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, **AMEREN'S POST-HEARING BRIEF**, copies of which are herewith served upon you.

Dated: October 30, 2020

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

By /s/Claire A. Manning

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing documents were electronically filed on October 30, 2020 with the following:

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and that copies were sent via email on the same date to the parties on the service list.

Respectfully submitted,
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
STANDARDS FOR THE DISPOSAL OF	)	R 2020-19
COAL COMBUSTION RESIDUALS IN	)	(Rulemaking -Land)
SURFACE IMPOUNDMENTS:	)	
PROPOSED NEW 35 ILL. ADM.	)	
CODE PART 845	)	

AMEREN'S POST-HEARING BRIEF

NOW COMES AmerenEnergy Medina Valley Cogen, LLC and Union Electric Company, d/b/a Ameren Missouri (collectively, "Ameren"), by their attorneys Claire A. Manning and Anthony D. Schuering of BROWN, HAY & STEPHENS, LLP, and for their Post-Hearing Brief, states as follows:

I. INTRODUCTION

Ameren owns closed former ash ponds at three locations in Illinois: Venice, Meredosia, and Hutsonville. Ameren has raised specific and discreet issues concerning the Illinois Environmental Protection Agency ("IEPA")'s proposed rule in relation to the status of these former ponds – issues specific to Ameren. The record is replete with comprehensive information, via testimony and exhibits, relative to the former ash ponds at these sites – all of which have been closed pursuant to the review, input and authorization of the IEPA – at a substantial cost to Ameren.

As the Board well knows, when the Illinois General Assembly crafted the Illinois Environmental Protection Act (the "Act"), 415 ILCS 5/1 et. seq., 50 years ago, it wisely put sole authority for promulgating substantive environmental rules in the capable hands of the Illinois Pollution Control Board (the "Board"). This was done in large part to ensure that the State effectively addresses important environmental issues on the basis of a public hearing and record,

by crafting an independent decision that respects science and law, considers economic reasonableness and technical feasibility, and removes political and special interest influence.

Here, in exercising its function in this important rulemaking concerning Coal Combustion Residuals ("CCR"), the Board is called upon to implement P.A. 101-0171 consistently with the legislative provisions contained in that act (now reflected in amendments to the Act contained at Sections 3.143 and 22.59, 415 ILCS 5/3.143 and 415 ILCS 5/22.59.) In implementing the statutory language and crafting regulations consistent with that language, the Board is also required to take certain factors into account, as prescribed in Section 27(a) of the Act:

> In promulgating regulations under this Act, the Board shall take into account the *existing physical conditions*, the character of the area involved, including the character of surrounding land uses, zoning classifications, the nature of the existing air quality, or receiving body of water, as the case may be, *and the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution*. The generality of this grant of authority shall only be limited by the specifications of particular classes of regulations elsewhere in this Act.

415 ILCS 5/27(a) (emphasis added). Ameren has keyed up specific substantive legal issues that require the Board's attention regarding the IEPA's proposed rule as applied to Ameren. If these issues are left unaddressed, they will create unnecessary and unwarranted infirmity in an otherwise valid and important Board rule. As the Board has previously recognized, even in a rule of general applicability, "[o]ne of the most fundamental tasks in framing regulations is to make as clear as possible what operations are subject to the regulations." Proposed Opinion, *In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills,* R88-7 (Mar. 1, 1990) at 34, available at https://perma.cc/UQ59-HR4T; *See also* Final Order, *In the Matter of: Groundwater Quality Standards*, R89-14, at 6 (Nov. 7, 1991), available at https://perma.cc/UXC9-5A79 (interpreting statutory language in order to "more clearly alert[] the public to what is being regulated").

Clear from the extensive record is this proceeding is the fact that Ameren occupies a unique position among the regulated entities as to the IEPA's proposed rule – for several reasons. First, Ameren was the first company in Illinois to close *any* of its former ash pond (with the closure of the Venice ponds in 2011). Second, Ameren is the only company that has already closed *all* of its former ash ponds, such that all remaining CCR surface impoundments owned by Ameren are now in post-closure care, subject to extensive groundwater monitoring plans and annual reporting to the IEPA. Importantly, Ameren has completed these closures pursuant to IEPA-reviewed, approved, and authorized closure plans and is now operating under IEPA-approved post-closure care plans.

Third, Ameren is the only company that has completed closure of certain of its former ash ponds prior to the July 29, 2019 effective date of P.A. 101-0171 but after October 19, 2015, the effective date of 40 CFR Part 257 (hereinafter the "federal CCR rule"). Thus, it is the only company adversely impacted by the IEPA's proposed definition of "[I]nactive Closed CCR surface impoundment" (requiring completion of closure by October 19, 2015), and thereby proposing to retroactively regulate closed surface impoundments as if they were not closed.[1] Fourth, Ameren is the only company that has already completed authorized closure of some of its former ash ponds by removal of all coal ash; thus, it is the only company adversely impacted by the IEPA's intended application of the definition of surface impoundment at Section 3.143 of the Act to former ash ponds that have removed all CCR pursuant to an IEPA-approved closure plan and therefore can no longer be considered a surface impoundment, as defined in the Act.

[1] IEPA's proposed rules allow [I]nactive Closed CCR surface impoundments" to be subject only to Section 845.170, while Inactive CCR surface impoundments are subject to a myriad of other rules, including the Subpart G closure rules. Ameren's closed surface impoundments at Hutsonville Pond D and Venice would fall into the first category, while Ameren's closed surface impoundments at Hutsonville Pond A and Meredosia would fall into the second – solely because of the IEPA's proposed inclusion of the October 19, 2015 date for completion of closure.

Fifth, Ameren is the only company that has *actively sought* state regulation and authorization for its closures, having sought and achieved a Site Specific rule applicable to Hutsonville Pond D with the Board's promulgation of the Board's Part 840 rules, rules which "served as a roadmap" for its future closures. *See* Pre-Filed Testimony of Gary King (hereinafter "King Pre-Filed Testimony"), Ex. 55, p. 14.

Finally, and importantly, Ameren is the only company in Illinois to which the federal CCR rule has never applied, since Ameren ceased generating electricity by coal (and stopped depositing CCR into ash ponds) in 2011. Therefore, Ameren's facilities were each considered an "inactive facility" outside the scope of the federal CCR rule as originally enacted. While that portion of the federal CCR rule was ultimately reversed and remanded by Circuit Court of Appeals' decision in *Util. Solid Waste Activities Grp. v. Envtl. Prot. Agency*, 901 F.3d 414 (D.C. Cir. 2018)[2] ("*USWAG*"), the August 2018 remand occurred well after Ameren's state-authorized closures were either complete or nearly completed. Importantly, the *USWAG* decision has not yet been implemented by the United States Environmental Protection Agency ("USEPA") in any revised federal CCR rules. See further discussion, *infra*, at pages 19–21.

More to the point, in the absence of federal regulation, Ameren has responsibly sought and achieved closure of its ash ponds via state-authorized closure. Ameren has worked cooperatively with the IEPA for over a decade to effectively and efficiently close CCR surface impoundments at its Venice, Hutsonville and Meredosia facilities in a manner that protects human health and the environment. *See* King Pre-Filed Testimony at p. 8. Instead of taking advantage of a regulatory abyss, Ameren actively sought State review, regulation, oversight, and approval for the closure of all of its former ponds. As to Hutsonville Pond D, Ameren sought and achieved a site-specific

[2] *judgment entered*, No. 15-1219, 2018 WL 4158384 (D.C. Cir. Aug. 21, 2018).

rule from the Board; thus, its closure and post-closure care is governed by the Board's Part 840. See *In the Matter of: Ameren Ashpond Closure Rules (Hutsonville Power Station): Proposed 35 Ill. Adm. Code 840.101 through 840.152*, R-09-21 (Ill. Pol. Control Bd.).[3] The Board's Part 840 then served as a model for the state-authorization of its subsequent closures. See Ex. 55, p. 14.

It is important that the Board have a full appreciation and understanding of the simplicity of Ameren's position and request in this proceeding – detailed more fully below in subsequent sections of this Post-Hearing Brief:

- Ameren seeks a Board modification of the IEPA's proposed definition of "[I]nactive Closed CCR surface impoundment" to eliminate the October 19, 2015 triggering date and in its place insert "the effective date of this Part".
    - Affected surface impoundments are Hutsonville Pond A and Meredosia Fly Ash Pond.[4]
- Ameren seeks a Board clarification as to Ameren's former ash ponds that were authorized by IEPA for closure by removal, and have been closed by removal prior to the effective date of this Part, specifically that Part 845 does not apply as they are no longer surface impoundments as defined in Section 3.143 of the Act.
    - Affected former ash ponds are Hutsonville Ponds B, C and Bottom Ash Pond and Meredosia Bottom Ash Pond.
- Ameren seeks a Board clarification that its new Part 845 does not apply to the Meredosia Old Ash Pond.
- Ameren seeks a Board exemption from its new Part 845 rules for Hutsonville Pond D, which is already regulated pursuant to the Board's Part 840 rules, having been closed and now in post-closure care pursuant to that Part.
- Ameren suggests that the Board provide for IEPA record keeping accountability, by the tracking of site-specific costs incurred under the program.

[3] While Ameren initially sought Board regulations governing other closures, such regulations were procedurally stymied and not advanced to promulgation, through no fault of Ameren. See *In the Matter of: Site-Specific Rule for the Closure of Ameren Energy Resources Ash Ponds: Proposed New 35 Ill. Adm. Code 840, Subpart B, R13-09.* (Ameren's Site-Specific rule proposal for the closure of several more ash ponds it then owned).

[4] To the extent that the Board does not clarify the status of Ameren's clean closed former ash ponds as outside the scope of "surface impoundment" Hutsonville Ponds B, C and Bottom Ash Pond and Meredosia Bottom Ash Pond would also be adversely impacted.

II. THE RECORD CONCLUSIVELY DEMONSTRATES THAT AMEREN'S FORMER ASH PONDS HAVE BEEN EFFECTIVELY AND EFFICIENTLY CLOSED IN A MANNER PROTECTIVE OF HUMAN HEALTH AND THE ENVIRONMENT, AND ACCOMPLISHED WITH THE REVIEW, INPUT, AND APPROVAL OF THE IEPA.

The IEPA's Statement of Reasons (hereinafter "Statement of Reasons") notes that the IEPA has identified "73 CCR surface impoundments at power generating facilities." Statement of Reasons, p. 3. Those 73 water treatment units,[5] which the IEPA asserts are CCR surface impoundments subject to Part 845, are listed in the IEPA's Pre-Filed Answers to the Board. *See* Ex. 2, pp. 150, 181–82. 10 of the 73 sites listed are sites which are owned or operated by Ameren. *Id.* at p. 181. Five of the purported CCR surface impoundments are at Ameren's Hutsonville site, three are at Ameren's Meredosia site, and two are at Ameren's Venice site.[6] *See Id.* Each of these sites, and the corresponding ash ponds, have well-documented histories of consideration by the IEPA throughout their closure process and include required extensive groundwater monitoring in their closure plans.

There is no factual dispute as to the IEPA's recognition of the closure of Ameren's ash ponds, as such closure is documented by virtue of the notations on the IEPA's exhibit that it attached to its Answers to Questions from the Board, Ex. 2, pp. 181–82. There is also no dispute that the IEPA authorized such closures, as such is perfectly clear from Ameren's exhibits, *See* Ex. 58, pp. 699, 718, 1321, 1526, and the Pre-Filed testimony of Gary P. King, *See* Ex. 55. There is also no dispute that the closures cost Ameren **21.6 million dollars at Hutsonville and Meredosia**

[5] The IEPA relied upon its prior identification of permitted water treatment units to identify what it asserts are CCR surface impoundments. Ex. 3, p. 6.

[6] As the Venice surface impoundments and Hutsonville Pond D both closed prior to October 19, 2015, the IEPA's proposal would consider them "inactive closed surface impoundments." Ameren agrees that these surface impoundments, are appropriately included in the new rule as inactive closed surface impoundments; Ameren's position is that Hutsonville Pond A and Meredosia Fly Ash Pond be treated similarly under the new Part 845, reflecting their actual status as closed and in post-closure care.

alone—**$4.2 million** for the closure of Hutsonville Ponds A, B, C, and Bottom Ash Pond; **$5.3 million** for its closure of Hutsonville Pond D; and **$12.1 million** for its closure of the Fly Ash and Bottom Ash Ponds at Meredosia. *See* Ex. 56, p. 7, the Pre-Filed Testimony of Michael J. Wagstaff, a licensed professional engineer in Illinois and Missouri and Ameren's project manager for the closure of these sites.

The following summary is detailed in the extensive closure documents Ameren has placed into the record in Exhibit 58, as well as the testimony of Gary P. King. Mr. King is eminently qualified to review IEPA closure documents and approvals, and apply relevant existing Illinois environmental regulations and programs, such as the Board's groundwater protection rules, in the context of analyzing said documents.

From 1990–2011, Mr. King was the senior manager for the IEPA site clean-up programs, where he led the development of multiple regulatory programs concerning the cleanup and closure of sites, by developing IEPA regulatory proposals and testifying in Board regulatory proceedings, including the original 35 Ill. Adm. Code Part 742, Tiered Approach to Corrective Action Objectives, or TACO, and related subsequent proceedings involving the interaction between TACO and the Board's groundwater rules at Part 620. King also led the development of the IEPA's rule proposal for the Board's Leaking Underground Storage Tank ("LUST") program contained in Parts 732 and 734, testifying at all Board proceedings from 1994–2011 for that program. King also led the development of the IEPA's Site Remediation program rules that are now contained in Part 740 of the Board's Rules.

King explained his role at the IEPA as having "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." He also "worked with

[IEPA] attorneys in the Division of Legal Counsel in addressing legal issues involved in the development and presentation of [IEPA] regulatory proposals to the Board and also as to the legal issues related to the implementation of Board regulations such as enforcement, compliance and permitting issues." Ex. 57, p. 1. Since 2012, King has developed regulatory strategy for environmental closure of sites for Arcadis U.S., a global environmental consulting firm. *Id.* Mr. King's testimony detailed the extensive work and cost associated with Ameren's closure of its former ash ponds. His purpose in detailing the costs, was to "assist the Board in evaluating the economic reasonableness of the proposed Part 845 rule". *Id.* at p. 8. As to the closures themselves, King stated:

> Ameren has worked cooperatively with the IEPA for over a decade to effectively and efficiently close CCR surface impoundments at its Venice, Hutsonville and Meredosia facilities in a manner that protects human health and the environment. Since Ameren ceased operations at Venice, Hutsonville and Meredosia prior to October 19, 2015, 40 C.F.R. Part 257 did not apply. No state regulation compelled Ameren to proceed; yet, Ameren sought state regulation to guide its closure. Ameren's closures were achieved through extensive review, input, and approval of the Illinois EPA, and include use of final cover systems and closure by removal.

Ex. 55, p. 8. At hearing, King testified that his experience with the IEPA allows him "to state with complete confidence that the [IEPA] would not have authorized closure of Ameren sites had it not believed closure was protective of human health and environment." Sept. 30, 2020 Hrg. Tr., pp. 239:1–5. King also supplemented his pre-filed testimony by stating that the Dynegy experts who testified in the proceeding confirmed "the environmental soundness of the approach that Ameren followed in closing its ponds in Illinois." *Id.* at p. 239:10–16. As to Lisa Bradley's testimony, King stated she "appropriately commended Illinois for its foresight [in] promulgating the Groundwater Protection Act which drives the groundwater [remediation] program in place at each of the closed surface impoundments." *Id*. at p. 239:18–23. He also supported the testimony,

provided by David Hagan, that although there are exceedances at some of the Ameren sites, those exceedances are statistically decreasing, which is what is expected and required in Ameren's Agency-Approved [post-closure] process" *Id.* at p. 240:3–8. King further concurred with Hagan's opinion that closure in place at surface impoundments, coupled with groundwater monitoring and remediation, is "effective at controlling and mitigating groundwater contamination". *Id*. at p. 240:13–16.

The IEPA did not refute or question Mr. King's testimony on any of the above points, nor could it reasonably do so since the IEPA's actions in approving the closures are in and of themselves a testament to the environmental soundness of Ameren's closures. Key aspects of Ameren's closure of Hutsonville and Meredosia are highlighted below. *See also* Attachment A to this Brief, documenting Ameren's Closure Timeline for each of the three Ameren sites.

A. Hutsonville Pond A and Clean Closed Ponds at Hutsonville

Ameren stopped generating coal-fired electricity in Illinois in 2011. At Hutsonville, Ponds A, B, C, and the Bottom Ash Pond stopped receiving ash for disposal in December 2011. Ponds A, B, C were each constructed with HDPE-liners. The Closure Plan, approved by the IEPA on April 8, 2015, provided for removal of CCR from Ponds B, C, and the Bottom Ash Pond – and placement of that CCR in Pond A – which the IEPA deemed to be "an appropriate means by which to close the Hutsonville Ash Ponds." Ex. 58, p. 699. The closure by removal at these three former ponds included removal of CCR, dewatering, removal of geomembrane liner, grading, construction of water surface control structures, and vegetation. Ex. 55, pp. 10–11.

The closure of Pond A included placement of CCR from the clean-closed ponds into Pond A, CCR subgrade grading, CCR subgrade compaction, placement of 40-mil HDPE geomembrane, placement of a three-foot think final cover soil layer, construction of surface water control structures and vegetation. After the geomembrane was constructed, 3 feet of final cover (soil) was

placed over the 40-mil HDPE geomembrane. Soil grading began on November 23, 2015. On December 22, 2015, the protective cover was winterized for completion in the spring. Protective cover placement, shaping, and grading resumed on April 6, 2016 and were completed on June 6, 2016. Ex. 55, p. 10. The IEPA has previously explained to the Board that this cover system "exceeds the federal minimum standards" in 40 CFR part 257. *IEPA's Motion to Amend,* No. R-14-10, at fn. 4, *available at* https://perma.cc/G86C-6VLE (Ill. Pol. Control Bd. Jul. 15, 2016).[7]

Throughout the closure process, as required by the agreed Construction Quality Assurance ("CQA") Plan, a scheduled program of monitoring, inspecting, sampling, and testing was performed. Ex. 55, p. 10. A CQA representative—a technical consultant hired by Ameren to assure construction is completed in accordance with the closure plan as submitted by Ameren and approved by the IEPA—periodically observed the CCR removal activities to assess the completeness of CCR removal. *Id.* at 11. As documented in the CQA, the CCR removal began on June 4, 2015 and concluded on September 24, 2015. Ex. 58, p. 1534, § 2.1.[8] On March 30, 2017, the IEPA formally acknowledged the Hutsonville CQA, noting that it had previously received a copy of the Hutsonville CQA at IEPA headquarters and "find[ing] that the [Hutsonville CQA] adequately documents the Closure process." Ameren's Pre-Hearing Comment, p. 78.

[7] It is also noteworthy that the IEPA's prior motion to amend explained that "[n]either the Board nor Illinois EPA is required to implement or adopt the federal rule[,]" and that the IEPA proposed exempting multiple ponds because, in relevant part, "the Agency has already approved closure and post closure care[,]" and "they already have an Agency approved closure plan and they are not bound by the federal rule's post-closure care requirements or groundwater quality standards." *IEPA's Motion to Amend*, No. R-14-10, at pp. 3, 5–6.

[8] The IEPA's matrix wrongly characterizes the date of CCR removal (referencing "removal Nov. 2016") when that was merely the date the CQA was provided to the IEPA. The CQA itself documents completion of removal on September 24, 2015. This error alone demonstrates the precarious nature of the IEPA's application of the October 19, 2015 date as a triggering mechanism for closure where closures occurred over an extended period of time and, as with this one, was authorized by the IEPA just six months prior to October 19, 2015 and well before the 2018 *USWAG* decision.

The Closure Plan for Pond A included a Groundwater Monitoring Program that specified eleven groundwater monitoring wells, upgradient and downgradient, to be monitored for purposes of monitoring compliance with ground water standards. Ex. 55, pp. 11–12. The Closure Plan also requires that Ameren maintain a groundwater management zone around Hutsonville Pond A and submit annual reports to the IEPA regarding the post-closure care activities Ameren is undertaking regarding the closed ponds. These are now ongoing activities as Pond A is in Post Closure Care and annually documents closure activities and environmental progress. The latest Annual Report, for 2019, is included as Ex. 58, pp. 4409–4913.[9]

The IEPA approved the Groundwater Monitoring Plan without requiring groundwater monitoring specific to the ponds that were closed by removal[10] and, in Gary King's opinion, such specific monitoring of the clean closed areas "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." Ex. 55, pp. 12–13.

As King later explained, his opinion is based upon his review of the closure documents which require that Ameren operate "a ground water monitoring system, approved by the IEPA, that includes monitoring wells that monitor potential impacts to the groundwater from Ponds A and D and the area between and adjacent to Pond A and D where Ponds B, C and the Bottom Ash pond had been located prior to closure by removal." Ex. 57, p. 7, Answer to Question 7. When further questioned as to his experience in monitoring or analyzing groundwater, he stated that he

[9] The IEPA has provided no further input to Ameren related to its post-closure activities documented in its annual reports. *See* Ex. 55, p. 12.

[10] The IEPA's proposed Section 845.740(b) appears to require three years of pond specific groundwater monitoring to demonstrate completion of closure by removal, allegedly to be consistent with 40 CFR Part 257. However, the federal rule does not contain such requirement. Such a rule is completely unnecessary and unwarranted as to Ameren's clean closed ponds for the reasons explained above.

has, "for over three decades . . . reviewed the results of groundwater sampling in developing and implementing regulatory programs which included the evaluation of groundwater monitoring results as required for IEPA decision-making and authorizations." *Id.*

The closure activities associated with Ponds A and the clean closed ponds at Hutsonville **cost Ameren $4,100,000**. Ex. 56.

B. Hutsonville Pond D

As to Hutsonville Pond D, it also stopped receiving ash for disposal in December 2011. The IEPA approved Ameren's closure plan for Pond D on April 18, 2012, pursuant to Part 840. Ex. 58, p. 718. These rules provided a roadmap for Ameren's future closures at Hutsonville and Meredosia. As with Hutsonville Pond A, the final cover system at Pond D included a 40 mil HDPE geomembrane liner plus three feet of soil. Ex. 55, pp. 13–14. Ameren completed capping of the Hutsonville Pond D in January 2013 and documented closure on January 30, 2013. Ameren submitted its first annual Post-Closure Report in January 2014. The latest annual report, for 2019, is included in the record at Ex. 58, pp. 4915–5463.

The Hutsonville Pond D closure **cost Ameren $5,300,000**. Ex. 56. Since the closure was finalized prior to October 19, 2015, the IEPA's rule proposal would treat this (but not Hutsonville Pond A) as an Inactive *Closed* CCR Surface Impoundment.

C. Meredosia Fly Ash and Bottom Ash Pond

The Fly Ash and Bottom Ash ponds at Meredosia also stopped receiving ash for disposal in December 2011. As to these ponds, Ameren went through a similar extensive closure approval process with the IEPA. On August 15, 2016, Ameren submitted a closure plan for the Bottom Ash Pond in Meredosia which called for a closure in place of the Bottom Ash Pond, which would include the "grading, installation of high performance high density polyethylene (HDPR)

geomembrane, and establishment of surface water control features" for the Bottom Ash Pond. Ex. 58, pp. 728–729, § 5.0.

On November 1, 2016, the IEPA sent a letter to Ameren which acknowledged the IEPA's review of the original closure plan and provided 23 categories of questions and comments for Ameren's "consideration and appropriate action." In response to this letter, on February 6, 2017, Ameren submitted a revised Closure Plan (the "Meredosia Closure Plan") to the IEPA for its consideration, together with an explanation of its responses to each of the IEPA's concerns. Ex. 58, p. . The Meredosia Closure Plan represented that it had been prepared "in general accordance with the requirements of the site-specific rule in 35 Illinois Administrative Code Part 840.101 through 840.152", and the USEPA regulations at 40 CFR parts 257, 261 (meaning the Federal CCR Rule). Ex. 58, p. 726, § 1.0.

On March 8, 2017, the IEPA responded to this February 6 letter. The IEPA's March 8 letter included a finding that Ameren's February 6 letter and the Meredosia Closure Plan "adequately addresses the IEPA's comments dated November 1, 2016." Ex. 58, p. 1321. On January 31, 2019, Ameren submitted a Quality Construction Assurance Report to the IEPA which explained that CCR was "removed from the Bottom Ash Pond" to "facilitate clean closure" of said pond. Ex. 58, p. 3728, § 2.1. This removal was initiated on March 12, 2018 and was concluded on July 11, 2018. *Id.* Since the completion of closure occurred after October 19, 2015, the IEPA's rule proposal excludes Meredosia from the definition of "Inactive **Closed** CCR surface impoundment".

Pursuant to the approved Plan, Ameren submitted an annual report documenting post-closure activities in March 2020. See Ex. 58, pp. 5465–5574. Closure of the Meredosia ponds **cost Ameren $12,000,000**. Ex. 56.

D. Meredosia Old Ash Pond

The IEPA's listing of purported CCR surface impoundments references the Meredosia Old Ash Pond as not closed. Ex. 2, p. 181. As noted in the Meredosia Closure Plan, the Old Ash Pond was reportedly closed and the IEPA, with full knowledge of the area, approved the plan on March 8, 2017 without requiring further closure. Ex. 58, pp. 726–727, § 3.0. *See also* Ex. 58, p. 1321.

The Meredosia Old Ash Pond was removed from service in 1972 and capped in the early 1970's with native materials. At the time, there was no relevant IEPA regulatory program. Since it stopped receiving wastes prior to the enactment of RCRA on October 21, 1976, it falls outside the federal regulatory system for the disposal of wastes. In response to questions as to Gary King's assessment that closure of this area "would cause more environmental harm than it would achieve in environmental benefit", *See* Ex. 55, p. 22, King provided a depiction of the area, demonstrating that there is a mature forest of trees growing on the Old Ash Pond and destruction of those trees would be an environmental harm, *See* Ex. 57, p. 15. Further, the USEPA acknowledges the Meredosia Old Ash Pond as closed. *See* Ex. 57, p. 24 ("The USEPA's risk assessment of Ameren's Meredosia facility . . . notes that the [Meredosia Old Ash Pond] has been closed.").

Ameren also presented information related to the current nature of the area, demonstrating that the mound does not hold water now, groundwater impacts are not anticipated, and the area is within the groundwater management zone established at Meredosia pursuant to the Closure Plan discussed above. In 2017, Ameren engaged Geotechnology to conduct a liquification analysis study the results of which demonstrated that the ash strata within the Old Ash Pond is above the groundwater table, the material within the structure is no longer capable of acting as a liquid and the structure is no longer considered an impoundment. *See* Ex. 58, pp. 5791–5842; *See also* Ex. 57, p. 16 (King's Answer to question 23.b.).

E. Venice Ash Ponds

Ameren's closed ash ponds at Venice would not be affected by any of the proposed changes in this brief. Nonetheless, for the sake of completeness, a brief history of these ash ponds is included. The IEPA approved the Closure Plan for the North and South Ponds at Venice on May 6, 2011. Ex. 58, p. 1526. The Closure Plan, dated February 14, 2011, called for a Groundwater Management Zone which covered the entirety of Ameren's property boundary in Venice. *See* Ex. 58, pp. 1331–32, § 1.5; *See also Id.* at pp. 1333–1346 (discussing site conditions at Venice).

The cap construction at Venice was completed on October 3, 2012. The final cover system included a 40-mil geomembrane liner and double-sided geocomposite panels on top of the liner. Ex. 55, p. 16. Ameren sent a letter to the IEPA on November 5, 2012 documenting completion of closure under the IEPA-approved closure plan, including the CQA Report. *See* Ex. 58, pp. 3742–4407 (Venice CQA). Pursuant to the approved closure plan, Ameren began submitting Annual Reports on March 31, 2013 documenting post-closure activities. Ameren has continued to report to the IEPA on post-closure activities annually. The latest annual report, for 2019, is included in the record at Ex. 58, pp. 5577–5789. Under the IEPA proposal the North and South Ponds are classified as Inactive Closed CCR surface impoundments, subject to Section 845.170. Ex. 55, p. 16.

III. IN ORDER TO ASSURE THE VALIDITY OF THIS IMPORTANT CCR RULE, THE BOARD MUST ELIMINATE THE IEPA'S PROPOSED RETROACTIVE REQUIREMENT THAT CLOSURE MUST HAVE BEEN COMPLETED PRIOR TO OCTOBER 19, 2015 IN ORDER FOR A SURFACE IMPOUNDMENT TO BE DEEMED AN INACTIVE CLOSED CCR SURFACE IMPOUNDMENT PURSUANT TO THE BOARD'S NEW PART 845.

The Board must modify the definition of "Inactive Closed CCR surface impoundment" in Section 845.120 to remove the reference to October 19, 2015 as the date by which closure must be completed for characterization as an "Inactive Closed CCR Surface Impoundment." As shown

below, the IEPA's utilization of October 19, 2015 as an effective date for this section is (1) arbitrary, (2) impermissibly retroactive, and (3) wholly unnecessary to effectuate the legislature's mandate that these rules be "at least as protective and comprehensive as the federal regulations" contained at 40 CFR Part 257. 415 ILCS 5/22.59(g)(1).

A. The October 19, 2015 Date is Arbitrary and Capricious.

Ameren's most significant objection to the IEPA's proposed rules is that the operative date in this proposed structure for closure is October 19, 2015—the effective date of 40 C.F.R. Part 257, a date which is almost five years past. During that time frame, the federal rule did not apply to Ameren; nonetheless, Ameren acted responsibly to close its ash ponds (that ceased accepting CCR *in 2011*) pursuant to the approval of the IEPA. *See* Att. A.

The IEPA's proposed definition of "closed" modifies the legislature's use of the word "closed" in a manner that is untenable. The trigging of "closure", as IEPA proposes, arbitrarily ignores the IEPA's extensive involvement, input, and authorizations in the closure process with Ameren, and Ameren's reliance on IEPA's "green light" – to the tune of many millions of dollars in construction and closure activities. Moreover, as to the former ash ponds closed by removal at Hutsonville, the IEPA's information that closure was not complete until Nov. 2016 is flat out wrong. *See* Ex. 2, p. 181 ("no, removal Nov. 2016"). As the relevant CQA report demonstrates, all CCR was removed by September 2015. Ex. 58, p. 1534. The November 2016 date is simply the date the IEPA received the CQA report.

The practical effect of the IEPA's proposed triggering date is completely arbitrary and wholly capricious as to Ameren – the only company caught by this unnecessary and unwarranted regulatory quagmire. First, it declares that ash ponds that were closed by removal and no longer contain CCR are not in fact closed – and therefore would be subject to the closure requirements contained in Subpart G of the proposed rules. Recall that upon removal of the CCR these former

ash ponds have been dewatered, liners removed, graded, and vegetated. As argued below, these former ash ponds cannot now even reasonably be considered "surface impoundments" as defined in Section 3.143 of the Act, and within regulatory reach of Section 22.59 of the Act and, concurrently, the Board's new Part 845. Second, it declares Ameren's existing closed surface impoundments (those still containing CCR and in post closure care) not closed at all if the closures were not complete until after October 19, 2015, thus subjecting the closed Hutsonville Pond A and Meredosia Fly Ash Pond to Subpart G—an entirely different result than Ameren's closed Hutsonville Pond D and the Venice Ponds (which would be considered "Inactive Closed CCR Surface Impoundments" subject to Section 845.170).

The effect of the IEPA's use of October 19, 2015 date effectively nullifies Ameren's prior closures of Hutsonville Ponds B, C, and the Bottom Ash Pond, and Fly Ash Ponds at Meredosia. As explained above, these closures (a) were conditioned upon the input and approval of the IEPA; (b) are protective of human health and the environment; and (c) required Ameren to expend tens of millions of dollars in reliance on the IEPA's representations regarding the approval and protective nature of the actions being undertaken. Moreover, as also explained above and based upon the matrix that IEPA included, the Ameren's facilities appear to contain the only former ash ponds which are impacted by the IEPA's rule proposal in this regard. *See* Ex. 2, p. 181.

B. The October 19, 2015 Date is Impermissibly Retroactive.

The IEPA's use of October 19, 2015 also constitutes an *ultra vires* retroactive application of the CCR law. The IEPA's rationale for including the October 19, 2015 date is purportedly based on the *USWAG* decision. *See* Ex. 2, pp. 138–39. As a result of this interpretation and as stated above, the IEPA is asserting that closure must have been completed by October 19, 2015 to be deemed closed. *See* Aug. 11, 2020 Tr., pp. 85:7–89:5. This interpretation requires that new liability—in the form of application of proposed Subpart G (closure requirements) to already

closed ash ponds —attach to Ameren. This is the type of impermissible retroactive application of the law is invalid under Illinois law.

Under Illinois law, courts apply the test provided in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), to determine whether a statute may be applied retroactively. *See Commonwealth Edison Co. v. Will Cty. Collector*, 196 Ill. 2d 27, 39 (2001) (adopting the *Landgraf* analysis). Under the *Landgraf* analysis, "if the legislature has clearly indicated the temporal reach of the amended statute, that expression of legislative intent must be given effect, absent a constitutional prohibition." *People ex rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 29.

When the statute contains "no express provision regarding its temporal reach," then the court must determine whether the statute will have a retroactive impact. *Id.* A statute "will be deemed to have retroactive impact if application of the new statute would *impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.*" *Id.* at ¶ 30 (emphasis added). If no retroactive impact results, the statute may be applied retroactively. *Caveney v. Bower*, 207 Ill. 2d 82, 91 (2003). However, "[i]f there *would* be a retroactive impact," then "the court must presume that the legislature did not intend that it be so applied." *Id.* (emphasis in original).

An application of the *Landgraf* analysis demonstrates that IEPA's proposed rule is impermissibly retroactive.[11] Section 22.59(g) of the Act provides that, not later than eight months after the effective date of P.A. 101–0171, the Board "shall adopt rules establishing construction permit requirements, operating permit requirements, design standards, reporting, financial assurance, and closure and post-closure care requirements for CCR surface impoundments." 415

[11] Because statutory interpretation "present[s] questions of law", *Hawthorne v. Vill. of Olympia Fields*, 204 Ill. 2d 243, 255 (2003), the Board is well suited to complete this type of analysis in this proceeding – but any court review of the Board's conclusions on these points will be subject to a *de novo* review.

ILCS 5/22.59(g). Subsection (g) then lists eleven subparts which contain categorical topics which the legislature requires the rules to provide for. *See Id.* To the extent any temporal reach is provided in Section 22.59(g), it is wholly prospective. Nothing in Section 22.59(g), nor Section 22.59 more generally, suggests that the legislature's intent with respect to the statute, and associated Board rules, to apply as of October 19, 2015.

Moreover, P.A. 101-0171 uses the word "closed" without temporal condition; since no indication of temporal reach is provided in Section 22.59, the Board must assess whether the October 19, 2015 date causes a retroactive impact. *J.T. Einoder, Inc.*, 2015 IL 117193 at ¶ 29. The answer is clearly yes. The effect of applying the October 19, 2015 effective date with respect to Ameren's ponds alone would cause ash ponds which are wholly closed to be subject to new closure requirements in the Board's new rules, as proposed. Conversely, an effective date of closure based on when the Board adopts the proposed rules would correctly apply a new set of regulations to Ameren's existing closed surface impoundments (again, those that meet the definition contained in Section 3.143 of the Act). For these reasons, Ameren does not object to the inclusion of Hutsonville Pond A and Meredosia Fly Ash Pond as "Inactive *Closed* Surface Impoundments" (emphasis added) under the Board's new Part 845 – as the Venice ponds and Hutsonville Pond D would be characterized by the proposed rules.

C. The October 19, 2015 Date is Not Necessary to Comply with Section 22.59(g)(1).

The IEPA notes that, to "obtain federal approval of Illinois' CCR surface impoundment program" by the USEPA, the IEPA's proposed rules must be "at least as protective" as 40 CFR Part 257. *See* Ex. 3, p. 36 (*citing* the WIIN Act, P.L. 114-322). As part of the IEPA's protectivity analysis, it has concluded that the Court's decision in *USWAG* requires "any CCR surface impoundment" which had not completed removal of CCR from the CCR surface impoundment

prior to October 19, 2015 to be subject to Part 257, and thus must be subject to the IEPA's proposed rules in order to comply with the protectivity requirement. *See* Ex. 2, pp. 138–39.

Such interpretation is both incorrect and legally flawed. Moreover, it belies the USEPA's own recent actions. On October 1, 2020, USEPA Director Andrew Wheeler signed an Advanced Notice of Proposed Rulemaking ("ANPR") in USEPA docket number EPA–HQ–OLEM–2020–0107, seeking "comments . . . and data on inactive surface impoundments at inactive facilities to assist in the development of future regulations for these CCR units." A true and correct copy of this ANPR is attached hereto and incorporated herein as Attachment B. The ANPR explains that this data will be used for "future regulations of CCR units[,]" and is in response to the *USWAG* decision. ANPR, p. 7. The ANPR itself demonstrates that the IEPA's reliance on October 19, 2015 is misguided for two reasons: first, as explained by Gary King in response to questioning by Assistant Attorney General Andrew Armstrong, the *USWAG* decision cannot be construed to operate with an immediate retroactive effect that would effectively require Illinois to undo closures at inactive facilities that it authorized prior to the *USWAG* reversal and remand. *See* Sept. 30, 2020 Hrg. Tr. at 259:22–266:19. Second, it appears that the USEPA itself is looking for comments as to what ought to be characterized as "legacy ponds" at inactive facilities – consistent with the Court's remand in *USWAG*. *See* Att. B.

On that later point, as Ameren also explained, none of Ameren's closed ash ponds fall into the category of legacy ponds that drove the *USWAG* court to its remand as to inactive sites, since all Ameren's former ponds have been safely closed pursuant to the oversight, input, and authorization of the IEPA. As Ameren proposes, those that continue to contain CCR would be subject to regulation *prospectively* as Inactive Closed Surface Impoundments, while those that no longer contain CCR cannot reasonably be considered surface impoundments. For that reason

alone, they pose none of the type of risks associated with the legacy pond discussion in the *USWAG* decision. *See, e.g.*, 901 F.3d at 423 (discussing failures of unlined legacy ponds which caused "coal residual sludge" to flow into nearby rivers). This obviously cannot occur with respect to Ameren's former ponds which were clean closed, as they contain no CCR. Nor does it apply to Ameren's four CCR surface impoundments which were closed in place pursuant to the authorization of the IEPA, and are now in post-closure care.

D. Conclusion

Ameren has no objection to its closed surface impoundments that continue to contain CCR from being governed, *prospectively*, by Board rules – thus incorporating the existing post-closure care framework applicable to these closed surface impoundments into the new rules. This would mean that all four of Ameren's closed in place surface impoundments would be subject to Section 845.170. However, IEPA's retroactive approach is not an appropriate or legally supportable addition to the regulatory framework. The Board should reject the IEPA's temporal definition of closed and modify that definition as Ameren has proposed: "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.

IV. THE BOARD HAS THE OBLIGATION AND RESPONSIBILITY TO DETERMINE THE APPLICABILITY OF ITS RULES TO THE REGULATED COMMUNITY AND TO THE PUBLIC; ACCORDINGLY, IT MUST CLARIFY KEY APPLICABILITY ISSUES RAISED BY AMEREN AS NECESSITATED BY THE ARTICULATED POSITION OF THE IEPA.

Ameren seeks a Board Order and Opinion which clarifies ambiguities that this proceeding has identified in the IEPA's interpretation of its own proposal, as well as the IEPA's intended application of these rules, as well as the underlying statutory definitions. Three of the most pressing issues are (1) what constitutes a Surface Impoundment under the IEPA's proposed

definition; (2) whether Hutsonville Pond D is entitled to continue to proceed under the Board's existing Part 840 rules, instead of both Part 840 and the new Part 845 rules; and (3), whether former ash ponds which were closed prior to the enactment of RCRA can be considered CCR surface impoundments, or if the enactment of RCRA—which serves as the legislative authority for 40 CFR Part 257—serves as a limitation on the IEPA's proposed rules.

With respect to the CCR surface impoundment definition, Ameren asks that the Board add the following language to Section 845.100: "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." This language will provide much needed clarity and stability to proposed Part 845. Second, as to any potential overlap between Part 840 and proposed Part 845, the Board can add the following clarifying language to Section 845.100: "This Part does not apply to any CCR surface impoundment that is subject to 35 Ill. Adm. Code Part 840." This language will prevent unnecessary confusion and permit an efficient operation of the proposed rules. Finally, the RCRA issue identified herein can be rectified by adding the following language to Section 845.100: "This Part does not apply to any CCR surface impoundment that ceased accepting waste prior to October 21, 1976." This language prevents an ambiguity in the regulations from being retroactively applied and avoids needless consternation by both the IEPA and the regulated community. Alternatively, Ameren would accept a Board clarification that the Meredosia Old Ash Pond is not a "surface impoundment" as defined by Section 3.143 of the Act.

Each of these issues can be addressed pursuant to the Board's authority under the Act, and the resolution of each issue falls squarely within the Board's purview, both in terms of its responsibility pursuant to Section 22.59(g) of the Act and in terms of the factors it must consider

under Section 27 of the Act. More generally, the Board's resolution of these issues will provide needed clarity and stability to the regulated community so that the Board's Part 845, and the IEPA's implementation of Part 845, comply with state and federal law and do not needlessly provoke litigation.

A. Ameren's Clean Closed Ponds are not Surface Impoundments.

One of the many ambiguities generated by the IEPA's proposal is how the IEPA will apply the term "CCR surface impoundment". As explained below, the IEPA's interpretation of the term has caused confusion as to the overall applicability of proposed Part 845. The term is defined at 415 ILCS 5/3.143 to mean "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." Nonetheless, the IEPA appears to be adding a qualifier which makes the applicability of the definition as against an ash pond contingent on whether the ash pond met the definition of a CCR surface impoundment on October 19, 2015.

When Ameren asked the IEPA to explain how an ash pond, which had been closed by removing CCR from the pond prior to the effective date of the definition of CCR surface impoundment (pursuant to a closure plan both reviewed and approved by the IEPA), the IEPA responded that:

> Q: [O]n what authority or interpretation does the [IEPA] apply the definition of surface impoundment? Does the [IEPA] consider the unit to treat CCR? Store CCR? Dispose of CCR?
>
> A: [A]ny CCR surface impoundment that had not completed removal of CCR from the CCR surface impoundment prior to October 19, 2015, the effective date of Part 257, is subject to the requirements of Part 257, including the definition of a CCR surface impoundment. Section 3.143 of the Act does have the same definition of CCR surface impoundment as Part 257. Section 22.59(m) of the Act applies the provisions of P.A. 101-171 to all existing CCR surface impoundments and all CCR surface impoundments after the date of the amendatory Act. A CCR surface impoundment that existed on

> Oct. 19, 2015 is regulated by both Part 257 and Section 22.59 of the Act. As currently written, Part 257 does not deem closure by removal complete until the CCR and any liner have been removed and decontamination of any area affected by releases from the CCR surface impoundment has been completed pursuant to Part 257.100(b)(5).

Ex. 2, pp. 138–39. Obviously, the IEPA's application of "surface impoundment" itself depends on a retroactive application that is not legally sound, as explained in the section above. Further, such application ignores a fundamental canon of statutory construction—that the language must be applied *as it is written*, and cannot be rewritten to "make [it] consistent with [one's] own idea of orderliness and public policy." *Schultz v. Illinois Farmers Ins. Co.*, 237 Ill. 2d 391, 406 (2010). Under the Illinois Environmental Protection Act, a "CCR surface impoundment" is a defined term which requires three elements to be present: it must be (1) a natural topographic depression, man-made excavation, or diked area"; (2) it must be "designed to hold an accumulation of CCR and liquids"; and (3) it must "treat[], store[], or dispose[] of CCR." 415 ILCS 5/3.143. This definition contains no element that is dependent on the ash pond's status as of October 19, 2015. A surface impoundment that has been clean closed prior to the effective date of the Board rules cannot meet this definition because, once deconstruction and dewatering began, it was no longer designed to hold an accumulation of CCR and liquids; and, moreover, it does not store, treat, or dispose of CCR. *See* Ex. 55, p. 20. Moreover, the practical effect of the IEPA's position is to treat these former ash ponds, which contain no CCR, as un-closed surface impoundments.[12]

Neither the IEPA nor the Board can alter the plain language of Section 3.143 via regulation to include things which do not meet the definition of a CCR surface impoundment. *See Hadley v. Illinois Dep't of Corr.*, 224 Ill. 2d 365, 385 (2007) ("Where an administrative rule conflicts with

[12] Pursuant to Section 22.59(j) of the Act, the IEPA demands fees from Ameren applicable to CCR surface impoundments which have not closed. *See, e.g.*, Aug. 10, 2020, Pre-Hearing Comment, at p. 167 (Sub-Exhibit 09 of Exhibit A).

the statute under which it was adopted, the rule is invalid."); *See also Carson Pirie Scott & Co. v. State of Ill. Dep't of Employment Sec.*, 131 Ill. 2d 23, 34 (1989) (although it is "generally recognized" IEPA interpretations are given "substantial weight and deference" when the underlying statute is ambiguous, IEPA interpretations are not binding and "agency action that is inconsistent with the statute or regulations must be overturned"); *See also Illinois Landowners All., NFP v. Illinois Commerce Comm'n*, 2017 IL 121302, ¶ 42 ("An administrative body is limited by the powers granted to it by the enabling statute. It is without authority to replace a statutory definition" in its regulations).

The Board must address the underlying definitional issue for two reasons. First, one of the "most fundamental tasks" for which the Board was created is to identify the intended applicability and scope of its regulations. Proposed Opinion at 34, *In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills*, R88-7 (Mar. 1, 1990), available at https://perma.cc/UQ59-HR4T; *See also* Final Order at 6, *In the Matter of: Groundwater Quality Standards*, R89-14 (Ill. Pol. Control Bd. Nov. 7, 1991), available at https://perma.cc/UXC9-5A79 (interpreting statutory language in order to "more clearly alert[] the public to what is being regulated"). Second, the Board must assure the legal viability of this important Board rule. That includes making determinations as to who and what is regulated, so that the IEPA properly implements these rules, consistent with the underlying statutory framework.

As the Board knows, it is charged with "determin[ing], defin[ing] and implement[ing] the environmental control standards applicable in the State of Illinois," 415 ILCS 5/5(b), while the IEPA's relevant regulatory authority only extends to providing "recommendations" for adoption

of such regulations, *See, e.g.,* 415 ILCS 5/4(u). Thus, it is incumbent upon the Board to resolve what is and is not a surface impoundment covered by its rules.[13]

B. Hutsonville Pond D should be Exempt from Coverage as it is regulated pursuant to Part 840

The Board's Opinion and Order in R09-21 and Part 840 provided Ameren with a clear roadmap that guided its other closures. Moreover, Hutsonville Pond D is now in post-closure care pursuant to Pond D, which requirements are similar but not identical to those proposed in Part 845. *See* Sept. 30, 2020 Hrg. Tr., pp. 243:18–247:22. Other examples are evident from King's Pre-Filed Answers to Questions, Ex. 57, at p. 9. IEPA's proposal, without Ameren's proposed modification, would have Ameren regulated under competing and redundant regulatory structures regarding the same subject matter as to the same surface impoundment. *See* Ex. 2, p. 145. Accordingly, as to Hutsonville Pond D, Ameren would find itself in the unnecessary and uncanny position of having to fully comply with both regulations, subjecting itself to enforcement and compliance under each—a virtual impossible task where the provisions conflict.

Neither Ameren nor any other member of the regulated community should be subjected to two conflicting regulatory regimes governing the same site and issues without some guidance from the Board on how to address the conflicts inherent in competing structures. This is not a novel position for the Board to be in—indeed, resolving competing regulatory schemes is a logical extension of the Board's "fundamental task[]" of "mak[ing] as clear as possible what operations

[13] With the IEPA sidestepping these issues at this important hearing, by virtue of its having made *contested* fee determinations in advance of this regulatory proceeding, it has effectively commandeered the Board's responsibility of drawing the parameters of environmental regulations. The IEPA simply cannot hamstring the Board by making independent fee determinations that depend on the interpretation of statutory definitions that the Board is charged with fleshing out in its rules. For the Board not to address these issues here would be tantamount to the IEPA usurping the Board's authority or the Board ceding its authority to the IEPA.

are subject to the regulations." Proposed Opinion at 34, R88-7, available at https://perma.cc/UQ59-HR4T.

Ameren's proposed addition to Section 845.100 would address this issue by making clear that the Board's site-specific rules at Part 840—which are more specific as to Pond D than this rule of general applicability would be—are what provide the operative regulatory requirements applicable to Hutsonville Pond D. Moreover, the choice of Part 840 to apply to Hutsonville Pond D instead of proposed Part 845 is in line with existing Illinois law, which notes that it is a "commonplace of statutory construction" for the specific enactment to govern the general enactment when conflicting enactments cover the same subject matter. *People ex rel. Madigan v. Burge*, 2014 IL 115635, ¶ 31 (*quoting Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384–85 (1992)). This canon "applies with special force where" the "earlier provision is specific and the later, general provision makes no mention of the earlier provision." *Burge*, 2014 IL 115635 at ¶ 32.

C. The Meredosia Old Ash Pond should be exempt from coverage as it was closed pre-RCRA and, alternatively, it is not a surface impoundment.

As explained above, the Old Ash Pond at Ameren's Meredosia facility has not been operational since RCRA was enacted, meaning that no new coal ash has been introduced to this former ash pond at any point during the existence of the RCRA. In fact, this former "ash pond" is a wooded patch of ground that is not designed to hold CCR and is not capable of holding CCR or liquid. When Ameren closed its other ash ponds at Meredosia, the IEPA never sought to include Old Meredosia in the Closure Plan during its review and approval. Nonetheless, while no groundwater impacts are expected from Old Meredosia, the area is included in a Groundwater Management Zone which encompasses the closed site.

As evident from IEPA's fee determinations made in advance of this proceeding, IEPA is erroneously categorizing Old Meredosia as a non-closed surface impoundment[14]—inappropriately applying both statutory provisions (it *is* closed; it is *not* a surface impoundment). The logical extension of IEPA's application of these definitions would mean that Ameren must comply with the closure requirements of Subpart G of the proposed new Part 845.

As the record demonstrates, such "closure" would cause more environmental harm than would be achieved in environmental benefit, as Ameren would have to "close" the Old Ash Pond by first de-foresting the site in order to complete "closure". This type of absurd result—where the environment is affirmatively harmed in the name of environmental protection—is precisely the type of concern which the Board is capable of addressing. Ameren's proposed addition to Section 845.100, which exempts pre-RCRA facilities, resolves this absurd outcome, and the Board should include it as part of the final rules.

Alternatively, Ameren would accept a clarification of Old Meredosia's status: that it is not a "surface impoundment" under the Act at all. Under this clarification, the Meredosia Old Ash Pond would not be subject to coverage under Part 845, since it is not "a natural topographic depression, man-made excavation, or diked area." This point is justified by the engineering work provided to the Illinois Department of Natural Resources and the Department's conclusion that the area no longer functions as an impoundment or embankment, and does not contain liquid. *See* Ex. 58, pp. 5846–5847.

[14] Pursuant to Section 22.59(j) of the Act, the IEPA demands $75,000 in a one-time fee from Ameren for the Meredosia Old Ash Pond, and a $25,000 annual fee as a CCR surface impoundment which has not been closed. *See* Aug. 10, 2020, Pre-Hearing Comment, at p. 168 (Sub-Exhibit 10 of Exhibit A).

V. THE BOARD SHOULD CONSIDER RECORD KEEPING ACCOUNTABILITY RELATED TO FEES AND COSTS ASSOCIATED WITH THIS PROGRAM.

Ameren has suggested proposed rules that would allow the IEPA to track its expenditures related to this program, much like it does in its Site Remediation program. This would provide for necessary record-keeping accountability by site, to insure the program dollars established by the legislature in its fee assessments at Section 22.59(j) are adequate and being used, as presumed, for the costs associated with the IEPA's efforts in administering this program, for each category of surface impoundment, at each site. See Ex. 55, pp. 23–24, and Gary King's Pre-filed Answers to Questions, Ex. 57, pp. 16–20.

VI. CONCLUSION

Ameren appreciates the Board's role and attention in this important rulemaking and looks forwarding to replying to other Post-Hearing Briefs and Post-Hearing Comments on November 6, 2020 – when it will supplement as necessitated by those filings, and respond to the recent filing of the IEPA on October 28, 2020.

Dated: October 30, 2020

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

By: /s/Claire A. Manning

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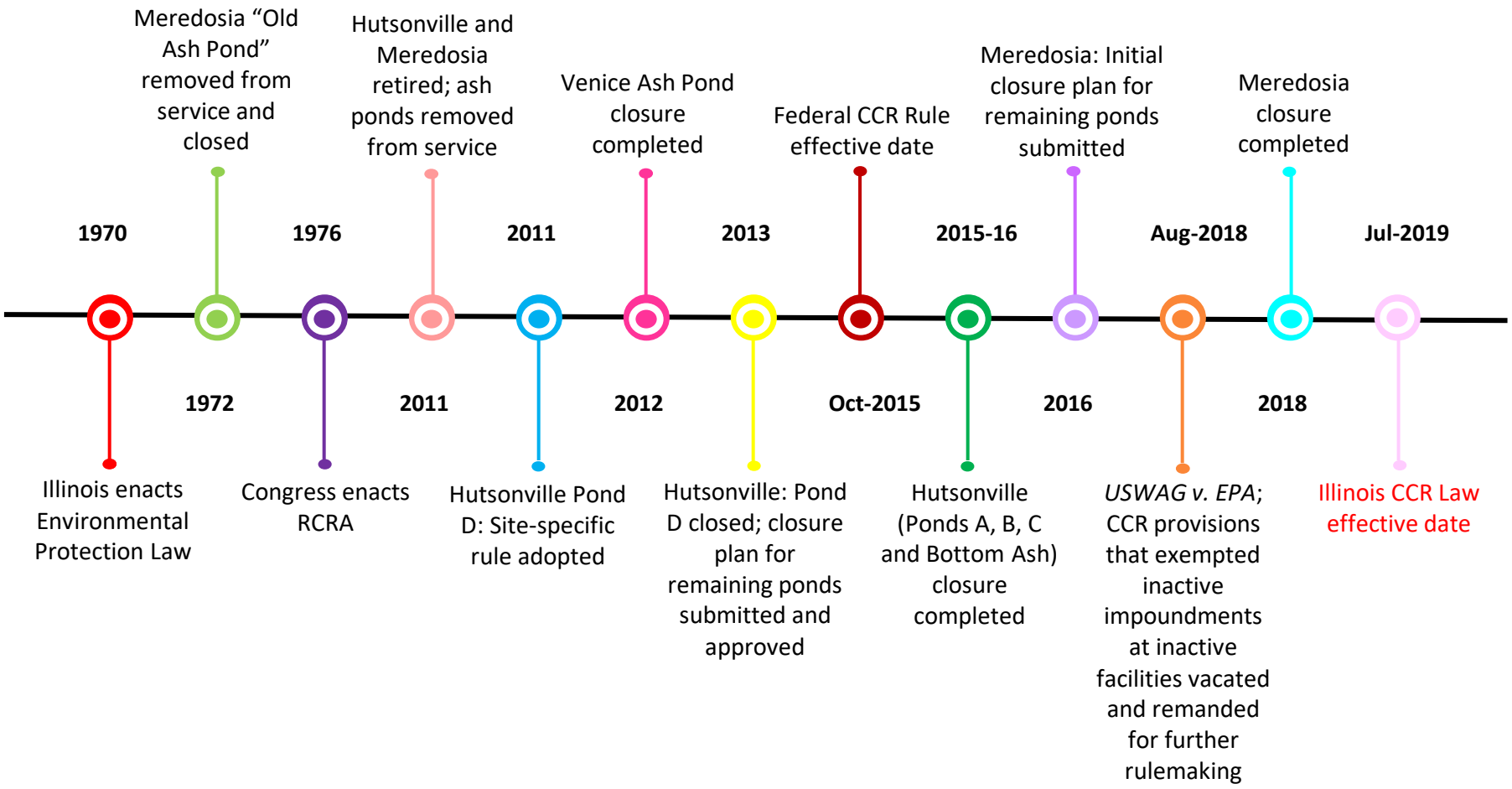
Ameren Ash Pond Closure Milestones



Prepublication Copy Notice:

The EPA Administrator signed the following *Federal Register* document on October 1, 2020:

Title: **Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments**

Action: **Advance notice of proposed rulemaking**

Docket No.: **EPA–HQ–OLEM–2020-0107**

This is a **prepublication version** of the document that EPA is submitting for publication in the *Federal Register*. While the Agency has taken steps to ensure the accuracy of this prepublication version of the document, **it is not the official version** of the document for purposes of public comment or judicial review. Please refer to the official version of the document that will appear in a forthcoming *Federal Register* publication.

Once the official version of the document publishes in the *Federal Register*, the prepublication version of the document posted on the agency's internet will be replaced with a link to the document that appears in the *Federal Register* publication. At that time, you will also be able to access the on-line docket for this *Federal Register* document at *http://www.regulations.gov*.

For further information about the docket and, if applicable, instructions for commenting, please consult the ADDRESSES section in the front of the *Federal Register* document.

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6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 257

[EPA–HQ–OLEM–2020-0107; FRL–10015-46-OLEM]

RIN 2050-AH14

Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Advance notice of proposed rulemaking.

SUMMARY: On April 17, 2015, the Environmental Protection Agency (EPA or the Agency) promulgated national minimum criteria for existing and new coal combustion residuals (CCR) landfills and existing and new CCR surface impoundments. On August 21, 2018, the U.S. Court of Appeals for the District of Columbia Circuit issued its opinion in the case of *Utility Solid Waste Activities Group, et al. v. EPA,* which vacated and remanded the provision that exempted inactive impoundments at inactive facilities from the CCR regulations. As a first step to implement this part of the court decision, EPA is seeking comments in this advanced notice of proposed rulemaking (ANPRM) and data on inactive surface impoundments at inactive facilities to assist in the development of future regulations for these CCR units. This ANPRM also discusses the related research conducted to date, describes EPA's preliminary analysis of that research, and seeks additional data and public input on issues that may inform a future proposed rule.

DATES: Comments must be received on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may send comments, identified by Docket ID No. EPA-HQ-OLEM-2020-0107, by any of the following methods:

- Federal eRulemaking Portal: *https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- Mail: U.S. Environmental Protection Agency, EPA Docket Center, OLEM Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- Hand Delivery or Courier (by scheduled appointment only): EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m. – 4:30 p.m., Monday – Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/*, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/* or email, as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets*.

FOR FURTHER INFORMATION CONTACT: For questions concerning this ANPRM, contact Michelle Long, Office of Resource Conservation and Recovery, Materials Recovery and Waste Management Division, Environmental Protection Agency, 1200 Pennsylvania Avenue NW, MC: 5304P, Washington, DC 20460; telephone number: (703) 347-8953; email address: long.michelle@epa.gov. For more information on this rulemaking please visit *https://www.epa.gov/coalash*.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Docket

EPA has established a docket for this action under Docket ID No. EPA-HQ-OLEM-2020-0107. EPA has previously established a docket for the April 17, 2015, CCR final rule (80 FR 21302) under Docket ID No. EPA-HQ-RCRA-2009-0640. All documents in the docket are listed in the *https://www.regulations.gov* index. Publicly available docket materials are available either electronically at *https://www.regulations.gov* or in hard copy at the EPA Docket Center. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the EPA Docket Center is (202) 566-1742.

B. Written comments

Submit your comments, identified by Docket ID No. EPA-HQ-OLEM-2020-0107, at *https://www.regulations.gov* (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

EPA is temporarily suspending its Docket Center and Reading Room for public visitors, with limited exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to

provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/* as there may be a delay in processing mail and faxes. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets*.

EPA continues to carefully and continuously monitor information from the Centers for Disease Control and Prevention (CDC), local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID-19.

C. Submitting CBI

Do not submit information that you consider to be CBI electronically through *https://www.regulations.gov* or email. Send or deliver information identified as CBI to only the following address: ORCR Document Control Officer, Mail Code 5305-P, Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; Attn: Docket ID No. EPA-HQ-OLEM-2020-0107.

Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. If you submit a CD-ROM or disk that does not contain CBI, mark the outside of the disk or CD-ROM clearly that it does not contain CBI. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2.

II. General Information

A. Does this action apply to me?

A future rulemaking for inactive ("legacy") CCR surface impoundments potentially applies to owners and operators of all CCR generated by electric utilities and independent power producers that fall within the North American Industry Classification System (NAICS) code 221112 and may affect the

following entities: electric utility facilities and independent power producers that fall under the NAICS code 221112. This discussion is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This discussion lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not described here could also be regulated. To determine whether your entity is regulated by this action, you should carefully examine the applicability criteria found in §257.50 of title 40 of the Code of Federal Regulations. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

B. What action is the agency contemplating?

EPA is seeking comments and data on legacy CCR surface impoundments at inactive facilities to assist in the development of future regulations for these CCR units. This action is in response to the August 21, 2018 opinion by the U.S. Court of Appeals for the District of Columbia Circuit (*Utility Solid Waste Activities Group, et al. v. EPA*) that vacated and remanded the provision that exempted inactive impoundments at inactive facilities from the 2015 CCR rule.

By this document, EPA is seeking public input on key issues at this preliminary stage to inform its thinking on any future proposed rulemaking. EPA is not reopening any existing regulations through this ANPRM.

C. What is the agency's authority for taking this action?

EPA is publishing this document under the authority of sections 1008(a), 2002(a), 4004, and 4005(a) and (d) of the Solid Waste Disposal Act of 1970, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA) and the Water Infrastructure Improvements for the Nation (WIIN) Act of 2016, 42 U.S.C. 6907(a), 6912(a), 6944, and 6945(a) and (d).

III. Background

On April 17, 2015, EPA finalized national minimum criteria for the disposal of CCR as solid waste under Subtitle D of the Resource Conservation and Recovery Act (RCRA) titled, "Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities," (80 FR 21302) (2015 CCR rule or CCR regulations). The 2015 CCR rule, codified in subpart D of part 257 of Title 40 of the Code of Federal Regulations, established regulations for existing and new CCR landfills and existing and new CCR surface impoundments and all lateral expansions of CCR units. The criteria consist of location restrictions, design and operating criteria, groundwater monitoring and corrective action requirements, closure and post-closure care requirements, recordkeeping, notification and internet posting requirements.

The 2015 CCR rule regulated existing and new CCR landfills and existing and new CCR surface impoundments and all lateral expansions of CCR units. The rule also imposed requirements on inactive surface impoundments[1] at active facilities,[2] but did not impose requirements on inactive surface impoundments at inactive facilities. The preamble to the 2015 CCR final rule (80 FR 21344) explained that inactive units at inactive facilities were not covered by the rule in part due to possible complications that were specific to inactive or closed facilities: the concern that the present owner of the land on which an inactive site was located might have no connection (other than present ownership of the land) with the prior disposal activities. For that reason, EPA exempted those units at §257.50(e).

The rule was challenged by several parties, including a coalition of regulated entities and a coalition of environmental organizations ("Environmental Petitioners"). Environmental Petitioners raised two challenges that are relevant to this ANPRM: first, they challenged the provision that allowed existing,

[1] An "inactive CCR surface impoundment" is defined at §257.53 as a CCR surface impoundment that no longer received CCR on or after October 19, 2015 and still contains both CCR and liquids on or after October 19, 2015.
[2] An "active facility or active electric utilities or independent power producers" is defined at §257.53 as any facility subject to the requirements of this subpart that is in operation on October 19, 2015. An electric utility or independent power producer is in operation if it is generating electricity that is provided to electric power transmission systems or to electric power distribution systems on or after October 19, 2015. An off-site disposal facility is in operation if it is accepting or managing CCR on or after October 19, 2015.

unlined surface impoundments to continue to operate until they exceeded the groundwater protection standard. See §257.101(a)(1). They contended that EPA failed to show how continued operation of unlined impoundments met RCRA's baseline requirement that any solid waste disposal site pose "no reasonable probability of adverse effects on health or the environment." 42 U.S.C. 6944(a). Secondly, Environmental Petitioners challenged the provisions exempting inactive surface impoundments at inactive power plants (i.e., "legacy ponds") from regulation. The environmental petitioners argued that legacy ponds are at risk of unmonitored leaks and catastrophic structural failures. The U.S. Court of Appeals for the D.C. Circuit issued its decision on August 21, 2018. The Court upheld most of the rule but ruled for the environmental petitioners on these two claims. The court held that EPA acted "arbitrarily and capriciously and contrary to RCRA" in failing to require the closure of unlined surface impoundments[3] and in exempting inactive surface impoundments at inactive power plants from regulation. The court ordered that these provisions be vacated and remanded back to the Agency. *Utility Solid Waste Activities Group (USWAG), et al.* v. *EPA,* 901 F.3d 414 (D.C. Cir. 2018). This decision is referred to as the '*USWAG* decision' in this ANPRM.

In overturning the exemption for legacy ponds, the court pointed to evidence from the 2015 CCR rule that legacy ponds are most likely to be unlined and unmonitored and have been shown to be more likely to leak than units at utilities still in operation, therefore these units are at risk of leaks and catastrophic structural failures. The court stated that legacy ponds pose the same threats to human health and the environment as the riskiest coal residuals disposal methods, compounded by diminished preventative and remediation oversight due to the absence of an onsite owner and daily monitoring. *See* 80 FR at 21343 through 21344 (finding that the greatest disposal risks are "primarily driven by the older existing units, which are generally unlined"). For these reasons, the court vacated and remanded the provision of the 2015 CCR rule that exempted inactive impoundments at inactive facilities from

[3] Unlined CCR surface impoundments were addressed in a separate regulatory action that was published on August 28, 2020 (85 FR 53516).

regulation, at §257.50(e). Until EPA finalizes amendments to the regulations to effectuate the court's order, facilities are not legally obliged to take any action to comply with the federal CCR regulations. As currently drafted, nothing in §257.50 would bring inactive surface impoundments at inactive facilities within the scope of the federal CCR regulations.

IV. What information is EPA seeking?

In this action, EPA is seeking additional information related to inactive surface impoundments at inactive facilities, referred to as "legacy" CCR surface impoundments throughout this preamble, to better inform a future rulemaking. The Agency is seeking input on regulatory authority and a potential definition of a legacy CCR surface impoundment. It is also soliciting specific information on the types of inactive surface impoundments at inactive facilities that might be considered legacy CCR surface impoundments. In particular, EPA is requesting information on how many of these units might exist, their current status (e.g., capped, dry, closed according to state requirements, still holding water), and names and locations of former power plants that may have these units and when they closed. Finally, the Agency is taking comment on which CCR regulations should apply to legacy CCR surface impoundments and on suggestions for timeframes that EPA should prescribe for coming into compliance with those regulations.

A. EPA regulatory authority

As discussed in the preamble to the final 2015 CCR rule (80 FR 21302, April 17, 2015), EPA has previously interpreted RCRA subtitle D to grant it the authority to regulate both active units—*i.e.*, those landfills and impoundments that receive waste after the effective date of the regulation—and inactive units—those landfills and impoundments which ceased receiving waste before the effective date of the regulation. 80 FR at 21342 through 21346.

A challenge to this interpretation in the context of EPA's regulation of inactive units at currently operating power plants in the 2015 CCR rule was rejected by a panel of the D.C. Circuit in *Utility Solid Waste Activities Group, et al. v. EPA*, 901 F.3d 414 (D.C. Cir. 2018) ("*USWAG* decision"), which concluded that "resolution of this issue begins and ends with RCRA's plain text." *Id.* at 440. The court

focused on the phrase "is disposed of" in the statutory definition of an open dump, concluding that "while the 'is' retains its active present tense, the 'disposal' takes the form of a past participle ('disposed')." In this way the disposal itself can exist ('it is') even if the act of disposal took place at some prior time." *Id.* (citations omitted). Based on this reading, the court concluded that "an open dump includes any facility (other than a sanitary landfill or hazardous waste disposal facility) where solid waste still 'is deposited,' 'is dumped,' 'is spilled,' 'is leaked,' or 'is placed,' regardless of when it might originally have been dropped off. In other words, the waste in an inactive impoundment 'is disposed of' at a site no longer receiving new waste in just the same way that it 'is disposed of' at a site that is still operating." *Id.* The court also opined that "[e]ven if the text were ambiguous, EPA's interpretation is eminently reasonable under *Chevron* step two." *Id.* at 442. Judge Henderson wrote separately and concluded that "the text—and more precisely, the grammatical structure—of RCRA's definition of 'open dump' is temporally ambiguous" and that EPA's interpretation of its authority to regulate inactive units was a reasonable interpretation of that ambiguity under *Chevron* step two. *Id*. at 451 (Henderson, J., concurring in part and concurring in the judgment).

EPA requests comment on whether, in light of the court's opinion in the *USWAG* decision, the Agency has the discretion to reinterpret the extent of its authority under RCRA subtitle D. *See Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). If EPA has the discretion to revisit its interpretation (including potentially identifying an alternative basis for not regulating inactive surface impoundments at inactive facilities ("legacy CCR surface impoundments") while addressing the court's concern about risk), EPA requests comment on whether (and, if so, why) it should interpret its authority, whether for technical and policy reasons or for other reasons, to extend only to units that were in operation after November 1980 or to some other smaller set of units. If EPA does not revisit the extent of its authority to regulate inactive units, EPA requests comment on how far back in time it should reach and whether EPA should regulate units differently based on when they became inactive. In addition, EPA requests comment as to whether EPA's regulation of inactive units should be limited to

only units at former power plants that sold electric power to the grid or whether it should also reach units at former power plants that provided power to a single site or facility. EPA generally requests comment on the technical, policy, and legal rationales for any distinctions that commenters believe it is appropriate for EPA to draw in this area or with respect to other topics that are subject to this advance notice of proposed rulemaking.

B. Definition

EPA is considering several options to define a legacy CCR surface impoundment. For example, EPA could define a legacy CCR surface impoundment as:

A surface impoundment that is located at a power plant that ceased generating power prior to October 19, 2015 and

- Option 1—the surface impoundment contained both CCR and liquids on the effective date of the 2015 CCR rule (i.e., October 19, 2015); or
- Option 2—the surface impoundment contained both CCR and liquids on the date the Court issued its mandate for the August 21, 2018 court decision (i.e., October 15, 2018); or
- Option 3—the surface impoundment contains both CCR and liquids on the date EPA issues a final rule bringing legacy CCR surface impoundments under the federal regulations.

EPA is specifically requesting comment on these options for the definition of legacy CCR surface impoundments. EPA provided three options for the definition of legacy CCR surface impoundment because the Agency is soliciting comment from the public on which option is best for this newly regulated universe and when such units contained both CCR and liquids. EPA does not have an estimated number of units that would be classified under each definition option at this time.

Furthermore, EPA requests comment on how the current owner of the legacy CCR surface impoundment should be defined. In particular, should there be a definition of innocent owner that would exclude certain qualifying landowners from regulation? If so, what should be the criteria? Should, for example, criteria be based on, or similar to, the criteria for the landowner liability protections under the

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund, see, *https://www.epa.gov/enforcement/landowner-liability-protections#ild*? To the extent that certain landowners are exempted from the CCR rule requiring owners ensure impoundments meet the national minimum criteria, how should EPA address the impoundments under their ownership? Relatedly, for this potential subset of impoundments and for other, abandoned impoundments that may still contain CCR and liquids, but do not have an identifiable owner/operator, or for impoundments whose ownership has been transferred, should EPA evaluate other authorities, (such as CERCLA), or state programs, to address those units?

C. Size of universe

The *USWAG* decision referenced a database that identifies legacy ponds and their owners that was included in the Regulatory Impact Analysis supporting EPA's Proposed RCRA Regulation of Coal Combustion Residues.[4] Upon further examination, it appears that these data include all the units that the Agency could identify at the time, not just inactive surface impoundments at inactive facilities.

EPA is requesting information on any known inactive surface impoundments at inactive power plants as of the effective date of the 2015 CCR rule, October 19, 2015. For example,

- Plant name (or former plant name);
- Location;
- If known, retirement year of power plant;
- If known, status of unit (e.g., still holding water);
- If known the year the surface impoundment ceased receipt of waste and whether the unit has gone through any sort of closure process;
- Any characteristics of the unit (e.g., size, volume); or
- Any other available information about the inactive surface impoundment.

[4] A copy of *Information Request Responses from Electric Utilities* (April 30, 2010) is available in the docket to this action.

Additionally, should there be a size limitation for legacy CCR surface impoundments?

Approximately 10 states have reported to EPA that they have estimated a total of 37 possible legacy CCR surface impoundments within their states. USWAG, after surveying their members, indicated they know of 45 units that could possibly be legacy CCR surface impoundments. Data showing approximately 140 facilities that have been reported to have one or more CCR units (boilers) retired or gone out of service between January of 1993 and October of 2015 were provided to EPA by the Department of Energy (DOE).[5] Those facilities are assumed to be closed because they do not have publicly accessible websites posted as required by the 2015 CCR rule. Some of these facilities may have been small power plants that did not generate electricity (or electricity and heat) for sale to the public, so any impoundments at those facilities would not be covered under 40 CFR part 257, subpart D. However, EPA could determine to expand the definition of legacy CCR surface impoundment to cover small power plant facilities that did not generate electricity for the sale to the public. However, CCR surface impoundments (if they exist) at the other facilities could potentially be considered legacy CCR surface impoundments.

In this same DOE database, approximately 110 coal units were listed as retired or otherwise not burning coal but are located at facilities that have posted a publicly accessible website containing CCR compliance data and information. Given the existence of those websites, any potential surface impoundments at facilities with closed units would already be regulated as inactive impoundments at active facilities and would not be considered legacy CCR surface impoundments.

D. Applicable regulations and time to come into compliance

The Agency specifically requests comment on which of the requirements of the 2015 CCR rule should apply to legacy CCR surface impoundments and whether other new requirements should apply to

[5] These data are from DOE's contractor, Energy Ventures Analysis, as of March 1, 2019. A copy of "DOE-Energy Ventures Analysis Coal Unit Retirements – Historical + Announced March 1, 2019" is available in the docket for this rulemaking.

legacy CCR surface impoundments. EPA has tentatively identified certain requirements from the 2015 CCR rule that should apply to legacy CCR surface impoundments.

For instance, the establishment of a publicly accessible CCR website(s) by the companies or States may be appropriate to give the Agency and public the ability to track groundwater monitoring and closure progress for these units. The 2015 CCR rule requires that owners and operators of CCR units establish a publicly accessible Internet site where they are required to post compliance information. The posting requirements include, for example, compliance information related to location restrictions, type of liner system, surface impoundment structural integrity information including hazard potential classification structural stability and safety factor assessments, fugitive dust control plans and annual reports, run-on and run-off controls for landfills, hydrologic and hydraulic capacity plans for surface impoundments, periodic inspections of CCR units, groundwater monitoring information including the annual groundwater monitoring and corrective action reports, and information related to closure or retrofit of a CCR unit and post-closure care. EPA is also interested in any potential liabilities associated with generating and maintaining a public website by owners or operators and local governments.

Also, because the Agency anticipates that many or all legacy CCR surface impoundments will be found to be unlined, and thus will be required to close, the groundwater monitoring, corrective action, closure and post-closure care requirements would be appropriate. EPA is requesting comment on who should be responsible for complying with existing requirements such as groundwater monitoring, corrective action, closure and post-closure care requirements.

Another technical requirement that may be appropriate for legacy CCR surface impoundments would be the fugitive dust requirements. This is because CCR could become airborne during closure of the unit and thus effectively minimizing releases would be appropriate.

However, some CCR rule requirements may not be necessary to apply to legacy CCR surface impoundments given that the legacy surface impoundments are no longer receiving waste. For example, certain location restrictions demonstrations (e.g., whether the legacy surface impoundment is located in a

fault area or seismic impact zone) may not be a necessary requirement for unlined legacy CCR surface impoundments because unlined surface impoundments would likely be subject to a requirement to close.

Another CCR rule requirement that may not be warranted for unlined legacy CCR surface impoundments is the provision to provide specific design and construction information pertaining to the CCR unit. One example in this provision is to provide area-capacity curves for the CCR unit, which show the reservoir water surface area at different water levels and the volume of the water contained in the unit at these different water elevations. It may not be warranted to require owners of legacy CCR surface impoundments to expend resources to compile this information for units likely to be subject to closure.

There may be additional standards or controls that are not required under the 2015 CCR rule that may be appropriate for legacy CCR surface impoundments. For instance, the posting of general information on the legacy CCR surface impoundment such as size, location, applicable state requirements, plant information, etc., could be useful.

The Agency could also consider a site security requirement for the facility to restrict access to the area containing the legacy CCR surface impoundment, since active facilities generally have guards and fencing. The Agency solicits comment on which additional standards or controls may be appropriate for legacy CCR surface impoundments.

In addition, EPA will need to determine the compliance deadlines for CCR surface impoundment regulations. The Agency would likely consider that a publicly accessible website would be required to be activated by the effective date of the rule. For other requirements, the Agency could base the timing on the timeline laid out in the 2015 CCR rule or from subsequent CCR rulemakings,[6,7,8] allowing approximately the same amount of time for legacy CCR surface impoundments to come into compliance as the active CCR surface impoundments. However, the timeline specified in the 2015 CCR rule was based in part on the owner or operator of the unit having to go through a series of steps to determine if the

[6] 81 FR 51807, Aug. 5, 2016
[7] 83 FR 36452, July 30, 2018
[8] 85 FR 53516, Aug. 28, 2020

unit would be required to close. In the case of unlined inactive CCR surface impoundments at inactive facilities, it may be reasonable to assume that some owners and operators of these units have known that they may need to close such units since October 15, 2018 (i.e., the date the Court issued its mandate for the August 21, 2018 *USWAG* decision). Because of this, and because neither the unit nor the power plant are operating, some owners and operators may have begun preparing for closure and thus could close in less time than was EPA has provided for active surface impoundments. The Agency specifically requests comment on the issue of appropriate compliance deadlines for the applicable requirements for legacy CCR surface impoundments. In addition, EPA is requesting comment on the establishment of publicly accessible websites, and specifically seeking input of who should establish and host the website, such as an owner or operator, a state or local government, or EPA.

In cases where significant vegetation or sensitive ecosystems are in place, should EPA take into account the impacts of disrupting that ecosystem when determining what actions should be imposed? Can the agency simply require notice and no further action under some circumstances? If so, what would those be, and why?

V. Request for Comment and Additional Information

EPA is seeking comment on all questions and topics described in this ANPRM, including the questions and issues identified in Unit IV, and requests that you submit any information, which may not be included in this document, that you believe is important for EPA to consider in connection with these questions and topics. At the same time, EPA does not plan to consider comments that are beyond the scope of the questions and topics described in this ANPRM.

Instructions for providing written comments are provided under **ADDRESSES**, including how to submit any comments that contain CBI.

VI. What are the next steps EPA will take?

EPA intends to carefully review all the comments and information received in response to this ANPRM. Once that review is completed, EPA may supplement the collected information, as appropriate,

to determine which regulatory criteria should apply to legacy CCR surface impoundments. The next step will be to submit an information collection request to OMB, or if EPA determines that additional information is not needed, EPA will publish a proposed rule with the input from this ANPRM and other publicly available information. The anticipated date for issuing the proposed rule is July 2021. At that time, the public will have the opportunity to comment on EPA's proposal.

VII. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993) and Executive Order 13563 (76 FR 3821, January 21, 2011), this action was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket for this action. Because this action does not impose or propose any requirements, and instead seeks comments and suggestions for the Agency to consider in possibly developing a subsequent proposed rule, other statutory and Executive Order reviews that apply to rulemaking do not apply to this action. Should EPA subsequently determine to pursue a rulemaking, EPA will address the statutes and Executive Order as applicable to the rulemaking.

Nevertheless, the Agency welcomes comments and/or information that would help the Agency to assess any of the following: the potential impact of a rule on small entities pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.); potential impacts on federal, state, or local governments pursuant to the Unfunded Mandates Reform Act ((UMRA) (2 U.S.C. 1531-1538); federalism implications pursuant to Executive Order 13132, entitled *Federalism* (64 FR 43255, November 2, 1999); availability of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113; tribal implications pursuant to Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000); environmental health or safety effects on children pursuant to Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997); energy effects pursuant to Executive Order 13211, entitled *Actions Concerning*

Regulations that Significantly Affect Energy Supply, Distribution, or Use (66 FR 28355, May 22,2001); Paperwork burdens pursuant to the Paperwork Reduction Act (PRA) (44 U.S.C. 3501); or human health or environmental effects on minority or low-income populations pursuant to Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994). The Agency will consider such comments during the development of any subsequent proposed rulemaking.

List of Subjects in 40 CFR Part 257

Environmental protection, Coal combustion products, Coal combustion residuals, Coal combustion waste, Disposal, Hazardous waste, Landfill, Surface impoundment.

Dated: _____.

_____

Andrew R. Wheeler,

Administrator.