BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	AS 2021-008
PETITION OF AMEREN ENERGY	)	
MEDINA VALLEY COGEN, LLC (OLD	)	(Adjusted Standard - Land)
MEREDOSIA) FOR ADJUSTED	)	
STANDARDS FROM 35 ILL. ADMIN.	)	
CODE PART 845	)	

NOTICE OF ELECTRONIC FILING

To: Attached Service List

PLEASE TAKE NOTICE that on August 19, 2024, I electronically filed with the Clerk of the Illinois Pollution Control Board ("Board") the **ENVIRONMENTAL GROUPS' COMMENTS ON AMEREN'S RESPONSE TO IEPA'S RECOMMENDED DENIAL OF AN ADJUSTED STANDARD FOR OLD MEREDOSIA**, copies of which are served on you along with this notice.

Dated: August 19, 2024

Respectfully Submitted,

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	AS 2021-008
PETITION OF AMEREN ENERGY MEDINA VALLEY COGEN, LLC (OLD MEREDOSIA) FOR ADJUSTED STANDARDS FROM 35 ILL. ADMIN. CODE PART 845	)	(Adjusted Standard - Land)

ENVIRONMENTAL GROUPS' COMMENTS ON AMEREN'S RESPONSE TO IEPA'S RECOMMENDED DENIAL OF ADJUSTED STANDARDS FOR OLD MEREDOSIA

Pursuant to 35 Ill. Adm. Code 101.628(c), 101.110(a), and 104.100, Earthjustice, Prairie Rivers Network, and Sierra Club (collectively, "Environmental Groups") submit the following comments on Ameren's response to the recommendation of the Illinois Environmental Protection Agency ("IEPA") that this Board deny adjusted standards for Old Meredosia ("Recommended Denial").[1]

I. The Board should reject Ameren's requested finding of inapplicability because Part 845 is squarely applicable to Old Meredosia.

Old Meredosia is an inactive coal combustion residuals ("CCR") surface impoundment and must be regulated as one under Part 845. As Environmental Groups explained in our initial comments in this docket,[2] we agree with IEPA that Old Meredosia meets the definition of a CCR surface impoundment: "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."[3] We also agree with IEPA that Old Meredosia meets the definition of an *inactive* CCR surface impoundment: "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."[4] The Coal Ash Pollution Prevention Act ("CAPPA") requires these definitions to be "at least as protective and comprehensive as" federal CCR regulations.[5]

A key dispute in this case is whether Old Meredosia is designed to hold an accumulation of CCR and liquids.[6] A straightforward application of state and federal law makes clear that Old Meredosia is so designed, and thus is an inactive CCR surface impoundment under Part 845.

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[1] Ameren's Response to IEPA's Recommendation (Feb. 5, 2024) ("Ameren Response").
[2] P.C. #1, Comments of Earthjustice, Prairie Rivers Network, and Sierra Club, at 1–3 (Oct. 12, 2023) ("Env't Groups' Initial Comments"); IEPA Recommendation, at 7–8 (Aug. 3, 2023) ("IEPA Recommendation").
[3] 35 Ill. Adm. Code 845.120.
[4] *Id.*
[5] 415 ILCS 5/22.59(g)(1).
[6] *See, e.g.*, Ameren Response at 23 (claiming that "Old Meredosia is not a surface impoundment because it has not been designed to hold liquids at any point during this century").

First, Old Meredosia "is designed" as a CCR surface impoundment. Ameren itself "does not dispute that the original 1960's design of Old Meredosia was to manage sluice waters and ash from the combustion of coal."[7] Thus, Ameren admits that Old Meredosia *was* designed to be a CCR surface impoundment. The D.C. Circuit's analysis in *Utility Solid Waste Activities Group v. EPA* ("*USWAG*") supports a finding that Old Meredosia *still* "is designed" that way. Applying the D.C. Circuit's reasoning, Old Meredosia "is designed" to hold an accumulation of CCR and liquids even though it no longer receives CCR or sluice waterjust as waste "is disposed of" at a site, making that site an "open dump" under RCRA, even if the site is "no longer receiving new waste."[8]

In its Response, Ameren has no choice but to "concede[] that," under *USWAG*, "Old Meredosia 'is designed' to hold CCR even though CCR is no longer deposited there because the CCR is still present . . . ."[9] With any contrary argument foreclosed, Ameren pivots to claiming *USWAG* does not resolve whether Old Meredosia "remains designed to hold liquids, because no liquids are present."[10] Ameren argues that even though Old Meredosia "was, in the past, designed to hold liquid," that "has no bearing on whether it is presently designed to do so."[11]

Ameren's argument fails because it runs headlong into the Illinois Court of Appeals' recent decision upholding this Board's definition of "inactive CCR surface impoundment" against industry challenges (including from Ameren). In that decision, the Court explains:

> [A] CCR surface impoundment need only be *designed* to hold CCR and liquid, not currently holding CCR and liquid. Accordingly, a dry surface impoundment that was designed to hold liquid but no longer holds liquid first qualifies as a "CCR surface impoundment" by virtue of its design and next qualifies as an "inactive CCR surface impoundment" by virtue of its current state being liquid-free.[12]

Ameren admits in its Response that "the original 1960's design of Old Meredosia was to manage *sluice waters* and ash from the combustion of coal."[13] This admission resolves the question: even if Old Meredosia "no longer holds liquid," it indisputably was "designed to hold liquid" and therefore "qualifies as a 'CCR surface impoundment' by virtue of its design" under the Illinois Appellate Court's decision.[14]

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[7] *Id.* at 30.
[8] *Util. Solid Waste Activities Grp. v. Env't Prot. Agency*, 901 F.3d 414, 440 (D.C. Cir. 2018) ("*USWAG*"); *see also* Env't Groups' Initial Comments at 2; IEPA Recommendation at 7–8.
[9] Ameren Response at 31.
[10] *Id.*
[11] *Id.*
[12] *Midwest Generation, LLC v. Ill. Pollution Control Bd.*, Ill. App. 4th 210304, at *7 (Mar. 13, 2024) ("*MWG v. IPCB*") (emphasis in original); *see also id.* at *8 ("[W]e conclude that the Board did not exceed its authority by defining 'inactive CCR surface impoundment' to include CCR surface impoundments that are designed to hold liquid but do not currently hold liquid.").
[13] Ameren Response at 30 (emphasis added); *see also id.* at 31 (conceding that Old Meredosia "was, in the past, designed to hold liquid").
[14] *MWG v. IPCB*, Ill. App. 4th 210304, at *7.

This is consistent with interpretations from IEPA, the U.S. Environmental Protection Agency ("U.S. EPA"), and this Board. IEPA correctly observes in its Recommended Denial that "a CCR surface impoundment need not 'hold' liquids during its entire active life to meet the definition of CCR surface impoundment found in Part 845."[15] As longtime IEPA senior staff members Lynn Dunaway and Darin LeCrone explained in testimony at the hearing on Midwest Generation's adjusted standard petition for Waukegan station, nothing in the federal or state definition of CCR surface impoundment specifies the amount of time that liquid must be "held" in an impoundment, nor what volume of liquid must "accumulate."[16]

IEPA's interpretation is consistent with U.S. EPA's. In its finalized rule on so-called "legacy" CCR surface impoundments ("2024 Federal CCR Rule"), discussed in detail below, U.S. EPA reiterates and reaffirms that a unit can be "designed to hold . . . liquids" regardless of whether the unit currently holds liquids:

> EPA agrees that a legacy CCR surface impoundment must meet the existing definition of a CCR surface impoundment in § 257.53. That definition contains three criteria: (1) The unit must be "a natural topographic depression, manmade excavation or diked area;" (2) The unit must be "designed to hold an accumulation of CCR and liquid;" and (3) The unit "treats, stores or disposes of CCR." 40 CFR 257.53. *None of these require the presence of a particular amount of water or hydraulic head—or indeed any. Rather, the unit must be "designed" —that is, intended to—hold an accumulation of CCR and liquid.* Although EPA expected that, based on its understanding of the utilities' current management practices, water would be present as a consequence of the treatment, storage, or disposal occurring in the unit, *nothing in the text of the definition requires it, let alone requires a minimum amount.*[17]

U.S. EPA also squarely rejects the argument that a unit that has dewatered ceases to be "designed to hold . . . liquids":

> EPA disagrees that an impoundment that has been dewatered and closed or is otherwise now maintained so as not to impound liquids should no longer be considered "designed to hold an accumulation of CCR and liquids," and therefore, should not be considered an inactive or legacy impoundment. Just as a landfill would not suddenly become "designed to hold an accumulation of both CCR and liquids" based on the temporary presence of precipitation, *removing liquids from a unit that was constructed as a surface impoundment and that operated as a surface impoundment by managing both CCR and liquids for decades, does not suddenly mean that the unit is no longer "designed to hold an accumulation of*

[15] IEPA Recommendation, at 8.
[16] *See* Corrected Transcript of February 13, 2024 Hearing, at 272:1–273:8, AS 2021-003 (June 27, 2024), https://pcb.illinois.gov/documents/dsweb/Get/Document-110507 (testimony of Mr. Dunaway); *id.* at 317:13–318:3 (testimony of Mr. LeCrone).
[17] Hazardous and Solid Waste Mgmt. Sys.: Disposal of Coal Combustion Residuals from Elec. Utils.; Legacy CCR Surface Impoundments, 89 Fed. Reg. 38950, 38992 (May 8, 2024), https://www.govinfo.gov/content/pkg/FR-2024-05-08/pdf/2024-09157.pdf (amending 40 CFR § 257) ("2024 Federal CCR Rule") (emphasis added).

> *CCR and liquids."* Even assuming all free liquids had been removed from the unit, which as discussed below is unlikely, the subsequent removal of liquids as part of closing the unit does not change either the original design or use of the unit . . . .[18]

Finally, IEPA's and U.S. EPA's interpretations align with this Board's conclusion (now affirmed by the Illinois Appellate Court)[19] that omitting "and liquids" from the definition of "inactive CCR surface impoundment" in Part 845 was "consistent with the federal regulations and provides clarity on the unintended consequence of excluding CCR surface impoundments containing CCR that may have leaked or were drained before the cutoff date."[20]

Thus, pursuant to the D.C. Circuit's decision in *USWAG*; the Illinois Court of Appeals' decision in *MWG v. IPCB*; this Board's February 2021 order in the Part 845 rulemaking docket; and IEPA's and U.S. EPA's interpretations, Old Meredosia meets the definition of a "CCR surface impoundment" because it "is 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."[21] Old Meredosia also meets the definition of an "inactive CCR surface impoundment" because it is undisputed that "CCR was placed before but not after October 19, 2015 and still contains CCR on or after October 19, 2015."[22] Part 845 is squarely applicable to Old Meredosia.

II. The Board should reject Ameren's request for adjusted standards.

A. Ameren bears the burden of proof.

As a threshold matter, Ameren bears the burden of proof in this proceeding.[23] Ameren repeatedly tries in its Response to place the evidentiary burden on IEPA,[24] but it cannot overcome the plain language of the Board's rule. As IEPA's Recommended Denial makes clear, and as we explain below, Ameren has failed to meet its burden.

B. Ameren fails to prove it meets the test for adjusted standards under Illinois law.

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[18] *Id.* (emphasis added).
[19] *MWG v. IPCB*, Ill. App. 4th 210304, at *11.
[20] Ill. Pollution Control Bd., Opinion and Order, 16, PCB R20-19 (Feb. 4, 2021); *see also MWG v. IPCB*, Ill. App. 4th 210304, at *11 (affirming the Board's definition of "inactive CCR surface impoundment"); Env't Groups' Initial Comments, at 3 (further discussing this issue).
[21] 35 Ill. Adm. Code 845.120 (emphasis added).
[22] *Id.*
[23] 35 Ill. Adm. Code 104.426 ("The burden of proof in an adjusted standard proceeding is on the petitioner.").
[24] *See, e.g.*, Ameren Response, at 17 ("The Illinois EPA has not demonstrated a need for [a Part 845-compliant groundwater monitoring network], nor has it provided any technical analysis different than that presented in the PAS [petition]."), 18 ("[T]he Illinois EPA raises issues without any technical analysis but rather mere conjecture.").

For Old Meredosia to qualify for adjusted standards from Part 845, Ameren must prove that it meets a four-factor test under Illinois law:

> (1) factors relating to that petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation applicable to that petitioner;
>
> (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.[25]

Ameren does not meet this test.

i. Ameren fails to prove that Old Meredosia meets factors one through three.

Ameren seeks adjusted standards that would exempt Old Meredosia from Part 845's closure and post-closure requirements, including by allowing the existing "cover" to remain over Old Meredosia. Ameren fails to meet its burden of proving that it meets the first three factors for an adjusted standard. Old Meredosia is not "substantially and significantly different" from other CCR surface impoundments regulated under Part 845 in large part because it poses the very same adverse environmental and health effects as those impoundments.

Ameren repeatedly emphasizes in its filings in this docket that Old Meredosia is old and covered by a forest, but those facts are not unique and do not mitigate the risks Old Meredosia poses.[26] As the evidence cited in IEPA's Recommended Denial shows, Old Meredosia is holding coal ash without adequate protection from infiltration, threatening human health and the environment[27]—just like any other CCR surface impoundment regulated under Part 845.

There is nothing "substantially and significantly different" about Old Meredosia or the environmental and health risks it poses as compared to other regulated CCR surface impoundments. Ameren's attempts to prove otherwise fail. First, Ameren tries to shift its burden to IEPA by challenging the Agency to identify "any other site" that matches Old Meredosia's profile.[28] Examples abound. In fact, Old Meredosia is analogous to the Joppa West coal ash unit, for which Electric Energy is also seeking adjusted standards from Part 845 based in part on

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[25] 415 ILCS 5/28.1(c)(1)–(4).
[26] *See, e.g.*, Ameren Response, at 8–9.
[27] *See, e.g.*, IEPA Recommendation, at 8 ("Old Meredosia was never lined and is located on alluvial sand and gravel as displayed in boring logs (See Pet. Ex 2 at 704-711/1169 pdf), allowing rapid infiltration of liquids from the impoundment . . ."), 16 ("[T]he requested adjusted standard may result in environmental or health effects because Old Meredosia is an inactive surface impoundment, *demonstrated to be leaching contaminants*.") (emphasis added).
[28] Ameren Response, at 10.

arguments that the unit is old and covered by trees. Environmental Groups' comments urging the Board to reject adjusted standards for Joppa West are equally applicable here.[29]

Ameren next makes the speculative claim that "the trees present on the Old Meredosia site, which does not receive surface water from anything but direct rainfall, *likely do not* allow any water to reach the groundwater table and, correspondingly, do not allow for any ash to migrate offsite or downgradient."[30]Ameren then attempts to recast speculation as certainty: "the data presented by Ameren clearly supports the conclusion that granting the Adjusted Standard will not cause health or environmental impacts significantly or substantially more harmful than those considered in adopting the general rule given that rainfall *does not* infiltrate through Old Meredosia to the groundwater and that the groundwater table is consistently below the bottom of the site, even during seasonal high groundwater conditions."[31]

Ameren overstates its own consultants' report, which concludes only that "the amount of vertical water movement through buried ash to groundwater is *likely to be minimal*."[32] Moreover, the consultants reached this conclusion by applying average transpiration rates found in the literature to tree species found at Old Meredosia; the consultants did not reach this conclusion by conducting a site-specific data analysis of how much water reaches the groundwater table at Old Meredosia.[33] Finally, the consultants' report does not overcome other site-specific evidence in the record that water is very likely infiltrating, and leaking from, Old Meredosia:

- "Old Meredosia was never lined and is located on alluvial sand and gravel as displayed in boring logs (See Pet. Ex 2 at 704-711/1169 pdf), allowing rapid

[29] *See* P.C. #2, Comments of Earthjustice, Prairie Rivers Network, and Sierra Club, at 6–7, AS 2021-005 (July 25, 2024), https://pcb.illinois.gov/documents/dsweb/Get/Document-110658; P.C. #1, Comments of Earthjustice, Environmental Law & Policy Center, Prairie Rivers Network, and Sierra Club, at 24, AS 2021-005 (Feb. 14, 2022), https://pcb.illinois.gov/documents/dsweb/Get/Document-105318. Both of these comments refer to U.S. EPA's 2022 letter to Duke Energy regarding its Gallagher Station—which is attached to Environmental Groups' Initial Comments in this docket as Attachment A—in which U.S. EPA determines that the 2015 Federal CCR Rule regulates CCR units at Gallagher and the fact that those units were "removed from service, drained of ponded surface water, and subsequently covered with soil and grass in 1989" was immaterial to U.S. EPA's determination. The D.C. Circuit recently upheld U.S. EPA's determination as set forth in its Gallagher letter when it rejected the claim that the Gallagher letter, among other documents, unlawfully expanded the scope of regulated units. The court explained that "the plain text of the 2015 Rule applies to 'inactive service impoundments,' 40 C.F.R. § 257.50(c), which the Rule defines as 'surface impoundment[s] that no longer receive[] [coal residuals] on or after October 19, 2015 and still contain[] both [coal residuals] and liquids on or after October 19, 2015,' *id.* § 257.53," *Elec. Energy, Inc. v. Env't Prot. Agency*, 106 F.4th 31, 42 (D.C. Cir. 2024) (alterations in original), and further concluded that "[c]onsistent with that regulatory text, EPA's letter to Duke Energy [regarding the Gallagher site] contemplated applying the 2015 Rule to surface impoundments that no longer receive coal residuals but still contain coal residuals and groundwater." *Id.*

[30] Ameren Response at 16 (emphasis added).

[31] *Id.* (emphasis added).

[32] *Id.*, Ex. A at 26 (emphasis added).

[33] *Id.*, Ex. A at 25–26 (indicating that the consultants' drew their conclusions by extrapolating from "[s]tudies of transpiration reported in literature" and applying that to "trees identified at the Old Meredosia site").

infiltration of liquids from the impoundment, making the time liquids were retained short."[34]

- "Petitioner's Ex. 2 at 700/1169 pdf[] demonstrates that contaminates do leach from the fly ash contained in Old Meredosia at concentrations above the groundwater protection standards."[35]

- "The Petitioner's data also demonstrates that contaminants in excess of groundwater protection standards exist in groundwater beneath Old Meredosia. *See* Petitioner's Ex. 2 at 701/1169 pdf."[36]

This evidence of infiltration and leakage at Old Meredosia is unsurprising. As U.S. EPA observes in the preamble to the 2024 Federal CCR Rule:

> [W]ithout an effective cover system many "dewatered" impoundments can nevertheless contain significant volumes of water simply as a consequence of the amount of precipitation that continually percolates through the unit . . . In the absence of any action taken to remove the water, over time it will continue to accumulate in the unit.[37]

Other statements in the preamble further underscore that Old Meredosia is not unique in terms of either its characteristics or risks:

> A number of commenters also claimed that their units are heavily vegetated or developed and that reopening or other removal/remediation activities may disrupt the current use of the site. EPA acknowledges some old units may be heavily vegetated. However, no commenter submitted any data or analysis to demonstrate that, over the short or long term, removal or remediation activities would be more detrimental to health and the environment than either cleaning up the contaminated groundwater or taking measures to prevent the legacy CCR surface impoundment[38] from contaminating groundwater.
>
> Moreover, *the fact that some impoundments have become heavily vegetated or redeveloped does not resolve the risks these unlined legacy CCR surface impoundments continue to pose . . . the risks associated with such units can be substantial . . . Consequently, the current record does not support an exemption for units that still contain both liquid and CCR even if the closure or remediation may disrupt the current use of the land*.[39]

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[34] IEPA Recommendation at 8.
[35] *Id.* at 14.
[36] *Id.*
[37] 2024 Federal CCR Rule, 89 Fed. Reg. at 38990.
[38] The next section explains that Old Meredosia is very likely a "legacy CCR surface impoundment" under the 2024 Federal CCR Rule.
[39] 2024 Federal CCR Rule, 89 Fed. Reg. at 38985 (emphasis added).

U.S. EPA also describes extensive evidence of the risks that old, unlined, and inadequately covered units pose, including cancer and non-cancer health risks, leading the agency to conclude that regulating such units "will have significant quantified and unquantified public health and environmental benefits."[40]

This is consistent with the Illinois Appellate Court's opinion in *MWG v. IPCB*. That decision affirms the risk that units like Old Meredosia pose when, upholding the Board's definition of "inactive CCR surface impoundment," the Court agrees with the Board's reasoning that even dry CCR surface impoundments "can pose a risk to groundwater."[41]

In sum, Old Meredosia is in fact very similar to other CCR surface impoundments, and both U.S. EPA's analysis of similar impoundments and IEPA's detailed, site-specific review of Old Meredosia strongly suggest that it is just as dangerous to human health and the environment. Ameren fails to meet its burden of proving that the adjusted standards it requests are justified under Illinois law.

ii. Granting the adjusted standards Ameren requests would be inconsistent with federal law.

Ameren makes the strained argument in its Response that its requested adjusted standards would be consistent with federal law. They would not.

Old Meredosia is subject to federal regulation under the 2024 Federal CCR Rule. Old Meredosia was not regulated under the 2015 Federal CCR Rule[42] only because U.S. EPA illegally excluded impoundments at inactive power plants, like Meredosia, when it promulgated the rule. The D.C. Circuit held in *USWAG* that U.S. EPA "acted arbitrarily and capriciously and contrary to RCRA . . . in exempting inactive surface impoundments at inactive power plants from regulation" and thus required U.S. EPA to propose a new rule for these so-called "legacy" ponds.[43]

U.S. EPA responded to the D.C. Circuit's order by issuing the 2024 Federal CCR Rule. This new rule defines "legacy CCR surface impoundment" as a "CCR surface impoundment that no longer receives CCR but contained both CCR and liquids on or after October 19, 2015, and that is located at an inactive electric utility or independent power producer," where "*inactive electric utility or independent power producer* means any electric utility or independent power producer that ceased providing power to electric power transmission systems or to electric power distribution systems before October 19, 2015."[44] The Rule requires legacy CCR surface impoundments "to comply with the same regulations that apply to inactive CCR impoundments

[40] *Id.* at 38951.
[41] *MWG v. IPCB*, Ill. App. 4th 210304, at *10.
[42] Hazardous and Solid Waste Mgmt. Sys.: Disposal of Coal Combustion Residuals From Elec. Utils., 80 Fed. Reg. 21302 (Apr. 17, 2015) ("2015 Federal CCR Rule").
[43] *USWAG*, 901 F.3d at 449.
[44] 2024 Federal CCR Rule, 89 Fed. Reg. at 39100 (emphasis in original).

at active facilities, except for the location restrictions (at §§ 257.60-257.64) and liner design criteria (at § 257.71)."[45]

Evidence strongly suggests that Old Meredosia is a "legacy CCR surface impoundment" under the 2024 Federal CCR Rule. Old Meredosia is a "CCR surface impoundment," as explained above, and is located at Meredosia Station, which is an "inactive electric utility." Thus, Old Meredosia is a "legacy CCR surface impoundment" if it "contained both CCR and liquids on or after October 19, 2015." There is no dispute that Old Meredosia contains CCR, and as Environmental Groups discussed in their initial comments, Old Meredosia likely also contains liquids in the form of percolating precipitation and potentially also groundwater.[46]

The 2024 Federal CCR Rule makes clear that impoundments "contain liquids" when they are "in contact with groundwater" or when precipitation can "freely migrate" within the impoundment. U.S. EPA states that the definition of "legacy CCR surface impoundment" includes (among others): "Any impoundment where, on or after October 19, 2015, *water flowed or continues to flow through the impoundment, permeating the waste in the unit, such as where the base of the impoundment intersects with the groundwater*."[47] U.S. EPA further explains that purportedly "dewatered" impoundments also can "contain liquids" as a result of an inadequate cover system:

> [D]efining a legacy impoundment as one that contains both CCR and liquid on or after October 19, 2015, retains oversight of units that may have been dewatered but have not yet completed closure. *In any unit without an effective cover system, precipitation can continue to freely migrate into the unit***,** and any leachate generated as a result would be a potential ongoing source of contamination, particularly where the unit is already leaking or in contact with groundwater.[48]

Taken together, these statements from the preamble to the 2024 Federal CCR Rule leave no doubt that if Old Meredosia is in contact with groundwater or enabling free migration of percolating precipitation—as evidence strongly suggests—then it "contains liquids" and is a "legacy CCR surface impoundment" under the rule. Granting adjusted standards for Old Meredosia that are inconsistent with the 2024 Federal CCR Rule would therefore be inconsistent with applicable federal law, and impermissible under 415 ILCS 5/28.1(c)(4).[49]

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[45] *Id.* at 38980.
[46] Env't Groups' Initial Comments, at 4. Environmental Groups incorporate the discussion in their initial comments regarding what it means for a CCR surface impoundment to "contain liquids."
[47] 2024 Federal CCR Rule, 89 Fed. Reg. at 38996 (emphasis added).
[48] *Id.* at 38984.
[49] In the unlikely event that Old Meredosia does not qualify as a "legacy CCR surface impoundment," it would still be regulated under federal law as a "CCR management unit," ("CCRMU") which the 2024 Federal CCR Rule defines as "any area of land on which any noncontainerized accumulation of CCR is received, is placed, or is otherwise managed, that is not a regulated CCR unit," including "inactive CCR landfills and CCR units that closed prior to October 19, 2015." *Id.* at 39100. CCRMU are subject to regulation when they are located at inactive facilities with legacy CCR surface impoundments. *Id.* at 39044. Other than Old Meredosia, Meredosia station has two impoundments—the Fly Ash Pond and

Ameren's key argument on this issue is that "consistency with federal law" does not mean "identical-in-substance" to federal law."[50] Ameren cites no legal authority for this claim. The Illinois Court of Appeals' opinion in *MWG v. IPCB* offers clarity on the question of what it means to be "consistent with federal law." There, Midwest Generation argued that the requirement in Part 845 to remove a unit's liner when closing by removal was "not consistent with the federal rule."[51] The Court rejected this argument, explaining:

> We reiterate that the legislature mandated the Board to promulgate rules that were at least as protective as the federal rules, not exactly the same as the federal rules. *That is to say, the legislature gave the Board authority to promulgate more protective rules, but not less protective rules . . .* clarifying the state regulation to provide explicit standards regarding completion of the removal portion of the closure process would ensure that the state regulation would never be less protective than the federal standard. In the context of the legislature's explicit mandate to the Board, section 845.740(a)'s liner removal requirement does indeed ensure consistency with the federal rule.[52]

The Court's discussion of what it means for Part 845 to be "consistent" with federal rules is instructive on what it means for adjusted standard from Part 845 to be "consistent" with federal law. Just as Part 845's provisions are consistent with those in the Federal CCR Rule so long as they are not less protective than those provisions, adjusted standards are consistent with federal law so long as they are not less protective than federal law. Applying that meaning here, any adjusted standard granted to Old Meredosia may not be "less protective" than federal law.[53]

As explained in Environmental Groups' initial comments,[54] Old Meredosia's existing "cover"—composed of sand, clay, soil or some mix thereof; designed and installed approximately fifty years ago; and continuing to allow CCR constituents to leach into groundwater—does not meet the 2015 Federal CCR Rule's requirement that a final cover system "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."[55] As a "legacy CCR surface impoundment," Old

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Bottom Ash Pond—that will very likely be regulated as "legacy CCR surface impoundments." Thus, if not regulated as a legacy CCR surface impoundment itself, Old Meredosia would nevertheless be subject to regulation as a CCRMU.

[50] Ameren Response at 7.

[51] *MWG v. IPCB*, Ill. App. 4th 210304, at *18.

[52] *Id.* (original emphasis removed) (emphasis added).

[53] It would be possible to grant such an adjusted standard from state requirements that would still satisfy federal requirements because Part 845 contains several requirements that are more protective than those in the 2015 Federal CCR Rule, such as requiring quarterly groundwater monitoring instead of semiannual monitoring for certain constituents (compare 35 Ill. Adm. Code 845.650 with 40 C.F.R. § 257.94) and requiring thicker covers when units are closed in-place (compare 35 Ill. Adm. Code 845.750 with 40 C.F.R. § 257.102), among others.

[54] Env't Groups' Initial Comments, at 7.

[55] 40 CFR § 257.102(d)(1)(i).

Meredosia will be subject to this same requirement under the 2024 Federal CCR Rule.[56] Therefore, granting an adjusted standard that allows Ameren to maintain Old Meredosia's existing "cover" system would be inconsistent with federal law.

This Board should likewise reject Ameren's baseless "belie[f]" that exempting Old Meredosia from Part 845's closure and post-closure requirements is "consistent with the goals the federal government wanted to achieve."[57] Ameren offers neither legal authority nor analysis in support of this "belief." Moreover, Ameren creates this legal test out of whole cloth. The law governing adjusted standards requires those standards to be "consistent with any applicable federal law,"[58] not consistent with the federal government's goals. This Board should reject Ameren's attempt to subject itself to a new legal test found nowhere in applicable Illinois law.

To the extent Ameren's "belief" stems from its subsequent arguments that federal CCR regulations were never intended to cover units like Old Meredosia, those arguments must fail in light of the 2024 Federal CCR Rule, which clearly applies to units like Old Meredosia as discussed in detail above.

Finally, Environmental Groups note that granting Ameren's requested adjusted standards could preclude U.S. EPA approval of Illinois' coal ash program. For Part 845 to operate in lieu of the federal CCR program, as IEPA intends,[59] then Part 845 must be "at least as protective" as the federal CCR rule under federal law.[60] Granting adjusted standards that exempt sites like Old

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[56] *See* 2024 Federal CCR Rule, 89 Fed. Reg. at 39110–11 (stating that the "owner or operator of a CCR unit must 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 in the waste and releases of CCR, leachate, or contaminated run-off to the ground or surface waters or to the atmosphere"), 39100 (defining "CCR unit" to include both "CCR management units" and "legacy CCR surface impoundments").

[57] Ameren Response, at 20.

[58] 415 ILCS 5/28.1(c)(1)–(4).

[59] *See, e.g.*, IEPA, Statement of Reasons, at 10, PCB R2020-19 (Mar. 30, 2020) ("The third purpose and effect of this proposed rule is to adopt the federal CCR rules in Illinois and obtain federal approval of Illinois' CCR surface impoundment program"); IEPA, Response to Final Post-Hearing Comments, at 36, PCB R2020-19 (Nov. 6, 2020) ("Further, the Agency intends to get approval by USEPA to manage CCR surface impoundments in place of Part 257.").

[60] 42 U.S.C. § 6945(d)(1)(B) ("[T]he Administrator . . . shall approve, in whole or in part, a permit program or other system of prior approval and conditions . . . if the Administrator determines that the program or other system requires each coal combustion residuals unit located in the State to achieve compliance with (i) the applicable criteria for coal combustion residuals units under part 257 of title 40, Code of Federal Regulations (or successor regulations promulgated pursuant to sections 6907(a)(3) and 6944(a) of this title); or (ii) such other State criteria that the Administrator, after consultation with the State, determines to be at least as protective as the criteria described in clause (i).") (emphasis added); *id.* § 6945(d)(1)(C) ("The Administrator shall approve under subparagraph (B)(ii) a State permit program or other system of prior approval and conditions that allows a State to include technical standards for individual permits or conditions of approval that differ from the criteria under part 257 of title 40, Code of Federal Regulations (or successor regulations promulgated pursuant to sections 6907(a)(3) and 6944(a) of this title) if, based on site-specific conditions, the Administrator determines that the technical standards established pursuant to a State permit program or other system are at least as protective as the criteria under that part.") (emphasis added).

Meredosia from federal requirements would render Illinois' coal ash program less protective than federal law, threatening Illinois' chance at primacy.[61] If Illinois is not authorized to operate its own coal ash regulatory program instead of the federal program, then sites with adjusted standards would still need to comply with all federal requirements regardless of Illinois law.

III. The Board need not decide Ameren's retroactive rulemaking argument.

Finally, this Board need not address the argument in Ameren's Response that applying Part 845 to Old Meredosia constitutes an "unlawful retroactive application of law." The Illinois Appellate Court rejected this same argument in *MWG v. IPCB*:

> Ameren cannot satisfy its burden to show the definition of an inactive closed impoundment applies retroactively if it cannot show that Illinois law has treated the sort of provision at issue as retroactive in some circumstance. Because Ameren cannot show that the use of a unit's closure status on October 15, 2015, to determine that the applicable regimen is "retroactive" in the sense used in section 4 of the Statute on Statutes, the entire argument fails.
>
> For the reasons stated, we hold that Ameren has failed to meet its burden to show that the Board exceeded its statutory authority under the amendments when it used the units' closure status as of part 257's October 19, 2015, effective date to determine the regulations to which particular units were subject.[62]

IV. Conclusion

For the reasons discussed here, as well as in IEPA's Recommended Denial and Environmental Groups' Initial Comments, this Board should deny Ameren's Petition for adjusted standards from Part 845.

Respectfully Submitted,

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[61] This Board has recognized that risk. *See, e.g.*, Ill. Pollution Control Bd., Opinion and Order, 17, PCB R20-19 (Feb. 4, 2021) ("Ensuring that all CCR surface impoundments fulfill the requirements of proposed Part 845 ensures protection of the environment and human health in the State and will help ensure approval by USEPA of Illinois' rules."); Ill. Pollution Control Bd., Opinion and Order, 5, PCB R20-19 (Apr. 15, 2021) ("'Maintaining October 1[9], 2015, the effective date of the federal rule, as the cutoff date for completing closure activities at inactive CCR surface impoundments is equitable to all participants.' *Id.* To eliminate that date would endanger USEPA approval of these State rules, an argument made by IEPA throughout this rulemaking, most recently in PC 152.").

[62] *MWG v. IPCB*, Ill. App. 4th 210304, at *27–28.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	AS 2021-008
PETITION OF AMEREN ENERGY	)	
MEDINA VALLEY COGEN, LLC (OLD	)	(Adjusted Standard - Land)
MEREDOSIA) FOR ADJUSTED	)	
STANDARDS FROM 35 ILL. ADMIN.	)	
CODE PART 845	)	

CERTIFICATE OF SERVICE

The undersigned, Lauren Piette, 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=17040, a true and correct copy of the **ENVIRONMENTAL GROUPS' COMMENTS ON AMEREN'S RESPONSE TO IEPA'S RECOMMENDED DENIAL OF AN ADJUSTED STANDARD FOR OLD MEREDOSIA**, before 5 p.m. Central Time on August 19, 2024. The number of pages in the email transmission is 16 pages.

Dated: August 19, 2024

Respectfully Submitted,

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