

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF:	)	
	)	AS 2021-003
PETITION OF MIDWEST	)	
GENERATION, LLC FOR AN	)	(Adjusted Standard)
ADJUSTED STANDARD FROM	)	
845.740(A) AND FINDING OF	)	
INAPPLICABILITY OF PART 845	)	

**NOTICE OF ELECTRONIC FILING**

To: Attached Service List

PLEASE TAKE NOTICE that on November 1, 2023, I electronically filed with the Clerk of the Illinois Pollution Control Board (“Board”) the **ENVIRONMENTAL GROUPS’ COMMENTS IN RESPONSE TO MIDWEST GENERATION’S RESPONSE TO ILLINOIS ENVIRONMENTAL PROTECTION AGENCY’S (“IEPA”) RECOMMENDATION**, copies of which are served on you along with this notice.

Dated: November 1, 2023

Respectfully Submitted,

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**ENVIRONMENTAL GROUPS’ COMMENTS IN RESPONSE TO MWG’S RESPONSE TO IEPA’S RECOMMENDATION**

Pursuant to 35 Ill. Adm. Code 101.628(c), 101.110(a), and 104.100, Clean Power Lake County, Earthjustice, Prairie Rivers Network, and Sierra Club (collectively, “Environmental Groups”) submit the following comments in response to the Response to Illinois Environmental Protection Agency’s Recommendation (“MWG Response” or “Response”) filed by Midwest Generation, LLC (“MWG”) on July 28, 2023 in this matter for the reasons explained herein.

In its Response, MWG argues that: (1) U.S. Environmental Protection Agency (“USEPA”) and the Board “agree” that the so-called “Grassy Field” portion of the Old Pond is not a coal combustion residual (“CCR” or “coal ash”) surface impoundment; (2) that portion of the Old Pond is not a CCR surface impoundment because it is not designed to hold liquids; (3) the “Grassy Field” will be regulated by USEPA once proposed regulations are finalized so, MWG implies, it need not be regulated by Illinois; and (4) whether groundwater pollution is present at the site is not relevant to the definition of CCR surface impoundment.

Yet again, MWG is wrong on nearly all counts. As explained in further detail below, neither USEPA nor the Board has concluded the “Grassy Field” is not a CCR surface impoundment. To the contrary: the history of that portion of the Old Pond, described in detail by IEPA in its Recommendation, together with the fact that a significant volume of the CCR in that area continues to be saturated in groundwater, make clear that it qualifies as a CCR surface impoundment. That combination of water and CCR—with the continued exceedances of health-based groundwater protection standards that can be expected when those two ingredients are present—is precisely why both USEPA and Illinois *already* regulate this unit and others like it.

Waukegan’s residents, who already bear so many environmental and social burdens, must not be further subjected to delays in cleaning up the waste that MWG and its predecessors have left near the shore of Lake Michigan. This Board has the authority and the obligation to direct MWG to comply with the rules adopted over two years ago, lightening the load on Waukegan residents and protecting Lake Michigan’s water for those who swim in, recreate on, and drink from this critical natural resource.

**1. Neither USEPA nor the Board have “agree[d]” that any portion of the Old Pond is not a CCR surface impoundment.**

MWG asserts that both USEPA and the Board have “agree[d]” that the “Grassy Field” portion of the Old Pond is not a CCR surface impoundment. MWG is wrong.

First, nowhere has USEPA “agree[d]” that the western third of the Old Pond is not a CCR surface impoundment. In its recent proposal to expand federal regulations to coal ash units at power plants that stopped producing power before October 19, 2015 (“Proposed Rule”),<sup>1</sup> USEPA includes the Old Pond in a list of “potential” “coal combustion residual management units” (“CCRMU”),<sup>2</sup> which EPA would define as “any area of land on which any noncontainerized accumulation of CCR is received, placed, or otherwise managed at any time, that is not a CCR unit. This includes inactive CCR landfills and CCR units that closed prior to October 17, 2015.”<sup>3</sup>

In the row referencing the Old Pond, EPA references the Old Pond as a “closed CCR surface impoundment” but writes “unknown” in the “closed” column, making clear that USEPA is not clear whether the unit fits its proposed definition for CCRMU.<sup>4</sup> USEPA’s title of the document as “Potential” CCRMU further reveals that the agency is far from definitive as to whether the disposal units on that list fit the definitional criteria. Moreover, nowhere else in the preamble of the Proposed Rule—which includes extensive discussion of the Waukegan site<sup>5</sup>—does USEPA state that the Old Pond is not a CCR surface impoundment.

In fact, as MWG correctly indicates, “U.S. EPA explains that units that do not contain liquids are different from those that do.”<sup>6</sup> As discussed below, there are liquids contained within the CCR in the western third of the Old Pond at Waukegan.<sup>7</sup> Thus, evidence in this record indicates that, contrary to MWG’s claim, USEPA would in fact recognize the Old Pond as an inactive CCR surface impoundment.

MWG is likewise wrong that the Board “agree[d]” that the Old Pond is not a CCR surface impoundment. Nowhere in its Opinion and Order in R2020-19 did the Board state that the Old Pond was not a CCR surface impoundment, nor did it point to anything in Environmental Groups’ comments for that proposition.<sup>8</sup> Indeed, the Board recognized in 2019 in the *Sierra Club v. MWG* Interim Final order that there is overlap between CCR and groundwater in the “Grassy Field” portion of the Old Pond.<sup>9</sup> However, the Board had no reason to classify the Old Pond as a CCR surface impoundment or landfill because, in that case, whether the CCR disposal area

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<sup>1</sup> Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments, 88 Fed. Reg. 31,982, 31,984 (May 18, 2023).

<sup>2</sup> See EPA, Potential CCR Management Universe, Docket ID No. EPA-HQ-OLEM-2020-0107-0155 (May 17, 2023), (“Potential CCR Management Universe”).

<sup>3</sup> 88 Fed. Reg. at 32,034 (proposed addition to 40 C.F.R. § 257.53).

<sup>4</sup> Potential CCR Management Universe, Row 25.

<sup>5</sup> See 88 Fed. Reg. at 32,016-017.

<sup>6</sup> MWG Response at 4.

<sup>7</sup> See Section 2 herein.

<sup>8</sup> See Order, at 12, R2020-19 (Feb. 4, 2021) (The Board cites Environmental Groups’ comments for the assertion that historic fill areas “have not been systematically categorized” by any state agency).

<sup>9</sup> Interim Opinion and Order, at 67, PCB 2013-15 (June 20, 2019).

qualifies as an impoundment or landfill is not at issue.<sup>10</sup> Nevertheless, the facts found by the Board in that Interim Order, together with the documents compiled by IEPA in its Recommendation, discussed below, make clear that that area fits the definition of an inactive CCR surface impoundment.

## 2. The “Grassy Field” portion of the Old Pond is a CCR Surface Impoundment.

- a. The “Grassy Field” sits within the footprint of a larger Old Pond that, in its entirety, meets the federal definition of a CCR surface impoundment.

The area at issue in this proceeding, which MWG likes to call the “Grassy Field,” is the western third of the larger Old Pond that also includes Waukegan Station’s East and West coal ash ponds.<sup>11</sup> IEPA correctly reasons that if this entire area meets the definition of a CCR surface impoundment, then the western third necessarily is also a CCR surface impoundment.<sup>12</sup>

The Federal CCR Rule defines CCR surface impoundment as “a natural topographic depression, man-made excavation, or diked area, which is designed to hold an accumulation of CCR and liquids, and the unit treats, stores, or disposes of CCR.”<sup>13</sup> IEPA amply demonstrates in its Recommendation that the entire area of the Old Pond meets this federal definition of CCR surface impoundment, and therefore the western third of the area also meets that definition. For example, IEPA provides extensive evidence that the entire Old Pond was a settling pond that received sluiced CCR for decades: by 1946, the coal plant operator was utilizing “the natural topographic depression within the dune field to settle CCR from sluice water prior to discharge.”<sup>14</sup> By 1974, the operator was utilizing “designed, man-made excavations and dikes (berms) within the dune field to settle CCR from sluice water prior to discharge.”<sup>15</sup> The design and use of this area clearly meet the federal criteria for a CCR surface impoundment. Because the “Grassy Field” sits within the footprint of this larger Old Pond area, it is a CCR surface impoundment under the Federal CCR Rule.<sup>16</sup>

As IEPA correctly points out, the fact that the western third of the Old Pond was graded and seeded, and “has maintained a vegetive [sic] cover[]” does not change its status as a CCR surface impoundment.<sup>17</sup> This issue turns on the meaning of “is designed” in the definition of a

<sup>10</sup> *Id.* at 79 (“It is immaterial whether any specific ash pond or any specific historic ash fill area can be pinpointed as a source to find MWG liable”).

<sup>11</sup> IEPA Recommendation at 5–6. MWG has already conceded that the East and West ponds are regulated CCR surface impoundments and not at issue in this proceeding. *See, e.g.*, MWG, Petition for an Adjusted Standard and a Finding of Inapplicability for Waukegan Station, at 1 (May 11, 2021) (“The Illinois CCR Rule regulates the East Pond as a Coal Combustion Residual (“CCR”) surface impoundment.”); MWG, Amended Petition for an Adjusted Standard and a Finding of Inapplicability for Waukegan Station, at 12 (Sept. 17, 2021) (stating that “the West Pond is subject to the Illinois CCR Rule” and amending its petition to request an adjusted standard for the West Pond instead of for the East Pond); MWG, Second Amended Petition for an Adjusted Standard and a Finding of Inapplicability for Waukegan Station, at 1 (July 28, 2023) (amending its petition to withdraw its request for an adjusted standard for the West Pond).

<sup>12</sup> IEPA Recommendation at 5-6.

<sup>13</sup> Federal CCR Rule at 21,469 (40 C.F.R. § 257.53).

<sup>14</sup> IEPA Recommendation at 7.

<sup>15</sup> *Id.* at 8.

<sup>16</sup> *Id.* at 10–11.

<sup>17</sup> *Id.* at 10.

CCR surface impoundment. We agree with IEPA that the D.C. Circuit's analysis in *Utility Solid Waste Activities Group v. EPA*<sup>18</sup> is instructive on this point.<sup>19</sup> In *USWAG*, the D.C. Circuit interpreted the phrase "is disposed" in RCRA's definition of "open dump" ("any facility or site where solid waste *is disposed* of which is not a sanitary landfill").<sup>20</sup> Industry argued that the phrase "is disposed of" means that a site must actively receive new waste in order to meet RCRA's definition of an "open dump."<sup>21</sup> The court rejected that argument, explaining that the word "disposed" took the form of a past participle and therefore an "open dump" includes sites where "the act of disposal took place at some prior time."<sup>22</sup> The court concluded that "the waste in inactive impoundments 'is disposed of' at a site no longer receiving new waste in just the same way that it 'is disposed of' in at a site that is still operating."<sup>23</sup> The same is true for a CCR surface impoundment that was used to receive CCR and liquids at some prior time, even if it no longer receives CCR.

MWG's claim that the Old Pond was designed to "disperse" —not "hold" —liquids, and therefore it is not a CCR surface impoundment, is unavailing. MWG concedes that the "core operation" of the larger area encompassing the Old Pond, when constructed, was to receive "sluiced CCR conveyed by pipe from the Station's boilers" where both CCR and liquids would remain until the liquid "either drained through the natural sand floor or was directed into the ditch along the Station's southern property line . . . and then to Lake Michigan."<sup>24</sup> USEPA has already rejected this interpretation, making clear that units like the Old Pond meet the federal definition of CCR surface impoundment. In a letter regarding CCR units at Duke Energy's Gallagher Station, USEPA wrote:

We understand that you interpret the definition of a CCR surface impoundment to exclude units such as the North Ash Pond, where liquid remains in the unit because the base of the unit intersects with groundwater. You argue that such units do not "hold" liquid because groundwater flows through the unit (instead of staying within the unit). EPA disagrees with your interpretation. The definition of a CCR surface impoundment does not require that the unit prevent groundwater from flowing through the unit, but merely requires that the unit be "designed to hold an accumulation of CCR and liquid." 40 C.F.R. § 257.53. Following your interpretation would lead to the incongruous result that impoundments where contaminants can migrate out in the groundwater would not be regulated by the CCR [Rule], while those that prevent that type of migration would be regulated.<sup>25</sup>

This has been USEPA's position since it adopted the Federal CCR Rule. In the preamble to that rule, USEPA explained:

"[C]onsider a diked area in which wet CCR is accumulated for future transport to

<sup>18</sup> 901 F.3d 414 (D.C. Cir. 2018).

<sup>19</sup> IEPA Recommendation at 11–12.

<sup>20</sup> 42 U.S.C. § 6903(14) (emphasis added).

<sup>21</sup> *USWAG*, 901 F.3d at 439.

<sup>22</sup> *Id.* at 440.

<sup>23</sup> *Id.*

<sup>24</sup> MWG Response at 8.

<sup>25</sup> Attach. A, USEPA, Letter re: Duke Energy's Gallagher Generating Station, at 1 (Jan. 2021) ("Duke Letter").

a CCR landfill or beneficial use. The unit is accumulating CCR, while *allowing for the evaporation or removal of liquid (no free liquids)* to facilitate transport to a CCR landfill or for beneficial use. In this instance, the unit again meets all three definition criteria, it is a diked area (i.e., there is an embankment), it is accumulating CCR for ultimate disposal or beneficial use; and it is removing any free liquids, (i.e., treatment). As such, this unit would meet the definition of CCR surface impoundment. In all of these examples significant quantities of CCR are impounded with water under a hydraulic head that will be managed for extended periods of time. This gives rise to the conditions that both promote the leaching of contaminants from the CCR and are responsible for the static and dynamic loadings that create the potential for structural instability. These units therefore all pose the same risks of releases due to structural instability and of leachate contaminating ground or surface water.”<sup>26</sup>

Thus, whether it retained liquids for significant periods or allowed liquids to drain out of the CCR (surely carrying with them leachable constituents), the entire Old Pond fits squarely into the definition of CCR surface impoundment.

Furthermore, the western third of the Old Pond is unlined<sup>27</sup> and holding CCR in groundwater—facts that indicate it meets the federal definition of a CCR surface impoundment. As explained above, the Board in its June 20, 2019 interim order in *Sierra Club v. Midwest Generation, LLC*, which MWG references in its Response,<sup>28</sup> noted that there are multiple feet of “overlap” between CCR and groundwater in the portion of the site.<sup>29</sup> Moreover, a boring log included with IEPA’s Recommendation also shows wet CCR in the western third of the Old Pond.<sup>30</sup> Like Duke’s North Ash Pond, MWG’s Old Pond is a CCR surface impoundment under the Federal CCR Rule. Because Illinois’ definition of CCR surface impoundment mirrors that of the Federal CCR Rule<sup>31</sup> and Illinois’ rules must be “at least as protective and comprehensive as” the Federal CCR Rule,<sup>32</sup> the Old Pond is likewise a CCR surface impoundment under Part 845.

b. The western third of the Old Pond is an inactive CCR surface impoundment.

Having established that the full Old Pond meets the definition of CCR surface impoundment, IEPA next demonstrates that the western third of the Old Pond is an “inactive” CCR surface impoundment under both the Federal CCR Rule and Part 845. Under the Federal

<sup>26</sup> Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21,302, 21,357 (Apr. 17, 2015).

<sup>27</sup> IEPA Recommendation at 15 (“The Agency has found no information indicating that the bottom of Old Pond was lined, including the Grassy Field portion.”).

<sup>28</sup> MWG Response at 5.

<sup>29</sup> Interim Opinion and Order, at 67, PCB 2013-15 (June 20, 2019); MWG Response at 1 n.1 (nothing that the Grassy Field is the same area as the “Former Slag/Fly Ash Storage Area”).

<sup>30</sup> See IEPA Recommendation at Ex. 47, Attach. 1, “Waukegan Station Geotechnical Study Results,” Figure 1-1 (PDF p. 1090 of 1394) (showing boring WS-GT-4 west of the West Ash Pond); *id.*, Log of Boring WS-GT-4 (PDF p. 1095 of 1394) (showing “wet” and “moist” bottom ash over various thicknesses as far as 19.5 feet down).

<sup>31</sup> See 35 Ill. Adm. Code 845.120 (defining “CCR surface impoundment” as “a natural topographic depression, man-made excavation, or diked area, which is designed to hold an accumulation of CCR and liquids, and the surface impoundment treats, stores, or disposes of CCR”).

<sup>32</sup> 5 ILCS 22.59(g)(1).

CCR Rule, an inactive CCR surface impoundment is “a CCR surface impoundment that no longer receives CCR on or after October 19, 2015, and *still contains* both CCR and liquids on or after October 19, 2015.”<sup>33</sup>

USEPA has explained that a surface impoundment “contains” liquids if any part of its base is in contact with groundwater:

EPA interprets the word “contains” to mean “to have or hold (someone or something) within” based on the ordinary meaning of the word. (e.g., Oxford English Dictionary, Merriam-Webster). Accordingly, an impoundment “contains” liquid if there is liquid in the impoundment, even if the impoundment does not prevent the liquid from migrating out of the impoundment. *This means that if a CCR surface impoundment contains liquid because its base (or any part of its base) is in contact with groundwater, it would meet the definition of an inactive CCR surface impoundment.*<sup>34</sup>

USEPA reiterated and elaborated on that explanation in its Proposed Rule:

A surface impoundment that, on or after October 19, 2015, has only decanted the surface water would normally still contain liquid if waste is saturated with water. *To the extent the unit still contains liquids, it would be covered by the existing definition of an inactive impoundment.* Under this proposed rule, such units would also be considered legacy CCR surface impoundments when located at inactive facilities. This would apply whether the unit is considered “closed” under state law, is in the process of closing, or whether at some subsequent point, the unit is fully dewatered and no longer contains liquid.<sup>35</sup>

Although the western third of the Old Pond stopped receiving CCR around 1980,<sup>36</sup> it still contains both CCR and liquids and thus meets the federal definition of an inactive CCR surface impoundment. IEPA confirms that “no mention, documentation, permit, permit application, or other evidence has been presented to the Agency showing that the Old Pond CCR materials were removed or covered in a manner that would prevent infiltration.”<sup>37</sup> Because the western third of the Old Pond still contains CCR and liquids, it is an inactive CCR surface impoundment under the Federal CCR Rule. Further, because Part 845 defines “inactive CCR surface impoundment” as “a CCR surface impoundment in which CCR was placed before but not after October 19, 2015 and still contains CCR on or after October 19, 2015”<sup>38</sup> the Old Pond likewise qualifies as an inactive CCR surface impoundment under Part 845.

In summary, IEPA’s analysis and evidence presented in its Recommendation—bolstered by the Board’s own findings concerning the western third of the Old Pond, which in no way concede that the area is not a CCR surface impoundment—make clear that both the Federal CCR

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<sup>33</sup> 40 C.F.R. § 257.53 (emphasis added).

<sup>34</sup> Duke Letter at 2 (emphasis added).

<sup>35</sup> Proposed Rule at 31,992 (emphasis added).

<sup>36</sup> See, e.g., MWG Response at 10–11; IEPA Recommendation at 10.

<sup>37</sup> IEPA Recommendation at 13.

<sup>38</sup> 35 Ill. Adm. Code 845.120.

Rule and Part 845 *already* apply to the Old Pond.

**3. While groundwater pollution does not determine whether a unit is a CCR surface impoundment, it shows the ongoing need for cleanup at this site.**

The one point that MWG gets right here is that groundwater pollution is not a component of the definition of a CCR surface impoundment. However, while it is not a part of the definition, groundwater pollution such as the contamination found in groundwater downgradient of the “Grassy Field” is entirely characteristic of CCR surface impoundments—particularly those that, like the “Grassy Field,” continue to contain CCR saturated in liquids.

As previously noted in Environmental Groups’ Comments in Response to MWG’s Motion for a Stay, CCR pollution from the western third of the Old Pond can cause—and in fact is causing—harm.<sup>39</sup> Extensive evidence shows that the Old Pond is polluting groundwater, including evidence that the Board has already weighed in *Sierra Club v. MWG*<sup>40</sup> and evidence presented in IEPA’s Recommendation in this docket. This longstanding, ongoing pollution underscores USEPA’s recent statement that “allowing groundwater to continue flowing through [CCR] indefinitely will not protect human health and the environment.”<sup>41</sup> That scenario—groundwater continuing to flow through CCR indefinitely—is precisely what will continue to occur at the Waukegan site if the western third of the Old Pond is allowed to escape the protective mandates of Part 845. Such ongoing pollution, on top of the excessive pollution burdens already borne by Waukegan residents, described below, requires denial of MWG’s proposed adjusted standard for the Old Pond.

**4. The disproportionate environmental and social burdens borne by Waukegan residents make cleanup at this site all the more urgent.**

As MWG has acknowledged,<sup>42</sup> the area surrounding the Waukegan power plant is an area of environmental justice concern. In the Coal Ash Pollution Prevention Act, the Illinois legislature underscored the need to enhance protections for such areas by requiring that coal ash

<sup>39</sup> See PC #7, Env’t Groups’ Comments Opposing MWG’s Motion to Stay, at 8–10 (Sept. 6, 2023).

<sup>40</sup> See *id.* at 68 (“Weighing the facts presented, the Board finds that Environmental Groups have proven that it is more likely than not that the historic areas [including the Former Slag/Fly Ash Storage area] and coal ash in the fill areas at the [Waukegan] Station are causing or contributing to GQS exceedances at the Station”), 69 (“[T]he 163 exceedances downgradient of the Former Slag and Fly Ash Storage area, along with higher concentrations of indicator constituents, show that the Former Slag and Fly Ash Storage area is contributing to the exceedances in wells MW-1 through 7.”), 75 (“The Board finds that the groundwater monitoring results indicate the Former Slag and Fly Ash Storage area is the likely source of boron exceedances at Waukegan Station in the wells downgradient of the area as well as the ash ponds.”), 76 (“[T]he Board finds that the likely source of the 57 exceedances of sulfate and 63 exceedances of TDS in the downgradient monitoring wells MW- 5, 7, 8, and 9 at Waukegan is the Former Slag and Fly Ash Storage area located west of the ash ponds”).

<sup>41</sup> Alabama: Denial of State Coal Combustion Residuals Permit Program, 88 Fed. Reg. 55,220, 55,237 (Aug. 14, 2023).

<sup>42</sup> MWG filed an application for an operating permit for the east and west CCR surface impoundments at Waukegan in fall 2021 in which it noted that both ponds fall within a mile of an area of environmental justice concern. See CCR Residual Surface Impoundment Permit Application, Waukegan Generating Station, at PDF pp. 40–41 (Oct. 26, 2021), [http://3659839d00ee48ab17-3929cea8f28e01ec3cb6bbf40cac69f0.r20.cf1.rackcdn.com/WAU\\_APE\\_IPL.pdf](http://3659839d00ee48ab17-3929cea8f28e01ec3cb6bbf40cac69f0.r20.cf1.rackcdn.com/WAU_APE_IPL.pdf).

ponds therein be prioritized for permitting<sup>43</sup> and that public participation opportunities be robust to ensure environmental justice considerations are incorporated into agency decisions. Waukegan's status as an environmental justice community makes prompt cleanup of these polluting CCR surface impoundments paramount.

Illinois regulation defines environmental justice areas using just two demographic flags: race and income. While this definition is useful as a quick, statewide categorization, the environmental justice concerns in the community surrounding the power plant go much deeper than these two indicators. As shown in the figures below, other circumstances compound the risks and burdens faced by Waukegan residents, including: (1) the presence of community gathering sites within the area, which makes the potentially exposed population even larger; (2) the presence of other potentially contaminating sites in the community; and (3) the relatively large percentage of nearby residents with underlying health conditions. All of these circumstances underscore the need for swift and effective cleanup of the ash at Waukegan to ensure that the CCR pollution does not cause any more harm to the community and environment.

The power plant and other potentially contaminating sites in the area not only pose a threat to those living near the site, but also to those that attend either of the two schools within two miles of the plant, those that visit the medical center, or those that visit the public natural spaces close to the plant. Within two miles of the plant, there are at least fifteen other brownfield or Superfund sites that are contaminating the environment and potentially impacting the health of the community. The pollutants emitted from these facilities may interact with pollution from the coal ash at the Waukegan plant, potentially compounding detrimental health outcomes.

The communities living near the Waukegan power plant are particularly vulnerable to potential health impacts from pollution. The Centers for Disease Control's ("CDC") Environmental Justice Index ("EJI") provides one measure of such vulnerability. For all census tracts in the US, the EJI calculates a cumulative burden score based on over thirty-five indicators, including race and income information, and also chronic health conditions and environmental stressors like air and water pollution.<sup>44</sup> South of the power plant, many census tracts score in the top ten percent nationally for this cumulative burden score, as is displayed in the first figure below. Taking a closer look at specific health indicators, the data show that many census tracts south of the plant rank in the top twenty percent nationally for the prevalence of diabetes, displayed in the second figure below.<sup>45</sup> Chronic conditions like diabetes put people at a higher risk for adverse health effects from exposure to air and water pollution. Finally, many of those living near the power plant do not have health insurance coverage; in many of the tracts near the plant, more than fifteen percent of the population is uninsured while the national average is eight percent.<sup>46</sup> This is displayed in the third figure below. Lack of insurance coverage makes those in these communities even more vulnerable to the adverse health impacts from polluting sources, given that seeking out medical treatment may not be financially feasible.

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<sup>43</sup> 5 ILCS § 22.59(g)(9).

<sup>44</sup> CDC, Agency for Toxic Substances and Disease Registry, Environmental Justice Index ("EJI") Explorer, <https://www.atsdr.cdc.gov/placeandhealth/eji/eji-data-download.html> (last accessed Nov. 1, 2023).

<sup>45</sup> *See id.*

<sup>46</sup> *See* Esri, American Community Survey Health Insurance Coverage Variables – Boundaries (Dec. 12, 2022), <https://hub.arcgis.com/maps/a1574f4bb84f4da78b60fa0c8616eaa1/about> (2017–2021 five-year average data).

Figure 1. Waukegan Power Plant and CDC's EJI Cumulative Burden Score

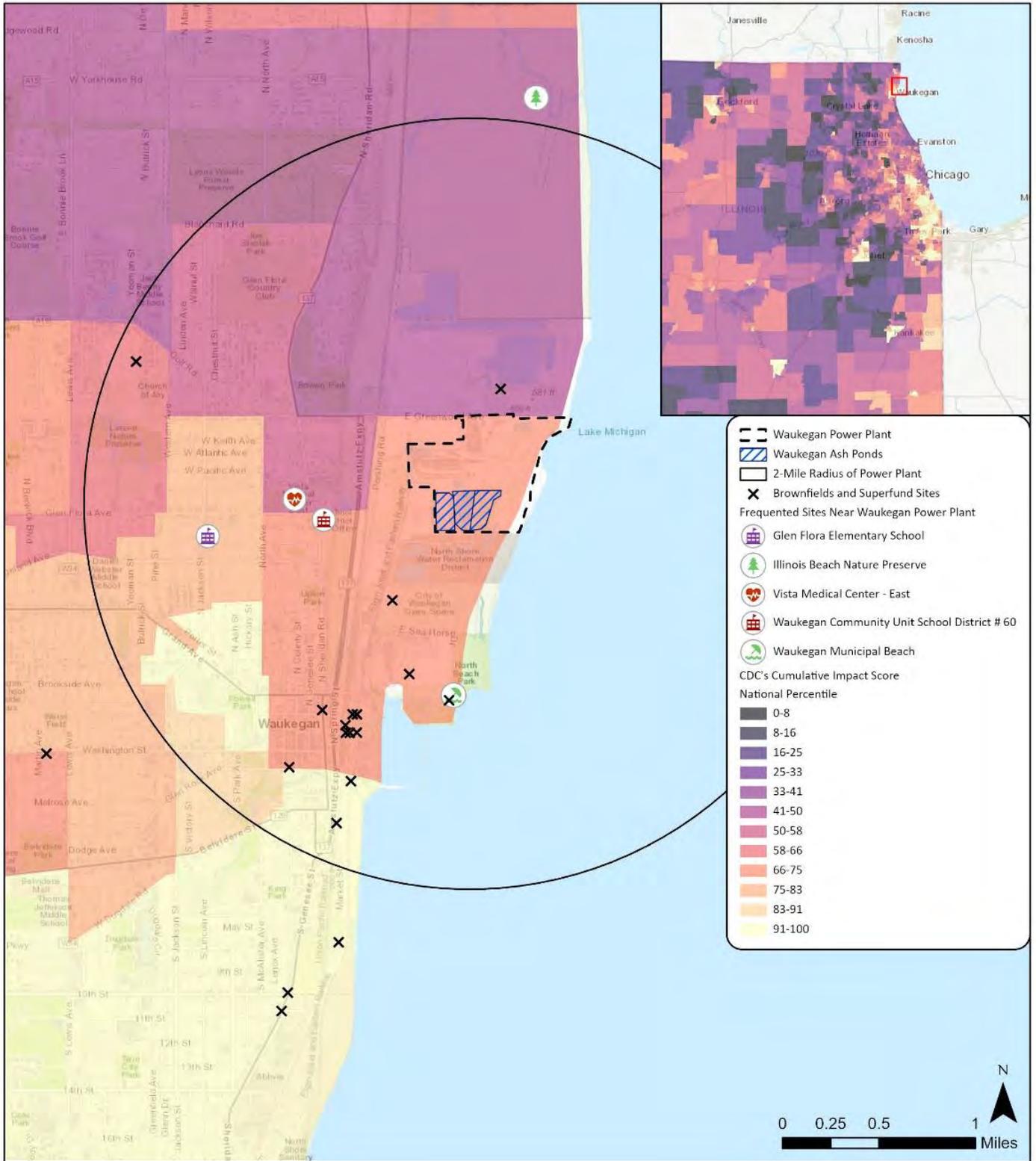


Figure 2. Waukegan Power Plant and Diabetes Prevalence

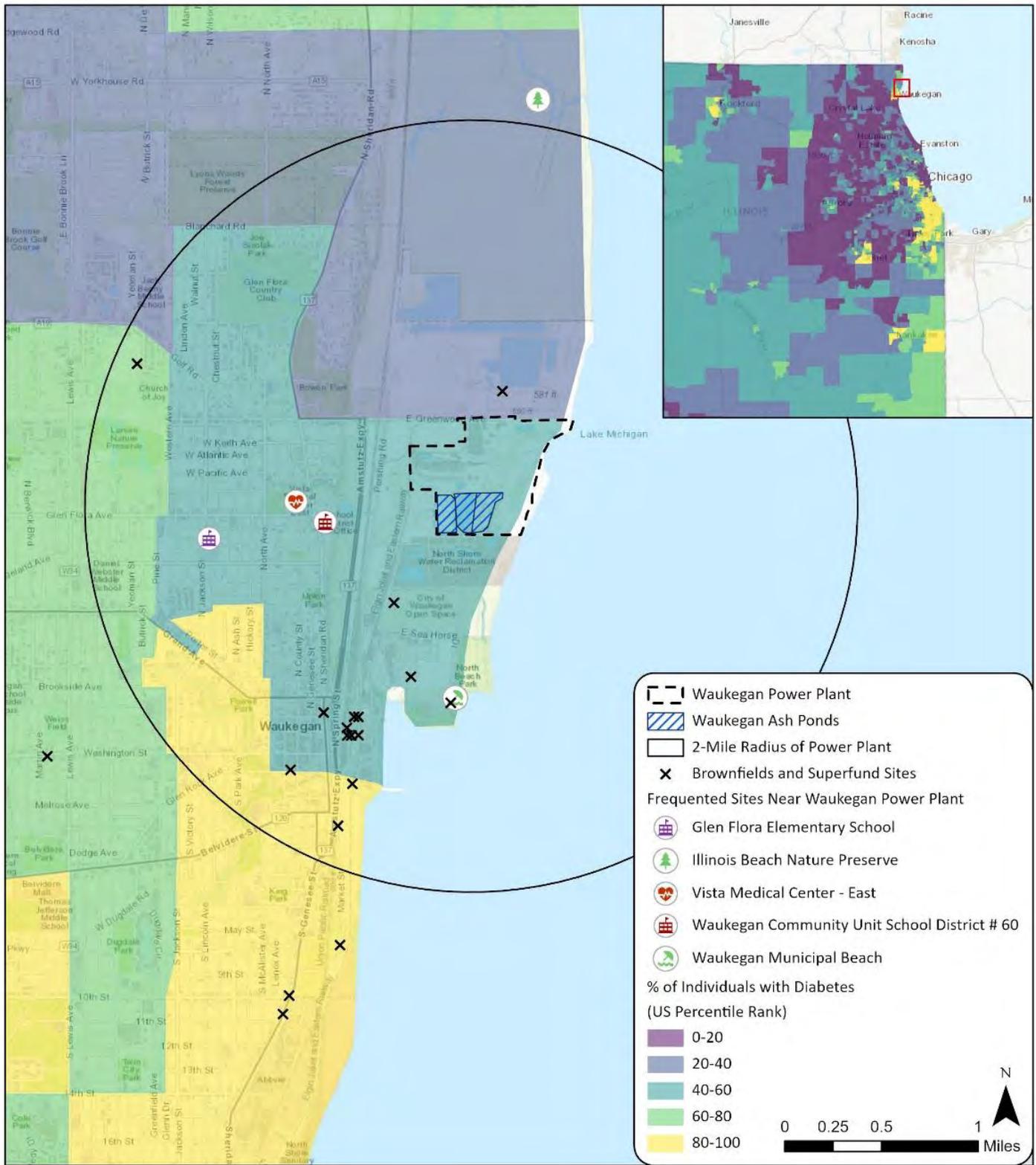
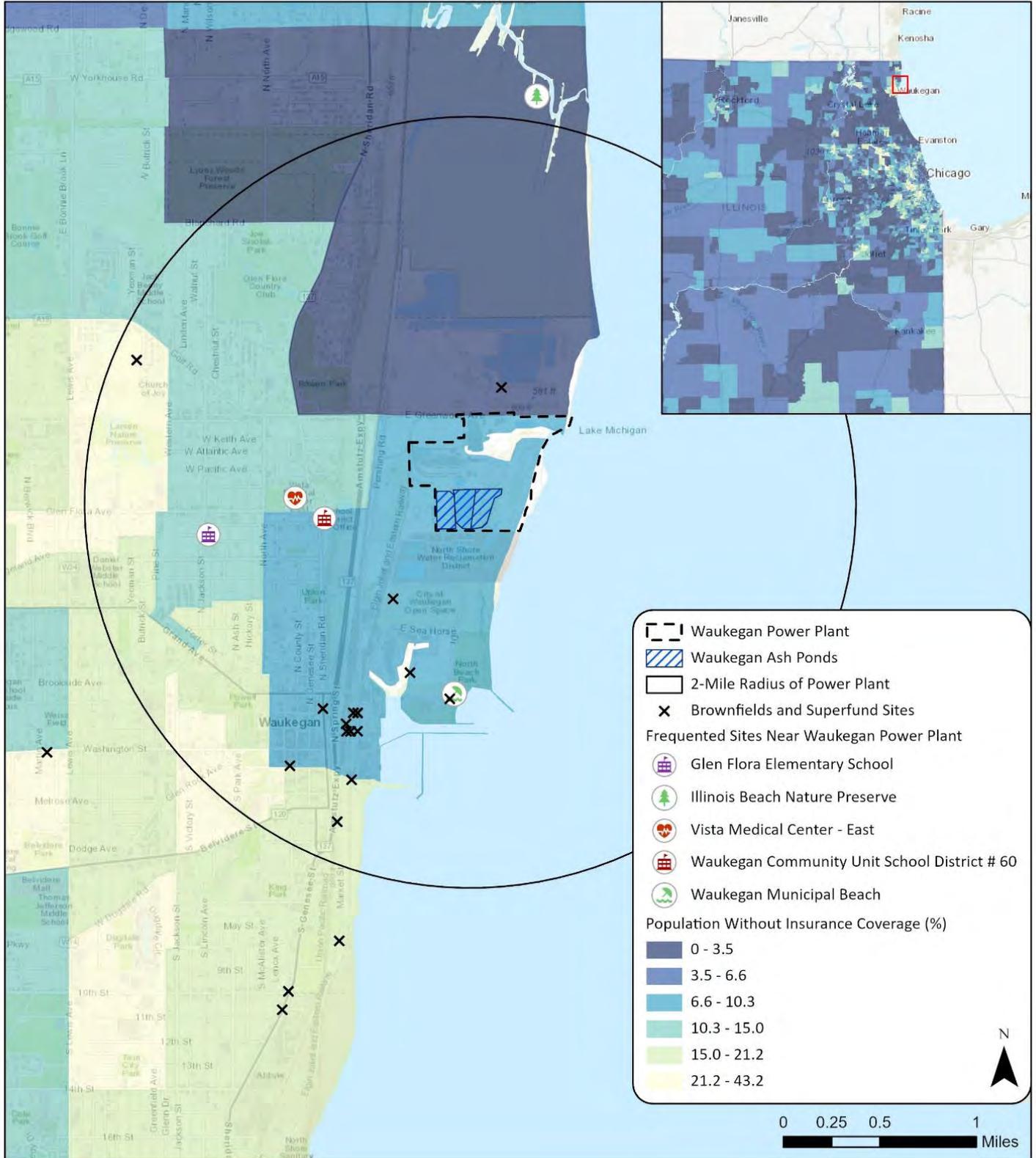


Figure 3. Waukegan Power Plant and Rates of Uninsured Populations



During USEPA's public hearing on its Proposed Rule in Waukegan, Waukegan resident and Clean Power Lake County member Dulce Ortiz explained the unjust and heavy toll that pollution, including from MWG's power plant, has taken on her and her community:

Environmental justice communities continue to bear the burden of coal ash pollution and it negatively impacts the health and well-being of our residents. Especially those that are uninsured or underinsured . . . Communities like Waukegan deserve better and we cannot continue to be left behind. As Waukegan residents we demand to have what other more affluent communities currently enjoy: a clean environment and good health. Can you imagine living in Waukegan and knowing your children have fourteen years less in their life expectancy compared to those that live only eight miles in a more affluent community?[] These are basic human rights . . . The vision I have for my family and for my community does not include thousands of tons of air, water and coal ash pollution. My vision for my family and community is a lakefront where I can take my children swimming in the waters of Lake Michigan without worrying about toxic water pollution; where we can go fishing without worrying about mercury and PCB contamination of the fish we catch. My vision for my family and community is a lakefront with open space that respects our environment, where corporate profit does not override the health needs of our families; where I can go running along the shore of Lake Michigan without worrying about my asthma. I want to see a clean energy future for Waukegan and all communities that have borne the burden of air, water and coal ash pollution for decades. And this can be done by making sure that NRG [MWG] is held accountable . . .<sup>47</sup>

## Conclusion

Waukegan residents have been subjected to MWG's CCR pollution, among too many other pollution burdens, for far too long. The Old Pond, including the portion of that pond which MWG calls the "Grassy Field," is a CCR surface impoundment that continues to add to that disproportionate pollution burden. For the reasons set out herein, the Board should deny MWG's requested adjusted standard and direct MWG to comply with the protective requirements of Part 845 at all of its impoundments at the Waukegan site, including the western third of the Old Pond.

Respectfully Submitted,

/s/ Jennifer Cassel  
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<sup>47</sup> Excerpt taken from a copy of Ms. Ortiz's statement at the public hearing.

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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF:	)	
	)	AS 2021-003
PETITION OF MIDWEST	)	
GENERATION, LLC FOR AN	)	(Adjusted Standard)
ADJUSTED STANDARD FROM	)	
845.740(A) AND FINDING OF	)	
INAPPLICABILITY OF PART 845	)	

**CERTIFICATE OF SERVICE**

The undersigned, Jennifer Cassel, an attorney, certifies that I have served by email the Clerk and by email the individuals with email addresses named on the Service List provided on the Board’s website, *available at* <https://pcb.illinois.gov/Cases/GetCaseDetailsById?caseId=17032>, a true and correct copy of the **ENVIRONMENTAL GROUPS’ COMMENTS IN RESPONSE TO MIDWEST GENERATION’S RESPONSE TO ILLINOIS ENVIRONMENTAL PROTECTION AGENCY’S RECOMMENDATION**, before 5 p.m. Central Time on November 1, 2023. The number of pages in the email transmission is 21 pages.

Dated: November 1, 2023

Respectfully Submitted,

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# **Attachment A**



REGION 5

77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:  
L-17J

Mr. Owen R. Schwartz  
Duke Energy  
1000 East Main Street  
Plainfield, Indiana 46168

Dear Mr. Schwartz,

This letter provides written confirmation of the discussion between the Environmental Protection Agency (EPA) and Duke Energy Gallagher staff during our conference calls on August 27 and September 17, 2021 regarding the history of the site and the closure of Coal Combustion Residuals (CCR) surface impoundments at Duke Energy's Gallagher Generating Station in New Albany, Indiana. This letter also serves to notify you that, based on the information provided in those telephone conversations, EPA has concluded that the North Ash Pond and the Primary Pond Ash Fill Area are subject to the requirements of 40 C.F.R. Part 257 Subpart D ("the CCR Regulations").

On the August 27 conference call, Duke Energy stated that two impoundments (i.e., North Ash Pond, Primary Pond Ash Fill Area) were removed from service, drained of ponded surface water, and subsequently covered with soil and grass in 1989. Further, EPA's understanding is that Duke has taken no engineering measures to remove any of the groundwater from either unit and both of these unlined units are sitting in approximately 20 feet of groundwater.

As an initial matter, we disagree with Duke Energy's argument that neither of these units are CCR surface impoundments within the meaning of the CCR Regulations. We understand that you interpret the definition of a CCR surface impoundment to exclude units such as the North Ash Pond, where liquid remains in the unit because the base of the unit intersects with groundwater. You argue that such units do not "hold" liquid because groundwater flows through the unit (instead of staying within the unit). EPA disagrees with your interpretation. The definition of a CCR surface impoundment does not require that the unit prevent groundwater from flowing through the unit, but merely requires that the unit be "designed to hold an accumulation of CCR and liquid." 40 C.F.R. § 257.53. Following your interpretation would lead to the incongruous result that impoundments where contaminants can migrate out in the groundwater would not be regulated by the CCR Regulations, while those that prevent that type of migration would be regulated.

### **Primary Pond Ash Fill Area**

The Primary Pond Ash Fill Area is not an existing CCR surface impoundment because (to EPA's knowledge) it has not received CCR after October 19, 2015. However, because it still contains CCR and liquids, it meets the definition of an inactive CCR surface impoundment. An inactive CCR surface impoundment is one "that no longer receives CCR on or after October 19, 2015 and still contains both CCR and liquids on or after October 19, 2015." EPA interprets the word "contains" to mean "to have or hold (someone or something) within" based on the ordinary meaning of the word. (e.g., Oxford English Dictionary, Merriam-Webster). Accordingly, an impoundment "contains" liquid if there is liquid in the impoundment, even if the impoundment does not prevent the liquid from migrating out of the impoundment. This means that if a CCR surface impoundment contains liquid because its base (or any part of its base) is in contact with groundwater, it would meet the definition of an inactive CCR surface impoundment. Under both the regulatory and dictionary definitions of the term, groundwater (or water) falls within the plain meaning of a "liquid." See 40 C.F.R. 257.53. Therefore, because the Primary Pond Ash Fill Area is sitting in approximately 20 feet of groundwater, it holds or contains liquids and is an inactive surface impoundment.

As an inactive CCR surface impoundment, the Primary Pond Ash Fill Area is regulated pursuant to 40 C.F.R. § 257.50(c), which specifies that "[t]his subpart also applies to inactive CCR surface impoundments at active electric utilities or independent power producers, regardless of the fuel currently used at the facility to produce electricity."

### **North Ash Pond**

On the September call, Duke Energy confirmed that the North Ash Pond has received CCR after the October 19, 2015 effective date of the CCR Rule. Therefore, that pond meets the definition of an existing CCR surface impoundment. An existing CCR surface impoundment is one that "receives CCR both before and after October 19, 2015." 40 C.F.R. § 257.53. Accordingly, the North Ash Pond falls within the ambit of 40 C.F.R. § 257.50(b), which specifies that "[t]his subpart applies to owners and operators of...existing CCR surface impoundments...that dispose or otherwise engage in solid waste management of CCR." Even if the North Ash Pond had not received CCR after October 19, 2015, it would be an inactive CCR surface impoundment for the same reasons that the Primary Pond Ash Fill Area is an inactive CCR surface impoundment and would fall within the ambit of 40 C.F.R. § 257.50(c).

### **Applicability of the Closure Requirements to these Impoundments**

For the reasons set out in the discussion above, the North Ash Pond and Primary Pond Ash Fill Area are regulated under 40 C.F.R. Part 257 Subpart D and Duke Energy will need to take action to bring these ponds into compliance by meeting all the requirements of the regulations. Significant among these is the requirement to close, because the North Ash Pond and the Primary Pond Ash Fill Area are unlined CCR surface impoundments. See, 40 C.F.R. § 257.101(a).

The applicable closure regulations are those that address closing with waste in place (assuming EPA's understanding is correct that Duke Energy's plan is to close both impoundments with waste in place). The Part 257 requirements applicable to impoundments closing with waste in place include general performance standards and specific technical standards that set forth individual engineering requirements related to the drainage and stabilization of the waste and to the final cover system. The general performance standards and the technical standards complement each other, and both must be met at every site. The general performance standards

under 40 C.F.R. § 257.102(d)(1) require that the owner or operator of a CCR unit “ensure that, at a minimum, the CCR unit is closed in a manner that will: (i) Control, minimize or eliminate, to the maximum extent feasible, post-closure infiltration of liquids into the waste and releases of CCR, leachate, or contaminated run-off to the ground or surface waters or to the atmosphere; and (ii) Preclude the probability of future impoundment of water, sediment, or slurry.” The specific technical standards related to the drainage of the waste in the unit require that “free liquids must be eliminated by removing liquid wastes or solidifying the remaining wastes and waste residues” prior to installing the final cover system. 40 C.F.R. § 257.102(d)(2)(i).

If Duke Energy plans to close with waste in place and the base of the impoundment does, in fact, intersect with groundwater, Duke Energy will need to implement engineering measures to remove groundwater from the unit prior to the start of installing the final cover system, as required by 40 C.F.R. § 257.102(d)(2)(i). This provision applies both to the free-standing liquid in the impoundment and to all separable porewater in the impoundment, whether the porewater was derived from sluiced water or groundwater that intersects the impoundment. The definition of free liquids in 40 C.F.R. § 257.53 encompasses all “liquids that readily separate from the solid portion of a waste under ambient temperature and pressure,” regardless of whether the source of the liquids is from sluiced water or groundwater. The regulation does not differentiate between the sources of the liquid in the impoundment (e.g., surface water infiltration, sluice water intentionally added, groundwater intrusion). Furthermore, the performance standard at 40 C.F.R. § 257.102(d)(2)(i) was modeled on the regulations that apply to interim status hazardous waste surface impoundments, which are codified at 40 C.F.R. § 265.228(a)(2)(i). Guidance on these interim status regulations clarifies that these regulations require both the removal of free-standing liquids in the impoundment as well as sediment dewatering. See US EPA publication titled “Closure of Hazardous Waste Surface Impoundments,” publication number SW-873, September 1982.

Similarly, Duke Energy will need to ensure that the impoundments are closed in a manner that will “control, minimize or eliminate, to the maximum extent feasible, post-closure infiltration of liquids into the waste and releases of CCR, leachate, or contaminated run-off to the ground or surface waters or to the atmosphere.” 40 C.F.R. § 257.102(d)(1). EPA views the word “infiltration” as a general term that refers to any kind of movement of liquids into a CCR unit. That would include, for example, any liquid passing into or through the CCR unit by filtering or permeating from any direction, including the sides and bottom of the unit. This is consistent with the plain meaning of the term. For example, Merriam-Webster defines infiltration to mean “to pass into or through (a substance) by filtering or permeating” or “to cause (something, such as a liquid) to permeate something by penetrating its pores or interstices.” Neither definition limits the source or direction by which the infiltration occurs. In situations where the groundwater intersects the CCR unit, water may infiltrate into the unit from the sides and/or bottom of the unit because the base of the unit is below the water table. This contact between the waste and groundwater provides a potential for waste constituents to be dissolved and to migrate out of (or away from) the closed unit that is similar to infiltration from above. In this case, the performance standard requires the facility to take measures, such as engineering controls that will “control, minimize, or eliminate, to the maximum extent feasible, post-closure infiltration of liquids into the waste” as well as “post-closure releases to the groundwater” from the sides and bottom of the unit.

Finally, because the North Ash Pond and the Primary Pond Ash Fill Area must close pursuant to 40 C.F.R. § 257.101(a), any further receipt of CCR into those units is prohibited. EPA also made this clear in the preamble to the March 15, 2018 proposed rule (83 FR 11605) where EPA stated:

The current CCR rules require that certain units must close for cause, as laid forth in § 257.101(a)–(c). As written, the regulation expressly prohibits “placing CCR” in any units required to close for-cause pursuant to § 257.101....Note that the rule does not distinguish between placement that might be considered beneficial use and placement that might be considered disposal. All further placement of CCR into the unit is prohibited once the provisions of § 257.101 are triggered.

If you have any questions about the information provided in this letter or if you have additional information that you would like EPA to consider, you may contact Angela Mullins at [mullins.angela@epa.gov](mailto:mullins.angela@epa.gov). Alternatively, Duke Energy counsel can contact Laurel Celeste at [celeste.laurel@epa.gov](mailto:celeste.laurel@epa.gov) in EPA’s Office of General Counsel for any questions on the Agency’s position set forth in the letter.

Sincerely,

Edward Nam  
Director  
Land, Chemicals and Redevelopment Division

cc: Peggy Dorsey,  
Assistant Commissioner  
Office of Land Quality  
Indiana Department of Environmental Management