the qualitative and quantitative description of the nature of emissions, discharges or releases currently generated by the petitioner's activity;***

14. The Petitioner provides a description of the former operations and current status of the Hutsonville Station. See Amd. Pet. at 9-10. The Agency has no information to dispute the facts presented.

***35 Ill Adm. Code 104.406(e). A description of the efforts that would be necessary if the petitioner was to comply with the regulation of general applicability. All compliance alternatives, with the corresponding costs for each alternative, must be discussed. The discussion of costs must include the overall capital costs as well as the annualized capital and operating costs;***

15. The Petitioner discusses some similarities and differences between Part 840 and 845. See Amd. Pet. at 18-20. For example: Both Part 840 and Part 845 require compliance with the groundwater protection standard for post-closure care to end, but Part 845 has a 30-year minimum cost care period while Part 840 is strictly performance based (i.e. achieving the groundwater protection standards). See Amd. Pet. at 19. The Agency agrees with these statements. Though the requirements of the report are not exactly the same, the Petitioner states that both Part 840 and Part 845 require that an annual report be submitted by January 31 of each year. See Amd. Pet. at 19. The Petitioner states that without the adjusted standard, failure to submit an annual report would

subject Ameren to duplicative penalties as set forth in Section 42(h) of the Act. See Amd. Pet. at 19. The Agency disagrees with these statements. As an inactive closed CCR surface impoundment, Hutsonville Pond D is subject to Section 845.170. Section 845.170 does not list Section 845.550 (Consolidated Annual Report) or the whole of Subpart E as a requirement for compliance with Part 845. Therefore, the Agency believes that there is no duplicative requirement for which a violation may be cited.

16. The Petitioner states that Part 840 has given Ameren certainty with regard to its regulatory status and requirements. See Amd. Pet. at 20. The Petitioner further states that subjecting Pond D to the new, different, overlapping requirements of Part 845 would serve no legitimate or beneficial regulatory purpose. See Amd. Pet at 20. The Petitioner states that compliance with Part 845 would require Ameren to duplicate efforts and expenses already addressed under Part 840, but is willing to follow new requirements for which the Board had no authority to include in Part 840. See Amd. Pet. at 20. The Petitioner states “[H]owever, Ameren believes that the wholesale application of Part 845 to Hutsonville D, and associated repeal of Part 840, would implicate an unlawful retroactive application of the law.” See Amd. Pet. at 20. The Agency points out that as an inactive closed CCR surface impoundment, Part 845 would not be applied to Pond D in a “wholesale manner”. The only portions of Part 845 applicable to Pond D are enumerated in Section 845.170. That said, Pond D is unique among the four inactive closed CCR surface impoundments in the State. No other inactive closed CCR surface impoundment has a site-specific rule.

***35 Ill Adm. Code 104.406(f)A narrative description of the proposed adjusted standard as well as proposed language for a Board order that would impose the standard. Efforts necessary to achieve this proposed standard and the corresponding costs must also be presented;***

17. Petitioner provides a narrative list of the adjusted standard it is requesting. See Amd. Pet. at 21. The Agency generally agrees with the Petitioner’s list but believes there are several other

Sections in Part 845 which are not duplicative of any requirement in Part 840. The Agency has included a list of additional proposed recommendations for inclusion in the adjusted standard, justification for their inclusion and proposed language for the additional recommendations. See Attachment 1. In Section IX, (2)(i), the Petitioner agrees to post all the groundwater record keeping documents required by Section 840.116 on an Internet website. See Amd. Pet at 21. However, as discussed by the Agency later, Section 840.116 does not require the generation of groundwater related documents. Therefore, the Agency has provided references to other Sections of Part 840 that it believes do require the generation of documents that should be stored on the website the Petitioner has agreed to maintain in accordance with Section 845.810 (See Amd. Pet. at 21).

***35 Ill Adm. Code 104.406(g) The quantitative and qualitative description of the impact of the petitioner's activity on the environment if the petitioner were to comply with the regulation of general applicability as compared to the quantitative and qualitative impact on the environment if the petitioner were to comply only with the proposed adjusted standard. To the extent applicable, cross-media impacts must be discussed. Also, the petitioner must compare the qualitative and quantitative nature of emissions, discharges or releases that would be expected from compliance with the regulation of general applicability as opposed to that which would be expected from compliance with the proposed adjusted standard;***

18. The Petitioner provides a discussion of the hydrogeologic characteristics of the Hutsonville site (see Amd. Pet at 11-12); groundwater monitoring network, groundwater monitoring plan, and a summary of the contents of the annual report (*id.* at 12-14); a discussion of how compliance with groundwater quality standards is determined on-site and off-site in both the shallow and deep migration zones (*id.* at 15-16); a description of the actions that will be taken to address any noncompliance that is found using the approved statistical analysis methodology (*id.* at 16-18); and a brief summary of compliance findings through 2020, for which data was available when the original Petition was filed with the Board (see AS2021-007).

19. Ameren has committed to begin reporting metals concentrations as totals as required under Part 845, instead of dissolved constituents as allowed under Part 840. See Amd. Pet. at 14. By switching to total metals analysis, the results generated under Part 840 can be directly compared to results which are generated under Part 845.

20. Based on the Agency's review of the Amended Petition, Section VII (35 Ill. Adm. Code 106.406(g)) does not provide a comparison of the qualitative and quantitative nature of emissions that would be expected under the rule of general applicability as opposed to what would be expected under the proposed adjusted standard. However, the cover of Pond D was constructed pursuant to the requirements of Section 840.126. Sections 840.126(a) and 845.750(c)(1)(B) have the same requirements for a geosynthetic membrane and the prepared base for the geomembrane. Sections 840.126(b) and 845.750(c)(2) have the same requirements for a final protective layer over the geomembrane. Section 840.120 requires the installation of a groundwater collection trench to control the migration of contaminated groundwater. Under Part 845, the appropriate corrective measures would be assessed under Section 845.660, designed under Section 845.670 and implemented under Section 845.680. Under Part 840, the groundwater collection trench was proposed and designed using the hydrogeologic site assessment required by Section 840.110 and implemented and operated under the requirements of Sections 840.120 and 840.122, respectively. A groundwater collection trench could be a corrective action under Part 845.

21. Given that the final cover system of Pond D is compliant with both Part 840 and Part 845, and the corrective action at Pond D required by Part 840 could also have been planned, designed, and implemented under Part 845, the Agency has no reason to believe the current groundwater conditions would be different if Part 845 was in effect at Pond D. Since the requested adjusted standard is to continue operation under Part 840, while adding a few additional requirements

discussed under Section 106.406(f), the Agency does not believe there would be a significant difference if Pond D operates under the requested adjusted standard or under Section 845.170, which is the rule of general applicability under Part 845. With the exception of requiring an operating permit under Section 845.230, the proposed adjusted standard, with the Agency's proposed additions, mirrors, and in some instances goes beyond, (e.g. deed restriction and public website) the requirements of Section 845.170.

***35 Ill Adm. Code 104.406(h). A statement that explains how the petitioner seeks to justify, under the applicable level of justification, the proposed adjusted standard;***

22. The Petitioner provides a discussion of each of the four factors identified in Section 28.1(c) of the Act (discussed below with excerpts of the Act shown in italics) relative to an adjusted standard for 35 Ill. Adm. Code 845. However, each factor is not specifically identified as an individual Section 28.1(c) factor. See Amd. Pet at 21-26. The Amended Petition incorrectly states that the adjusted standard is from the Board's landfill regulations, see Amd. Pet. at 21.

*1) factors relating to that petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation applicable to that petitioner;*

23. The Amended Petition discusses the unique character of Hutsonville Pond D as the only CCR surface impoundment in the State with its own site-specific rule. See Amd. Pet. at 21-23. The Agency does not dispute the facts presented by the Petitioner.

*2) the existence of those factors justifies an adjusted standard;*

24. The Amended Petition discusses the unique character of Hutsonville Pond D as the only CCR surface impoundment in the State with its own site-specific rule. See Amd. Pet. at 21-23. The Agency agrees that these facts justify an adjusted standard.

*3) the requested standard will not result in environmental or health effects substantially and significantly more adverse than the effects considered by the Board in adopting the rule of*

*general applicability; and*

25. The Amended Petition provides findings from the Board's Opinion and Order R09-21, supporting the Petitioner's position that Part 840 will not result in substantial human health or environmental impacts. See Amd. Pet. at 23-25. As discussed in the Agency's Recommendation responsive to Section 106.406(g), the final cover system required by Section 840.126 is equivalent to a final cover system under Section 845.750(c). The groundwater collection trench required by Section 840.120 could have been a corrective measure developed and implemented under Sections 845.660, 845.670 and 845.680. Since controlling the generation of contaminants with a final cover and controlling the migration of contaminants through corrective measures (e.g. the groundwater collection trench) serve as the primary means to protect human health and the environment and Hutsonville Pond D employs both through Part 840, the Agency believes that there will not be substantially and significantly more adverse effects if the adjusted standard is granted by the Board.

4) *the adjusted standard is consistent with any applicable federal law.* [415 ILCS 5/28.1(c)]

26. The Amended Petition does not contain a discussion specifically identifying 415 ILCS 5/28.1(c)(4). However the Amended Petition does contain a discussion of consistency with federal law under Section 104.406(i). See Amd. Pet. at 26. The Agency does not dispute the facts presented in the Amended Petition relative to consistency with federal law.

***35 Ill Adm. Code 104.406(i). A statement with supporting reasons that the Board may grant the proposed adjusted standard consistent with federal law. The petitioner must also inform the Board of all procedural requirements applicable to the Board's decision on the petition that are imposed by federal law and not required by this Subpart. Relevant regulatory and statutory authorities must be cited;***

27. The Amended Petition contains a discussion of consistency with federal law. See Amd. Pet. at 26. The Petitioner cites the requirement of Section 840.152 that should any portion of Part

840 ever be determined less stringent or inconsistent with any part of RCRA, then RCRA will prevail. See Amd. Pet. at 26. The Petitioner further discusses that the federal CCR rule, 40 CFR 257, which became effective October 19, 2015, does not include regulations for any CCR surface impoundment located at a generating facility that ceased generation before the effective date, though that has been remanded back to USEPA. See Amd. Pet. at 26. The Agency does not dispute the facts presented by the Petitioner.

28. Pursuant to 415 ILCS 5/22.59(g)(1), the Board was directed to adopt rules for coal combustion residuals (“CCR”) surface impoundments “at least as protective and comprehensive” as Subpart D of 40 CFR 257 (“Part 257”) and to use Part 257 “as a baseline.” 415 ILCS 5/22.59(g)(1) and In the Matter of: Standards for Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19 (“R20-19”), Order (February 4, 2021), at 11. On April 15, 2021, the Board adopted new regulations providing standards for disposal of CCR in surface impoundments at 35 Ill. Adm. Code 845. R20-19, Final Order (April 15, 2021). The Part 845 rules became effective on April 21, 2021. 45 Ill. Reg. 5884 (May 7, 2021). While independent of the federal rule, Part 845 complies with the statutory mandate in 415 ILCS 5/22.59(g)(1) using Part 257 as a baseline and written with at least the same protection and comprehensiveness as Part 257. R20-19, Order (February 4, 2021), at 11.

29. As previously stated, the Agency believes Part 840 with the Agency’s proposed additions to the adjusted standards requested by the Petitioner will be as protective of human health and the environment as the Part 845 rule of general applicability. Since Part 845 is as protective and comprehensive as Part 257, the Agency believes Part 840 in conjunction with an adjusted standard from Part 845 as proposed here-in is also as comprehensive and protective as Part 257 and therefore consistent with federal rules.

*A statement requesting or waiving a hearing on the petition (under Section 104.422(a)(4) a hearing will be held on all petitions for adjusted standards filed under 35 Ill. Adm. Code 212.126);*

30. Ameren provides a statement that it waives its right to a hearing. See Amd. Pet. at 27. The Agency concurs that any differences in the requested adjusted standard and the proposed additional recommendations in the Agency's Recommendation can be resolved without a Board hearing.

**RECOMMENDATION**

WHEREFORE, for the above and foregoing reasons, Illinois EPA recommends that the Board GRANT Petitioner's request for an adjusted standard from 35 Ill. Adm Code 845 with conditions as provided by the Agency.

Dated: April 28, 2023

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1021 North Grand Avenue East  
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Respectfully submitted,  
ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,

Respondent,

BY: /s/Sara Terranova  
Sara Terranova

**CERTIFICATE OF SERVICE**

I, the undersigned, on affirmation certify the following:

That I have electronically served the attached **ELECTRONIC NOTICE OF FILING** and **RECOMMENDATION OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY** upon those listed on the Service List before 4:30 p.m. on April 28, 2023.

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

By: /s/ Sara Terranova  
Sara Terranova  
Assistant Counsel  
Division of Legal Counsel

DATED: April 28, 2023

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ATTACHMENT 1

**Proposed Conditions to the Narrative Description of the Proposed Adjusted Standard [35 Ill. Adm. Code 104.406(f)]**

Proposed Addition of Language to Amended Petition Section IX.2 at 21:

(v) The owner or operator of Hutsonville Pond D must place on, or immediately adjacent to Pond D, a permanent identification marker at least six feet high showing the identification number of the CCR surface impoundment assigned by the Agency, the name associated with the CCR surface impoundment and the name of the owner or operator of Pond D. The owner or operator of Pond D must maintain the marker at all times until the completion of post-closure care.

Proposed Addition to Amended Petition Section IX.2 at 21:

(2)(vi) The owner or operator of Hutsonville Pond D will continue to maintain corrective action as previously identified as adequate by the Agency and the Board in consideration of Part 840. If a release from Hutsonville Pond D not previously evaluated occurs subsequent to the grant of this Adjusted Standard, and the Agency has not concurred with an alternative source demonstration, the owner or operator of Hutsonville Pond D will initiate an assessment of corrective measures that prevents further releases, remediates any releases, and restores the affected area pursuant to 35 Ill. Adm. Code 845.170(c), including application for and obtainment of a construction permit pursuant to the requirements of 35 Ill. Adm. Code 845.220(a) and (c).

Proposed Addition of Language to Amended Petition Section IX.2 at 21:

(vii) Deed Notation

- 1) The owner or operator of Hutsonville Pond D must record a notation on the deed to the property, or some other instrument that is normally examined during title search.
- 2) The notation on the deed must in perpetuity notify any potential purchaser of the property that:
  - A) The land has been used as a CCR surface impoundment; and
  - B) Its use is restricted under the post-closure care requirements as provided by Section 845.780(d)(1)(C)
- 3) Within 30 days after recording a notation on the deed to the property, the owner or operator must submit to the Agency a notification stating that the notation has been recorded. The owner or operator must place the notification on the facility's Internet Website maintained in accordance with 35 Ill. Adm. Code 845.810.

Proposed addition to Amended Petition Section IX.2 at 21:

(viii) The owner or operator of Hutsonville Pond D must provide a description of the planned uses of the property during the postclosure care period by submitting a description of the planned uses to the IEPA in a letter format as a supplement to the postclosure plan approved under Part 840. The description of the planned uses must include the name, address, telephone number and email address of the person or office to contact about the facility during the post-closure care period. Postclosure use of the property must not disturb the integrity of the final cover, liners, or any other component of the containment system, or the function of the monitoring systems unless necessary to comply with the requirements of Part 840. Other disturbances may be allowed if the owner or operator demonstrates that disturbance of the final cover, liner, or other component of the containment system, including any removal of CCR, will not increase the potential threat to human health or the environment. The demonstration must be certified by a qualified professional engineer and must be submitted to the Agency.

Proposed addition to Amended Petition Section IX.2(i) at 21:

i) The owner or operator of Hutsonville Pond D must maintain a publicly accessible internet site that separately identifies any reports, plans and certifications related to Pond D prepared pursuant to any of the following sections of Part 840:

- 840.116 Groundwater Quality Standards
- 840.118 Demonstration of Compliance
- 840.132 Modification of Existing Permits
- 840.136 Post-Closure Maintenance of Cover System
- 840.142 Post-Closure Report/Certification of Completion of Post-Closure Care
- 840.144 Recordkeeping and Reporting Requirements
- 840.148 Review, Approval, Modification of Closure/Post-Closure Care Plans
  - 840.150 Review and Approval of Closure Report and Certification of Completion of Closure, Post-Closure Report and Certification of Completion of Post-Closure Care Plan