BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	R 2020-019
STANDARDS FOR THE DISPOSAL OF COAL	)	
COMBUSTION RESIDUALS IN SURFACE	)	(Rulemaking – Land)
IMPOUNDMENTS: PROPOSED NEW 35 ILL.	)	
CODE 845	)	

NOTICE OF FILING

To: Service List

PLEASE TAKE NOTICE that I have today electronically filed, with the Office of the Clerk of the Pollution Control Board, **PRE-FILED ANSWERS OF GARY KING**, copies of which are herewith served upon you.

Dated: September 24, 2020

Respectfully submitted,
AmerenEnergy Medina Valley Cogen, LLC and Union Electric Company, d/b/a Ameren Missouri.

By /s/Claire A. Manning

BROWN, HAY & STEPHENS, LLP
Claire A. Manning
Registration No. 3124724
Anthony D. Schuering
Registration No. 6333319
205 S. Fifth Street, Suite 1000
P.O. Box 2459
Springfield, IL 62705-2459
(217) 544-8491
cmanning@bhslaw.com
aschuering@bhslaw.com

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing document were electronically filed on September 24, 2020 with the following:

Don Brown, Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, IL 60601
Don.Brown@illinois.gov

and that copies were sent via email on September 24, 2020, to the parties on the service list.

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205 S. Fifth Street, Suite 1000
P.O. Box 2459
Springfield, IL 62705-2459
(217) 544-8491
cmanning@bhslaw.com
aschuering@bhslaw.com

SERVICE LIST

Don Brown, Clerk of the Board Don.brown@illinois.gov Vanessa Horton, Hearing Officer Vanessa.Horton@illinois.gov Illinois Pollution Control Board James R. Thompson Center Suite 11-500 100 West Randolph Chicago, Illinois 60601	Stefanie N. Diers – Assistant Counsel Stefanie.diers@illinois.gov Christine M. Zeivel – Assistant Counsel Christine.zeivel@illinois.gov Illinois Environmental Protection Agency 1021 N. Grand Ave., East, P.O. Box 19276 Springfield, Illinois 62794-9276
Virginia I. Yang - Deputy Counsel virginia.yang@illinois.gov Nick San Diego - Staff Attorney nick.sandiego@illinois.gov Robert G. Mool bob.mool@illinois.gov Paul Mauer - Senior Dam Safety Eng. Paul.Mauer@illinois.gov Renee Snow - General Counsel renee.snow@illinois.gov Illinois Department of Natural Resources One Natural Resources Way Springfield, IL 62702-1271	Matthew J. Dunn, Chief mdunn@atg.state.il.us Stephen Sylvester Sr. Asst. Attorney General ssylvester@atg.state.il.us Andrew Armstrong, Chief aarmstrong@atg.state.il.us Kathryn A. Pamenter KPamenter@atg.state.il.us Office of the Illinois Attorney General 69 West Washington Street, Suite 1800 Chicago, IL 60602
Michael L. Raiff mraiff@gibsondunn.com Gibson Dunn and Crutcher, LLP 2001 Ross Avenue, Suite 2100 Dallas, TX 75201	Alisha Anker - V.P. Reg. & Market Affairs aanker@ppi.coop Prairie Power 3130 Pleasant Run Springfield, IL 62711
Michael Smallwood Msmallwood@ameren.com Ameren 1901 Choteau Ave. St. Louis, MO 63103	Cynthia Skrukrud Cynthia.Skrukrud@sierraclub.org Jack Darin Jack.Darin@sierraclub.org Christine Nannicelli christine.nannicelli@sierraclub.org Sierra Club 70 E. Lake Street, Ste. 1500 Chicago, IL 60601-7447
Jeffrey Hammons Jhammons@elpc.org Environmental Law & Policy Center 1440 G Street NW Washington, DC 20005	Chris Newman newman.christopherm@epa.gov USEPA Region 5 77 West Jackson Blvd. Chicago, IL 60604

Melissa Legge mlegge@earthjustice.org Earthjustice 48 Wall Street, 15th Floor New York City, NY 10005	Mark A. Bilut mbilut@mwe.com McDermott, Will & Emery, LLP 227 West Monroe Street Chicago, IL 60606-5096
Kim Knowles kknowles@prairierivers.org Andrew Rehn arehn@prairierivers.org Prairie Rivers Network 1902 Fox Drive, Suite 6 Champaign, IL 61820	Abel Russ – Attorney aruss@environmentalintegrity.org Environmental Integrity Project 1000 Vermont Avenue NW, Suite 1100 Washington, DC 20005
Kiana Courtney KCourtney@elpc.org Environmental Law and Policy Center 35 E. Wacker Drive, Suite 1600 Chicago, IL 60601	Jennifer Cassel jcassel@earthjustice.org Thomas Cmar tcmar@earthjustice.org Earthjustice 311 South Wacker Drive, Suite 1400 Chicago, IL 60606
Keith I. Harley kharley@kentlaw.edu Daryl Grable dgrable@clclaw.org Chicago Legal Clinic, Inc. 211 West Wacker Drive, Suite 750 Chicago, IL 60606	Mychal Ozaeta mozaeta@earthjustice.org Earthjustice 707 Wilshire Blvd., Suite 4300 Los Angeles, CA 90017
Deborah Williams Regulatory Affairs Director deborah.williams@cwlp.com City of Springfield Office of Public Utilities 800 East Monroe, 4th Floor Municipal Bldg. East Springfield, IL 62757-0001	Alec M Davis - Executive Director adavis@ierg.org Jennifer M. Martin jmartin@heplerbroom.com Kelly Thompson kthompson@ierg.org IERG 215 E. Adams St. Springfield, IL 62701
Stephen J. Bonebrake sbonebrake@schiffhardin.com Joshua R. More jmore@schiffhardin.com Ryan C. Granholm rgranholm@schiffhardin.com Schiff Hardin, LLP 233 South Wacker Drive Suite 6600 Chicago, IL 60606-6473	Susan M. Franzetti sf@nijmanfranzetti.com Kristen Laughridge Gale kg@nijmanfranzetti.com Vincent R. Angermeier va@nijmanfranzetti.com Nijman Franzetti, LLP 10 South LaSalle Street, Suite 3600 Chicago, IL 60603

Faith Bugel fbugel@gmail.com 1004 Mohawk Wilmette, IL 60091	Walter Stone - Vice President Walter.Stone@nrg.com NRG Energy, Inc. 8301 Professional Place, Suite 230 Landover, MD 20785
Melissa S. Brown melissa.brown@heplerbroom.com Jennifer M. Martin Jennifer.Martin@heplerbroom.com HeplerBroom, LLC 4340 Acer Grove Drive Springfield, IL 62711	

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RESPONSES BY GARY KING TO PREFILED QUESTIONS OF ELPC, PRAIRIE RIVERS NETWORK, AND SIERRA CLUB

1. On Page 7, you state: "I am an attorney licensed to practice law in Illinois. I received a Juris Doctor degree from Valparaiso University and a Bachelor of Sciences degree in Civil Engineering, also from Valparaiso University."

   a. What year did you obtain your Bachelor of Sciences?
   Response: 1974

   b. What year did you obtain your Juris Doctor degree?
   Response: 1977

   c. Have you ever been employed in any engineering capacity?
   Response: No, I am not a Licensed Professional Engineer.

   d. Have you even been employed as a hydrogeologist?
   Response: No, I am not a Licensed Professional Geologist.

   e. Since obtaining your B.S., have you worked in any capacity other than as a licensed attorney?
   Response: Yes. From 1990 through 2011 I was the Division Manager for the Division of Remediation Management within the Illinois Environmental Protection Agency ("IEPA" or the "Agency")'s Bureau of Land. In that position I supervised engineers, geologists and specialists with other scientific disciplines in the development and implementation of regulatory programs relating to environmental remediation and closure of sites, including but not limited to landfills, underground storage tank remediation, and Illinois' voluntary site remediation program. I also worked with Agency attorneys in the Division of Legal Counsel in addressing legal issues involved in the development and presentation of Agency regulatory proposals to the Board and also as to legal issues related to the implementation of Board regulations, such as enforcement, compliance and permitting issues. Since 2012 I have developed regulatory strategy for environmental closure of sites for Arcadis U.S. *See* https://www.arcadis.com/en/united-states

f. Have you ever been a licensed Professional Engineer?
Response: No

2. On page 8, you state: "Illinois EPA testimony confirms that the Exhibit is actually a list of ash ponds which it formerly regulated as water treatment units ("units"). *Illinois EPA's First Supp. Pre-Filed Answers*, p. 6; *See also* Aug. 11, 2020 Hrg. Tr., pp. 30:17–31:10."

a. What statements in "*Illinois EPA's First Supp. Pre-Filed Answers*, p. 6" support your conclusion that "Illinois EPA testimony confirms that the Exhibit is actually a list of ash ponds which it formerly regulated as water treatment units?"
Response:

> **4. The Agency has identified CCR surface impoundments in Illinois and has assigned identification numbers to the CCR surface impoundments it has identified. What is the authority the Agency is relying upon to identify the CCR surface impoundments?**
>
> **Response: The Agency's authority to permit water treatment units was used to identify CCR surface impoundments.**

Agency's First Supp. Pre-Filed Answers, p. 6.

b. What statements in "Aug. 11, 2020 Hrg. Tr., pp. 30:17–31:10" support your conclusion that "Illinois EPA testimony confirms that the Exhibit is actually a list of ash ponds which it formerly regulated as water treatment units?"
Response:

> **MS. GALE: Great. Thank you. Moving on to Exhibit 2, the Agency's answers to Midwest Generation's questions. Sorry. Exhibit -- no, 2 -- 3. Exhibit 3. On Page 6 of the answers, Question 4, the Agency states that its authority to identify CCR surface impoundments is its authority to permit water treatment units, what –where is that authority coming from?**
>
> **MR. BUSCHER: This is Bill Buscher. The authority to identify those actually comes from the act at 22.59. We do administer a permit program. So we are aware of such types of impoundments that exist.**
>
> **MS. GALE: Right, and they were permitted as part of the NPDES permit program, is that what you mean?**
>
> **MR. BUSCHER: That is correct.**

Aug. 11, 2020 Hrg. Tr., pp. 30:17–31:10.

An additional segment of the August 11, 2020 hearing is also instructive on this point. See below:

> **MS. MANNING: Thank you. What I wanted to ask is with the identification of the 73 water treatment units that you identified in your answer to Dynegy, you indicated that they were water treatment units. That particular identifier that identified those 73 units that are listed on Page 181 and 182 of your filing, the exhibit that the Board asked you to create, those water treatment units pre-existed -- the identifiers pre-existed the definition of surface impoundment either as it is put in federal law or in state law, is that correct?**
>
> **MR. DUNAWAY: Yes, those certain CCR surface impoundments existed prior to the existence of Section 22.59 of the act.**

***Id.* at pp. 82:11–83:1.**

3. On page 8, you state "The Illinois EPA's list includes former ponds that do not meet the definition of CCR surface impoundment provided for in Section 3.143 of the Illinois Environmental Protection Act ("Act"), as adopted in P.A. 101-171 (eff. July 30, 2019)."

   a. Is this statement a legal conclusion?
   Response: This statement is based on a comparison of Ameren sites on the list with information related to Agency approval of Ameren closure activities at Hutsonville, Venice and Meredosia.

   b. What "former ponds" are you referring to in this statement?
   Response: Hutsonville Ponds B, C and Bottom Ash Pond. Meredosia Bottom Ash Pond – which were authorized by the Agency to close by removal.

   c. What is the basis for your opinion that the "former ponds" on Illinois EPA's list "do not meet the definition of CCR surface impoundment provided for in Section 3.143 of the Illinois Environmental Protection Act ("Act")?"
   Response: For something to be regulated as a "CCR surface impoundment" under Section 22.59 of the Act upon its promulgation on July 30, 2019, the corresponding triggering definition in Section 3.143 would require three things: (a) that it be "a natural topographic depression, manmade excavation, or diked area" (b) that it "is designed to hold an accumulation of CCR and liquid" and (c) that it is a unit which "treats, stores, or disposes of CCR". 415 ILCS 5/3.143.

   The Agency authorized the former ash ponds referenced in 3(b) above to close by removal prior to the effective date of Section 3.143 and such closure has occurred pursuant to the plans approved by the Agency. As such, none of these units were storing, treating, or disposing of CCR as of July 30 2019, the

effective date of Section 3.143. None of these units are currently storing, treating, or disposing of CCR.

d. Did those "former ponds" at any point impound liquid?
Response: Yes, but the former ponds were dewatered upon closure.

e. Is there CCR in those "former ponds?"
Response: No

f. Is the groundwater at those "former ponds" monitored?
Response: Yes. Each of these former ponds is included within a network of monitoring wells for the Hutsonville and Meredosia facilities.

g. If so, does that monitoring reveal any exceedances of the proposed groundwater protection standards set out in proposed Part 845.600?
Response: Since there is considerable overlap between Part 620 standards and proposed groundwater protection standards in Section 845.600, the response to following question 3(h) would also apply here.

h. If so, does that monitoring reveal any exceedances of the Part 620 groundwater standards?
Response: As noted within the post-closure annual reports submitted to the Agency, groundwater exceedances of the Part 620 groundwater standards have been identified and reported as to the Agency authorized groundwater monitoring network in place at the Hutsonville and Meredosia facilities. The post-closure plans for Meredosia, Hutsonville Pond A and Hutsonville Pond D specify the actions to be taken in response to Part 620 exceedances. The former ponds, now clean closed, at these facilities are within the groundwater monitoring networks approved by the Agency for the units there that are closed in place.

i. If groundwater at those "former ponds" is not currently monitored, has it been monitored at any time?
Response: Not applicable.

j. If so, when was it monitored?
Response: Not applicable.

k. If so, did the monitoring results reveal any exceedances of the proposed groundwater protection standards or Part 620 standards?
Response: Not applicable.

l. Do the "former units" you reference have liners meeting the standards of proposed Part 845.400?
Response: Ponds B and C at Hutsonville were constructed with geomembrane liners. These liners were removed when the units were closed by removal.

4. On page 9, you state: "the Illinois EPA's list fails to recognize four other units that either have completed closure or should be considered closed in the Board's Part 845 rules."

   a. What are the "four other units" referred to in your statement?
   Response: Hutsonville Ponds B, C and Bottom Ash Pond. Meredosia Bottom Ash Pond. These are the same four ponds referenced in my responses to Question 3.

   b. Did those four units at any point impound liquid?
   Response: Yes, but the former ponds were dewatered upon closure.

   c. Is there any CCR in those four units?
   Response: No

   d. Is the groundwater at those four units monitored?
   Response: Yes. Each of these former ponds is included within a network of monitoring wells for the Hutsonville and Meredosia facilities.

   e. If so, does the monitoring reveal any exceedances of the proposed groundwater protection standards set out in proposed Part 845.600 or the Part 620 groundwater standards?
   Response: See my responses to Question 3(h), above.

   f. If groundwater at those four units is not currently monitored, has it been monitored at any time?
   Response: Not applicable.

   g. If so, when was it monitored?
   Response: Not applicable.

   h. If so, did the monitoring results reveal any exceedances of the proposed groundwater protection standards or Part 620 standards?
   Response: Not applicable.

   i. Do the four other units you reference have liners meeting the standards of proposed Part 845.400?
   Response: Ponds B and C at Hutsonville were constructed with geomembrane liners. These liners were removed when the units were closed by removal.

5. On page 12, you state: "No Board rule required Ameren to monitor groundwater conditions specific to these three impoundments as a condition of closure by removal."

   a. What is the relevance that there is no "Board rule" requiring "Ameren to monitor groundwater conditions specific to these three impoundments as a condition of closure by removal?"
   Response: The Agency approved Ameren's closure plan for Hutsonville Ponds A, B, C and Bottom Ash Pond based on closure by removal for B, C and

Bottom Ash pond and continued groundwater monitoring of Ponds A and D. Closure by removal of these three ponds was completed and approved by the Agency in 2016. The Agency has proposed a rule in Section 845.740(b) that requires three years of pond specific groundwater monitoring to demonstrate completion of closure by removal. There was no Board rule in 2016 requiring pond specific monitoring to demonstrate closure by removal had been completed. In 2020 the Agency is now contending that closure by removal has not been completed for these ponds because there was not three years of pond specific groundwater monitoring.

6. On page 12, you state: "40 CFR Part 257, as currently in effect, does not require pond-specific groundwater monitoring to demonstrate closure by removal."

   a. Please provide the basis for this statement.
   Response: 40 C.F.R. §§ 257.102(c) ("An owner or operator may elect to close a CCR unit by removing and decontaminating all areas affected by releases from the CCR unit. CCR removal and decontamination of the CCR unit are complete when constituent concentrations throughout the CCR unit and any areas affected by releases from the CCR unit have been removed and groundwater monitoring concentrations do not exceed the groundwater protection standard established pursuant to § 257.95(h) for constituents listed in appendix IV to this part.) and 40 C.F.R. § 104(a)(2) ("An owner or operator of a CCR unit that elects to close a CCR unit by removing CCR as provided by § 257.102(c) is not subject to the post-closure care criteria under this section.")

   b. What is the relevance that "40 CFR Part 257, as currently in effect, does not require pond-specific groundwater monitoring to demonstrate closure by removal?"
   Response: The Agency's proposed rules would require three years of groundwater monitoring for Ameren's former ash ponds that have already been closed by removal, allegedly on the basis that the proposed Illinois rules should be "at least as protective and comprehensive" as the federal rules – without recognizing that (a) there is no current federal rule requiring three years of groundwater monitoring specific to units closed by removal; and (b) removal has already been authorized and concluded without requiring such pond specific monitoring; and (c) the risks associated with CCR Surface Impoundments have been addressed by the closure plans, approvals and implementation; and (d) the units no longer can be said to be Surface Impoundments regulated pursuant to Section 22.59.

   c. Why did you use the qualification "as currently in effect?" Are there any pending proposals by US EPA to change 40 CFR Part 257 that would affect your statement?
   Response: As to why the qualification was used, see my answer to Question 6.b, above. As to the second question, no, a pending proposal would not affect my statement.

7. On page 12, you state: "Moreover, in my opinion such monitoring would provide little to no environmental benefit as the groundwater monitoring system currently in place is sufficient to capture any impact from the areas that formerly contained CCR and will be identified through the post-closure plans in place for Pond A."

   a. What does "environmental benefit" mean?
   Response: In this context, potential for environmental improvement.

   b. What is the basis for your opinion?
   Response: The groundwater monitoring system currently in place is sufficient to capture any impact from the areas that formerly contained CCR and will be identified through the post-closure plans in place for Pond A.

   c. Did you conduct any analysis to support your opinion?
   Response: Yes, I reviewed the closure plan submitted by Ameren and reviewed and approved by the Agency.

   d. What facts or evidence support your opinion?
   Response: Ameren operates a ground water monitoring system, approved by the Agency, that includes monitoring wells that monitor potential impacts to groundwater from Ponds A and D and the area between and adjacent to Ponds And D where Ponds B, C and the Bottom Ash pond had been located prior to closure by removal.

   e. Do you have any experience conducting groundwater monitoring sampling or analysis of groundwater monitoring samples? If yes, what is your experience?
   Response: I have not taken groundwater samples. I have not performed laboratory analysis of groundwater monitoring samples. For over three decades, I have reviewed the results of groundwater sampling in developing and implementing regulatory programs which included the evaluation of groundwater monitoring results as required for Agency decision-making and authorizations.

8. On page 13, you state: "The Illinois EPA has provided no factual or legal basis for its apparent conclusion that a closure completed in 2016 should not be considered complete based upon a federal rule proposed in 2020, that was never applicable to Ameren and continues to be proposed, not promulgated."

   a. What facts or evidence support your opinion that "Illinois EPA has provided no factual or legal basis for its apparent conclusion…"
   Response: The Agency did not provide any testimony or documents to support a conclusion that a closure completed in 2016 should not be considered complete based upon a federal rule proposed in 2020, that was never applicable to Ameren and continues to be proposed, not promulgated.

   b. What does "apparent conclusion" mean?
   Response: After reviewing my testimony, I believe the word "apparent" is extraneous to the meaning of the sentence.

c. What "federal rule" are you referring to?
Response: 40 CFR Part 257

d. Can a rule "not promulgated" be "applicable" to any regulated entity?
Response: No

e. Does the "federal rule" referred to in this statement require the same monitoring as Illinois EPA's proposed rule 845.740(b)?
Response: During the Part 845 hearings in this proceeding, Ameren requested that IEPA provide a citation to the Federal Register stating the proposed rule. *See* Aug. 11, 2020 Hrg. Tr., pp. 206:14–207:3; 208:9–209:7. IEPA counsel agreed to provide the citation, but it has not yet been provided.

9. On page 13, you state: "On Page 139 of its response to questions, the Illinois EPA concedes that it will have to delete Section 845.740(b) if USEPA does not promulgate the final rule by the close of the record in this proceeding."
   a. Considering that Illinois EPA filed three separate responses to questions, what is the specific "response to questions" you refer to in your statement? **Exhibit 2** What is the date of that document?
   Response: Exhibit 2 was admitted into the record on August 11, 2020

   b. What was the "question" Illinois EPA responded to?
   Response: Question 4, page 139

   c. What specific statements in Illinois EPA's "response to questions" support your opinion that "Illinois EPA concedes that it will have to delete Section 845.740(b) if USEPA does not promulgate the final rule by the close of the record in this proceeding."
   Response: The Agency stated as follows with regards to Section 845.740(b):

> **"The Agency notes that this provision of Part 845 is based on an amendment to Part 257 that USEPA has proposed. If the amendment to Part 257 is not adopted by USEPA before the record on Part 845 closes, the Agency believes it will have to request that the Board delete Section 845.740(b) and related subsections in order to meet the requirements of Section 22.59(g)(1) of the Act."**

10. On page 13, you state: "A CCR surface impoundment that completed closure prior to the effective date of Part 845 should have the same status as an inactive closed CCR surface impoundment subject to Section 845.170."What is the basis for your opinion?
Response: Based on the Agency's proposed definitions, and Section 845.101(d), the Agency classifies Hutsonville Ponds A, B, C, and the Bottom Ash Pond as existing CCR surface impoundments (not closed) because closure was not completed by October 19, 2015. As "existing CCR surface impoundments", these impoundments would be required to go through the Subpart G closure process as if they had not already been closed under Agency approval. This means that the characterization

and closure requirements of Subpart G would now apply to these sites even though Ameren completed their closure under an Agency approved plan years ago. A CCR surface impoundment that has been approved by the Agency as having completed closure prior to the effective date of Part 845 should not have to go through the closure process a second time.

11. On page 14, you state: "While Ameren does not dispute that characterization under the proposed rules, Ameren disputes whether any aspect of Part 845 should apply to Pond D since the Board's Part 840 already applies."
    a. Are the opinions you express in your testimony your opinion or Ameren's opinion?
    Response: Both

    b. Are you authorized to speak on behalf of Ameren?
    Response: Yes, in the context of the testimony I presented and the responses to questions.

12. On page 14, you state: "As post-closure care is already governed by that state regulation, the conflicting regulatory program proposed here is duplicative and unnecessary from an environmental protection or regulatory perspective."
    a. What "state regulation" are you referring to?
    Response: 35 Ill. Adm. Code Part 840

    b. What's the basis for the opinion that Illinois EPA's proposed CCR program is "conflicting"?
    Response: Post-closure care for Hutsonville Pond D is already required and governed by the Board's adopted rule in 35 Ill. Admin. Code Part 840.
        i. What is it in conflict with?
        Response: See previous response

    c. What's the basis for your opinion that Illinois EPA's proposed CCR program is "duplicative?"
    Response: Post-closure care for Hutsonville Pond D is already required and governed by the Board's adopted rule in 35 Ill. Admin. Code Part 840.

    d. Did you conduct any analysis to support the opinion that the Illinois EPA's proposed CCR program is "unnecessary from an environmental protection or regulatory perspective?"
    Response: Yes.
        i. If yes, what analysis did you conduct?
        Response: Comparative review of adopted Part 840 and proposed Part 845.
    e. What facts or evidence support the opinion that the Illinois EPA's proposed CCR program is "unnecessary from an environmental protection or regulatory perspective?"
    Response: Post-closure care for Hutsonville Pond D is already required and governed by the Board's adopted rule in 35 Ill. Admin. Code Part 840.

13. On page 14-15, you state: "Under the Illinois EPA's proposal, the Fly Ash Pond and the Bottom Ash pond are classified as an Inactive CCR surface impoundment (not Inactive Closed CCR surface impoundments) since it did not close prior to October 19, 2015…. Ameren disputes the Illinois EPA's characterization, as it is unsupportable factually and legally."

    a. What is the basis for your opinion that Illinois EPA's characterization of the Meredosia Fly Ash and Bottom Ash Ponds is "unsupportable factually?"

    Response: Under the Agency's proposal, the Fly Ash Pond and the Bottom Ash pond are classified as an Inactive CCR surface impoundment (not Inactive Closed CCR surface impoundments) since they did not close prior to October 19, 2015. As a result, according to proposed 845.100(d), the requirements that apply to existing surface impoundments apply to these Meredosia Ponds. This means that the characterization and closure requirements of Subpart G would now apply to these sites even though Ameren completed their closure under an Agency approved plan in 2019—at a cost of $12 million.

    b. What is the basis for your opinion that Illinois EPA's characterization of the Meredosia Fly Ash and Bottom Ash Ponds is unsupportable "legally?"

    Response: The Board's adoption of an Agency proposed rule that would deem these ponds not closed on the effective date of its rules would constitute a retroactive application of law. The Agency makes this distinction based on the effective date of 40 C.F.R. Part 257—October 19, 2015—without valid justification. As of October 19, 2015, Part 257 was not applicable to any of the Meredosia ponds because Ameren had ceased being a power generating facility. There is no rational basis to conclude that an Agency approved closure completed before the effective date of Part 845 should not have the same status as an Agency approved closure completed before the effective date of 40 CFR Part 257. Ameren should not be required to re-initiate closure or any closure activities, in a construction permit or otherwise in an operational permit, for already closed sites that have been closed pursuant to a closure plan approved by the Agency.

14. On page 15, you state: "The Board's adoption of an Illinois EPA proposed rule that would deem these ponds not closed on the effective date of its rules would constitute a retroactive application of law."

    a. What is the basis for your opinion that Illinois EPA proposed rule "would constitute a retroactive application of law?"

    Response: See previous response to Question 13(b).

15. On page 15, you state: "The Illinois EPA makes this distinction based on the effective date of 40 C.F.R. Part 257—October 19, 2015—without valid justification."

    a. What is the "justification" you refer to?

    Response: The Agency did not provide any reasoning to support why this date should be used to exclude sites that completed closure, with IEPA approval, after October 19, 2015 from being subject to 845.170.

b. What is necessary to make a justification "valid" in your opinion?
Response: An explanation that is based on reason, that is not arbitrary, and that is in accordance with existing statutes, regulations and court decisions.

16. On page 16, you state: "Further, the area encompassing the pond is within the groundwater management zone that is in place at Meredosia for the closed surface impoundment there. Any risks from the area will be identified and addressed."
a. What is the basis for the opinion that the existence of a "groundwater management zone" will ensure "[a]ny risks from the area will be identified and addressed?"
Response: With Agency approval, Ameren established groundwater management zones under Part 620.250 at its Venice, Hutsonville and Meredosia facilities as part of the process of closing the surface impoundments at each of these facilities. Ameren provides reports annually on each of its facilities relative to groundwater impacts.

b. Can you identify any surface impoundments within a groundwater management zone where impacts to groundwater were identified and addressed?
Response: Yes. Surface impoundments at Venice, Hutsonville and Meredosia.

c. Can you identify any surface impoundments within a groundwater management zone where impacts to groundwater were identified and not addressed?
Response: No

17. On page 17, you state: "Unfortunately, the proposal which the Illinois EPA has produced has significant flaws—particularly as it seeks to go backward and regulate conduct that has already occurred under the sanction of state regulatory structures."
a. What does "sanction of state regulatory structures" mean?
Response: Previous approvals by IEPA of Ameren actions relating to closing surface impoundments at Ameren facilities.

b. What "conduct" are you referring to?
Response: Ameren actions closing surface impoundments at Ameren facilities.

c. What "state regulatory structures" are you referring to?
Response: Previous approvals by IEPA in response to documents submitted by Ameren that were discussed, reviewed and approved by Agency.

18. On page 17, you state: "The Illinois EPA's assertion of a past date in order to consider a former ash pond "closed" under the Board's new rules, is invalidly modifying the legislature's use of the word "closed" to insert a past date as the date at which closure had to have occurred."
a. What "legislature" are you referring to?
Response: The Illinois General Assembly.

b. What does "invalidly modify" mean?
Response: Make a modification which the IEPA does not have the authority to make.

c. How does the Illinois EPA's assertion "invalidly modify the legislature's use of the word 'closed?'"
Response: The Agency's proposal treats something as if it is not closed that is in fact closed and, as justification, retroactively applies state law to create new liability on the owners and operators of ash ponds for past conduct and, in this case, conduct that was authorized by the Agency, as well as activities conducted in reliance on Agency authorization.

i. What is the basis for your opinion?
Response: Existing jurisprudence regarding retroactivity, statutory construction, and delegation of authority to agencies like the IEPA and the Board.

19. On page 18, you state: "In its decision, the Court was referring to ponds that continued to pose a serious risk of failure—and were unaddressed by the federal rule."
a. What statements by the Court support your interpretation of the Court's decision?
Response: The Court's discussion of the "unique confluence of risks" posed by legacy ponds. *See Util. Solid Waste Activities Grp. v. Envtl. Prot. Agency*, 901 F.3d 414, 432–33 (D.C. Cir. 2018) ("USWAG").

b. Was the Court's decision solely about "legacy ponds?"
Response: No.

20. On page 21, you state: "Ameren requests the addition of clarifying language to Section 845.100 (Scope and Purpose) as follows:
A former ash pond that was closed by removal of CCR pursuant to a state-approved closure plan prior to the effective date of this Part is not a surface impoundment as defined in Section 3.143 of the Act, and is not subject to this Part."

a. Does the proposed definition conflict with USEPA's Part 257 rules? Why or why not?
Response: No. Part 257 includes similar exemptions from its applicability. *See, e.g.*, 40 C.F.R. § 257.50(d). Moreover, the purpose of Part 257 is to establish "minimum national criteria" for "determining which solid waste disposal facilities and solid waste management practices do not pose a reasonable probability of adverse effects on health or the environment under sections 1008(a)(3) and 4004(a) of the Resource Conservation and Recovery Act." 40 C.F.R. § 257.50(a). It is not reasonable to conclude that the removal of all CCR from an ash pond, via a plan approved and monitored by the IEPA, could conflict with this stated purpose simply because the removal occurred between October 2015 and July 2019.

b. Does the proposed definition conflict with the Coal Ash Pollution Prevention Act? Why or why not?
Response: No. The Coal Ash Pollution Prevention Act, P.A. 101-0171,

amended the Illinois Environmental Protection Act to add Sections 3.143, which defines a 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. In order to be regulated under rules promulgated pursuant to the Coal Ash Pollution Prevention Act, a unit first has to be a "surface impoundment" as defined in that Act. The proposed amendment would simply codify a logical conclusion—that a thing, which does not meet a specific definition on the date the definition came into existence, cannot be within the scope of the definition. Codifying this conclusion creates no conflict because there is no indication in the Coal Ash Pollution Prevention Act that it was intended (or could lawfully be intended) to retroactively apply to former ash ponds that have been closed pursuant to the state's existing authorities and approvals.

c. Are rules with a narrower scope than the federal CCR rule "at least as protective and comprehensive" as the federal CCR rule? Why or why not?
Response: The vagueness of the term "narrower scope" and the hypothetical nature of the question makes it difficult to understand. Section 3.143 of the Act uses the same definition for "CCR surface impoundment" as is found at 40 C.F.R. § 257.53, and the proposed amendment does not modify this definition, so it is unclear how the "scope" of the proposed rule would be "narrower" as a result of the proposed amendment. Moreover, as a policy matter, the thrust of the federal CCR rule is to eliminate threatened pollution from surface impoundments. Here, threats of the types discussed by the court in the USWAG decision have been eliminated pursuant to the state-authorized closure by removal. Moreover though, since the former ponds no longer contain CCR–they cannot be said to store, treat or dispose of CCR.

21. On page 21, you state: "subjecting a regulated entity to two separate Board rules, each intended to accomplish a similar result, is fraught with difficulty and potential inconsistency (including separate enforcement structures, each with separate and independent penalties) and should be addressed by the Board."
    a. Can you identify the "difficulty" you refer to in your statement?
        i. If yes, what is it?
        Response: Yes. The difficulty exists in determining which regulatory structure is applicable when the two structures diverge, and in harmonizing existing law on statutory (and regulatory) construction given that one regulatory scheme is newer than the other, while one is more specific than the other.

        ii. Is there more than one "difficulty?"
        Response: Yes.

    b. Can you identify the "potential inconsistency" you refer to in your statement?
        i. If yes, what is it?
        Response: See my answer to Question 21.a, above, as well as my

answers to Question 1 (a)–(d), posed to me by the Agency and contained herein at pp. 20–21.

ii. Is there only one "potential inconsistency?"
Response: No.

c. Can you identify whether compliance with both the proposed Part 845 rules and the rules applicable to Hustonville Pond D is impossible?
Response: As a prefatory note, I object to this question to the extent that it represents "impossibility" as being the correct standard against which the regulated community's regulatory burden is assessed. Under Section 27(a) of the Act, the Board must take into account, among other factors, the "the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution." 415 ILCS 5/27(a). The express purpose of this language is to consider the economic impact of a proposed regulation. As a result, assessing whether something is "impossible" or not is not in keeping with the Board's authority under Section 27(a).

However, one more fundamental problem with the question is that "impossible" is overly vague. In the abstract, anything is possible with unlimited resources, but since the question does not qualify the word "impossible", the question becomes unable to be answered.

Assuming the question is asking simply whether there are contradictory provisions in Part 840 and Part 845, the answer is yes. As just one non-exclusive example, Section 840.116(a) and proposed section 845.170(b) and (c) overlap. The requirements for a response to a groundwater exceedance under section 840.116(a) is substantially different from the requirements under proposed section 845.170.

i. If yes, what provision or provisions of Part 845 are impossible to comply with at for the Hutsonville Pond D?
Response: See above.

22. On page 21-22, you state: "As such, this pond falls outside of the federal regulatory system (RCRA) for the disposal of wastes."
a. Does RCRA provide the Illinois EPA authority to propose its Part 845 rules governing surface impoundments?
Response: No.

b. Does RCRA provide the Illinois Pollution Control Board authority to adopt rules governing surface impoundments?
Response: No.

c. Is Illinois EPA relying on any authority in RCRA to propose its Part 845 rules?
Response: The Agency's authority to propose Part 845 comes from the Illinois General Assembly, in promulgating the Coal Pollution Prevention Act.

Although the Agency stated in its Statement of Reasons that one of the purposes and effects of its proposed Part 845 rule is to adopt the federal CCR rules in Illinois, the legislature did not mandate identical-in-substance rulemaking here.

23. On page 22, you state: "The Illinois EPA's proposed closure rules, if required to be applied to the Old Ash Pond at Meredosia, would cause more environmental harm than it would achieve in environmental benefit."

    a. Can you identify the "environmental harms" referred to in your statement? **Yes.** If yes, what are they?
    Response: There is a mature forest of trees growing on the Old Ash Pond. Photos of those trees are included below. Destruction of these trees would be an environmental harm.

b. Did you conduct any analysis to weigh the "environmental harms" and "environmental benefits" referred to in your statement? If yes, please describe it.
Response: Yes. The nearest potable well to the Meredosia facility is approximately 1,000 feet away in an upgradient direction. The Meredosia facility has a groundwater monitoring network which can provide information relative to groundwater impacts. The Meredosia facility has a Groundwater Management Zone that includes the Old Ash Pond. When Ameren submitted its closure plan for the Meredosia Fly Ash and Bottom Ash Ponds, Ameren included a brief discussion identifying the existence of the Old Ash Pond. IEPA did not require any actions specific to investigating or closing the Old Ash Pond as part of the closure of the Fly Ash and Bottom Ash ponds.

24. On page 23, you state: "Further, the proposed rule is problematic in that it seeks to have the Board promulgate a standard—based upon an assertion of federal consistency— which is not even yet a promulgated federal regulation."

a. What does "problematic" mean?
Response: Has a problem.

b. Does inclusion of a proposed federal regulation in a proposed state regulation render the proposed state regulation "problematic?" If yes, what's the basis for that opinion?
Response: Yes. In my experience, the Board has not adopted a State regulation based on a proposed federal rule–based upon an assertion that it has to do so in order to be at least as comprehensive as the federal program.

c. Does inclusion of a proposed federal regulation in a final state regulation render the final state regulation "problematic?" If yes, what's the basis for that opinion?
Response: Yes. USEPA could change the regulation from proposed to final or not adopt the proposed regulation at all.

d. If the proposed federal regulation is finalized before the proposed state regulation, does that render the proposed state regulation "problematic?" If yes, what's the basis for that opinion?
Response: Potentially. It would depend on how the Agency administered the adopted rule.

e. If the proposed federal regulation is finalized after the state regulation is finalized, and the final state regulation contained the then-proposed federal regulation, does that render the final state regulation "problematic?" If yes, what's the basis for that opinion?
Response: Potentially. It would depend on how the Agency administered the adopted rule. In my experience, in this circumstance the Agency would seek an amendment of the regulation through the Board's public hearing process, if warranted.

25. On page 24, you state: "Section 22.59(j) established fee payment amounts, but there is no record information as to the basis for those fees."
    a. What does "record information" mean?
    Response: Information documenting how the fee amounts were developed.

    b. How is this related to the current rulemaking?
    Response: Ameren has proposed the addition of Subpart J to Part 845.

26. On page 24, you state: "However, unless there is tracking of the costs incurred under the program, there will be no way for either the environmental community or the regulated community to know that these fees are being used to address the Part 845 program."
    a. What does "address" mean?
    Response: Pay the Agency's costs in administering the Part 845 program.

27. On page 24, you state: "My understanding with regards to several questions raised by the environmental community was that they are interested in knowing whether the Illinois EPA is going to have sufficient staffing, with the correct expertise, to administer the Part 845 program."
    a. What is the basis for your "understanding?"
    Response: The questions presented to Agency witnesses at the hearings in this proceeding.

28. On page 24, you state: "Only if there is recordkeeping of costs by the Illinois EPA can that be known."
    a. What is the "that" you are referring to in "that be known?"
    Response: The information is publicly available as to whether the Agency is using the fees paid to administer the Part 845 program.

    b. How does "recordkeeping of costs" ensure that "that" is known?
    Response: If recordkeeping of costs is publicly available, then the public will know whether the fees paid are being used to administer the Part 845 program.

29. On page 24, you state: "The legislature has provided for substantial fees, presumably to reimburse the Illinois EPA to perform its review and oversight in Section 22.59(j)."
    a. What does "reimburse" mean?
    Response: Payment for costs incurred.

    b. What is the basis for your opinion that the fees are "presumably to reimburse the Illinois EPA?"
    Response: Based on my experience, when the Illinois legislature establishes legislation for a new program and includes fees related to that legislation it is anticipating that those fees will be used to operate that program and that the costs for operating the program will not be drawn from some general purpose fund that is not related to the program.

30. On page 24, you state: "In other programs where the Illinois EPA is entitled to such fees, such as the Site Remediation program, the Board has provided for similar accountability measures."

a. What does "fees" mean?
Response: Payments to the Agency.

b. Does the Site Remediation assess fees?
Response: Yes.

If yes, does the Site Remediation program assess fees in the same way Section 22.59 of the Illinois Environmental Protection Act assesses fees for surface impoundments?
Response: No.

c. What is the basis for your opinion that the recordkeeping requirements in the Site Remediation program are for "accountability?"
Response: The recordkeeping requirements in the SRP provide assurance that a Remediation Applicant under the SRP pays for the costs related to the Agency activities related to each site that is in the SRP.

d. Are there other programs at Illinois EPA that have the same recordkeeping requirements as the Site Remediation program?

i. If not, are there other programs at Illinois EPA that have recordkeeping requirements similar to those required by the Site Remediation program?
Response: Yes.

e. Are there other programs where the Illinois Environmental Protection Act authorizes assessment of fees?
Response: Yes.

i. If yes, do those other programs require the same or similar recordkeeping requirements as the Site Remediation program?
Response: Yes. The SRP requires the payment of a No Further Remediation Assessment fee in addition to the fees for review and evaluation services. See 415 ILCS 5/58.10(g).

31. In your Exhibit B, you propose adding a Subpart J, which includes proposed Section 845.1010(a), which would read:

> Costs incurred by the Agency shall be tracked within the Agency by the use of site-specific codes. The following types of costs shall be documented as applicable:
>
> 1) Personal services costs and indirect costs;
> 2) Agency travel costs;
> 3) Professional and artistic services contractual costs;
> 4) Laboratory costs; and
> 5) Other contractual costs.

a. What's the basis for these categories of costs?
Response: These are categories of costs for which the Agency maintains information.

b. Why only five categories of costs?
Response: These are categories of costs for which the Agency maintains information.

c. What does "personal services costs and indirect costs" mean?
Response: "Personal services costs" means costs relative to the employment of individuals by the Agency. Such costs include, but are not limited to, hourly wages and fringe benefits. "Indirect costs" means those costs incurred by the Agency that cannot be attributed directly to a specific site but are necessary to support the site-specific activities, including, but not limited to, such expenses as managerial and administrative services, building rent and maintenance, utilities, telephone and office supplies. See 35 Ill. Admin. Code § 740.120

d. What does "agency travel costs" mean?
Response: "Agency travel costs" means costs incurred and documented for travel in accordance with 80 Ill. Adm. Code 2800 and 3000 by individuals employed by the Agency. Such costs include costs for lodging, meals, travel, automobile mileage, vehicle leasing, tolls, taxi fares, parking and miscellaneous items. See 35 Ill. Admin. Code § 740.120.

e. What does "professional and artistic services contractual costs" mean?
Response: "Professional and artistic services contractual costs" means costs for contractual services involving professional services such as engineering, hydrology, geology and hydrogeology.

f. What does "laboratory costs" mean?
Response: "Laboratory costs" means costs for services and materials associated with identifying, analyzing, and quantifying chemical compounds in samples at a laboratory. See 35 Ill. Admin. Code § 740.120

g. What does "other contractual costs" mean?
Response: "Other contractual costs" means costs for contractual services not otherwise specifically identified, including, but not limited to, printing, blueprints, photography, film processing, computer services and overnight mail. See 35 Ill. Admin. Code § 740.120.

32. In your Exhibit B, you propose adding a Subpart J, which includes proposed Section 845.1010(b), which would read:

> <u>All Agency personnel performing review services or other support services for a site under this Part shall allocate their time to that site using the assigned site-specific codes.</u>

a. What does "review services" mean?
Response: Agency activities related to review of documents that are submitted to the Agency that relate to a CCR surface impoundment.

b. What does "other support services" mean?
Response: Agency activities that relate to a CCR surface impoundment that do not involve reviewing submitted documents, such as inspections, compliance determinations and holding public hearings.

c. What does "for" mean?
Response: Related to.

d. Does "for" mean "on behalf of?"
Response: No.

e. What "review services" would Illinois EPA do "for" a "site?"
Response: Agency activities related to review of documents that are submitted to the Agency that relate to a CCR surface impoundment.

f. What "other support services" would Illinois EPA do "for" a "site?"
Response: Agency activities that relate to a CCR surface impoundment that do not involve reviewing submitted documents, such as inspections, compliance determinations and holding public hearings.

RESPONSES BY GARY KING TO PREFILED QUESTIONS OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1. On Page 7 of your testimony you state that Hutsonville Ash Pond D was closed pursuant to the Board's Part 840.
   a. Is a CCR surface impoundment closed in place, similar to a landfill, in that they are both final disposal sites?
   Response: From a regulatory standpoint under the Environmental Protection Act, no. Landfills are used to dispose of waste. The definition of waste in Section 3.535 of the Act excludes industrial discharges which are point sources subject to the NPDES provisions of the Clean Water Act. The Agency, through the Bureau of Water, has regulated CCR surface impoundment discharges through the NPDES program since the 1970s. The Agency, through the Bureau of Land, regulates landfills. The distinction between the two regulatory programs has been maintained for forty years.

   b. Are the requirements of Sections 845.750(c) similar to the requirements of Section 811.314(a), (b) and (c)?
   Response: Yes, they are similar. It appears that the Agency used the referenced provisions as a model for the language in Section 845.750(c).

   c. Are the requirements of Section 845.750(c)(B)(i) and (ii) the same as Section 840.126(a)(1) and (2)?

Response: No, Section 845(c) (1) (B) (ii) is different from Section 840.126(a)(2).

d. Are the requirements of Section 845.750(c)(2)(A) through (E) the same as Section 840.126(b)(1) through (5)?
Response: No, the referenced portions of Part 840.126 use the term "geosynthetic membrane" instead of "low permeability layer".

2. You propose that Section 845.100 include new subsections (i), (j), and (k).

a. Does Section 3.143 of the Act include a time limit during which a CCR surface impoundment must be designed in order to meet the definition?
Response: As posed, the question is confusing. The Agency and Board only have the authority to regulate surface impoundments and the legislature has provided a three-part definition of surface impoundments at Section 3.143 which became effective on July 30, 2019. It was not in effect prior to that date. While the definition does not reference the design life of a CCR surface impoundment, such is not relevant to the status of Ameren's former ash ponds as they currently exist.

b. In Section 22.59(m) of the Act, the phrase "without limitation" is used. What do you believe the meaning of this phrase is?
Response: I am not aware of any legislative history which would provide information as to the legislative intent for this phrase, but it is not reasonable to conclude that the legislature would intend that this general clause be applied in a manner inconsistent with the specific provisions of the Act in question, or inconsistent with other state law, federal law, the United States Constitution, the Illinois Constitution, previously adopted Board regulations, and judicial interpretations. Thus, the phrase does not justify the portions of Agency's proposal that would have the Board ignore the closed status of Ameren's former ash ponds.

c. Doesn't Section 22.59(m) of the Act divide CCR surface impoundments into two categories, "existing" and "any CCR surface impoundment constructed after the effective date" of Section 22.59 of the Act?
Response: Yes.

d. Did the legislature provide a definition for "existing CCR surface impoundment" as used in Section 22.59(m) of the Act?
Response: No.; however, the legislature did provide a definition for "CCR surface impoundment" at Section 3.143 of the Act.

e. Based on your understanding of the Part 845, as proposed, if an owner or operator of a CCR surface impoundment determined that it was in their best economic interest to remove only a portion of the CCR from a CCR surface impoundment, and use a final cover system for closure of the remaining CCR, would the remaining closed in place CCR be subject to post-closure care requirements?
Response: This question is confusing because it appears to base a regulatory

interpretation on the best economic interest of a CCR owner or operator.

3. You propose the following definition revision to Section 845.120:

> "Inactive Closed CCR surface impoundment" means an inactive CCR surface impoundment that completed closure before ~~October 19, 2015~~ the effective date of this Part with an Agency-approved closure plan.

a. Does the Illinois Environmental Protection Act include requirements and prohibitions which must be followed outside of any Board rule?
Response: Yes. *See* 415 ILCS 5/12(a).

b. Does Section 22.59(e) of the Act provide a condition applicable only to owners and operators of CCR surface impoundments who complete closure, with an Agency approved closure plan, within 24 months (i.e. July 30, 2021) of the effective date of Section 22.59 of the Act?
Response: Yes.

c. Would the proposed change to the definition of "Inactive Closed CCR Surface Impoundment" have the effect of potentially making all of those CCR surface impoundments referred to by Section 22.59(e), subject to Section 845.170?
Response: **No.**

4. You provide testimony about the Meredosia Old Ash Pond.

a. Is it known whether the Old Ash Pond at Meredosia ever impacts groundwater?
Response: Ameren closed and capped the Old Ash Pond in the early 1970s. Based on a study submitted to IDNR in 2017 (further described in response to question 4(g) below) the ash strata within the Old Ash Pond is above the groundwater table. Based on the groundwater modeling performed by Geotechnology, impacts on groundwater from the Old Ash Pond are not anticipated. In addition, the Old Ash Pond is located within a Groundwater Management Zone ("GMZ") authorized by the Agency upon the closure of the other ponds at Meredosia and, as such, any impacts would be subject to monitoring and annual reporting.

b. Has the Old Ash Pond at Meredosia ever contributed to impacts to groundwater?
Response: See responses to Question 4(a) above and 4(i) below. Since the Old Ash Pond was closed several decades ago, Ameren does not have records detailing the history of the pond, but based on current information the Old Ash Pond is not impacting groundwater.

c. Was the material in the Old Ash Pond at Meredosia transported to the impoundment by pumping it there?
Response: Yes.

i. If so, was the CCR mixed with water in order to pump it to the CCR impoundment?
Response: Yes.

ii. In order to contain the mixture of CCR and water, was the Old Ash Pond at Meredosia designed to "hold an accumulation of water and liquids"?
Response: Since the Old Ash Pond was closed several decades ago, Ameren does not have records detailing the history of the pond, but it is likely that water was held in the basin to allow time for the ash to settle out of the water prior to discharge. Further, it does not hold water now and, as IDNR concluded, it is not an impoundment. *See* Answer 4(g) below.

d. For the period of time that the Old Ash Pond at Meredosia was receiving CCR would there have been head on the bottom of the impoundment?
Response: Since the Old Ash Pond was closed several decades ago, Ameren does not have records detailing the history of the pond. Ameren records do not have information as to whether there was head on the bottom of the Old Ash Pond.

e. Is there potential for the Old Ash Pond at Meredosia to have leaked when it stored CCR?
Response: Since the Old Ash Pond was closed several decades ago, Ameren does not have records detailing the history of the pond. As a result, Ameren records do not provide information on whether there was head on the bottom of the Old Ash Pond, or if any transport water was simply decanted directly after placement. As to current impacts, see responses to questions 4(a) and 4(i).

f. Is the Old Ash Pond at Meredosia currently used to dispose of CCR?
Response: **No. The last time CCR was placed in the Old Ash Pond was in the early 1970's.**

g. Has Ameren obtained site specific data on what the water level is with in the footprint of the Old Ash Pond at Meredosia?
Response: **Yes. Geotechnology Inc performed a liquefaction analysis study on the Meredosia facility that was submitted to the Illinois Department of Natural Resources (IDNR) on September 20, 2017. This study was prepared to support a request by Ameren to change the dam classification status for the berms at the Meredosia facility. In summary, six – approximately 25 feet deep cone penetration test (CPT) soundings were performed in the Closed Ash Pond and eight- approximately 25 feet CPT soundings were performed in the Fly Ash Pond. Direct push samples from the impounded ash were collected to a depth of approximately 24 feet in the Closed Ash Pond and approximately 24 feet in the Fly Ash Pond.**

Geotechnology analyzed the CPT data for liquefaction potential and dynamic (post liquefaction) settlement utilizing a design PGA of 0.08g and an earthquake magnitude of 7.5. The analysis incorporated the results of the laboratory tests to refine the fines content within the soundings. Based on the liquefaction results there were not potentially liquefiable layers identified within the impounded ash. Ameren records show the design of the old pond, with a top of berm elevation of 460 and bottom at 450, well above the groundwater elevation as indicated by CPT O002 (-29' to water table, i.e. 441'+/-) and CPT O003 (-26' to water table, i.e. 444'+/-) in the liquefaction study, as well as out of the record flood elevation of 446.86'. In responding to the study and Ameren's request, on April 12, 2019, IDNR concluded there are no structures at the Meredosia Power Station which are jurisdictional under the Part 3702 rules stating as follows:

> **Bottom Ash Pond - A portion of the embankment has been removed. The structure is no longer capable of impoundment and does not meet the definition of a dam under the Part 3702 rules.**
>
> **Fly Ash Pond - The investigation shows that the material within the structure is no longer capable of acting as a fluid. By definition, the structure is no longer intended to provide impoundment and is not considered to be a dam.**
>
> **Old Ash Pond - The investigation shows that the material within the structure is no longer capable of acting as a fluid. By definition, the structure is no longer intended to provide impoundment and is not considered to be a dam.**

h. Is any of the ash in the impoundment saturated?
Response: No. See prior response.

i. If so, what is the range of saturated thickness within the foot print of the Old Ash Pond at Meredosia?
Response: See prior response.

ii. Referring to pages 7 and 8 of Andrew Rehn's testimony for ELPC, Mr. Rehn testifies that the USEPA Risk Assessment identified the Old Ash Pond as a surface impoundment? Do you agree with this statement?
Response: **No. The USEPA's risk assessment of Ameren's Meredosia facility assesses two surface impoundments—the Fly Ash Pond and the Bottom Ash Pond. *See* Rehn Att. 12, § 4, pp. 15–19. The Risk Assessment acknowledges the Old Ash Pond as having existed, but also notes that the pond has been closed. *See Id.* at p. 9.**

5. You propose deleting Section 845.740(b), which requires owners and operators to continue groundwater monitoring for three years following closure by removal.

   a. Does Section 22.59(g)(10) of the Act require that the Agency propose and the Board adopt rules that define when complete removal of CCR is achieved and specify the standards for responsible removal?
   Response: Yes. Ameren objects to the questions in Subsections 5(b)-(f) following. Ameren requested that the Board delete Section 845.740(b) because in response to Ameren's questions requesting justification for Section 845.740(b) the Agency's only response was that it was based on a *draft* rule prepared by USEPA. With the following questions the Agency is purporting to transfer its responsibility to provide justification for proposed Section 845.740(b) to Ameren. If the Agency has additional reasoning to support its proposal it should do so affirmatively as a supplementary response to Ameren's questions. In any event, as to the Ameren's former ponds closed by authorized clean closure, any application of the proposed rule to now require three years of groundwater monitoring specific to these ponds would constitute an unlawful retroactive application.

   b. Assuming contamination has migrated down gradient of a CCR surface impoundment, will removal of CCR result in immediate compliance with applicable groundwater standards in the plume?
   Response: The answer to this question depends on site conditions which are not provided in the hypothetical.

   c. Can geologic materials be variable over fairly short distances?
   Response: The answer to this question depends on site conditions which are not provided in the hypothetical.

   d. Can groundwater migrate at different velocities within geologic materials due to the material's variable nature?
   Response: The answer to this question depends on site conditions which are not provided in the hypothetical.

   e. Can the variability of geologic materials and groundwater flow result in different concentrations of contaminants at various monitoring points?
   Response: The answer to this question depends on site conditions which are not provided in the hypothetical.

   f. Why should an owner or operator who elects to close a CCR surface impoundment by removal not be required to demonstrate compliance with the applicable groundwater protection standards for a time period that allows for observation of variation in groundwater quality?
   Response: **It should be a site-specific decision rather than a rule of general applicability. For example, at the Hutsonville facility, Ponds B, C and the Bottom Ash Pond were closed by removal. These ponds were located immediately adjacent to one another and remaining Ponds A and D which**

were closed in place with final cover systems. With the groundwater monitoring network in place for the remaining Ponds A and D additional groundwater monitoring specific to the closed by removal ponds was not necessary. Ameren proposed closure by removal for Ponds B, C and the Bottom Ash Pond without groundwater monitoring specific to those ponds and the Agency agreed with that approach. In addition, Section 845.740(b) should not be applied retroactively to ponds that were closed in 2016.

6. You propose new Subpart J to require site-specific cost recordkeeping by the Agency. On page 24 of your testimony, you state that "[i]n other programs where the Illinois EPA is entitled to such fees, such as the Site Remediation Program, the Board has provided for similar accountability measures."

   a. Was the fee structure for the CCR surface impoundment program statutorily determined by the legislature in Section 22.59(j) of the Act?
   Response: Yes.

   b. Did the legislature determine that flat fees were appropriate?
   Response: I am not aware of any legislative record information that demonstrates how the fees were determined. Based on my experience, the Illinois General Assembly does not include fees related to environmental matters under the Agency's jurisdiction without obtaining information from the Agency relative to what the fees should be and the purpose for which the fees will be used. If the Agency has such information, it would be helpful if it were shared in this proceeding.

   c. Did the legislature require that costs incurred in administering the Agency's statutory and regulatory mandates be documented or recovered from the owner or operator?
   Response: See response to subsection (e) below.

   d. Are you aware that under Section 58.7(b)(1) of the Act, the legislature provided that the Agency may recover its reasonable costs incurred and documented while administering the Site Remediation Program?
   Response: Yes.

   e. Does Section 22.59 of the Act authorize the Agency to recover its reasonable and documented costs directly from the owner or operators?
   Response: Yes. The legislature established a fee system in Section 22.59(j) that requires payment of fees by owners and operators of CCR surface impoundments to the Agency for deposit in the Environmental Protection Permit and Inspection Fund. This Fund is used to pay costs across various Agency permitting and inspection programs. The Bureau of Water will request allocation of funds from the EPPI Fund related to its costs for administering the program under Section 22.59. Funds will not be allocated for administration of the Section 22.59 program for costs that are undocumented or unreasonable.

f. If there is no need for a determination or documentation of what costs are reasonable for purposes of recovery, what statutory mandate would proposed Subpart J fulfill?
Response: See previous response.

g. Why do you believe the Board has the legal authority to require Illinois EPA to keep a site-specific accounting of the Agency's administration of the CCR surface impoundment program and Part 845?
Response: Under Section 22.59(g) the Board has authority to adopt reporting requirements related to CCR surface impoundments. Under Section 5(f) the Board is authorized to establish fees for permit systems. While those fees cannot be different than what is prescribed in the Act, they also cannot exceed the total cost to the Agency for its inspection and permit program. The Board has previously utilized its authority in establishing Agency fee and reporting requirements. The Site Remediation program is a good example.