

ILLINOIS POLLUTION CONTROL BOARD

July 11, 2024

IN THE MATTER OF:)
)
PETITION OF AMEREN ENERGY) AS 21-7
MEDINA VALLEY COGEN, LLC) (Adjusted Standard – Land)
(HUTSONVILLE D) FOR ADJUSTED)
STANDARD FROM)
35 ILL. ADM. CODE PART 845)

OPINION AND ORDER OF THE BOARD (by J. Van Wie):

Ameren Energy Medina Valley Cogen, LLC (Ameren) filed a petition (Pet.), and an Amended Petition (Am. Pet.), under Section 28.1 of the Environmental Protection Act (Act) and Part 104 of the Board's procedural rules. *See* 415 ILCS 5/28.1 (2022); 35 Ill. Adm. Code 104.Subpart D. Ameren seeks an adjusted standard from Part 845, Standards for the Disposal of Coal Combustion Residuals (CCR) in Surface Impoundments. 35 Ill. Adm. Code 845. Specifically, Ameren requests relief from Part 845's Permitting, and Closure and Post-Closure Care requirements for a CCR surface impoundment known as Pond D at Ameren's inactive Hutsonville Power Station in Crawford County. *See* 35 Ill. Adm. Code 845.170(a)(2), 845.170(a)(3). Pond D is currently subject to the site-specific CCR surface impoundment regulations under Part 840. *See* 35 Ill. Adm. Code 840.101-840.152; Ameren Ashpond Closure Rules (Hutsonville Power Station): Proposed 35 Ill. Adm. Code 840.101 through 840.152, R09-21 (Jan. 20, 2011).

Ameren explains that relief is necessary because Parts 840 and 845 have conflicting requirements relating to key components of closure and post-closure care that result in duplicative efforts in some cases and are incompatible in others. Am. Pet. at 19. To reconcile these conflicting or duplicative requirements, Ameren seeks relief from all the provisions of Part 845, except: Subpart H: Recordkeeping, Section 845.810, Publicly Accessible Internet Site Requirements; and Subpart I: Financial Assurance. *See*, Am. Pet. at 7, 22. Ameren specifically seeks relief from the permitting requirements in Section 845.170(a)(2), and the closure and post-closure care requirements in Section 845.170(a)(3).

The Illinois Environmental Protection Agency (IEPA) recommends that the Board grant Ameren's requested adjusted standard with conditions. In its response, Ameren agreed to comply with the conditions proposed by the IEPA.

After reviewing the record and arguments by the parties, the Board finds it appropriate to grant Ameren the requested relief from the Part 845 requirements for Pond D, subject to the conditions proposed by IEPA and agreed to by the petitioner. The Board finds that Ameren has sufficiently demonstrated that the factors relating to Pond D are substantially and significantly different from the factors considered by the Board in adopting the rules of general applicability under Part 845. Further, the Board finds that those factors justify an adjusted standard. The

Board also finds that 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 Part 845 rule of general applicability. Finally, the Board finds that Ameren's requested relief is consistent with federal law.

In this opinion and order, the Board first provides the procedural history followed by the factual background, including a description of the Hutsonville Pond D facility and the Part 840 site-specific rulemaking. Next, the Board summarizes the petition, amended petition, and IEPA's recommendation. The Board then provides the regulatory background, including the regulations from which Ameren seeks relief, and the legal framework for granting adjusted standards. The Board addresses the IEPA's recommendation before discussing the Section 28.1(c) factors and making its findings on Ameren's petition.

PROCEDURAL HISTORY

On May 11, 2021, Ameren filed a petition requesting an adjusted standard and findings of inapplicability as to Pond D. On May 22, 2021, notice of the adjusted standard petition was timely published in the *Robinson Daily News*.

On May 21, 2021, IEPA filed a motion for an extension of time to file its recommendation. On June 3, 2021, the Board granted IEPA's motion. Ameren Energy Medina Valley Cogen, LLC, AS 21-7 (June 3, 2021). By hearing officer order, Ameren stated its intent to file an amended petition. The parties agreed by subsequent hearing officer order to extend IEPA's deadline to file its recommendation to 45 days after Ameren filed its amended petition.

Ameren filed an amended petition (Am. Pet.) on December 16, 2022, as well as six exhibits (Exh. 1-6). In the amended petition, Ameren waived its right to a hearing. Am. Pet. at 27; 35 Ill. Adm. Code 104.422. On January 19, 2023, the Board accepted Ameren's amended petition. Ameren Energy Medina Valley Cogen, LLC, AS 21-7 (Jan. 19, 2023). On January 31, 2023, the hearing officer granted IEPA's motion to extend the deadline to file its recommendation to April 28, 2023.

On April 28, 2023, IEPA timely filed its recommendation (Rec.). On May 12, 2023, Ameren filed its response (Resp.) to IEPA's recommendation.

On July 20, 2023, the Board received a comment (PC 1) from Earthjustice, Prairie Rivers Network and Sierra Club (the Environmental Groups) regarding the future applicability of potential federal regulations to Pond D under the United States Environmental Protection Agency's (USEPA) proposed coal ash rule.

FACTUAL BACKGROUND

Ameren's Hutsonville Pond D

Ponds A through D are located at Ameren's inactive Hutsonville Power Station (Station), which is approximately 205 acres in Hutsonville, Crawford County. Am. Pet. at 9. It is bordered

by the Wabash River on the east, farmland on the west and south, and undeveloped wooded areas on the north. *Id.* The Station ran for more than 60 years before being decommissioned. *Id.* After it was decommissioned, all infrastructure was removed apart from Ponds A and D. *Id.* When active, the Station employed 58 people and operated coal powered boilers for steam production that was used to power steam turbines. *Id.* at 9-10. Additionally, the Station would withdraw water from the Wabash River to be used in its boiler and turbine systems and ash would be removed from the boilers and into its impoundment system. *Id.* at 10. The impoundment system was composed of a series ash ponds (Ponds A-D), which were used to remove solids from sluice water and discharged into the Wabash River through a National Pollutant Discharge Elimination System (NDPES) permitted outfall (see Figure 1-2 of Exhibit 4). Am. Pet. at 10. However, the Station has not generated electricity since December 2011 and Pond D has been closed since January 2013. *Id.* at 9.

Pond D, which is a “CCR surface impoundment” as defined by the Act, is the only pond for which Ameren is seeking relief. 415 ILCS 5/3.143 (2022); Am. Pet. at 10. Pond D was built in 1968 and covers approximately 22 acres on the west bank of the Wabash River in Crawford County, Illinois. Am. Pet. at 10. It was used as a wastewater treatment unit until the construction of Pond A in 1986. *Id.* Pond D was completely removed from service and allowed to dewater with the construction of Ponds B and C in 2000. *Id.* In 2011, the Board adopted site-specific regulations under Part 840 specifically for the closure and post closure of Pond D. *See* R09-21 (Jan. 20, 2011), 35 Ill. Adm. Code 840. Ameren completed closure of Pond D in January of 2013 in compliance with the Part 840 regulations.

Part 840 was promulgated, and Pond D was closed, prior to the implementation and effective date of both the federal Coal Combustion Residual rule (Federal CCR Rule) and the Illinois Coal Ash Pollution Prevention Act (Illinois CCR Act) and resulting rules. Am. Pet. at 2. The Federal CCR Rule was promulgated April 17, 2015, with an effective date of October 19, 2015. *Id.* The Illinois CCR Act was adopted on July 30, 2019, and the Board adopted associated regulations on April 15, 2021, with an effective date of April 21, 2021. *Id.*; See Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19 (Apr. 15, 2021) (Part 845 Rulemaking). Ameren objected to Pond D being included within the scope of the Part 845 Rulemaking because Pond D was already subject to, and Ameren has already implemented, the Board’s site-specific determinations made in R09-21 and reflected in Part 840. *Id.* (citing Part 845 Rulemaking, slip. op. at 13 (Feb. 4, 2021)); *see* 35 Ill. Adm. Code 840. The Petitioner now seeks this adjusted standard from Part 845 for Pond D insofar as Part 845 is duplicative of or contradicts the closure and post-closure care requirements of Part 840. Am. Pet. at 3; *see also*, Part 845 Rulemaking, slip. op. at 13 (Feb. 4, 2021).

Ameren clarifies that the other, now-closed former ash ponds at the Station are not the subject of this Petition. Am. Pet. at 1. Pond A remains in existence as a closed and inactive CCR surface impoundment. *Id.* at 3; 415 ILCS 5/3.143 (2022). Ponds B and C were also removed from service and closed by removal of all CCR, which included dewatering and removal of the liner systems. *Id.*

In R09-21, Ameren proposed a site-specific rulemaking for the closure and postclosure of Pond D. The Board adopted this site-specific rule as Part 840 on January 21, 2011. Because

Pond D is now covered by both the Part 840 and Part 845 rules, Ameren seeks an adjusted standard to clarify the regulatory structure for Pond D.

Petition

Ameren filed its original petition on May 11, 2021, requesting that the Board grant an adjusted standard under Section 28.1 of the Act (415 ILCS 5/28.1 (2022)) and Part 104.400 of the Board's procedural rules (35 Ill. Adm. Code 104.400). Pet. at 1. Ameren relied on the factors listed in Section 28.1(c) of the Act because the rules of general applicability do not specify a level of justification required of the petitioner. See 415 ILCS 5/28.1(c) (2022); Pet. at 10-11. Specifically, Ameren seeks adjusted standards from Part 845 for Pond D, one of two CCR surface impoundments at Ameren's inactive Hutsonville Power Station. Pet. at 21; see 35 Ill. Adm. Code 845.

Amended Petition

On December 16, 2022, Ameren filed an amended petition that made changes to address the items suggested by the IEPA after the filing of the petition. *Id.* Specifically, Ameren seeks relief from the requirements of 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). Am. Pet. at 6. Ameren argues that the adjusted standard is necessary because Part 840 is currently in effect as a site-specific rule that is applicable only to Hutsonville Pond D. *Id.*; see 35 Ill. Adm. Code 840. Ameren seeks an adjusted standard to continue to follow the regulatory requirements of Part 840, which was adopted prior to Part 845, but to allow for any "new" requirements of Part 845 that the Board did not have the authority to adopt under Part 840 to apply to Pond D, like requirements for reporting and financial assurance. Am. Pet. at 7.

Ameren explains that the Board's adoption and implementation of Part 840 required Ameren to perform post-closure care for Pond D under that Part. Am. Pet. at 7. Ameren asserts that because its post-closure care obligations under Part 840 are legally enforceable requirements, failure to comply with any of the activities required by Part 840 constitutes a violation of the Act. *Id.*

Ameren asserts that it is unreasonable to expect Pond D to comply with two conflicting regulations. Am. Pet. at 19. This is because Parts 840 and 845 have conflicting requirements relating to key components of closure and post-closure care that result in duplicative efforts in some cases and are incompatible in others. *Id.* Ameren notes conflicts in timelines for post-closure care and duplicative efforts in the generation of annual reports for both programs. *Id.* To cease the tension between the two regulatory programs, Ameren proposes an adjusted standard from Subparts B (permitting) and G (closure and post-closure care). *Id.* at 6-7. However, Ameren emphasizes it has no objection to complying with the portions of Part 845 that the Board did not have the authority to implement at the time of Pond D closure, specifically Subparts H (recordkeeping) and I (financial assurance). *Id.* at 20-22.

Ameren argues that its petition meets the factors set out in Section 28.1(c) of the Act for granting an adjusted standard. 415 ILCS 5/28.1(c) (2022). Ameren explains that Hutsonville

Pond D is the only former ash pond in the State of Illinois with its unique regulatory structure. Hutsonville Pond D was closed and is in post-closure care under the Board rules adopted specifically for Pond D. Those rules at Part 840 were adopted prior to the Board's implementation of Part 845, which are the rules of general applicability for CCR surface impoundments. Am. Pet. at 21-22; *see* 35 Ill. Adm. Code 840, 845. Ameren argues that the Board's adoption of Part 840 rule for Pond D was the culmination of ten years of Ameren's attempts to define the appropriate regulatory requirements for the closure of Pond D. *Id.* at 7, citing R09-21, slip. op. at 15, 70 (Oct. 7, 2010). Ameren closed Pond D in January of 2013, and performs post-closure care at Pond D in compliance with Part 840. Am. Pet. at 22. Ameren argues that by adopting generally applicable Part 845 after the adoption of the site-specific Part 840, the Board and IEPA have recognized that the factors relating to Hutsonville Pond D and its closure are substantially and significantly different from the factors relied on by the Board in adopting the generally applicable rule in Part 845. *Id.* at 22-23. Finally, Ameren points to the Board's suggestion in R20-19 that Ameren file a petition for adjusted standard to address the duplicative and conflicting portions of Part 845 as to Hutsonville Pond D as evidence that Pond D is substantially and significantly different from other closed CCR surface impoundments. *Id.* at 2; *see also* R09-21 (Oct. 7, 2010).

Ameren asserts that 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. Am. Pet. at 23. Ameren argues that the Board already carefully evaluated the potential for adverse environmental or health effects at length in the context of its technical feasibility and economic reasonableness review in R09-21, and found that the site-specific rule under Part 840 will not result in substantially and significantly more adverse environmental or health effects. *Id.*; *see* R09-21, slip op. at 6-7 (Dec. 16, 2010); slip op. at 16-33, 69, 70 (Oct. 7, 2010); Am. Pet. Exh. 6, 7. Ameren argues that it completed closure of Pond D on January 30, 2013, and continues to monitor and maintain Pond D in compliance with the post-closure plan mandated under Part 840, without substantial or significantly more adverse environmental or health effects related to Pond D. Am. Pet. at 25.

Finally, Ameren maintains that the requested relief is consistent with federal law as required by Section 28.1(c)(4) of the Act. Am. Pet. at 26; 415 ILCS 5/28.1(c)(4) (2022). Specifically, Ameren states that while Part 845 was adopted to implement the State's programs related to RCRA, the standards from which adjustment is sought do not implicate federal or federally delegated regulatory programs as applied to Pond D. *Id.* at 8, 26. Further, Ameren notes that Part 840 provides that, "[t]o the extent that any rules adopted in [Part 840] are less stringent than or inconsistent with any portion of RCRA applicable to the closure of Ash Pond D, RCRA will prevail." *Id.* at 26; 35 Ill. Adm. Code 840.152.

Ameren also notes that, at the time of filing its amended petition, the USEPA had not adopted rules applicable to legacy CCR surface impoundments at inactive facilities that had closed under state regulatory authority prior to the effective date of the Federal CCR Rule, October 19, 2015.¹ *Id.*; *see* 40 CFR 257. Additionally, the Federal CCR Rule did not include

¹ The Board notes that USEPA adopted rules addressing "legacy CCR impoundments" on May 8, 2024. 89 Fed. Reg. 38951.

requirements for legacy ponds at inactive facilities. Am. Pet. at 26; *see* 40 CFR 257. While USEPA is currently evaluating potential regulatory requirements, USEPA has indicated that a federal rule concerning legacy ponds was years away. Ameren also contends that USEPA has not indicated that it would not honor responsible closures completed prior to USEPA promulgating a legacy CCR surface impoundment rule. Am. Pet. at 26.

REGULATORY BACKGROUND AND LEGAL FRAMEWORK

Part 845 CCR Surface Impoundment Rules

On April 15, 2021, the Board adopted new Statewide regulations governing the disposal in surface impoundments of coal combustion residuals, or CCR, also commonly called “coal ash”, which is generated by coal-fired power plants. *See* R20-19 (Apr. 15, 2021), 35 Ill Adm Code 845. Part 845 was adopted under the Coal Ash Pollution Prevention Act, which the General Assembly passed, and Governor JB Pritzker signed into law, in 2019 as Public Act 101-171. 415 ILCS 5/22.59 (2022). These rules of general applicability provide for the protection of public health and the environment in Illinois by establishing a comprehensive State permitting program to govern all aspects of CCR surface impoundments.

Part 845 applies “to owners and operators of new and existing CCR surface impoundments, including any lateral expansions of CCR surface impoundments that dispose of or otherwise engage in solid waste management of CCR generated from the combustion of coal at electric utilities and independent power producers.” 35 Ill. Adm. Code 845.100(b).

The Act defines “coal combustion residual”, or CCR, to mean “fly ash, bottom ash, boiler slag, and flue gas desulfurization materials generated from burning coal and for the purpose of generating electricity by electric utilities and independent power producers.” 415 ILCS 5/3.142 (2022).

Further, the Act defines “CCR surface impoundment” to be “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.” 415 ILCS 5/3.143 (2022).

Finally, the Board’s regulations define “existing CCR surface impoundment” as follows:

A CCR surface impoundment in which CCR is placed both before and after October 19, 2015, or for which construction started before October 19, 2015 and in which CCR is placed on or after October 19, 2015. A CCR surface impoundment has started construction if the owner or operator has obtained the federal, State, and local approvals or permits necessary to begin physical construction and a continuous on-site, physical construction program had begun before October 19, 2015. 35 Ill. Adm. Code 845.120.

Part 840 (R09-21) Ameren Ash Pond D Closure

In the R09-21 rulemaking, Ameren proposed a site-specific rulemaking for the closure and postclosure of Pond D. The Board adopted this site-specific rule under Part 840 on January 21, 2011. Ameren evaluated multiple options for closure of Hutsonville Pond D to develop site-specific closure rules under Part 840. Am. Pet. Ex. 6 at 5. The closure options were evaluated to prevent off-site migration of impacted groundwater, to minimize infiltration of rain and snowmelt within Pond D, and to protect human health and the environment. Am. Pet. Ex. 5 at 16. Additionally, the alternatives were categorized as “Groundwater Management” or “Final Cover Alternatives” and were further evaluated on the feasibility of construction/implementation, effectiveness, and costs. *Id.* at 16-17.

Ameren claimed that groundwater impact from Pond D to the Wabash River “does not pose a threat to human health and the environment” because the “impacted groundwater is localized and limited to the pond area itself and a narrow band of shallow groundwater immediately south of the property.” Am. Pet. Ex. 5. at 17. Therefore, due to the impacted groundwater being localized and not to be used for potable water, treatment of the groundwater is unnecessary and instead focus is on prevention of “southward off-site migration of impacted groundwater in the upper migration zone.” *Id.* Ameren evaluated several options, including site monitoring with no groundwater collection, the construction of “low-permeability barrier wall around Ash Pond D”, installation of a groundwater collection trench, and treatment. *Id.* at 17-22. Ameren decided to implement the groundwater trench option, because the isolation of groundwater in the trench is “an economically viable and environmentally justified option” that mitigates “offsite migration of contaminants without any negative impact to the Wabash River.” *Id.* at 19. Other options were rejected because they would not achieve the closure objectives. Am. Pet. Ex. 6 at 6.

Ameren evaluated four cover systems consisting of: geomembrane, compacted clay, earthen fill, and pozzolanic fly ash. Am. Pet. Ex. 5 at 27-29. Ameren chose to employ the geomembrane option because the cost was similar to other low-permeability layers, while also being more effective at preventing groundwater infiltration. *Id.* at 27. Additionally, the Board had already found in other regulations, like the Part 811 landfill rules, that the geomembrane was adequately protective of environmental and human health in other proceedings. *Id.* The other alternatives were eliminated due to either being cost prohibitive with similar effectiveness levels, or technical infeasibility. *Id.* at 28- 30.

Legal Framework For Adjusted Standard

The Act and the Board’s procedural rules provide that a petitioner may request, and the Board may grant, an environmental standard that is different from the generally applicable standard that would otherwise apply to the petitioner. This is called an adjusted standard. The general procedures that govern an adjusted standard proceeding are found at Section 28.1 of the Act and Section 104 Subpart D of the Board’s procedural rules. 415 ILCS 5/28.1 (2022); 35 Ill. Adm. Code 104.400 et seq.

The Board’s procedural rules specify the required contents of a petition for an adjusted standard. *See* 35 Ill. Adm. Code 104.406, 104.416. Once a petition for an adjusted standard is filed, IEPA must file its recommendation with the Board. *See* 415 ILCS 5/28.1(d)(3) (2022); 35

Ill. Adm. Code 104.416. The adjusted standard proceeding is adjudicatory in nature and is not subject to the rulemaking provisions of the Act or the Illinois Administrative Procedure Act (5 ILCS 100/1-1, et seq. (2022)). *See* 415 ILCS 5/28.1(a) (2022); 35 Ill. Adm. Code 101.202 (defining “adjudicatory proceeding”).

Ameren is seeking an adjusted standard from provisions of the Board CCR rules at Part 845. Because the regulations from which Ameren seeks an adjusted standard do not specify a level of justification, the factors under Section 28.1(c) of the Act apply:

- (c) If a regulation of general applicability does not specify a level of justification required of a petitioner to qualify for an adjusted standard, the Board may grant individual adjusted standards whenever the Board determines, upon adequate proof by petitioner, that:
 - (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 the petitioner;
 - (2) the existence of those factors justifies 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
 - (4) the adjusted standard is consistent with any applicable federal law. 415 ILCS 5/28.1 (2022).

The burden of proof in an adjusted standard proceeding is on the petitioner. 415 ILCS 5/28.1(b), (c) (2022); 35 Ill. Adm. Code 104.426. Once granted, the adjusted standard, instead of the rule of general applicability, applies to the petitioner. 415 ILCS 5/28.1(a) (2022); 35 Ill. Adm. Code 101.202, 104.400(a). In granting adjusted standards, the Board may impose conditions as may be necessary to accomplish the purposes of the Act. *See* 415 ILCS 5/28.1(a) (2022); 35 Ill. Adm. Code 104.428(a).

REQUESTED RELIEF

Ameren requests that the Board grant an adjusted standard from the permitting and post-closure care requirements of Part 845. *See* 35 Ill. Adm. Code 845.170(a)(2), 845.170(a)(3). Ameren asserts that Pond D is already subject to its site-specific rule under Part 840. Ameren claims there is conflict between the inactive CCR surface impoundment requirements in Part 845 and the requirements in its site-specific rule Part 840. Additionally, because Pond D is an inactive CCR surface impoundment that closed in January 2013, before the effective date of the Federal CCR Rule (Oct. 19, 2015), it is not subject to the federal rule.

Ameren states that although Pond D’s closure date precedes the effective date of Illinois’ CCR Surface Impoundment Rule (April 21, 2021), Pond D is subject to the requirements of Part

845. *Id.* Because Pond D is subject to both site-specific rules under Part 840 and the new CCR surface impoundment rules under Part 845, Ameren seeks an adjusted standard to reconcile conflicting or duplicative requirements. *Id.*

Specifically, Ameren seeks an adjusted standard from all of Part 845, except: 1) Subpart H, Recordkeeping, Section 845.810, Publicly Accessible Internet Site Requirements; and 2) Subpart I: Financial Assurance. *Id.* at 22. Because there are no current regulations regarding legacy ponds, Ameren claims that the requested adjusted standard is consistent with Federal law. *Id.*² Ameren proposes the following adjusted standard language:

Pursuant to Section 28.1 of the Environmental Protection Act (Act) (415 ILCS 5/28.1), the Board grants Ameren Energy Medina Valley Cogen, LLC (Ameren) an adjusted standard as follows:

- (1) Ameren shall continue to comply with the provisions of the Board's Site-Specific regulation, as promulgated by the Board in 35 Ill. Admin. Code Part 840.
- (2) Unless otherwise provided below, the provisions set forth in the Board's Section 845.170(a)(2) (Permitting) and Section 845.170(a)(3) (Closure and Post-Closure), shall not be applicable to Hutsonville D.
 - (i) Ameren shall post all groundwater record keeping documents required pursuant to 35 Ill. Admin. Code 840.116 on an Internet Website maintained in accordance with 35 Ill. Admin. Code 845.810.
 - (ii) Ameren shall maintain financial assurance for Hutsonville D, as required under 35 Ill. Admin. Code 845, Subpart I.
 - (iii) Ameren shall continue operation of the groundwater Collection Trench, under Hutsonville Station's National Pollutant Discharge Elimination System (NPDES) permit (IL0004120).
 - (iv) Beginning in 2023 Ameren shall begin reporting constituent concentrations in groundwater based on a totals analysis.

SUMMARY OF IEPA'S RECOMMENDATION

IEPA recommends the Board grant Ameren's petition for an adjusted standard from Part 845 subject to certain conditions. Ag. Rec. at 1. Pond D is identified as an inactive CCR surface impoundment regulated under Section 845.170. *Id.* at 3. IEPA notes that Pond D is unique because it is the only inactive CCR surface impoundment in the state that is regulated under its own site-specific rule, Part 840. *Id.* at 7; *see also* Am. Pet. at 22. IEPA also highlights that Pond D's closure and post-closure practices under Part 840 are consistent with closure and post-closure procedures and requirements under Part 845. *See generally*, Ag. Rec. For these reasons,

² See footnote 1.

IEPA asserts that there is no reason to believe groundwater conditions would be different if Part 845 was in effect at Pond D. *Id.* at 7-8. IEPA maintains that the requested adjusted standard with the recommended conditions would be as protective and encompassing as the Federal CCR Rule and is therefore consistent with federal rules. *Id.* at 10.

While the IEPA does not dispute any of the facts presented by Ameren regarding the nature of post-closure care activities under Parts 840 and 845, IEPA disputes Ameren's claims that submission of annual reports under both Parts may result in duplicate enforcement actions. Ag. Rec. at 4-5. IEPA clarifies that, as an inactive CCR surface impoundment, Ameren is not required to submit a consolidated annual report under Section 845.550, because Pond D would not be subject to Subpart E. *Id.* at 5. While Pond D as an inactive CCR surface impoundment is not subject to all of Part 845, IEPA states that Pond D must comply with several, non-duplicative requirements of Part 845 that are applicable to inactive CCR surface impoundments. *Id.* at 6. These requirements include: placement of a permanent identification marker directly next to Pond D; maintenance of corrective action as outlined in Part 840 with measures compliant with Sections 845.170(c) and 845.220(a) and (c); addition to the deed that discloses the land had been used for a CCR surface impoundment and there are use restrictions under Section 845.780(d)(1)(C); the submission of "a description of the planned uses" as a supplement to their post-closure care plan; and maintenance of a public internet site that hosts documents related to Pond D prepared for Part 840. *Id.*, Attachment 1. IEPA recommends that the Board include these requirements as conditions to the adjusted standard. *Id.*

IEPA states that Ameren "did not provide a comparison of the qualitative and quantitative nature of emissions" between Part 845 and the requested adjusted standard. Ag. Rec. at 7. Nevertheless, the final cover system currently in place is consistent with the requirements in Part 845. *Id.* In this regard, IEPA notes that requirements under Parts 840 and 845 for geomembranes and geomembrane bases [Sections 840.126(a) and 845.750(c)(1)(B)], and final protective layers over the geomembrane [Sections 840.126(b) and 845.750(c)(2)] are almost identical. *Id.* Also, the groundwater collection trench in Section 840.120 is consistent with corrective action requirements under Part 845. *Id.* Therefore, IEPA determines that "there will not be substantially and significantly more adverse effects if the adjusted standard is granted by the Board." *Id.* at 9.

Regarding consistency with the federal law, IEPA does not dispute the facts presented in the amended petition except for Ameren's statement that Part 845 was adopted to implement RCRA. IEPA maintains that Part 845 was designed to implement Sections 12, 22, and 22.59 of the Act. Ag. Rec. at 3. The IEPA emphasizes that the scope of Part 845 was determined by the Illinois General Assembly's mandate to the Board to implement Section 22.59 using 40 CFR 257 as a baseline. *Id.* Because Part 845 is based on the federal Part 257 rules, IEPA believes that the requested adjusted standard from Part 845 with the IEPA's proposed additional conditions will be as protective of human health and the environment as the federal CCR rule. Ag. Rec. at 10. Therefore, IEPA agrees with Ameren that the requested relief is consistent with federal rules. IEPA concludes to recommend that the Board grant the adjusted standard as requested with the IEPA's proposed conditions. *Id.* at 10-11.

DISCUSSION

The Board will now discuss each of the factors in Section 28.1(c) of the Act (415 ILCS 5/28.1(c) (2022)) in order to determine whether the adjusted standard from the permitting (Section 845.170(a)(2)) and closure and post-closure (Section 845.170(a)(3)) requirements for Ameren's Pond D is warranted.

Justification for Adjusted Standard

Section 28.1 of the Act allows the Board to grant an adjusted standard if a level of justification is met. "If a regulation of general applicability does not specify a level of justification required of a petitioner to qualify for an adjusted standard, the Board may grant individual adjusted standards whenever the Board determines" that the factors listed in Section 28.1(c) justify the granting of a different standard. In this instance, Part 845 does not provide a level of justification for an adjusted standard from its requirements. Therefore, the Board is required to evaluate whether the requested adjusted standard is justified based on the Section 28.1(c) factors. 415 ILCS 5/28.1(a) (2022).

Section 28.1(c)(1): Substantially Different

To grant an adjusted standard, the Board must determine whether the factors relating to Pond D are substantially and significantly different from the factors relied upon by the Board in adopting the Permitting requirements in Section 845.170(a)(2), and Closure and Post-Closure requirements in 845.170(a)(3). In adopting these requirements, the Board considered factors applicable to CCR surface impoundments throughout the State of Illinois, while Ameren's Part 840 rule is specific to Pond D. Therefore, the Board considered statewide factors when adopting the Part 845 provisions applicable to Pond D, rather than considering the site-specific rule factors applicable to Pond D. As a result, Part 845 sometimes contradicts or is duplicative of those under Part 840. When adopting Part 845, the Board specifically noted that Ameren could file an adjusted standard to address any potential conflicts or duplications between the two rules. *See* Part 845 Rulemaking, slip. op. at 13 (Feb. 4, 2021).

The Board notes that Pond D is one of only four inactive CCR surface impoundments in Illinois, and the only one subject to its own site-specific regulation regarding closure and post-closure care (Part 840). *Am. Pet.* at 22. Additionally, Pond D closed before the effective dates of both the Federal (Part 257) and Illinois CCR (Part 845) Rules. *Id.* at 26. Thus, it is classified as an "inactive pond" under the Illinois CCR Rule and a "legacy pond" under the Federal CCR Rule. *Id.* Pond D as an inactive CCR surface impoundment is subject to portions of Part 845 (Subpart A, portions of Subpart B and G, and all of Subpart I), and not regulated under Part 257.³ *Id.* at 7. In adopting the Part 840 regulations, the Board and participant exerted much time and effort to ensure that Part 840 was adequately protective of human health and the environment. R09-21, slip op. at 6 (Jan. 20, 2011). The Board is aware of conflicts between Parts 840 and

³ The Board will more fully address the impact of the Federal Rule addressing legacy CCR impoundments under the Board's analysis of Section 28.1(c)(4) (415 ILCS 5/28.1(c)(4) (2022)) below.

845, and Ameren is seeking an adjusted standard from the portions of Part 845 that conflict with Part 840.

IEPA agrees that Pond D is unique because it is regulated by a site-specific rule and that rule is consistent with the provisions of Part 845. Rec. at 3, 7.

The Board finds that Ameren has demonstrated that factors relating to Pond D are significantly different than those considered by the Board in adopting the statewide CCR surface impoundment rule under Part 845. Therefore, the Board finds that the Board may consider granting to Ameren's Hutsonville Pond D an adjusted standard.

Section 28.1(c)(2): Those Factors Justify an Adjusted Standard

The Board must next determine whether the factors that make Ameren's Pond D substantially different from those considered by the Board in adopting Part 845, justify an adjusted standard. *See* 415 ILCS 5/28.1(c)(2) (2022). The Board notes that Pond D is the only former ash pond in the State that closed and is undergoing post-closure care under Part 840 (site-specific rule). Further, Pond D was closed under Part 840, and began post-closure care prior to adoption of Part 845.

Prior to proposing the Part 840 site-specific rule, Ameren spent 10 years trying to define the appropriate regulatory requirements for Pond D. *See generally* R09-21. Because Part 840 is site-specific, no other CCR surface impoundment can use the provisions of Part 840.

Ameren highlighted that in the adoption of site-specific rule Part 840, that much time and effort was dedicated into ensuring the closure and post-closure care at Pond D is environmentally sustainable and will not result in adverse effects to either the environment or human health. Furthermore, Ameren states their requested adjusted standard will incorporate the portions of Part 845 that do not conflict with Part 840 and that the Board did not have the authority to implement at the time of adoption of Part 840. Therefore, the Board finds that there are substantially and significantly different factors justifying the granting of an adjusted standard.

Section 28.1(c)(3): Environmental Impact

When the Board adopted the site-specific standards in Part 840, the Board found that the rules were technically reasonable and economically feasible. The Board also considered protection of the environment, based on the site-specific criteria at Hutsonville. *See* R09-21, slip op. at 6-7 (Dec. 16, 2010). In its petition, Ameren reiterated the factors considered when deciding on which measures to implement for closure and post-closure care at Hutsonville D. Ameren notes that it continues to operate a groundwater collection trench along the south and west property boundaries of the Hutsonville Power Station to prevent the migration of groundwater impacted by Hutsonville Pond D as well as Hutsonville Pond A. Am. Pet. at 4. The discharges from the groundwater collection trench are regulated under Ameren's NDPES permit. *Id.* Ameren has also discussed the groundwater compliance history at Pond D since its closure. Ameren's data demonstrate that groundwater contamination has not been a significant concern at Hutsonville D under Part 840.

IEPA agrees that the impacts on human health and the environment will not be “substantially and significantly more adverse” if the adjusted standard is adopted. Rec. at 9.

Based on the evidence in the record, the Board finds that the adoption of the adjusted standard will not result in environmental or health effects substantially and significantly more adverse than the effects considered by the Board in adopting Part 845.

Section 28.1(c)(4): Consistent with Federal Law

The Board next examines whether the requested adjusted standard is consistent with federal law. The Environmental Groups submitted a comment concerning the applicability of future legacy CCR surface impoundment regulations promulgated by USEPA to Pond D. *See* PC 1 at 2. On May 8, 2024, USEPA issued its final order regulating legacy CCR surface impoundments. *See* 89 Fed. Reg. 38950 (May 8, 2024). The Board has reviewed USEPA’s final legacy CCR surface impoundment rules and finds the adjusted standard is consistent with the USEPA rule. Of significance is that USEPA included a list of potential legacy sites in its background information on the adopted rule. *See* <https://www.epa.gov/coalash/final-rule-legacy-coal-combustion-residuals-surface-impoundments-and-ccr-management-units#rule-summary>. Hutsonville Pond D is not included in USEPA’s list of legacy CCR surface impoundments, while Pond A, not subject to this adjusted standard, is included. Also, neither IEPA nor Ameren provided additional comment concerning the applicability of the USEPA final rule. Therefore, the Board finds that the proposed relief is consistent with federal law.

Conditions

IEPA recommended that certain conditions be added to Ameren’s proposed adjusted standard language. Rec. at Attachment 1. IEPA explained that these conditions require Ameren to comply with several other Sections in Part 845 which are not duplicative of any requirement in Part 840. Ag. Rec. at 6. Ameren agrees to the addition of IEPA’s conditions. Resp. at 2. The Board has included these conditions in today’s order by combining them with the adjusted language and conditions proposed in Ameren’s amended petition. Today’s order includes non-substantive clarifications to reflect that the conditions apply to Ameren as the owner and operator of Pond D, and format changes to comply with the Board’s general adjusted standard format.

CONCLUSION

After reviewing the record and arguments by the parties, the Board finds that Ameren has sufficiently demonstrated that the factors relating to Hutsonville Pond D are substantially and significantly different from the factors considered by the Board in adopting the Part 845 CCR surface impoundment rules of general applicability for permitting (Section 845.170(a)(2)) and closure and postclosure (Section 845.170 (a)(3)). Further, the Board finds that Ameren has justified the adjusted standard and that the requested relief is consistent with federal law. The Board also finds that the requested adjusted 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.

Thus, the Board finds that Ameren's Hutsonville Pond D is not subject to the permitting requirements in Section 845.170(a)(2), or the closure and post-closure care requirements in Section 845.170(a)(3) of Part 845, because Pond D is subject to the site-specific post-closure care requirements that Part 840 specifically created for Pond D. The Board further finds that Pond D is not subject to these permitting and post-closure care requirements of Part 845 only as long as Pond D continues to comply with the non-duplicative requirements of Part 845 that are applicable to inactive CCR surface impoundments as enumerated in this order. Therefore, the Board grants the adjusted standard subject to conditions specified in the Order.

ORDER

The Board grants Ameren Energy Medina Valley Cogen, LLC (Ameren) an adjusted standard under Section 28.1 of the Act (415 ILCS 5/28.1 (2022)) for Pond D, which is located at Ameren's Hutsonville Station, located on the west bank of the Wabash River approximately one and one-half miles north of the Village of Hutsonville, in Crawford County, Illinois, from the permitting requirements in 35 Ill Adm Code 845.170(a)(2) and the closure and post-closure care requirements in 35 Ill Adm Code 845.170(a)(3). This adjusted standard is subject to the following conditions: .

1. Pond D remains subject to the site-specific rule under 35 Ill. Adm. Code 840.
2. Pond D must continue to comply with the requirements of 35 Ill. Adm. Code 845 that are not duplicative of those in 35 Ill. Adm. Code 840.
3. Ameren must maintain financial assurance for Pond D, as required under 35 Ill. Adm. Code 845, Subpart I.
4. Beginning September 1, 2024, Ameren must report constituent concentrations in groundwater based on a total concentration analysis.
5. Identification Marker

Ameren 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 Illinois Environmental Protection Agency (Agency), the name associated with the CCR surface impoundment, and the name of the owner or operator of Pond D. Ameren must maintain the marker at all times until the completion of post-closure care.

6. Corrective Action
 - a) Ameren must continue operation of the Groundwater Collection Trench, under Hutsonville Station's National Pollutant Discharge Elimination System (NPDES) permit (IL0004120).

- b) Ameren must continue to maintain corrective action at Pond D as previously identified as adequate by the Agency and the Board in consideration of 35 Ill. Adm. Code 840.
- c) If a release from 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, Ameren must initiate an assessment of corrective measures that prevents further releases, remediates any releases, and restores the affected area under to 35 Ill. Adm. Code 845.170(c), including application for and obtainment of a construction permit under the requirements of 35 Ill. Adm. Code 845.220(a) and (c).

7. Deed Notation

- a) Ameren must record a notation on the deed to the property (Pond D site), or some other instrument that is normally examined during title search.
- b) The notation on the deed must in perpetuity notify any potential purchaser of the property that:
 - i) The land has been used as a CCR surface impoundment; and
 - ii) Its use is restricted under the post-closure care requirements specified in 35 Ill. Adm. Code 845.780(d)(1)(C).
- c) Within 30 days after recording a notation on the deed to the property, Ameren 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 compliance with 35 Ill. Adm. Code 845.810.

8. Planned Uses of Property

- a) Ameren must provide a description of the planned uses of the property during the post-closure care period by submitting a description of the planned uses to the Agency 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.
- b) Post-closure 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 35 Ill. Adm. Code 840.

- c) Other disturbances may be allowed if Ameren 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.

9. Publicly Accessible Internet Site

Ameren must maintain a publicly accessible internet site as provided in 35 Ill Adm Code 845.810 that separately identifies any reports, plans and certifications related to Pond D prepared under any of the following Sections of 35 Ill Adm Code 840, including posting of all groundwater record keeping documents:

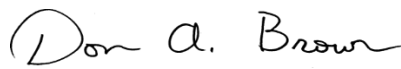
- a) Section 840.116 Groundwater Quality Standards
- b) Section 840.118 Demonstration of Compliance
- c) Section 840.132 Modification of Existing Permits
- d) Section 840.136 Post-Closure Maintenance of Cover System
- e) Section 840.142 Post-Closure Report/Certification of Completion of Post-Closure Care
- f) Section 840.144 Recordkeeping and Reporting Requirements
- g) Section 840.148 Review, Approval, Modification of Closure/Post-Closure Care Plans
- h) Section 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.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2022); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702. Filing a motion asking that the Board reconsider this final order is not a prerequisite to appealing the order. 35 Ill. Adm. Code 101.902.

Names and Addresses for Receiving Service of Any Petition for Review Filed with the Appellate Court	
Parties	Board
<p>Ameren Energy Medina Valley Cogen, LLC Attn: Claire A. Manning, Anthony D. Schuering, Lucas J. Hall Brown, Hay & Stephens, LLP 205 S. Fifth Street, Suite 1000 P.O. Box 2459 Springfield, IL 62705-2459 cmanning@bhslaw.com aschuering@bhslaw.com llhall@bhslaw.com</p>	<p>Illinois Pollution Control Board Attn: Don A. Brown, Clerk 60 E. Van Buren, Suite 630 Chicago, Illinois 60605 don.brown@illinois.gov</p>
<p>Illinois Environmental Protection Agency Division of Legal Counsel Attn: Stefanie N. Diers, Sara Terranova 1021 North Grand Avenue East P.O. Box 19276 Springfield, IL 62794-9276 Stefanie.diers@illinois.gov Sara.terranova@illinois.gov</p>	

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on July 11, 2024, by a vote of 4-0.



Don A. Brown, Clerk
Illinois Pollution Control Board